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Does Harvey Give You An Excuse: Force Majeure And Related Contract Doctrines

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Force Majeure is a civil law concept (French for "superior force"), but in U.S. law it is largely a creature of contract. *Force majeure* comes into play when "acts of God" or other extraordinary events prevent contractual performance.[1] In the wake of Hurricane Harvey, a number of energy companies have declared *force majeure* or announced shutdowns in southeast Texas, the nation's hub for petrochemical plants and refineries. (ICIS.com publishes extensive information on the operational status of Texas petrochemical plants.) The performance obligations of the companies affected by such an extraordinary event will be governed under either applicable contract provisions (*force majeure* "provisions") or, in their absence, under the UCC or common law contract doctrines, such as impossibility and commercial impracticability. This blog post provides an overview of these doctrines and makes some suggestions for including *force majeure provisions* in contracts.

Force Majeure

Most companies in the energy industry will address the potential for disruption from a hurricane prospectively through a *force majeure* clause in their contracts. In such cases, the language of the contract is determinative as to whether an event of *force majeure* has, in fact, occurred. As a consequence, in Texas, an "act of God" does not relieve the parties of their contractual obligations absent an applicable *force majeure* clause. *See*, *e.g.*, *GT&MC, Inc. v. Texas City Refining, Inc.*, 822 S.W.2d 252, 259 (Tex. App.—Houston 1991, writ denied). Courts will apply the usual rules of contract construction in interpreting the *force majeure* provisions. *Virginia Power En. Mktg. v. Apache Corp.*, 297 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist] 2009, pet. denied) ("The scope and effect of a '*force majeure* clause' depends on the specific contract language and not on any traditional definition of the term."). Typically, a *force majeure* clause will require that the disruption of performance be beyond the invoking party's reasonable control and that the event was not reasonably foreseeable.

In construing *force majeure* clauses, a common question that often predictably arises is whether a disruption at one point in a distribution or supply chain, which causes effects rippling up or down stream, will permit a party affected as a result of the ripple to assert *force majeure.* Often the contract will resolve the issue explicitly. But, if the contract is ambiguous or worse, silent, and, assuming a causal relationship exists between the event and the inability to perform, the courts are not uniform in how they treat the matter. Many have not excused performance while others have done so. Because the outcomes in such cases are so fact sensitive and there is no bright line rule to apply, contracting parties should attempt to address this possibility in their contracts.

The *force majeure* clause often will include specific steps that the party invoking *force majeure* must take. It is likely to require a party to exercise good faith or best efforts or commercially reasonable efforts to reserve the ability to perform. The clause may even provide a specific action plan for ameliorating the disruption. Thus, it may require a seller to pay for

a more expensive sources of supply than originally contemplated. It may also require, in the case of limited supply, an allocation of available product among customers.

If the contract includes a *force majeure* provision, then the focus is on whether the contract clearly defines the rights of the parties as a consequence of declaration of *force majeure*. For example, what sort of timely notice is required to invoke the contract? What must the notice contain? In this respect, in drafting such a notice, it is important to be factual and specific and to avoid unnecessary speculation or predictions as to future events. The failure to provide sufficient notice may deprive the party of the protections of the contract provision.

If the event qualifies as an event of *force majeure*, does the contract excuse all performance? Not necessarily. For instance, if the event only makes performance more difficult or expensive, it will not necessarily excuse performance. Furthermore, a *force majeure* clause is likely to require that the party rendered unable to perform nevertheless take reasonable steps to minimize delay or resulting damages. Performance is usually not suspended unless the disruption lasts for a specified period of time

Related Contract Doctrines

In the event a contract lacks a *force majeure* provision, then the parties must look to either the doctrine of impossibility of performance or, more recently, the doctrine of commercial impracticability. In a case involving sales of goods, one must look to Section 2-615 of the Uniform Commercial Code for guidance. It provides a defense similar to commercial impracticability.

The doctrine of impossibility of performance was originally recognized by courts in cases of objectively impossible performance. That doctrine has largely been supplanted by the doctrine of commercial impracticability. Under the commercial impracticability doctrine, contractual performance is excused where, (1) an event renders performance impracticable, (2) its non-occurrence was a basic assumption of the contract, and (3) the risk of the event is not allocated by custom or contract. Under the UCC, the seller whose performance has been impaired must also provide reasonable notice to the buyer of delay or non-delivery and if allocation is required an estimate of the allocation to the buyer.

How to Protect Against *Force Majeure* Events in Your Contracts

As noted above, *force majeure* protection is obtained through contract. Consequently always include *force majeure* provisions. Make sure those provisions identify possible *force majeure* events tailored to your specific business and risks. You will not want to limit *force majeure* relief to circumstances where it is impossible to perform. Catchall language, intended to broaden the scope of *force majeure,* may create more issues than it solves, if the language is ambiguous. Remember if you do not include *force majeure* the default contract rules or the UCC will decide for you what rules will govern. Among other things:

- Make sure the *force majeure* provisions of your contracts specify the rights and obligations of the parties over such matters as notice, mitigation and allocation obligations. You might also want to consider writing clauses that excuse under-performance where that would be preferable to complete suspension of performance.
- Harmonize your contracts' *force majeure* provisions with those of your suppliers and customers. You want to make sure your obligations and rights are at least the same as your suppliers and customers.
- Provide a mechanism for the flow of information with your supplier and customers. In this regard, consider whether you want audit or inspection rights and specify the information that will be exchanged.

Obviously, this is not an exhaustive list of considerations but it is a starting point.

If you think you have *force majeure* issues or concerns we at Kane Russell Coleman Logan may be able to help.

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[1] Examples of events that can constitute *force majeure* include hurricanes, earthquake, drought, flood, war, rebellion, riots, strikes and acts of terrorism.