

## REVISITING FORCE MAJEURE: THE TEXAS AND LOUISIANA PERSPECTIVES

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### I. Introduction

When Captain McAllister docked in New Orleans, he contracted with Glover to tow his ship up the Mississippi River to Natchez the next day. McAllister's passengers, however, were apprehensive about the epidemic that "was raging in the city with great violence," and the captain ultimately determined that even "an hour's delay might have endangered the lives of the passengers and crew." And so McAllister's ship left the same day with another tow, intentionally breaching the contract with Glover.

These events transpired nearly 180 years ago, during a deadly outbreak of yellow fever. *William Roley Glover v. Samuel T. McAllister*, 2 Rob. (La.) 161 (1842). But the Louisiana Supreme Court's reaction, discussed *infra*, is instructive even today—in a world facing an unprecedented pandemic, with a scarcity of jurisprudence addressing the effect of disease (and its economic fallout) on contractual obligations. As the COVID-19 virus invites reexamination of basic contractual principles, this article examines force majeure in the neighboring oil and gas heavyweights Texas and Louisiana.

### II. Texas

The general rule in Texas is that, absent a contractual force majeure provision, an act of God or other unforeseen circumstance does not relieve parties of their contractual obligations.

#### A. Statutory and Common Law Exceptions

There are two exceptions to this general rule—one based on statute and the other in the common law. First, Section 2.615 of the Texas Business and Commerce Code excuses performance under contracts for the sale of goods "made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order. . . ."

Second, the common-law doctrine of impossibility or impracticability of performance excuses a party's performance when it becomes impracticable or impossible by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made. Unfortunately, these doctrines are applied inconsistently by various courts of appeal throughout the state. While some Texas courts use the terms "impossibility" and "impracticability" (and sometimes "frustration of purpose") interchangeably, others excuse performance only if rendered impossible. In considering this conflict, the Fourteenth Court of Appeals decided that Texas recognizes a defense based on impracticability. *See Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60, 64 (Tex. App.—Houston [14th Dist.] 2003), *opinion supplemented on overruling of reh'g*, 118 S.W.3d 929 (Tex. App.—Houston [14th Dist.] 2003, no pet.); *see also Centex Corp. v. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992) (referring to defense

as “impossibility” but approving of the substance of Restatement (Second) of Contract §§ 261 and 264, which apply to impracticability).

Under both Section 2.615 and the common law, the event must have been (1) unforeseeable and (2) not the fault of the breaching party.

Texas courts have refused to find performance excused by changes in market conditions or economic impracticability (at least not in a vacuum) under either Section 2.615 or the common law. *See, e.g.*, Tex. Bus. & Comm. Code § 2.615, cmt. 4 (“Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover.”); *Huffines v. Swor Sand & Gravel Co., Inc.*, 750 S.W.2d 38, 40 (Tex. App.—Fort Worth 1988, no writ) (“economic impracticability is not a recognized defense in Texas”). In fact, the Fourteenth Court of Appeals has limited the application of this defense to the following circumstances: (1) the death or incapacity of a person necessary for performance; (2) the destruction or deterioration of a thing necessary for performance; and (3) a change in the law that prevents a person from performing (e.g., that makes performance illegal). *Philips v. McNease*, 467 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Tractebel*, 118 S.W.3d at 65).

## **B. Contractual Force Majeure Provisions**

Parties seeking to excuse performance based upon a contractual force majeure provision are typically on more solid ground than those relying on the common-law or statutory impossibility and/or impracticability defenses. Yet application of the contractual defense is dependent on the precise language of the contract.

To establish a defense under a contractual force majeure provision, the breaching party must prove (1) the clause applies to the event at issue; (2) the event was beyond its control and without its fault or negligence; and (3) its performance has thereby been prevented (distinguished from merely being made more difficult or economically burdensome). The parties’ intent, as evidenced within the four corners of the contract, controls the scope, application, and effect of the force majeure clause, and common-law rules merely fill in gaps left unanswered by the contract (e.g., the concept of unforeseeability and the doctrine of *ejusdem generis*). Consequently, the common-law doctrine of impossibility of performance will not apply, and events historically recognized as acts of God but that do not come within the scope of the relevant clause will not excuse a breach.

The most common force majeure dispute in Texas case law relates to the first issue, whether or not the clause applies to the specific event in question. If the event is specifically enumerated as an act of force majeure within the clause, the inquiry on this point ends. However, it is common for the list of specific events to be followed by a general, catch-all term such as “any other cause not enumerated herein.” Utilizing the canon of construction *ejusdem generis*, courts construe this generic phrase as extending the scope of the force majeure provision to only events of the same general kind or class as those specifically mentioned in the preceding list. In

contrast, if the list is preceded by the phrase “including but not being limited to,” a court may refuse to apply the doctrine of *ejusdem generis*, as use of this term indicates intent to excuse all delays coming within the general description regardless of their similarity to the listed excuses.

According to a recent opinion from the First Court of Appeals, a party relying on a catch-all phrase excusing performance of, for example, “events beyond a party’s control,” is required to show that the event was unforeseeable at the time the contract was signed. In contrast, if the event is specifically enumerated, a showing of unforeseeability is not required. *See TEC Olmos v. ConocoPhillips*, 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

It follows that the extent to which disruption based on the COVID-19 pandemic will excuse performance depends in large part on the specific contractual language at issue. Where a force majeure clause expressly uses terms such as “disease,” “epidemic,” “pandemic,” “quarantine,” “state of emergency,” “governmental authority,” or “governmental order,” parties may, depending on the circumstances, be able to assert force majeure as a defense to non-performance or anticipatory breach. No Texas cases addressing whether a disease or pandemic could excuse performance under either contractual force majeure provision or the common-law and statutory doctrines of impossibility or impracticability was found. To the extent a party wishes to invoke a force majeure provision based solely upon a market downturn, such language must be included in the subject contract. A change in market conditions will not fall within a catch-all phrase, as Texas courts have held this to be a foreseeable event, including in the oil and gas context. *See Valero Transmission Co. v. Mitchell Energy Corp.*, 743 S.W.2d 658, 663-664 (Tex. App.—Houston [1st Dist.] 1987, no writ) (finding significant change in price of gas was foreseeable); *see also Watson v. Rochmill*, 155 S.W.2d 783 (Tex. 1941); *Reid v. Gulf Oil Corp.*, 323 S.W.2d 107, 113 (Tex. Civ. App.—Beaumont 1959), *aff’d*, 337 S.W.2d 267 (Tex. 1960).

If the clause does not contain the terms listed above but does include a catch-all phrase, the question will be whether the COVID-19 pandemic was foreseeable at the time of contracting. As foreseeability introduces a fact issue, it is unclear how Texas courts will determine this issue *en masse*, though unique individual circumstances will make such findings more or less probable. There is, however, at least some evidence that a global pandemic is not unforeseeable. Following the SARS outbreak, legal commentator Patrick O’Connor suggested that courts might find a virus outbreak to be foreseeable and advised revising force majeure provisions to incorporate such events. *See Kristin Choo, The Avian Flu Time Bomb: The Legal System Will Play a Key Role in Planning the Response to a Possible Onslaught of the Virus*, ABA J. 36, 41 (2005). In fact, O’Connor correctly predicted that “the most likely source for the next pandemic will be some virus that jumps to us from an animal.” Patrick J. O’Connor, *Allocating Risks of Terrorism and Pandemic Pestilence: Force Majeure for an Unfriendly World*, Constr. Law. 5, 7 n.24 (2003).

What is clear is that parties should ensure that any new contracts define force majeure to specifically include references to disease and/or an epidemic/pandemic, as it will be difficult to show that a future pandemic was unforeseeable in light of the current crisis.

### III. Louisiana

In Louisiana, the legal principle of force majeure inheres in every contract. The Louisiana Civil Code calls such obstacles “fortuitous events,” defined as “one that, at the time the contract was made, could not have been reasonably foreseen.” La. Civ. Code art. 1875. The Code provides that “[a]n obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible.” La. Civ. Code art. 1873. Thus, to constitute a statutory force majeure, the event must be (1) unforeseeable, and (2) it must make performance impossible.

Traditionally, impossibility is a high bar. Scholars assert that Louisiana does not provide relief for “exceptionally difficult” or “excessively burdensome” contracts; instead, the impediment to performance must be “truly impossible.” Saul Litvinoff, *Force Majeure, Failure of Cause and Theorie de l’Imprévision: Louisiana Law and Beyond*, 46 LA. L. Rev. 1 (1985).

Unlike in Texas, where the existence of a force majeure clause forecloses application of the common-law doctrine of impossibility or impracticability of performance, the Civil Code’s force majeure articles supplement all contracts. But they do not supplant them: a contractual force majeure clause may have broader scope than the Civil Code articles, and thus, as with any contractual inquiry, the starting point should be the language of the contract. For example, in *Exxon Corp. v. Columbia Gas Transmission Corp.*, the court recognized that “[t]he scope of force majeure” in the subject contracts was “considerably broader than the statutory concept of force majeure,” and thus a full evidentiary hearing was necessary to determine whether an abnormally mild winter, economic recession, and change in relative gas prices constituted force majeure events. 624 F. Supp. 610, 611-12 (W.D. La. 1985). We observe that contractual force majeure provisions extending to changes in a party’s financial situation are rare; thus, jurisprudence applying force majeure principles to economic changes is instructive.

#### A. Economics and Impossibility

Louisiana courts usually have not considered economic hardship to constitute a force majeure. A classic example is *Marionneaux v. Smith*, where a party who contracted to cut and market timber argued that the worldwide financial panic of the Great Depression meant he could not perform the contract without suffering great financial loss. The court found that this did not make the performance impossible, but merely rendered it more difficult, burdensome, and unprofitable—causes that could not be excused. 163 So. 206 (La. App. 1st Cir. 1935).

These principles hold true in the oil and gas context. For example, in *Hanover Petroleum Corp. v. Tenneco, Inc.*, market and regulatory disruptions were held not to be force majeure events excusing a purchaser’s breach of a “take or pay” contract. 521 So. 2d 1234 (La. App. 3d Cir. 1988). The applicable force majeure provision listed a litany of events (including epidemics, in fact) “and any other causes, whether of the kind herein enumerated or otherwise, not reasonably within the control of the party claiming suspension.” Relying on this broad language, Tenneco cited as force majeure events “the economic recession; the pricing scheme of the Natural Gas Policy Act of 1978; the abundance of and the drop in the price of competitive fuels; the mild 1982–1983 winter” and similar events making its performance burdensome. In a

carefully-reasoned opinion—and noting that the issues were *res nova* at the state appellate level—the court rejected this argument as a matter of law: “Although the circumstances relied upon by Tenneco are forces or events beyond its control, adverse economic conditions and modifications in governmental regulations and policy which tend to render performance burdensome and unprofitable do not constitute force majeure.” *Id.* at 1240. *See also Esplanade Oil & Gas, Inc. v. Templeton Energy Income Corp.*, 889 F. 2d 621, 625-26 (5th Cir. 1989) (applying Louisiana law: “the decline in the market price of oil did not make [the defendant’s] performance ‘impossible,’ it merely made [its] performance unprofitable. Thus, the doctrine of *force majeure* does not apply.”).

There is room for counter-argument, however. *See Continental Oil Co. v. Crutcher*, 434 F. Supp. 464 (E.D. La. 1977) (a “drastic and unforeseen price rise” of 500% for natural gas was “likely to qualify as a force majeure event” excusing non-performance under a take-or-pay gas contract). In particular, Louisiana opinions have not deeply engaged with the degree of economic hardship brought about by unforeseen events: performance that has become “unprofitable” is not excused, but what about performance that is financially ruinous?

## **B. Disease and Impossibility**

Like Texas, no known reported Louisiana decisions squarely discuss disease as a force majeure. In *Glover v. McAllister*—the 1842 yellow fever towing case discussed in the introduction—neither the words “force majeure” nor “fortuitous event” appear. Instead, the trial judge found that “although the contract was deliberately broken, it was so for reasons which are good and valid in themselves, although foreign to the contract.” While the plaintiff sought \$900 in contractual damages, the court awarded Glover only \$300 in “naked damages,” a term the Louisiana Supreme Court interpreted as damages “actually sustained, without allowing for profits lost.” Feeling “no disposition to differ” from the trial court, the Louisiana Supreme Court affirmed the judgment.

Arguably, the danger posed by yellow fever was not treated like a true force majeure, because Captain McAllister’s breach was not excused. He was still liable, but the court adjusted damages under the circumstances. On the other hand, the outcome could be viewed as presaging Civil Code article 1876, which provides that “[w]hen a party’s entire performance has been made impossible, the contract is dissolved and the other party may recover for any performance already rendered.”

The COVID-19 pandemic may be unprecedented in our lifetime, but basic contractual principles endure. Whether or not a force majeure provision includes disease, or even extreme market changes, most contracts—like Louisiana statutory law—require that the event must prevent performance. The existence of COVID-19 is less important than its impact. How has it made performance impossible? Economics alone may not be enough, but legitimate health concerns, attendant logistical disruptions, government restrictions, or other consequences may rise to the level of impossibility in the right circumstances.