FORCE MAJEURE DURING AND AFTER THE COVID PANDEMIC

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I. Introduction[1]

As the saying goes, "when it rains, it pours." Practitioners reading this article in early 2021 should have no problem creating a list of realistic force majeure hypotheticals. During 2020 and into 2021, virtually every industry has been forced to navigate a multitude of historic issues and chain reactions. Oil and gas companies across the nation have scrutinized their oil and gas leases, operating agreements, development agreements, service agreements, and other contracts to analyze their options for responding to these unique events and circumstances.

Of course, the initial catalyst for this very article was the COVID-19 pandemic, which brought about an array of local, county, state, and federal emergency orders that directly or indirectly affected the oil and gas industry. COVID-19 has directly and indirectly contributed to a wide-array of issues such as unavailability of labor, supply chain issues, historic low oil prices, takeaway curtailment, and storage shortages. That low price environment has more-or-less sustained throughout 2020 and into the first quarter of 2021, which has forced many operators to make difficult decisions on where to direct cash flow, where to direct personnel, how and where to slash budgets, and whether to divest of certain assets.

The last 18 months have also seen their fair share of political and social movements. Some parts of the country have seen a number of riots and other unrest, and a presidential impeachment over allegations of inciting an insurrection.

Then, in February of 2021, historic low temperatures and snow swept across the Gulf Coast and West Texas, overpowering the Texas power grid and leaving approximately 4.3 million Texas residents without electricity. Of particular relevance to this article, this weather event froze over many gas wells, pipelines, and pumping and compression facilities, contributing to the shortfall in electricity generation.

Oil and gas companies typically include a variety of provisions in their leases and other contracts to handle the inaction or delay that may necessarily (and/or sometimes desirably) follow a variety of unforeseeable

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or uncontrollable circumstances or interruptions. For instance, oil and gas companies often include force majeure provisions in their leases and contracts, which generally serve to relieve a party from certain performances under their contract when prevented or hindered by causes outside of their control.

II. Common Law Background

The law pertaining to force majeure provisions has an interesting historical evolution, with underpinnings in civil law, which eventually developed parallel concepts in common law systems.[2] While that historical development is outside the scope of this article, a basic overview is helpful to understand the treatment of force majeure provisions under Texas law.

As a general rule, under common law systems, a party must perform or satisfy their contractual obligations, conditions, and limitations, or face the consequences.[3] This is in contrast to the civil law systems, which free a person or entity from liability for damages resulting from a "superior force," that is unforeseeable and irresistible, such as natural phenomena (e.g., flooding, strong winds, or ice storms as well as actions by third parties (e.g., strikes, wars, acts of terrorism, embargoes, or rebellions).[4]

By the nineteenth century, some common law courts began to somewhat soften that strict rule with the recognition of limited defenses of "impossibility of performance," "impracticality of performance," and "frustration of purpose."[5] Those defenses have been recognized by Texas courts.[6] However, those defenses are limited in scope and the elements can be difficult to establish. For instance, the doctrines of impossibility and impracticability require proof that the non-occurrence of the event was unforeseeable, the parties did not allocate the risk, and the event rendered performance impossible or impracticable (meaning performance would be "extreme and unreasonable difficulty, expense, injury, or loss to one of the parties.").[7] The doctrine of frustration of purpose requires proof that an event occurred that caused the near total destruction of some thing, or death of some person, that served as the principal purpose of the transaction, and that the non-occurrence of that event was a basic assumption of the parties.[8] Further, those doctrines will not

[2] For an excellent historical overview of jurisprudence surrounding force majeure under civil law and common law, see Fred R. Pletcher & Anthony A. Zoobkoff, *Force Majeure (and Other Useful French Profanities) in Resource Agreements*, 59 Rocky Mtn. Min. L. Inst. § 17.01, § 17.02[1], at 17-3 (2013) (hereinafter "Zoobkoff").

[3] *See* Joseph M. Perillo, Calamari and Perillo on Contracts § 13.1 (6th ed. 2003) ("The harsh traditional common law rule was 'pacta sunt servanda;' promises must be kept though the heavens fall.").

[4] *See, e.g., Civil Code of Québec,* S.Q. 1991, c. 64, art. 1470; *see also Gulf Oil Can. Ltd. v. Canadien Pacifique Ltée*, [1979] C.S. 72.

[5] Zoobkoff, supra at n. 2, at §17-3 ("By 1863, the English courts began to relax the sometimes harsh and uncompromising doctrine of absolute liability.").

[6] *See, e.g., Tractebel Energy Mktg. v. E.I. du Pont de Nemours & Co., 11*8 S.W.3d 60, 64 (Tex. App.—Houston [14th Dist.] 2003); *see also Ramirez Co. v. Hous. Auth. of Hous.*, 777 S.W.2d 167, 173 n.11 (Tex. App.—Houston [14th Dist.] 1989, no writ) (recognizing impossibility of performance, commercial impracticability, and frustration of purpose as excuses for non-performance); *see also* Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis, 6* J. Legal Stud. 83, 86 (1977) (stating no functional distinction exists among doctrines of impossibility, impracticability, and frustration of purpose).

[7] Restatement (Second) of Contracts § 261 cmt. d (Am. Law Inst. 1981); *see also TEC Olmos, LLC v. Conocophillips Co.*, 555 S.W.3d 176, 184 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (quoting *E. Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 990 (5th Cir. 1976)).

[8] *Philips v. McNease*, 467 S.W.3d 688, 695 (Tex. App.—Houston [14th Dist.] 2015, no pet.) (citing *Chevron Phillips Chem. Co. LP v. Kingwood Crossroads, L.P.*, 346 S.W.3d 37, 52 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)); *see also* Restatement (Second) of Contracts §§ 261-266 (1981)).

apply if the supervening event was foreseeable, avoidable, or the fault of the party claiming the defense.[9]

Given the limited scope of these common law doctrines, parties eventually began incorporating express force majeure provisions into their contracts as a means of obtaining the broader protections of force majeure provisions from civil law systems.[10] In general, the purpose of an express force majeure provision is to forgive an obligation, or limit liability for non-performance or late performance, in situations where a supervening event has occurred that frustrates the reasonable expectation of the parties.[11]

Force majeure provisions serve an important role in oil and gas leases, because the ordinary habendum clause indicates that an oil and gas lease will terminate automatically during its secondary term by operation of a special limitation.[12] This is a critical distinction, as "[n]either unavoidable delays or accidents, acts of God, … will afford an excuse for the failure to comply literally with the provisions of [a habendum clause] in the absence of an express stipulation otherwise contained in the lease."[13]

For example, in one case the Railroad Commission issued an order requiring wells in the Spraberry sand to be shut-in by reason of gas waste.[14] The Texas Supreme Court later found that order was illegal.[15] Nonetheless, the lessee shut in its wells and the lessor claimed the lease terminated.[16] The lease contained a 60-day cessation clause, but no force majeure provision.[17] The Fifth Circuit Court of Appeals held that the lessee's estate was a determinable fee subject to a special limitation.[18] "The lease fixed precisely enough the conditions upon which its continuance depended, and compliance with such conditions was not excused by the acts of the Railroad Commission."[19]

III. Scope and Application of Force Majeure Provisions

Texas courts do not recognize a common law force majeure defense, and Texas courts will not imply a force majeure provision into a contract.[20] Rather, in Texas, a party will enjoy force majeure protections only if the underlying contract contains a force majeure provision.[21]

The party asserting a force majeure defense has the burden of proof to establish the defense.[22]

Two fundamental issues in drafting and analyzing a force majeure provision are the scope of what qualifies as a "force majeure event," and the protections provided

[9] *Calvin v. Koltermann, Inc. v. Underream Piling Co.*, 563 S.W.2d 950, 957 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.)

[10] Zoobkoff, *supra* n. 2.

[11] *Sun Operating P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1988, pet. denied).

[12] *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298, 305 (5th Cir. 1955).

[13] *Id.* at 305.

[14] Id.

[15] *Id* at 301.

[16] *Id.* at 304.

[17] *Id.*

[18] *Id.* at 305-06.

[19] *Id.* at 306.

[20] *GT & MC, Inc. v. Tex. City Refin., Inc., 82*2 S.W.2d 252, 259 (Tex. App.—Houston [1st Dist.] 1991, writ denied) ("The rule is that an act of God does not relieve the parties of their obligations unless the parties expressly provide otherwise.").

[21] *Id.*

[22] *Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc.*, 861 S.W.2d 427, 436 (Tex. App.—Amarillo 1993, no writ) (citing *Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 723 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.)).

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