

# Out of Control

What you need to know about force majeure clauses.

BY JOHN P. WARREN

With hurricane season upon us, it is a good time to look at the meaning and effect of the force majeure clause in your contract (or purchase order). It is in the boilerplate you have probably skimmed over with all those other standard clauses. If you had a lawyer perform a review, he or she may have listed it and given you some information about its meaning. Texas recognizes parties have a right to include force majeure clauses in their contracts, but does not limit,

restrict, or define that clause.

## Definition

Force majeure is often referred to as an “act of God” and this wording is usually included in a contract’s general terms and conditions. However, there are a number of other terms, such as fire, strike, hurricanes, floods, equipment failure, governmental actions, or any other cause not listed, but which are beyond the reasonable control of the party whose performance is affected. The 1st Court of Appeals in Houston recently ruled<sup>1</sup> that not only must the event be beyond the reasonable control of the party, but it also must not have been foreseeable. This means that in reviewing the clause, you must list events that might prevent performance even though out of your control. In the case mentioned, a drop in oil prices was considered foreseeable and the party should have included it in the force majeure clause.

## Requirements

Force majeure is a temporary excuse for failure to perform all or a part of a contract. For example, it allows a reasonable time to repair damage and then resume performance promptly when the performing affected party’s business is up and running again. Some clauses provide for termination of the contract if performance cannot be resumed within a specific period of time, such as three months. Of course, there may be many other variations.

## Steps

A party who is unable to perform based on a defined force majeure event must give notice within a specified number of days or within a reasonable time. Even before sending a formal notice, it would be advisable to speak with the other party or send an email. It would also be a wise idea to have a template prepared in advance so that this requirement can be met timely. The notice should identify the event, the effect on your business, the anticipated delay, and reference to the force majeure clause.

After the event is over and you have a date to resume performance, you should send a notice to the other party so they can prepare to receive those goods or services. Keep in mind that the other party may also have been forced to suspend performance or enter into other contracts to cover your inability to perform and they will also need to take appropriate actions.

If you have not already done so, now would be an excellent time to review the force majeure clauses in your contracts and direct any questions you have to your attorney. It would also be a good time to prepare a checklist of actions to be taken as well as a plan for alternate suppliers if such an event does occur. We all hope never to send such a notice, but living in Texas we know all about the effects of hurricanes, tropical storms, and tornadoes, so be prepared. **TBJ**

## Notes

1. *TEC Olmos and Terrace Energy Corp. v. ConocoPhillips Co.*, No. 01-16-00579, 2018 WL 2437449 (Tex. App.—Houston [1st Dist.] May 31, 2018).

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