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Force Majeure Under Texas Law in the Aftermath of Hurricane Ida

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Following the devastating landfall of Hurricane Ida, one lingering question is whether the effects of this Gulf storm will be sufficient to excuse a delay or failure to perform. Many parties in oil and gas, oilfield service, and energy infrastructure that have been affected by the storm utilize Texas law in their service contracts, and in most cases, these parties will find some level of coverage under the terms of the force majeure provisions in their contracts.

Indeed, a number of oil and gas industry giants have already declared force majeure in their business dealings over the past couple of weeks — Royal Dutch Shell, the largest oil producer in the Gulf of Mexico; offshore drilling contractor Noble Corporation; and OxyChem, of Occidental Petroleum, to name a few. Whether the storm will be sufficient to excuse any delay or failure to perform will depend largely on the circumstances of the delay or failure to perform and the exact language of their force majeure clauses.

Force Majeure Language Is Key

In the unlikely scenario that a contract does not contain force majeure language, the force majeure defense will not be available. Texas courts do not apply a common law doctrine of force majeure in the absence of a force majeure provision in a contract. If there is no force majeure clause, there is no force majeure defense to nonperformance. In some circumstances, there may be an impossibility of performance defense (sometimes called frustration of purposes or impracticability of performance) available.

Review Wording Carefully

Most force majeure provisions contain a definition and an enumerated list that the parties agree are force majeure events, and Texas courts will respect the intent of the parties and rely on the contractual language.

Parties negotiating in the Gulf of Mexico typically include “named and numbered tropical storms” or hurricanes as force majeure events in their enumerated lists. If for some reason “hurricane” or similar language is not listed, to claim force majeure, a party may have to rely on related terms such as “flood” or “power outage” or comprehensive terms such as “act of God,” “natural disaster,” or “act of government authority” (assuming emergency government action following the hurricane). Under maritime law, courts consistently allow parties to claim defense under “act of God” if they can show they took reasonable precautions under the circumstances to avoid nonperformance.

The extent to which a party can rely on a force majeure defense will also depend on other limitations the parties may or may not write into their contracts. The specific language of the force majeure provision will be important. For instance, is a mere delay in performance excusable while nonperformance is not? Does performance have to be literally impossible?

Pay Attention to Notice Provisions

Any notice provisions of the contract may be vital. Care should be taken to observe the notice requirements necessary to trigger application of a force majeure provision.

No Force Majeure Provision Applicable — Consider Impossibility of Performance

If a party cannot rely on a force majeure defense, all is not lost. A party may still be able to rely on the defense of “impossibility of performance” or “frustration of purpose,” which is recognized in Texas for both goods and services contracts.

In Texas, we are familiar with unprecedented weather conditions. With each event, the industries learn — and force majeure provisions are adjusted to include new terms. Hurricanes are no exception. Where parties depend on operations in the Gulf of Mexico, we should expect force majeure provisions to contain “hurricane,” “named and numbered tropical storms,” “inclement weather,” or similar terms.

Danielle Kinchen also contributed to this article.

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