

# Unforeseen Circumstances

## Contractual Obligations During a Pandemic

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When parties enter into a contract, they generally agree on basic terms and foreseeable contingencies. For instance, they determine who will do what and at what price, time for performance, what is to be considered a material breach, and how to handle disputes or late payments. However, they might not address things nobody expects, such as war or disasters. And, of course, they probably do not address global pandemics that bring the economy to a slow crawl.

How do the COVID-19 pandemic and widespread shelter-in-place orders affect Texas contracts? Under what circumstances will a party be excused from its contractual obligations due to the pandemic? The answers to such questions generally depend on the answers to these questions:

- Was there an “act of God” that prevented a party from performing its contractual obligations?
- Is there a force majeure clause in the contract and, if so, what does it say?

### The Takeaway

Broadly speaking, “acts of God” or force majeure are natural events that could not reasonably have been foreseen and prevented by parties in a legal contract. Whether the COVID-19 pandemic qualifies is an interesting question courts will need to address.

- If there is not a force majeure clause, do the doctrines of impossibility, impracticability, or frustration of purpose excuse performance?

### Tricky to Define

It would be nice if there was a Texas case directly addressing a situation like the one Texans now face with COVID-19, but there is not. Such extraordinary events are generally known as “acts of God” or *force majeure*. Defining these terms is tricky, and the case law contains

numerous attempts. Technically, they don't even mean the same thing, although the terms are often used interchangeably. A working definition might be "an event attributable to natural causes or the violence of nature, not originating from a human cause or intervention, and that could not reasonably have been foreseen and prevented by the parties."

The touchstone for determining an act of God is foreseeability. Take weather as an example. Weather is typically not an act of God, legally speaking. One court noted that cold weather in Texas in December is foreseeable, although it could have said the same about hot weather in Texas in December. For weather or a flood to be an act of God, it must be so unusual that it could not have been reasonably expected. Thus, a hurricane, rainstorm, or flood might be an act of God, but it depends on the circumstances. Flooding in "normal" amounts in an area where flooding is common is not an act of God, but floods of an unusual and unforeseeable character may qualify. An act of God does not have to be something that has never happened before, but it must be so unusual that it could not have been reasonably expected.

That brings us to our current situation. Illnesses are not acts of God, as they are common and foreseeable. However, a pandemic of the kind the world now faces is not common. It will be interesting to see what the courts think about its foreseeability. After all, this is not the first time the world has experienced a pandemic. Economic downturns and government actions are not acts of God, but an economic downturn as a result of a global pandemic and/or the governmental response to the pandemic might be.

## Force Majeure Clauses

The general rule in Texas is that an act of God does not relieve the parties of their contractual obligations unless the parties expressly provide otherwise. Many contracts contain a clause to address this, known as a force majeure clause. Here is an example:

If the performance by a party of any provision of this Contract is delayed or prevented by (i) an act of God such as weather or earthquake; (ii) an act of war or terrorism; or (iii) restriction by any governmental authority, then the period for the party's performance of the provision shall be automatically extended for the same amount of time that the party is so delayed or hindered.

Courts look to the language of the clause to determine what the parties intended. They interpret force majeure clauses to mean what they say. If an event is expressly mentioned in the force majeure clause, performance is excused (or the time for performance is extended) in accordance with the contract. If disease, epidemics, or pandemics are specifically mentioned, a party would likely be excused from performing. If the contractual language is more general, or if the event is included in a "catch-all" phrase, it will depend on whether the event was foreseeable.

For example, when a force majeure clause excused performance for "causes beyond its reasonable control," the court refused to excuse performance due to declining market conditions. Declining market conditions are not unforeseeable, and contractual obligations cannot be avoided just because performance has become more burdensome than anticipated. *Valero Transmission Co. v. Mitchell Energy Co.*, 743 S.W.2d 658 (Tex. App.—Houston [1st Dist.] 1987), no writ. See also, *TEC Olmos v. ConocoPhillips*, 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018), pet. denied.

Again, for events not specifically enumerated, the touchstone is foreseeability. If the event is foreseeable, then it's presumed that the party agreed to bear the loss if the event happened. This is because the contracting party could have required an express provision dealing with a foreseeable occurrence but did not. However, when the parties have contemplated an event and contractually assigned the risk, they will be held to their agreement.

In addition to the foreseeability analysis, courts apply the doctrine of *ejusdem generis*, which means that when a specific list of items is followed by a "catch-all" phrase, the catch-all only includes items similar to those specifically listed. So "other" doesn't mean "everything else." It means other things of the same kind as specifically listed.

Often, contracts will require notice when an event triggers the force majeure clause. Parties should be careful when considering whether and how to give the required notice. Failing to comply with a notice requirement prevents a party from relying on the force majeure clause. However, without a contractual provision stating otherwise, the notice might be considered an anticipatory breach or repudiation, giving the other party the option to treat it as a breach and bring a lawsuit. It may also trigger obligations (by both parties) to mitigate damages. A party faced with the decision to give notice and/or who has received notice from the other party should consult a lawyer.

## What If There's No Force Majeure Clause?

When there is no force majeure clause, performance might be excused under other common law doctrines such as impossibility, impracticability, or frustration of purpose. These doctrines all work essentially the same way. A party's performance is excused when there is an event, not caused by the party asserting the defense, that changes a basic assumption relied upon by all of the parties at the time the contract was made, and that makes performance under the contract impossible or impracticable. For example, a key person necessary for performance dies, making performance impossible. When the contract was made, the parties assumed that person would be alive and available to perform.

Impracticability or frustration of purpose may apply when it is not actually impossible to perform, but when it will take a lot more time and money to do so—more than the parties anticipated when the contract was made or when unforeseen circumstances make the contract worthless to one of the parties. An example might be a contract where work is to be done on a structure, but before the job can be finished, the structure is destroyed by fire, flood, or storm. To rely on an impracticability defense, the party must make reasonable efforts to overcome the obstacles to performance.

Impracticability can be caused by government action, as seen in *Centex Corp. V. Dalton*, 840 S.W.2d 952, 954 (Tex. 1992). There, a regulatory agency's rule made performance illegal. The Texas Supreme Court held that the party's obligation to perform was discharged. In the case of COVID-19, the government did not make actual performance illegal. Rather, government-imposed shut-downs made it financially difficult or impossible. In the future, expect to see words like *epidemic*, *pandemic*, and *governmental action* in many force majeure clauses.

COVID-19 and governmental actions to deal with it will no doubt result in numerous contract disputes. Ultimately, courts will decide how these principles apply to the specific facts of each case. Persons who find themselves in COVID-19-related disputes should consult an attorney for advice. Even parties who are working together toward solutions should consult an attorney to take steps to preserve their legal rights.

Nothing in this publication should be construed as legal advice for a particular situation. For specific advice, consult an attorney. 📌

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