

HELL OR HIGH WATER: Force Majeure in Texas and in Bankruptcy

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Introduction

- A force majeure clause allows a party to excuse themselves from performance under the right circumstances.
- Force majeure has evolved from a common law concept into a contractual concept here in Texas.
- There is no force majeure doctrine outside of the contract.

Introduction

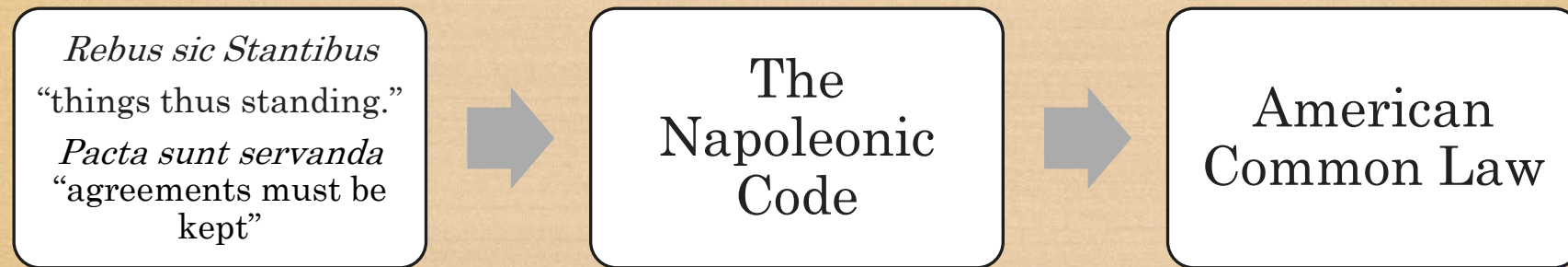
- In Texas, either a party premeditates the notion of some force majeure event and negotiates its mention into a force majeure clause or allows for the courts to make its own determination as to whether an event qualifies under the doctrine of impossibility.
 - **Force Majeure:** a contractual provision excusing performance following enumerated acts of god or other unforeseen or uncontrollable events.
 - **Impossibility:** the common law doctrine that applies in the absence of a force majeure clause.

This presentation aspires to...

- Discuss the rules and application of force majeure and impossibility in Texas.
- Reconcile their origins and underpinnings with modern application.
- Explore possible intersections between the doctrine and bankruptcy law.

Part 1: The Mechanics, History, and Application of Force Majeure Doctrine

Origins and Underpinnings of Force Majeure



Origins and Underpinnings of Force Majeure

- Three elements need to be present for an event to qualify as force majeure: the harm causing event needs to be...
 - External,
 - Unforeseeable, and
 - Irresistible



Ulysses and the Sirens, John W. Waterhouse

Origins and Underpinnings of Force Majeure

- Courts engage in a highly factual determination and consider cases one at a time.
- Courts will inevitably have a high amount of discretion.

How courts tend to utilize their discretion is in *pari passu* with how parties prepare their contractual agreements.

Force Majeure in Texas

- Historical basis has mostly eroded in favor of contract interpretation.
- Scope and effect of a force majeure clause depend ultimately on the specific language used in the contract.
- Without a contractual clause, force majeure does not apply—parties are left to common law defenses (eg., impossibility)

Force Majeure in Texas

- If the contract contains a force majeure provision, a force majeure event, such as an act of god or an act of war usually will not relieve a party of its obligations, “unless the parties expressly provide otherwise” by including applicable language in a force majeure provision.
 - list of events
 - catch-all provision
- Courts will only accept a force majeure or impossibility defense argument if there is a causal link between the event and the nonperformance.

Force Majeure as a Bargaining Chip

- A force majeure clause application, although unpredictable, has value as a bargaining chip at the outset of litigation.

Interpreting a Force Majeure Clause

- Interpretation by *Ejusdem Generis*
 - When “general words follow an enumeration of two or more things, they apply only to . . . things of the same general kind or class specifically mentioned.”
 - Ejusdem generis limits the meaning of the catch-all to the same type of events as those listed specifically
- Court does not take the parties subjective intent into consideration. This places pressure on the parties to make sure that they use specificity when drafting.

Interpreting a Force Majeure Clause

- “When more specific items in a list are followed by a catch-all ‘other,’ the doctrine of ejusdem generis teaches that the latter must be limited to things like the former.” *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 182 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).
- *TEC Olmos* Example:
 - “Should either Party be prevented or hindered from complying with any obligation . . . by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected, then the performance of any such obligation is suspended...”

Impossibility, the Texas way

- Impossibility is also an excuse for non-performance but exists when the contract between the parties does not feature a force majeure clause.
- Has been associated with Section 261 of the Restatement (Second) of Contracts

Where, after a contract is made, a party's performance is made impracticable without his fault, by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary

Impossibility, the Texas way

- Texas has recognized three contexts in which the impossibility excuse may be available:
 - (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
- Texas courts limit the application of the impossibility defense to situations where both parties held a basic (though unstated) assumption about the contract that proves untrue.

Impossibility Example

- By inferring basic assumptions of the parties, sometimes courts may make a string of inferences that becomes increasingly attenuated as it grows. *See Tractebel Energy Mktg., Inc. v. E.I. Du Pont de Nemours & Co.*, 118 S.W.3d 60 (Tex. App.—Houston [14th Dist.] 2003, pet. denied); *see also Al Asher & Sons, Inc. v. Foreman Elec. Serv. Co., Inc.*, MO:19-CV-173-DC, 2021 WL 2772808 (W.D. Tex. Apr. 28, 2021).

Recap for Part 1

Part 2: Force Majeure and Bankruptcy

- Market Conditions / Market Risk
- The Rent Cases
- Contract / Lease Termination

The precise contract language will control the outcome.

There Must Be a Causal Link

- *In re Bushnell*, 273 B.R. 359, 362 (Bankr. D. Vt. 2001) (holding the 9/11 attack could not justify late-filed appeal where there was no evidence of nexus between those events).

Market Conditions Are Not Enough

- *In re Intelligent Surveillance Corp.*, No. 21-31096-sgj-7, 2022 BL 123248 (Bankr. N.D. Tex. Apr. 7, 2022).
- Held: that “general force majeure considerations” do not excuse debtor’s failure to generally pay debts as they come due for purposes of § 303(h)(1).

Market Conditions Are Not Enough

- *The Containership Co. v. U.S. Pac. Transp., Inc. (In re The Containership Co.)*, 2016 BL 140976 (Bankr. S.D.N.Y. Apr. 28, 2016).
Changes in commercial conditions including...changes in market or inability of Shipper to sell the goods, ***shall not be considered*** a force majeure circumstance.
- Held: an unexpected shortage of cargo containers and “truck power” were insufficient to excuse shipper’s inability to meet contractual minimum shipping commitments.

Market Conditions Are Not Enough

- *Miller Bros. Coal, LLC v. Consol of Ky., Inc. (In re Clearwater Natural Res., LP)*, 421 B.R. 392 (Bankr. E.D. Ky. 2009).
The *refusal, failure or inability of any customer(s) of COK to receive and purchase* from COK quantities of Coal mined by Contractor hereunder which such customer(s) had committed to receive and purchase from COK *shall constitute a force majeure event...*
- Held: Defendant's allegations that customers were not taking all the coal they had contracted to purchase did not establish force majeure under coal supply contract.

The Rent Cases

- Business partially or wholly (but temporarily) shut down by local executive order.
- Debtor tenant seeks rent relief while revenue is suppressed.
- § 365(d)(3) only provides a limited deferral; not actual rent relief.

The Rent Cases

- *In re Hitz Rest. Grp.*, 616 B.R. 374 (Bankr. N.D. Ill. 2020)
Landlord and Tenant shall each be excused from performing its obligations or undertakings provided in this Lease, in the event, ***but only so long as*** the performance of any of its obligations are prevented or delayed, retarded or hindered by. . . laws, ***governmental action*** or inaction, ***orders of government*** ... Lack of money shall not be grounds for Force Majeure.
- Held: Debtor was required to pay partial rent corresponding to partial operating ability (eg, take-out service); balance of rent was ***excused***.

The Rent Cases

- *In re CEC Entm't, Inc.*, 625 B.R. 344 (Bankr. S.D. Tex. 2020).
Notwithstanding anything to the contrary herein contained, however, the provisions of this Article 27 ***shall not be applicable to Tenant's obligation to pay***, when due and payable, ***the rents***, charges or other sums reserved hereunder: and in addition, lack of funds and inability to procure financing shall not be deemed to be an event beyond the reasonable control of Tenant.
- Held: contractual force majeure clause superseded frustration of purpose defense and did not excuse payment of rent.

The Rent Cases

- *In re Cinemex USA Real Estate Holdings, Inc.*, 627 B.R. 693 (Bankr. S.D. Fla. 2021).

If the Performance by Landlord or Tenant of any of its obligations under this Lease is delayed by reason of “Force Majeure,” the period for the commencement or completion thereof *shall be extended* for a period equal to such delay.

- Held: Debtor’s lease obligation was deferred for period of executive order and added back at the end of the original lease term.

What's the Remedy?

- *In re Whistler Energy II, LLC*, 571 B.R. 199 (Bankr. E.D. La. 2017).
The Force Majeure Rate ... will be payable during any period in which operations are not being carried on because of Force Majeure ... ***up to a maximum of ten (10) consecutive days, after which*** and during the continuous existence of the Force Majeure condition ***no day rate will be payable*** and the Contract may be terminated at the option of either party...
- When did force majeure **commence** (i.e., was proper notice given)
- When did the force majeure **end**? (i.e., return to normal daily rate)

Contract / Lease Termination

- *In re Flying Cow Ranch HC, LLC*, No. 18-12681-BKC-MAM, 2018 BL 494866 (Bankr. S.D. Fla. June 22, 2018).
any other cause *not reasonably within the control* of Seller or Buyer and which by the exercise of due diligence the non-performing party is unable in whole or in part to prevent or overcome
- Held: Failure to obtain zoning approvals or permits is foreseeable; debtor required to assume/reject land sale contract.

Contract / Lease Termination

- *Breithaupt v. Nueces Petroleum Corp. (In re Nueces Petroleum Corp.)*, Adv. No. 06-3696, 2007 BL 226694 (Bankr. S.D. Tex. Feb. 2, 2007).
- Debtor sought to reorganize around lease that lessor claimed had terminated prepetition for failure to maintain continuous operations.
When any of the operations contemplated by this lease are delayed or interrupted by operation of force majeure including *storm, flood* or other act of God... *the time of such delay or interruption shall not be counted against Lessee.*
- Held: Insufficient evidence of flood-caused delays; lease deemed terminated.

Potential for Stay Violation

- *Miller Bros. Coal, LLC v. Consol of Ky., Inc. (In re Clearwater Natural Res., LP)*, 421 B.R. 392 (Bankr. E.D. Ky. 2009).
- Held: unilateral termination of an executory contract based on alleged force majeure is not a mere breach of contract (*cf. Citizens Bank v. Strumpf*), but an exercise of control over an estate asset so as to deprive the debtor of its use and value.

Questions?
