

# Force Majeure and Similar Considerations for the Oil and Gas Industry in the Aftermath of Hurricane Harvey and Other Current Severe Weather Events

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September 20, 2017

# Overview

- Setting the stage
- Primer on force majeure
- Case studies from the aftermath of Hurricanes Katrina, Rita and Ike
- Takeaways for parties asserting force majeure
- Takeaways for parties resisting force majeure

# Setting the Stage: Experiences of Hurricane Katrina, Rita and Ike

- Katrina and Rita shut in more than 8 Bcf of gas production, 1.5 MMBD of oil production and shut down the rubber industry between Houston and New Orleans for nearly a month, among other impacts
- Ike, which followed on the heels of Gustav, had similar effect on oil and gas production and caused massive disruption to the chemical industry, not only from shutting down for the storm but also the disruption of suppliers that prevented restart
- Substantial force majeure litigation followed
- <https://www.oel.doe.gov/docs/HurricaneComp0508r2.pdf>

# Hurricane Paths and Critical Oil and Gas Operations



# Hurricane Harvey wreaked havoc on the energy industry from Corpus Christi to Lake Charles

- Multiple, inter-related weather events:
  - Hurricane
  - Tornadoes
  - Flooding
- Some estimates of total damage upwards of \$180 billion
- Substantial litigation expected to follow

# Probable “aftermath” force majeure situations

- Hurricane Harvey replicated Katrina, Rita and Ike in most respects: shut ins, shut downs, damaged facilities, storage failures, environmental issues
- Substantial force majeure litigation is expected to follow
  - Failure to supply v. Force majeure
  - Force majeure due to supplier’s failure to supply
  - Negligence as a defense to force majeure

# Primer on force majeure: typical contractual requirements

- An enforceable contract force majeure clause will govern
- Unforeseen or unforeseeable
- Beyond a party's control
- Impossibility of performance or similar standard
- Notice
- Mitigation
- Though not stated in the contract, the force majeure event must have actually caused the effect on performance

# Primer on force majeure: common force majeure events

- Governmental orders and regulations
- War, terrorism, sabotage
- Loss of fuel of transportation
- Inability to obtain fuel, power or materials necessary to manufacture product
- Machinery breakdowns or failures that otherwise satisfy force majeure requirements
- Acts of God: hurricanes, tornadoes and floods



# Force majeure under Texas law

- Impossibility is recognized as a common law defense to contract performance when there is no contract clause.
- Based on Section 261 of the Restatement (Second) of Contracts
- Applies where the thing necessary for performance has been destroyed or deteriorated and where the action is prevented by government regulation.
- Impossibility may also be referred to as force majeure, frustration of purpose or “commercial impracticability.”
- Regardless of the nomenclature, impossibility—as opposed to mere impracticability or inconvenience (such as financial inconvenience)—will typically be required.

# Force majeure under Louisiana Law

- La. Civ. Code Articles 1873 to 1878: “Fortuitous event”
- Applies when no contract clause governs
- Requirements:
  - Unforeseeable at time contract was made
  - Renders performance impossible in whole or in part
  - Fortuitous implies beyond a party’s control
- Impossibility of performance is a high standard; inconvenience or frustration will not do

# Force Majeure in the Fifth Circuit

- Fifth Circuit covers both Louisiana and Texas, among others
  - *Industrias Magromer Cueros Y Pieles S.A. v. Louisiana Bayou Furs, Inc., et al.*, No. 01-30185 (June 24, 2002) (Louisiana law)
  - *Ppg Industries, Inc. v. Shell Oil Company*, 919 F.2d 17 (5th Cir. 1990) (Texas law)
- General federal maritime law recognizes the “Act of God” defense

# Force majeure internationally

- Libyan Civil Code Art. 360; UAE Civil Transactions Law Art. 472; Indonesian Civil Code Arts. 1244-45; PRC Contract Law Art. 117
- Common law doctrine of frustration in former British Commonwealth countries
- Common requirements:
  - Beyond a party's control
  - Unforeseeable or unavoidable
  - Renders performance impossible in whole or in part

# Case studies arising from Hurricanes Katrina, Rita and Ike: contract and force majeure

- Ergon-West Virginia, Inc., et al. v. Dynergy Marketing & Trade, 706 F.3d 419 (5th. Cir. 2013)
- Virginia Power Energy Marketing v. Apache Corp., 297 S.w.3d 397 (Houston-14<sup>th</sup> Dist. 2009)
- Dollar Thrift Autogroup Inc. v. Bohn-DC, LLC, 23 So.3d 301 (La.App. 5 Cir. 2008)
- Payne v. Hurwitz, 978 So.2d 1000 (La.App. 1 Cir. 2008)
- False and/or fraudulent force majeure claims

# Case studies arising from Hurricanes Katrina, Rita and Ike: tort

- *Comeaux v. Stallion Oilfield Construction*, 911 F. Supp.2d 413 (W.D.La. 2012)(Louisiana law)
- *French Quarter Renovations, LLC v. Richardson*, 2010 WL 8972364 (La.App. 4 Cir. November 24, 2010) (unpublished; Louisiana law)
- *Simmons v. Lexington Ins. Co.*, 2010 WL 1254638 (E.D.La. March 19, 2010) (general federal maritime law and Louisiana law)

# Notice Issues

- Timing issues
- Content issues
  - The notice
  - The response
  - Amended or updated notice
- Assume the letters will be exhibits in litigation and draft accordingly

# Takeaways for Party Claiming Force Majeure

- The words of the force majeure clause really matter
- Prompt, preventative action is best practice
- Consider alternatives, including alternatives for partial performance
- Communicate promptly with counterparties in compliance with notice requirements
- Compile evidence to support the claim and keep your eye on causation
- Remember your other contractual protections



# Takeaways for Party Receiving Force Majeure Notice

- The words of the force majeure clause really matter
- Consider alternative causes seriously
- Communicate promptly with counterparties in compliance with notice requirements
- Compile evidence to support the claim and keep your eye on causation
- Remember your other contractual protections