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Key Excuses from Performance Under Texas Contract Law

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The shock to the economy of COVID-19 has been administered more rapidly than any economic blow in modern history and has placed enormous strain on the web of contracts that support commerce around the world. In Texas, the shock has exacerbated the severe economic consequences of an already declining energy market. The combined strain has led many parties to contracts, rightly or wrongly, to refuse performance and assert a number of excuses available under Texas law. This article provides a substantive review of four categories of such excuses under Texas law: (1) force majeure; (2) impossibility, impracticability and frustration of purpose; (3) failure of conditions precedent or subsequent; and (4) material breach.

I. Force Majeure

"Force majeure" generally refers to the occurrence of any event that is beyond a party's control and that prevents the party from performing obligations under a contract. Typical force majeure events include acts of God, such as floods, earthquakes, and hurricanes, as well as wars, strikes, boycotts, and similar events. There is no prevailing common law legal principle providing an excuse from performance of contracts for matters beyond a party's control, and whether a force majeure relieves a party from its contractual obligations under Texas law generally depends on the specific terms of that contract. However, the related common law concepts of impossibility, impracticability, and frustration of purpose are available under Texas law and are discussed below.

There are limited situations where an excuse from performance as a result of matters beyond a party's control is provided by statute. Examples of such statutes are Texas Business & Commercial Code §§ 2.614 and 2.615 in the Texas Uniform Commercial Code chapter on sales of goods. These statutes address both impracticability and a limited version of force majeure relating to government regulations or orders, as well as obligations for substituted performance.[1] The scope and application of any particular excuse provided by a force majeure clause will depend on the specific wording of the force majeure clause at issue.[2] Common law only fills in gaps where the parties have not addressed an issue. In *Sun Operating Limited Partnership v. Holt*, for example, the court refused to read into a contract a requirement to exercise "due diligence" and take "all reasonable steps to avoid, remove and overcome the *effects* of 'force majeure'" where no such language or requirement was included in the relevant contract's force majeure clause.[3] Likewise, in *PPG Industries v. Shell Oil*, the court held that the events enumerated in the relevant force majeure clause did not need to be "beyond the reasonable control" of the impacted party in order to excuse performance, where the contract stated that non-performance would be excused "to the extent that the performance is delayed or prevented

[1] *See Virginia Power Energy Mktg., Inc. v. Apache Corp.*, 297 S.W.3d 397, 404 (Tex. App.—Houston [14th Dist.] 2009, pet. denied) (noting that UCC gap filler provisions will be overridden by an express agreement of the parties).
[2] *Zurich Am. Ins. Co. v. Hunt Petroleum (AEC), Inc.*, 157 S.W.3d 462, 466 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *WC 1899 McKinney Ave., LLC v. STK Dallas, LLC*, 380 F. Supp.3d 595,603 (W.D. Tex. 2019).
[3] *See Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied).

by any of [*sic*] circumstances (except financial) reasonably beyond its control" or by those included in an enumerated list.[4] However, this approach does not appear to be universally followed. In *Red River Resources v. Wickford*, for example, the federal district court proposed a general rule that "[a] RRC severance order does not constitute a *force majeure* event when compliance with the regulation violated was within the reasonable control of the lessee," apparently without regard to whether "beyond the reasonable control" was a specified criterion in the force majeure clause.[5]

Perhaps the most frequently litigated force majeure issue is whether a particular event falls within the scope of the force majeure clause. If the force majeure clause specifically lists an event, it should qualify as a force majeure subject to satisfying any other requirement (such as being beyond the reasonable control of the party) set forth in the clause.. Where an event must be beyond the reasonable control of the affected party, higher costs or worse economics are generally not considered to meet this standard[6] and therefore fall outside the scope of the force majeure clause.

Texas courts have often struggled with determining which matters are covered by general catch-all phrases, such as "and any other matters beyond the reasonable control of the affected party," that often follow a list of specified events constituting force majeure. A case that received significant attention recently, *TEC Olmos v. ConocoPhillips*, relied on a non-Texas case to apply the doctrine of *ejusdem generis* and concluded that "'any other cause not enumerated herein' must be limited to the types of events specified before".[7] Another recent Texas case, *Anadarko Petroleum v. Noble Drilling (U.S.)*, examined whether circumstances that were excluded from the enumerated list could fall under the subsequent catch all clause "or any other cause beyond the reasonable control of such party, whether or not similar to the causes specified herein."[8] The court concluded that circumstances that were specifically excluded from the enumerated list could not be picked up by the catch-all clause, explaining that all parts of the contract's definition of force majeure had to be read together.

Texas courts have also considered whether qualifications such as "beyond reasonable control," "unavoidable by reasonable diligence," and "unforeseeable" that appear in catch-all language at the end of a force majeure clause modifies an entire preceding list of enumerated events. In *Sun Operating*, the court noted that such qualifications can be read as modifying the preceding entries.[9] Similarly, the court in *Roland Oil Company v. Railroad Commission of Texas* found that language reading "or by any other cause or causes beyond reasonable control of the party" imposed the "beyond the reasonable control" standard on the entire list of events that preceded it, particularly in light of the "other" reference.[10] In contrast, in *Ergon-West Virginia v. Dynegy Marketing & Trade*, the Fifth Circuit held that a force majeure provision that included

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[4] 919 F.2d 17, 19, n.1. (5th Cir. 1990).
[5] 443 B.R. 74, 80 (E.D. Tex. 2010).
[6] *See Sherwin Alumina L.P., v. AluChem, Inc.*, 512 F. Supp.2d 957, 967 (S.D. Tex. 2007) (where an event must be beyond the reasonable control of the affected party, higher costs or worse economics are generally not considered to meet this standard and therefore fall outside the scope of the force majeure clause).
[7] 555 S.W.3d 176, 186 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).
[8] No. H-10-2185, 2012 WL 13040279, at *16–17 (S.D. Tex. May 3, 2012).
[9] *Sun Operating*, 984 S.W.2d at 287–88.
[10] No. 03–12–00247–CV, 2015 WL 870232, at *4–6 (Tex. App.—Austin Feb. 25, 2015, pet. denied).

the catch-all phrase "and any other causes, whether of the kind herein, or otherwise, not within the control of the party claiming suspension and which *by the exercise of due diligence such party is unable to prevent or overcome*" was ambiguous and subject to interpretation using extrinsic evidence.[11] There, the issue was whether the phrase "by the exercise of due diligence such party is unable to prevent or overcome" applied to an entire enumerated list of force majeure events that preceded it or instead only applied to the "other causes" referenced therein.

Another issue courts often face in relation to force majeure clauses is unforeseeability. Texas courts have historically taken what could be seen as divergent views on whether, in the absence of express language, an occurrence must be unforeseeable in order to qualify as force majeure. In *Valero Transmission Co. v. Mitchell Energy*, the Houston 1st District Court of Appeals rejected claims by a gas purchaser that a market downturn constituted force majeure, holding that market downturns are foreseeable events. The court explained that a "force majeure clause does not relieve a contracting party of the obligation to perform, unless the disabling event was unforeseeable at the time the parties made the contract."[12] The court cited, among other authorities, the Third Circuit case of *Gulf Oil v. Federal Energy Regulatory Commission*, which was rejected the same year by the San Antonio Court of Appeals in *Kodiak 1981 Drilling Partnership v. Delhi Gas Pipeline.*[13] In *Kodiak 1981 Drilling Partnership*, the court relied on the Fifth Circuit case of *Eastern Airlines v. McConnell Douglas* to hold that force majeure events do not have to be unforeseeable.[14] Decades later, the Houston 1st District Court of Appeals examined a force majeure clause that did not mention unforeseeability and attempted to reconcile the preceding cases by holding that the unforseeability requirement should be read into general catch-all force majeure clauses but does not apply to specified force majeure events.[15] In *WC 1899 McKinney Avenue v. STK Dallas*, the federal district court for the Western District of Texas took a different approach, noting that because the text of the force majeure clause that did not mention forseeability at all did "not clearly and unambiguously require that Force Majeure Events be beyond the reasonable anticipation of the party," "a fact issue exists as to whether the force majeure clause encompasses events anticipated by the parties."[16]

Even if an event or circumstance qualifies as a force majeure under a particular clause, the failure to provide proper notice or satisfy mitigation requirements may prevent its application. Where a clause provides specific requirements for notice, such as timing or information to be provided, they should be followed to avoid a breach.[17] At least one court has found that a notice actually delivered, though not to all required addressees, was sufficient to support a force majeure claim.[18] Additionally, force majeure clauses may contain mitigation

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[11] 706 F.3d 419, 425–26 (5th Cir. 2013).
[12] 743 S.W.2d 658, 663 (Tex. App.—Houston [14th Dist.] 1987, writ denied)..
[13] *Gulf Oil Corp. v. FERC*, 706 F.2d 444 (3r Cir. 1983); *Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 720–21 (Tex. App.—San Antonio 1987).
[14] *Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 720–21 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.) (citing *E. Airlines, Inc. v. McConnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976)).
[15] 555 S.W.3d 176, 183–84 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).
[16] 380 F. Supp.3d 595, 603–04 (W.D. Tex. 2019).
[17] *See Anadarko Petroleum Corp. v. Noble Drilling (U.S.) LLC.*, No. H-10-2185, 2012 WL 13040279, at *23 (S.D. Tex. May 3, 2012).
[18] *See, e.g.*, *Kleberg Cnty v. URI, Inc.*, 540 S.W.3d 597, 617 (Tex. App.—Corpus Christi 2016, pet. granted) (reversed on other grounds).

requirements, which have also been examined by courts applying Texas law. In *Ergon-West Virginia*, the court determined that a requirement to remedy the force majeure event "with all reasonable dispatch" required only actions that "'would be thought satisfactory to the offeror by a reasonable man in the position of the offeree.'"[19] Where no express mitigation requirement is included, at least some courts of appeals have refused to find such a duty.[20]

The burden in a force majeure case rests upon the party asserting that it is excused by a force majeure event.[21]

Notably, Texas courts have commented on the application of force majeure in the context of at least one standard industry form, the NAESB Base Contract for natural gas sales. In *Virginia Power Energy Marketing., Inc. v. Apache Corporation*, Apache and VPEM agreed in 2003 upon a NAESB Base Contract to govern a series of natural gas sales from Apache (producer) to VPEM (marketer). In 2005, when two different hurricanes hit the Gulf Coast, Apache claimed force majeure and delivered significantly less gas to the two agreed delivery points. The resulting shortfall in deliveries required VPEM to buy gas on the spot market for $2.25 million more than the price under its contract with Apache.[22] VPEM discovered Apache was one of the spot sellers, concluded that Apache had wrongly claimed force majeure, and offset the $2.25 million additional purchase price for the gas against its other payments due to Apache. Apache sued for the funds, and VPEM counterclaimed that Apache improperly claimed force majeure. Apache moved for partial summary judgment arguing that its performance was excused due to force majeure.

Because one of the two delivery points was unusable due to hurricane damage, VPEM relied on the language in the contract stating "Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a *Force Majeure*" to argue that Apache was required to deliver to an alternate location. The court disagreed, finding that, because the parties agreed to delivery at *specific* delivery points (with no language obligating parties to agree to an alternate delivery location if requested), VPEM's interpretation would both conflict with the express language of the contract and frustrate the parties' intent to excuse non-performance due to a force majeure event.[23] The court also rejected VPEM's alternative argument that UCC §2-614 required Apache to deliver to an alternate location, identifying that section as being a "gap-filler" provision that only applies in the absence of specific agreement between the parties. And because the contract at issue contained a specific agreement between the parties, UCC §2-614 could not be used to vary those terms.[24]

Although the hurricanes did not prevent deliveries of gas at the second delivery point where gas was to be delivered under the contract, Apache asserted that it was excused from those deliveries by force majeure because of the loss of its "gas supply" from the specific offshore platforms that it had scheduled to use to supply the contract. VPEM argued that "gas supply" is a

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[19] *Ergon-West Virginia*, 706 F.3d at 425 (quoting *Christy v. Andrus*, 722 S.W.2d 822, 824 (Tex. App.—Eastland 1987, writ ref'd n.r.e.)).
[20] *See Sun Operating*, 984 S.W.2d at 283.
[21] *Virginia Power*, 297 S.W.3d at 402; *Red River Resources*, 443 B.R. at 79.
[22] *Virginia Power*, 297 S.W.3d at 401.
[23] *Id*. at 403–04.
[24] *Id*. at 404.

general term that would encompass any uncommitted gas that Apache had available in the geographic region.[25] Apache contended that it is common practice in the industry to use the supplier's internal designations of gas supplies for particular customer commitments, but the court found insufficient evidence that this concept is so commonly understood that the contract should be taken to have been made with that concept in mind.[26] Instead, the court looked at the plain meaning of "gas supply" and concluded that Apache could not establish, for purposes of summary judgment, that it lost its "gas supply" as a consequence of the hurricanes.[27]

II. Impossibility, Impracticability, and Frustration of Purpose

A. Impossibility

The impossibility defense in Texas is based on Section 261 of the Restatement (Second) of Contracts, which provides that "[w]here, 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."[28] Impossibility of performance may be classified as either "original impossibility" or **"**supervening impossibility." "Original impossibility" refers to circumstances where the impossibility of performance exists at the time the contract is entered into. "Supervening impossibility" is that which develops sometime after the inception of the contract.[29]

In the case of original impossibility, an obligor's duty to perform can be excused if the contract is impossible to perform from the outset because of facts unknown to the obligor.[30] However, when a person knows at the time of contractual formation that his performance under the contract will be impossible, impossibility will not serve as a defense.

If the impossibility arises after inception of the contract (supervening impossibility), an obligor's performance can be excused if it is made impossible or impracticable by supervening circumstances that could not have been anticipated when the contract was executed.[31] However, if an impossibility is created by an obligor's voluntary act, performance is not excused.[32] The supervening impossibility defense generally applies in three types of instances: (1) death or incapacity of a person necessary for performance, (2) destruction or deterioration of a thing necessary for performance, and (3) prevention by governmental regulation.[33] To be excused under this theory, a party must show supervening circumstances that made its performance

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[25] *Id*. at 405.
[26] *Id*. at 406.
[27] *Id*. at 407–408.
[28] *Key Energy Servs., Inc. v. Eustace*, 290 S.W.3d 332, 339–40 (Tex. App.—Eastland 2009, no pet.) (quoting Restatement (Second) of Contracts § 261 (1981)).
[29] Restatement (Second) of Contracts § 261 (1981).
[30] *Solar Soccer Club v. Prince of Peace Lutheran Church*, 234 S.W.3d 814, 824 (Tex. App.—Dallas 2007, pet. denied); *Janak v. Fed. Deposit Ins. Corp.*, 586 S.W.2d 902, 906–07 (Tex. App.—Houston [1st Dist.] 1979, no writ).
[31] *Centex Corp. v. Dalton*, 840 S.W.2d 952, 953–54 (Tex. 1992) (finding that the corporation was excused from performance because federal bank regulations prohibited paying finder's fees).
[32] *See Stafford v. S. Vanity Magazine, Inc.*, 231 S.W.3d 530, 537 (Tex. App.—Dallas 2007, pet. denied).
[33] *Key Energy Servs., Inc.*, 290 S.W.3d at 340.

impossible.[34] A mere showing that performance has become economically burdensome is not sufficient.[35]

B. Impracticability

"Impracticability" is defined by the Restatement (Second) of Contracts as occurring "[w]here, 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".[36] As noted in the discussion of force majeure, above, the Texas Uniform Commercial Code establishes a statutory impracticability defense applicable to the sale of goods.[37]

There is a split of authority on whether a common law defense of impracticability exists under Texas law. At least one court of appeals has concluded that no such defense of impracticability exists, while others have relied on the Restatement (Second) of Contracts to conclude that the defense is recognized under Texas law.[38] In *Tractebel Energy Marketing, Inc. v. E.I. Du Pont De Nemours and Company*, the court observed that "[t]hough Texas courts rarely use the that name [commercial impracticability], they have accepted the defensive doctrine under aliases."[39] The court went on to hold that "the doctrine of commercial impracticability as defined in the Restatement [sections 261 and 264] does exist in Texas[.]"[40]

Although the Texas Supreme Court has not directly addressed this split in the lower courts, its reliance on Restatement § 261 concerning impracticability in *Centex Corporation v. Dalton* at least suggests the possibility that such a common law defense does exist in Texas.[41]

C. Frustration of Purpose

Under the theory of frustration of purpose, as described in *Philips v. McNease*, an obligor may be excused from performing a contract if an event occurs and the contract was made on the basic assumption that the event would not occur.[42] Texas courts have spoken very little on the topic of frustration of purpose as an excuse for non-performance under a contract; however, the Restatement (Second) of Contracts, which is often relied on by Texas courts, provides for a defense based on supervening frustration when "a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." Notably, that the same court that decided the

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[34] *Centex Corp.*, 840 S.W.2d at 954.
[35] *See Huffines v. Swor Sand & Gravel Co., Inc.*, 750 S.W.2d 38, 40 (Tex. App.—Fort Worth 1988, no writ); *see also Philips v. McNease*, 467 S.W.3d 688, 696 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
[36] Restatement (Second) of Contracts § 261 (1981).
[37] Tex. Bus. & Com. Code §2.615.
[38] *Huffines*, 750 S.W.2d at 40; *Juarez v. Hamner*, 674 S.W.2d 856, 861 (Tex. App.—Tyler 1984, no writ).
[39] *Tractebel Energy Mktg Inc. v. E.I. Du Pont De Nemours and Co.*, 118 S.W.3d 60, 64 (Tex. App—Houston [14th Dist.] 2003, pet. denied).
[40] *Tractebel*, 118 S.W.3d at 65.
[41] *Centex Corp.*, 840 S.W.2d at 954-55.
[42] *Philips v. McNease*, 467 S.W.3d at 695–96.

Philips case had, twelve years earlier, denied that frustration of purpose existed as a separate affirmative defense under Texas law.[43]

D. Overlapping Defenses

It would be fair to say that the Texas courts have often not drawn bright lines between the affirmative defenses of impossibility, impracticability, and frustration. Thus, the three defenses are often asserted together, which leads courts to then analyze the defenses together.[44]

III. Failure of Condition Precedent or Condition Subsequent

In contract law, a condition is a future, uncertain fact, act, or event that triggers (or negates) an obligation to perform.[45] The condition itself is not a covenant, promise, or obligation by any party. Unless there is an independent duty of at least one of the parties to bring about (or prevent) the condition (whether express or implied), the failure of the condition is not a breach of the contract. Instead, the failure of a condition is generally held to have two consequences: first, the obligation that is subject to the condition will not become due unless the failure is cured (if curable) or waived; second, if the failure of the condition is not curable, the non-performance of the conditioned obligation is excused.[46]

In the context of a merger and acquisition transaction, litigation with respect to conditions focuses on whether the applicable condition, such as absence of a material adverse effect, has been satisfied, with one party asserting that a closing condition was not satisfied (or is incapable of being satisfied), thereby excusing performance, and the other party asserting that all conditions were satisfied and seeking specific performance. However, in the context of general commercial transactions, courts are frequently called upon to determine whether a particular provision is in fact a covenant or a condition to performance.[47]

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[43] *See Walden v. Affiliated Computer Servs.*, 97 S.W.3d 303, 321 (Tex. Civ. App.—Houston [14th Dist.] 2003, pet. denied). Even in the *Phillips* case, the citations referenced primarily address impracticability, or use the terms interchangeably.[44] *See, e.g., BP Chem., Inc. v. AEP Tex. Cent. Co.*, 198 S.W.3d 449, 459–460 (Tex. App.—Corpus Christi 2006, no pet.) *and Hollis v. Gallagher*, No. 03–11–00278–CV, 2012 WL 3793288 at *4 (Tex. App.—Austin Aug. 28, 2012,) (mem. op.).

[44] *See, e.g., BP Chem., Inc. v. AEP Tex. Cent. Co.*, 198 S.W.3d 449, 459–460 (Tex. App.—Corpus Christi 2006, no pet.) *and Hollis v. Gallagher*, No. 03–11–00278–CV, 2012 WL 3793288 at *4 (Tex. App.—Austin Aug. 28, 2012,) (mem. op.).

[45] *See* Restatement (Second) of Contracts § 224 (1981); 8 Corbin on Contracts § 30.6, at 1 (2019); *and Condition*, Black's Law Dictionary (11th ed. 2019).

[46] Restatement (Second) of Contracts § 225 (1981).

[47] *See Centex Corp.*, 840 S.W.2d at 956 (finding that the Centex Corporation's obligation to pay a finder's fee was conditioned on approval of the acquisition, and therefore the plaintiff's right to enforce payment could not accrue until the acquisition was approved by the Federal Home Loan Bank Board); *Chambers v. Hunt Petroleum Corp.*, 320 S.W.3d 578, 585 (Tex. App.—Tyler 2010, no pet.) (finding that the parties did not intend to condition the lessee's option to purchase land on its covenant to pay taxes and other costs prior to exercise of the option); *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010) (holding that, in a dispute between a general contractor and a property owner, a reasonable reading of the lien-release provision, which did "not contain language that is traditionally associated with a condition precedent," did not make performance of the lien release a condition to payment); *and Calpine Producer Servs., L.P. v. Wiser Oil Co.*, 169 S.W.3d 783, 788 (Tex. App.—Dallas 2005, no pet.) (finding that a provision requiring a buyer to pay the seller only after it "receives payment from its customers" is a condition precedent and not a covenant).

Because the failure to satisfy a condition can "impose draconian consequences for even *de minimis* deviations" from contract requirements, conditions are not favored by courts.[48] As a result, Texas courts have sometimes sidestepped what would otherwise be the consequences of a condition with interpretive rules. Courts have construed contract language as a covenant rather than a condition in order to avoid forfeiture of the bargained for obligation.[49] In other instances, courts have found that a condition exists but nevertheless excuse its failure if the condition is "not an essential part of the bargained-for exchange."[50] Finally, courts have excused the failure of a condition when the non-performance of the other party causes the failure.[51]

IV. Material Breach

In contrast to the failure of a condition, breach of a covenant typically gives rise to a cause of action for damages but does not impact the enforceability of the contract.[52] However, a fundamental principle of contract law is that a party is discharged and excused from its obligation(s) when the other party commits a material breach of a contract.[53] In determining the materiality of a breach, Texas courts frequently cite the following five factors of the Restatement (Second) of Contracts to determine whether a breach is material:[54]

> (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;
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> (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

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[48] *PAJ, Inc. v. Hanover Ins. Co.*, 243 S.W.3d 630, 636 (Tex. 2008); *see also Sirtex Oil Indus., Inc. v. Erigan*, 403 S.W.2d 784, 787 (Tex. 1966) (noting that "[b]ecause of their harshness in operation, conditions are not favorites of the law"); *Hohenberg Bros. Co. v. George E. Gibbons & Co.*, 537 S.W.2d 1, 3 (Tex. 1976) (quoting *Sirtex*); *Henshaw v. Tex. Nat. Res. Found.*, 216 S.W.2d 566, 570 (Tex. 1949) (stating that "[s]ince forfeitures are not favored, courts are inclined to construe the provisions in a contract as covenants rather than as conditions").

[49] *Criswell v. European Crossroads Shopping Ctr., Ltd.*, 792 S.W.2d 945, 948 (Tex. 1990).

[50] *PAJ, Inc.*, 243 S.W.3d at 636 (where the court adopts a notice-prejudice rule with respect to occurrence insurance policies). *But cf. Matador Petroleum Corp. v. St. Paul Surplus Lines Ins. Co.*, 174 F.3d 653, 659 (5th Cir. 1999) (applying Texas law and declining to apply a notice-prejudice rule with respect to a "claims-made" policy, noting that, "unlike in 'occurrence' policies, the insured and insurer specifically negotiate the terms of the notice provisions.").

[51] *Rich v. McMullan*, 506 S.W.2d 745, 747 (Tex. App.—San Antonio 1974, writ ref'd n.r.e.) (citing 17 Am. Jur. 2d Contracts § 427 (1964))*; see also Chambers v. Hunt Petroleum Corp.*, 320 S.W.3d at 583 (holding that the "failure of the optionee to comply strictly with the terms or conditions of the option will be excused when the failure is brought about by the conduct of the optionor").

[52] *Solar Applications Eng'g, Inc. v. T.A. Operating Corp.*, 327 S.W.3d 104, 108 (Tex. 2010).

[53] *See Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d 691, 692 (Tex. 1994), *Jack v. State*, 694 S.W.2d 391, 398 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.); *Mead v. Johnson Grp., Inc.*, 615 S.W.2d 685, 689 (Tex. 1981).

[54] *See Hernandez v. Gulf Grp. Lloyds*, 875 S.W.2d at 693 ("In determining the materiality of a breach, courts will consider, among other things, the extent to which the nonbreaching party will be deprived of the benefit that it could have reasonably anticipated from full performance…The less the non-breaching party is deprived of the expected benefit, the less material the breach.") (citing the Restatement (Second) of Contracts § 241 (1981)); *Solar Applications*, 327 S.W.3d at 108 (citing the Restatement (Second) of Contracts §§ 236 cmt. a, 241, 242 cmt. a (1981)); *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 199 (Tex. 2004) (citing the Restatement (Second) of Contracts §§ 241, 242 (1981)) *and Advance Components, Inc. v. Goodstein*, 608 S.W.2d 737, 740 (Tex. App.—Dallas 1980, writ ref'd n.r.e.) (quoting the predecessor section to Restatement (Second) of Contracts § 241 (1981)).

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing."[55]

Generally, materiality is an issue for the finder of fact; however, courts will rule as to materially as a matter of law if "reasonable jurors could reach only one verdict.[56]

Applying the Restatement rules has led to mixed outcomes. In a contract dispute involving a food-product manufacturer and a refrigeration contractor, the court deferred to the jury's implied finding that the refrigeration contractor's failure to deliver refrigeration units that operated at a certain temperature was a breach but not a material breach.[57] In a dispute between a pipeline owner and a contractor, the court held that even without a jury finding as to materiality, the contractor's breach of its obligation to timely complete construction work was, as a matter of law, material where the owner stressed timing during the bid process, time was expressly of the essence, and the contract addressed the need for sufficient resources to meet the timing requirements.[58] Further, in a series of insurance related cases, courts have repeatedly found as a matter of law that notice provisions under insurance policies (even when structured as conditions to coverage and not covenants to provide notice) are not essential parts of the bargained-for exchange, and therefore non-performance will not result in discharge of the insurer unless the insurer is prejudiced.[59]

V. Other Defenses to Performance

In addition to those defenses above, which are perhaps the most significant in many commercial contract performance disputes, there are a number of others which may be relevant depending on the circumstances, including (1) failure of consideration; (2) lack of capacity, absence of authority, etc.; (3) mutual mistake; (4) duress; (5) illegality; (6) fraud; and (7) waiver. It is not surprising to find the party seeking an excuse for its performance asserting as many of these defenses as are even remotely plausible.

VI. Conclusion

[55] Restatement (Second) of Contracts § 241 (1981).
[56] *Bartush-Schnitzius Foods Co. v. Cimco Refrigeration, Inc.*, 518 S.W.3d 432, 436 (Tex. 2017).
[57] *Id.*
[58] *Mustang Pipeline Co.*, 134 S.W.3d at 199 (Tex. 2004).
[59] *See Prodigy Commc'ns Corp. v. Agric. Excess & Surplus Ins. Co.*, 288 S.W.3d 374, 382 (Tex. 2009) (finding that, with respect to a claims-made policy that required notice as soon as practicable "but in no event later than ninety (90) days," that the obligation to provide notice "as soon as practicable" was not a material part of the bargained-for exchange). *See also supra* note 47.

In the current environment, many companies are reviewing their contracts to assess risks of counterparty non-performance, analyze counterparty claims, assess their own non-performance rights, and consider future changes to contract forms. Understanding the evolving Texas law on excuses from contract performance will be an important foundation for all of these efforts.