

**POSSIBLE IMPLICATIONS OF TERROR ATTACKS
AND RELATED EVENTS ON PERFORMANCE OF CONTRACTS**

In the uncertain world in which we have all lived after the events of September 11, 2001, and in light of the economic uncertainties resulting from those events and the subsequent military actions and other related matters, issues may arise concerning whether and to what extent parties are obligated to comply with pre-September 11, 2001 contractual obligations. Over time, periods of great upheaval have caused problems for parties with contractual obligations that may be difficult, costly, or impossible to perform as a result of intervening events not anticipated when the contract was entered into.

One of the issues that may arise is whether, and to what extent, a non-performing party may invoke a force majeure clause to delay, alter, or avoid performance, in whole or in part, of contractual obligations. Traditionally, courts have required a strong showing as a basis for invoking a force majeure provision under such circumstances, normally requiring extreme events such as certain acts of war or Acts of God.

Although it is not absolutely clear how courts would look at the recent events, past decisions do provide some guidance. For example, courts have examined situations in which supply shocks caused by events outside of the parties' control have impeded performance of the contract. In Gulf Oil Corp. v. Federal Energy Reg. Comm'n, 706 F.2d 444, 454 (3rd Cir. 1983), a gas supplier sought to excuse performance under a force majeure clause on the basis of a claim that the available supply of gas could no longer support the requirements of a contract due to the repeated shutdown of certain gas fields. In that case, the court denied relief on the basis that the supplier had failed to establish that, in the absence of the alleged force majeure event, it would have had sufficient sources of gas to meet the required level of performance.

The standards applied by the United States Court of Appeals for the Third Circuit in Gulf Oil Corp. are illustrative. Normally, to excuse or delay performance under a force majeure clause, a non-performing party must show:

- The specific actions taken to attempt to perform the contract and to overcome the alleged force majeure event;
- The specific efforts undertaken to prevent or mitigate the alleged force majeure event; and
- Proof of a causal relationship between the alleged force majeure event and the contractual obligation sought to be modified.

In Pacific Vegetable Oil Corp. v. C.S.T., LTD., 29 Cal.2d 228, 230 (1946), the Supreme Court of California imposed standards similar to those applied in Gulf Oil Corp. In Pacific Vegetable, a shipper of copra (dried coconut portions) cancelled a contract when it could not obtain an export permit from the Fiji Island Government. When the United States entered World War II, the Fiji Island Government refused the permit and requisitioned the copra shipment for its own supply. In that case, the court held that the failure was excused by events caused by World War II, which

were intervening matters that could not have been prevented by the exercise of prudent diligence and care.

More recent cases that arose during the Gulf War also provide some guidance on these issues. The Southern District Court of New York addressed the effects of terrorism in Connecticut Nat'l Bank v. Trans World Airlines, Inc., 762 F. Supp. 76, 81 (S.D.N.Y. 1991). In Connecticut Nat'l Bank, an airline defaulted on several loan payments. In defense of its repayment obligations, the airline argued that it was having financial problems as a direct result of reduced airline travel caused by fear of terrorist attacks during the Gulf War. The court refused to excuse the airline from the repayment of its loans. The relevant agreement did not contain a force majeure provision, but the court opined that even a force majeure provision would not have created a defense under these circumstances.

A similar issue that may arise is whether, and to what extent, a force majeure event may affect contractual obligations that require completion by a certain time or date. In situations in which the completion of a contract by a certain time or date is deemed vital to performance, the parties may include a "time is of the essence" clause. In those situations, a failure to perform on time is a material breach of contract.

A "time is of the essence" clause that does not itself contain an exception for delays caused by force majeure or other events may not permit performance to be delayed. If the parties expressly want to allow certain delays, exceptions to the "time is of the essence" requirement probably need to be expressly contained within the "time is of the essence" clause. If an express exception is not provided in the "time is of the essence" clause, a delay in performance – whether for force majeure or other reasons – probably cannot be excused.

For example, the Court of Federal Claims reviewed these issues in Jardine Mining Co. v. United States, 115 F. Supp. 279 (Ct. Cl. 1950). In Jardine Mining, a supplier argued that its obligations to provide arsenic to the United States Government should have been delayed when alleged force majeure events prevented timely shipment. The contract at issue contained specific delivery deadlines and both a "time is of the essence" clause and a separate force majeure provision. The Court of Federal Claims ruled that the separate force majeure provision did not trump or otherwise modify the "time is of the essence" clause. If the parties intended that the delivery deadlines be modified in light of force majeure events, then that intention had to be expressed clearly as a stated exception to the "time is of the essence" clause. In so holding, the Court pointed out that a contrary ruling might have allowed indefinite extensions of performance, which the Court found wholly inconsistent with the notion that "time is of the essence."

In a case that arose during World War I, Edward Maurer Co. v. Tubeless Tire Co., 272 F. 990 (N.D. Ohio 1921), the court examined whether and to what extent wartime events fell within a force majeure provision, and the specific effect that those events might have upon the obligations of parties to a contract. The case involved a contract for the sale of rubber, the performance of which was affected by wartime events, including rubber rationing. Both the seller and the buyer invoked the force majeure provision, but for different reasons.

The buyer argued that the force majeure provision vitiated completely the need for the parties to perform their obligations. The seller argued that the force majeure provision dictated that performance of the contract be delayed, but not excused completely. Performance would be required at some future date, when the force majeure events had abated. The court disagreed, finding that to the extent that the force majeure provision applied (which it did, based on the fact that acts of war were involved), performance was excused completely and not merely delayed. The court chose simply to invalidate the contractual obligations rather than rewrite them and leave the parties at the mercy of wartime events with an indeterminate final result.

Although these cases provide guidance, it remains unclear how courts will construe contracts in the context of the recent events. The ultimate result may depend upon the nature of the events involved, the type of contractual obligations at issue, and the ability of the parties to perform regardless of the effect of ongoing events. These issues will continue to unfold rapidly in the days ahead, as even more developments take place (such as disruption of mail delivery caused by Anthrax-related concerns).