Its Not My Fault: Recent Force Majeure Decisions

G. Brian Wells
Associate
Introduction

Virtually all production and sales contracts in the coal industry contain provisions which excuse the performance by one party if certain, usually enumerated, events occur, provided the occurrence is not the fault of the party claiming the excuse. These provisions are commonly known as “force majeure” provisions.

Despite the fact that there are literally thousands of contracts relating to the production and sale of coal, the law concerning events of force majeure is not as developed as one might expect. There have been some recent developments in the law of force majeure, however, which are worth noting as they could affect the way that parties govern themselves in the context of coal production and sales contracts.

Background

A force majeure provision is generally defined as a contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event that the parties could not have anticipated or controlled. However, many contracts expressly include foreseeable events as the basis for excusing performance. As applied to the coal industry, at least one court has summarized an event of force majeure as one that is “commonly considered to be caused by [an] overpowering, superior, or irresistible force, such as an act of God, which is beyond the reasonable control of the parties and cannot be avoided by the exercise of due care. Generally, the party asserting an event of force majeure has the burden of proving that the event was beyond its control and not due to its fault or negligence.

Recent Cases Concerning Force Majeure Provisions

There are several new cases which concern the law of force majeure. While the cases discussed below are not, by any means, intended to be an exhaustive summary of all such cases, these cases have been summarized to address a few particular issues of interest to coal producers and buyers.

Lack of Stockpile Space Deemed a Market Risk

In a recent decision of a Bankruptcy Court sitting in Kentucky, the Court determined that the lack of stockpile space of a coal producer in a contract mining agreement was not an event of force majeure, but rather was a market risk which did not excuse the obligation of the producer to accept coal mined by its contractor. Consequently, the Court held that the contractor was entitled to damages as the result of the producer’s refusal to accept coal mined by the contractor.

Consol of Kentucky, Inc. entered into a contract mining agreement with Miller Bros. Coal, LLC pursuant to which Miller Bros. was to mine certain coal for Consol in what is commonly referred to as the Yellow Mountain area for a fixed price. Miller Bros. did mine coal from Yellow Mountain and delivered it to Consol at its Jones Fork preparation plant for several months. On May 15, 2009, Consol sent notice to Miller Bros. alleging the occurrence of certain events argued to be force majeure events.

Specifically, the notice claimed three events of force majeure, namely that: 1) market conditions had limited Consol’s ability to sell coal from its Jones Fork plant which caused its stockpiles to be overfilled with unsold coal; 2) Consol’s customers weren’t taking all of the coal they contracted to buy; and 3) Consol planned to idle the Jones Fork plant. In rejecting each of Consol’s alleged events of force majeure, the Court categorized the events as normal market risks caused by the significant decrease in the price of coal and Consol’s own failure to secure adequate contracts to sell the coal. The Court appeared particularly influenced
by the fixed price nature of the contract. Indeed, the Court said that the fact Consol had agreed to pay Miller Bros. a fixed price was determinative of its willingness to accept market risks in the contract. Unless otherwise stated in the contract, normal market risks are typically considered outside of the realm of events constituting force majeure. The force majeure provision in the Miller Bros. contract did not protect Consol against market risks. Based on its conclusion that the events which Consol argued were events of force majeure were actually market risks which had been assumed by Consol, the Court determined that Consol owed damages to Miller Bros. for breach of contract.

Written Notice
At least one recent case has dealt with the notice required to the party not claiming the occurrence of events of force majeure. Although the language in force majeure provisions varies significantly, one element that is typically included in force majeure provisions is a requirement that the party seeking to have its performance excused give prompt written notice to its counterparty when force majeure events occur. Despite the existence of requirement to provide written notice in one of its coal supply agreements, a coal producer recently argued that the requirement of written notice could be avoided if the purchaser actually knew of the events claimed to be events force majeure.

Shortly after C.W. Mining (“CWM”) entered into a contract to sell coal to Aquila Inc., it experienced a labor strike which impacted much, but not all, of CWM’s labor force. CWM sent notice to Aquila informing it that CWM considered the labor issue a force majeure event. In addition, to the labor strike, CWM also had to shut down one of its mines for safety reasons. In spite of these issues, CWM represented to Aquila that it could meet its obligations based on its projected production from two of CWM’s other mines. CWM’s luck worsened and it encountered numerous geologic issues in one of its other mines. Specifically, there were areas of extreme temperatures where coal reserves were burning in the ground; mud in the mine made mining incredibly difficult; and, there had been roof falls in sections of the mine.

A representative for Aquila was brought to CWM’s mines for a tour and was shown the geologic impediments that CWM faced. Despite the fact CWM had disclosed these issues to the representative, the Court noted that it reportedly downplayed the significance of the geologic conditions and never provided written notice to Aquila that CWM considered these events to be force majeure events. The trial court determined that, although CWM had sent notice to Aquila of a labor shortage, the real events of the force majeure were the poor geologic conditions that CWM encountered. Consequently, CWM’s notice of the labor shortage did not excuse the CWM’s performance based on adverse geologic conditions.

On appeal, CWM argued that it was not able to overcome the geologic impediments because of its diminished labor force. The trial court disagreed stating that the geologic factors were independent of the labor shortage, and the Appellate Court did not find enough evidence to overturn the trial court’s finding. Based on this conclusion, the Court determined that CWM was required to provide notice of the poor geologic conditions and that it failed to do so.

CWM argued in the alternative that it was nevertheless excused from performing under the contract because Aquila had “actual knowledge” of the poor conditions in CWM’s mine. CWM contended that Aquila’s representatives knew about the problems because of a mine tour in which CWM explained the conditions to one such representative. The Court ultimately
determined that Aquila did not have actual notice of the conditions. However, it provided a hint as to how it might have decided the case had it determined that actual knowledge existed.

The Court noted that a recent opinion questioned whether actual notice could be substituted for written notice, and further observed that caselaw relied upon by CWM in asserting that actual notice was an appropriate substitute applies to contracts which are arguably distinguishable from CWM’s contract with Aquila. The Court further noted that age-old “cardinal” contract interpretation principles teach that unless contractual provisions are ambiguous, that the parties are bound to the language in their contracts. Based on the Court’s dicta, it appears that CWM may have had difficulty convincing the Court that actual notice was a suitable substitute for its failure to provide written notice to Aquila.

Material Fact Exists Where Labor Shortage at a Particular Mine is Claimed Despite Expansion of Company’s Labor Force Overall Labor shortages have long been included among the events qualifying as events of force majeure. In another recent opinion, Massey Energy Co. idled its Black King mine, asserting that the quantity and quality of its labor force at that mine made its continued operations unsafe. One of the parties purchasing Massey’s coal from the Black King mine, Shenango, Inc., argued that Massey’s assertion of events of force majeure was really an effort by the producer to excuse its obligations under lower priced contracts so that it could sell its coal for more money. Interestingly, although the Court concluded that Shenango had produced “compelling evidence” that a labor shortage was not responsible for Massey’s decision to idle its Black King mine, it nevertheless determined that the case should be allowed to proceed to trial. The Court made this determination despite evidence that Massey had expanded its production capacity, increased its labor force and added new mines.

Massey argued that although it was able to find workers, it was not able to find workers who were skilled enough to operate its Black King mine because of challenging conditions in that mine. While the Court did not seem to be impressed with Massey’s argument that it lacked enough skilled labor to operate the Black King mine, it nevertheless concluded, that Massey produced enough evidence to create a material issue of fact sufficient to survive summary judgment.

The outcome of this case suggests that it is possible for a company to hire more workers and expand its overall production, yet assert that it cannot fulfill its contractual obligations due to a labor shortage at one particular mine. To be clear, Massey must still prove at trial that the labor shortage was not within its control and that the shortage, rather than a desire to obtain more money for its coal, prohibited Massey from performing its obligations under the Shenango contract. However, the Court’s determination shows that a material issue fact may exist where a producer claims a labor shortage and yet hires a larger workforce and produces more coal than the year before.

Conclusion

Each dispute concerning events of force majeure is unique factually and admittedly, the outcome of those disputes appear to be driven more by the facts than the law itself. Nevertheless, the recent cases provide useful insight for both producers and purchasers of coal as to how the courts may interpret force majeure provisions in coal production and sales contracts.
Brian Wells is a member of the Firm’s Natural Resources & Environmental Service Team. He concentrates his practice in the area of corporate mergers and acquisitions, with an emphasis in mineral and energy transactions. He is located in the Firm’s Lexington office.

859.288.7639
bwells@wyattfirm.com
Click here for a full bio