



## Negotiation and Drafting Issues Surrounding Force Majeure Provisions

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The COVID-19 pandemic has caused many companies and lawyers to check the force majeure provisions of contracts and consider the rights and remedies available under them. Many articles have been written on enforcing, avoiding and otherwise litigating these provisions in the context of the present pandemic.

By contrast, this article is oriented toward drafting force majeure provisions. Like many of the "boilerplate" provisions toward the back of most contracts, the import and nuance of force majeure provisions may not get the care and attention devoted to the front portions of the agreement, or may be "left to lawyers" to address and negotiate. This article aims to shed some light on this often-overlooked provision and point out several of the issues that should be considered in negotiations and drafting.

### BACKGROUND

The basics of U.S. contract law find their roots in English common law. Even now, the standard casebooks used in law schools' first-year contracts courses feature a number of English cases. By contrast, the phrase and concept of "force majeure" are literally and figuratively foreign to the common law of contracts, coming to us from French civil law. Because the concept is foreign, lawyers who review or draft contracts governed by U.S. law should start with the assumptions that 1) principles of force majeure will not be implied in a contract that does not expressly provide for them, and 2) U.S. courts will interpret and apply force majeure provisions narrowly.

The discussion in this article is based generally on New York law. The reader is reminded that each U.S. state has its own principles of contract law and rules of construction, and cautioned that most rules have exceptions.

### WHAT IS FORCE MAJEURE?

The literal translation of force majeure is "superior force." In general, it is understood to mean events that are 1) unanticipated, 2) beyond the control of the contracting parties, and 3) of a nature that render a party's performance of its contractual obligations impossible. Typical examples include earthquakes or extreme weather (often referred to as acts of God), strikes or other labor disruption, and war.

Force majeure provisions in contracts often provide a list of force majeure events, e.g., "war, terrorism, earthquakes, hurricanes, acts of government, fire, strikes, and such other acts or events that are beyond the control of parties." In New York, at least, the catch-all phrase at the end of this exemplary provision is typically read narrowly to include only events that are close to those specifically enumerated. For example, a tsunami may qualify because it is caused by an earthquake, but a tornado that is not spawned by a hurricane likely would not. Nor would an epidemic be likely to qualify, although an "act of government" such as a quarantine that is imposed because of an epidemic would seem to be expressly included.

Parties will sometimes draft a force majeure provision that seeks to avoid the narrow construction applied in New York. For example, this provision from a commercial lease was quoted in a complaint filed in New York state court by a tenant against its landlord seeking a declaration that the events surrounding the COVID-19 pandemic entitled it to a rent abatement:



"Force Majeure" shall mean fire, casualty, any strike, lock-out or other labor trouble, governmental preemption of priorities or other controls in connection with a national or other public emergency or shortages of fuel, supplies or labor resulting therefrom, *or any other cause, whether similar or dissimilar*, beyond Landlord's or Tenant's reasonable control, as the case may be; or any failure or defect in the supply, quantity or character of electricity or water furnished to the Premises, by reason of any requirement, act or omission of the public utility or others serving the Building with electric energy, steam, oil, gas or water, or for any other reason whether similar or dissimilar, beyond Landlord's or Tenant's reasonable control, as the case may be. [emphasis added]

The cases also generally hold that an event that would otherwise constitute a force majeure will not be treated as such if it was existing or contemplated at the time the agreement was reached, or if the point of the agreement was to deal with the event. For example, severe weather will not be a force majeure event in the case of an agreement to furnish emergency generators to an area threatened by an impending hurricane.

The advisability of including a force majeure provision in a contract is addressed below. However, the attorney who concludes that including one is desirable should be careful to draft broadly enough to capture as many contingencies as necessary to serve the client's purpose.

## **WHAT IS THE EFFECT OF A FORCE MAJEURE EVENT?**

Generally speaking, the occurrence of a force majeure event will not excuse a party's nonperformance simply because it makes performance more difficult or expensive. Rather, performance will be excused only if the force majeure event renders it virtually impossible. The distinction is sometimes expressed as the difference between performance being impossible versus performance being impractical.

For example, a musician who lives in California and agrees to perform at a concert in New York probably intends to travel by air. If air travel is suspended because of a strike that has been announced in advance, it may still be possible to meet the commitment by taking a train or bus. Although the travel would be inconvenient and unpleasant, it would not be virtually impossible. By contrast, if the musician is scheduled to perform in California on Friday and in New York on Saturday, severe weather that grounds all air traffic would make it truly impossible to arrive on time for the concert in New York, because air travel is the only way to arrive on time.

The difference between impossibility and difficulty can also be explored in the context of a fixed-price supply agreement. If a force majeure event reduces the availability of the supplier's raw materials and thus drives up their price, the supplier may lose money by performing, but its performance remains possible. By contrast, if the raw material is entirely unavailable because of a complete disruption of supply caused by a force majeure event, the supplier's performance would be truly impossible.

A U.S. court hearing a case in which a party asserts a force majeure provision in defense to a contract claim will adjudicate these issues. Using a pandemic as an example of an asserted force majeure event, it is unlikely that the existence of the pandemic would be subject to genuine dispute. However, the court would have to determine, likely as a legal matter as opposed to a factual question, if a pandemic is within the force majeure categories in the parties' contract. Assuming that it qualifies, the court would still have to adjudicate as factual issues 1) if the pandemic actually prevented the defaulting party's performance of its obligations under the contract, and 2) whether the defaulting party met its duty (if provided in the contract) to try to perform notwithstanding the constraints imposed by the pandemic, e.g., in the case of a supply agreement, by sourcing needed raw materials from an alternate supplier that was itself able to remain in operation. If the contract is governed by U.S. law and the dispute is heard by a U.S. court, the court is not likely to accept a "force majeure certificate" issued by the defaulting party's home jurisdiction as relieving that party of its



obligation to prove the factual bases of the defense, although it could consider it in conjunction with all other evidence presented by the parties.

## **DO YOU WANT A FORCE MAJEURE PROVISION IN YOUR AGREEMENT?**

The purpose of a force majeure provision is to absolve a contracting party from ordinary breach-of-contract liability if its performance of the contract is rendered virtually impossible by occurrence of a force majeure event. Properly understood, it is simply one of many ways to manage and allocate risk in a commercial agreement. Too often, however, it is included without thought as part of an agreement's boilerplate in a manner that creates inconsistencies with other provisions of the agreement or frustrates the parties' intent.

Consider, for example, an agreement for lease of a warehouse. A well-drafted lease will provide for the case in which the warehouse is destroyed or rendered unusable by a fire or natural disaster. Inclusion of a boilerplate force majeure provision may create ambiguity and lead to a dispute as to which provision should control.

Similarly, a long-term supply agreement often provides for the adjustment of price based on the cost of raw material or processing expenses, and generally deals with the allocation of risk if the supplier is unable to perform. From the purchaser's perspective, the cause of a disruption may be irrelevant, i.e., the purchaser does not care whether the cause of a disruption is a force majeure event or an ordinary breakdown of the supplier's manufacturing equipment. The supplier might be considered to be more blameworthy if it suffered a mechanical breakdown because it failed to properly maintain its equipment, as opposed to damage caused by severe weather, but there is no concept in contract law of moral fault. Either way, the purchaser is not being supplied with the product it needs. To be sure, "freedom of contract" means that the parties may choose to provide in their agreement that the risk of supply disruptions will be allocated in different ways depending on the cause of the disruption, but there is no reason to assume that a boilerplate force majeure provision — or indeed that any force majeure provision — will represent the optimal solution.

A final example are the many kinds of contracts that require the payment of money. The simple case is an ordinary note executed by the borrower as part of a commercial loan. The lender would prefer to maintain the borrower's obligation to timely repay the loan as unconditional, and not qualify that obligation with a force majeure provision.

## **CHOICES TO MAKE IN NEGOTIATING A FORCE MAJEURE PROVISION**

Assuming that the client's business interest are served by including a force majeure provision in a contract — which as discussed above may not be the case — the following are some points to be considered when negotiating and drafting.

- Are the enumerated kinds of events, and those very similar to them, intended to be exclusive or only illustrative? As noted above, some courts (including New York) will apply a narrow construction of the type of events that constitute a force majeure. If the decision is made to include events that are not listed, the draft provision should clearly provide for this.
- Is the goal to excuse all performance by both parties during the period of a force majeure event, or only certain performance by one of the parties? For example, in the case of a multiproduct supply agreement, it could be that the supplier is unable to provide some but not all of the products. Depending on the nature of the products, it could make sense to suspend the supplier's obligation to supply all of the products, or it may be preferable to require the supplier to continue supplying the products that are not affected by the force majeure event. Similarly, it may be desirable to suspend or maintain different obligations to make payments required under a contract.



- Keep in mind that economic burdens caused by a force majeure event may not relieve the burdened party from continuing performance. Again in the example of a supply agreement, a retailer may find itself without a viable market for its goods if a force majeure event closes its stores. But this does not necessarily make it impossible for the retailer to keep taking delivery of (and keep paying for) goods that are the subject of the supply agreement. Contingencies such as this are better addressed in specific provisions of the agreement that, e.g., permit the purchaser to suspend deliveries on notice to the supplier.
- Consider whether the suspension of performance caused by a force majeure event should be time limited. A party may be willing to accept a force majeure provision that affords its counterparty the right to suspend or delay performance for a limited period of time, but not for lengthy or indefinite periods.
- Some force majeure provisions permit one or both parties to terminate the agreement if performance remains suspended for more than a specified period of time. This kind of provision can be mutual or one-sided. Consider also consequences of termination in this instance, e.g., what rights and obligations (if any) survive termination under these circumstances, and what remedies (if any) are available following termination.

The kinds of events that may qualify as a force majeure range from the moderately predictable (floods in certain river valleys or deltas) to the unpredictable (whether a particular coastal city will be hit with a major tropical cyclone), and from the intensely local (a factory is destroyed in a fire) to worldwide (COVID-19 pandemic). Obvious risks and contingencies — such as the inability of a supplier to deliver — can be addressed in a specific manner, and the parties may conclude that the consequences that flow from this should not depend on whether the cause of the supplier's inability is a true force majeure as opposed to some other event that is not within the supplier's reasonable control. Ideally, a force majeure provision should not substitute for the work of considering reasonably predictable reasons that a party may be unable to perform its contractual obligations, or addressing the situation in which a party remains able to perform but the business purpose of its performance is frustrated by external factors. Nor should a party include a force majeure provision in a new contract by copying the boilerplate of a prior contract without considering its business necessity and implications, or accept without critical thought a counterparty's argument during negotiations that "this is something that's always done."

Like many other contractual terms, a force majeure provision is at bottom a way to allocate risk. Thinking about it as such may help the contract drafter decide whether such a provision is advisable at all, and if so to refine its content to protect the client's business goals.

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