Force Majeure Clauses: Key Issues

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This Practice Note discusses force majeure clauses, which allow the contract parties to allocate the risk of certain force majeure events such as acts of God, hurricanes, earthquakes and other natural disasters, epidemics, quarantines, terrorism, government acts, embargos, labor strikes and lock-outs, and other events beyond the control of the parties. Force majeure clauses work to mitigate the negative effects of force majeure events, including business interruption and supply chain disruption.

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In every business transaction, extreme events, commonly referred to as force majeure events beyond the control of the obligor, may arise and prevent the impacted party from performing the contract. For example, a natural disaster can negatively affect a seller's ability to deliver goods under a sale of goods agreement.

If the contract is silent on force majeure, a court renders its decision whether to excuse an impacted party's performance during the force majeure event based on the foreseeability of the event. For example, the **Uniform Commercial Code (UCC)** excuses a seller from timely delivery or for non-delivery of goods where its performance has become impracticable either:

- By the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.
- By compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

(UCC § 2-615(a).)

To reduce uncertainty, contract parties typically negotiate a contract provision called a **force majeure clause** to:

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- Allocate the risk of specified force majeure events regardless of their foreseeability because there are circumstances that are unlikely or unpreventable, such as a severe storm, but that can nevertheless be foreseen as a possibility.

- Excuse the impacted party's performance during the force majeure event.

If the parties unambiguously allocate the risk of the specified event, there should be no room for a court to inquire into the foreseeability of the event. However, courts sometimes inquire into the foreseeability of an event even if the parties explicitly list the event as a force majeure event. For more information on force majeure clauses, see Standard Clause, General Contract Clauses: Force Majeure: Drafting Note: Expert's View.

When negotiating a force majeure provision, the party bearing most of the principal non-payment obligations of the agreement typically is the main beneficiary of the force majeure clause. In a sale of goods transaction, the seller typically bears most of the principal non-payment obligations under the agreement. Therefore, it will try to negotiate a broadly drafted force majeure provision that:

- Covers a wide range of events that give rise to excused performance.

- Limits the buyer's express contractual remedies when performance is excused.

However, a buyer in a sale of goods agreement generally wants:

- To draft the force majeure provision as narrowly as possible and limit the definition of force majeure events to those events that are genuinely outside the seller's control.

- The ability to terminate the contract if a force majeure event continues for a certain length of time.

For a sample of a pro-seller force majeure provision, see Standard Document, Sale of Goods Agreement (Pro-Seller): Section 18.19. For a sample of a pro-buyer force majeure provision, see Standard Document, Sale of Goods Agreement (Pro-Buyer): Section 18.20.

When negotiating force majeure provisions, the parties must also consider:

- The contract's choice of law and dispute resolution clauses, which may affect the outcome of any dispute related to force majeure events, for example, whether:
    - immediate relief is available; and
    - force majeure-related disputes must be arbitrated.

- Whether force majeure events (including any specified types of force majeure events) are covered or excluded by the parties' respective commercial general liability, business interruption, contingent business interruption, or other insurance policies.

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For more information on choice of law and dispute resolution clauses, see:

- Practice Note, Choice of Law and Choice of Forum: Key Issues.
- Standard Clause, General Contract Clauses: Choice of Law.
- Standard Clause, General Contract Clauses: Choice of Forum.
- Standard Clause, General Contract Clause: Alternative Dispute Resolution (Multi-Tiered).

For more information about insurance coverage, see:

- Standard Clause, General Contract Clauses: Insurance Covenant (Sale of Goods).
- Insurance Policies and Coverage Toolkit.

Components of Force Majeure Clause

Force majeure clauses typically contain the following parts:

- **Obligor excused from performance.** The clause typically starts with language excusing one or both parties from performing the contract if specified force majeure events occur.
- **List of force majeure events.** The parties can negotiate the list of force majeure events (see List of Force Majeure Events).
- **Impacted party's obligations.** The parties can negotiate the impacted party's obligation to:
  - notify the obligee; and
  - mitigate.
- **Other party's remedies.** The parties can negotiate the other party's remedies, for example, its right to terminate the contract without liability if the force majeure event remains in effect after the specified number of days or consecutive days.

For more information on drafting and negotiating force majeure clauses, including the impacted party's obligation to send notice and the other party's potential remedies, see Standard Clause, General Contract Clauses: Force Majeure.

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List of Force Majeure Events

The parties negotiate the list to allocate the risk of force majeure events. The parties can choose to negotiate that the specified for majeure event be listed or not listed:

- **Specified force majeure event listed.** If the specified event is listed, this means that the parties allocated the risk of the specified event to the obligee. If the specified event occurs, the impacted party is excused from performance (*One World Trade Ctr., LLC v. Cantor Fitzgerald Sec.,* 789 N.Y.S.2d 652, 655 (N.Y. Sup. Ct. 2004)).

- **Specified force majeure event not listed.** If the specified event is not listed, this means that the parties allocated the risk of the specified event to the impacted party. If the specified event occurs, the impacted party:
  - is not excused from performance;
  - must perform the contract; and
  - will breach the contract if it does not perform, even if the specified event renders performance impossible.

The negotiated list typically involves the consideration of these events:

- Natural disasters such as floods, earthquakes, and severe weather events (such as hurricanes). Depending on local practice or experience, the parties may consider specifically listing other disasters that have a higher likelihood of occurring in a particular state (for example, hurricanes in Florida) and impacting the contract. However, the more exhaustive the list, the more likely that a court may exclude any natural disaster not specifically listed in the force majeure clause (for example, a meteor strike) (see Unrestricted versus Finite List of Force Majeure Events).

- Epidemics, pandemics, and quarantines, such as the events connected with **COVID-19.**

- Violence such as war, hostilities, terrorist acts, and civil unrest.

- Government action (unless the contract counterparty is a governmental entity or government-owned) such as:
  - **expropriation**, **eminent domain**, or other condemnation of property;
  - changes in laws, regulations, orders, and embargoes; and
  - sometimes a government authority's failure to act on a timely basis.

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- Organized labor activities such as strikes and work slow-downs (see Impacted Party's Degree of Control Over Specified Event).
- Shortages of power, supplies, infrastructure, or transportation (see Impacted Party's Degree of Control Over Specified Event).

To cover any other events not listed, parties typically include open-ended or catch-all language, such as:

- "Acts beyond their reasonable control".
- Acts of God (see Acts of God).
- Similar or dissimilar events (see Similar Versus Dissimilar Events).

Impacted Party's Degree of Control Over Specified Event

The obligee should take care not to list events that are reasonably within the obligor's control, for example:

- Organized labor activities (see Organized Labor Activities).
- Shortages (see Shortages).

Organized Labor Activities

The obligor's ability to perform its contract obligations may depend in part on the availability of labor. For example, a distributor (obligor) cannot fulfill its obligation to deliver goods to its customer (obligee) if the distributor's vendor cannot manufacture the goods because of a labor strike or lock out. However, from the obligee's perspective, the obligor should not be able to invoke force majeure if the obligor:

- Locks out its own employees.
- Bargains in bad faith or in a manner that causes its employees to strike or engage in a work slow-down.

Shortages

The obligor's ability to perform its contract obligations may depend in part on the availability of third-party:

- Facilities such as warehouse space.
- Transportation services.

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For example, a distributor (obligor) cannot fulfill its obligation to deliver goods to its customer (obligee) if the distributor cannot secure adequate transportation services. However, from the obligee's perspective, the obligor should not be able to invoke force majeure if the obligor:

- Is a transportation company, such as a common carrier, that has entered into a contract to provide transportation services.
- Caused the disruption in transportation services by breaching its contract with the third-party transportation company.
- Fails to timely secure adequate transportation services.
- Fails to adequately plan ahead for forecasted force majeure events, such as hurricanes.

Unrestricted versus Finite List of Force Majeure Events

The scope of the list of force majeure events largely depends on the negotiating power of the parties and the circumstances of the deal. In most cases, the parties agree to limit the force majeure events to those events that are outside of the control of the impacted party. Parties can impose the condition of control by either:

- Keeping the force majeure event list open-ended, to cover any unexpected eventuality outside of the control of the impacted party. The party most likely to be the impacted party will likely favor this approach (see Unrestricted List of Force Majeure Events).
- Limiting the force majeure events to only those listed events that are by their nature outside of the control of the impacted party. The party least likely to be the impacted party will likely favor this approach (see Finite List of Force Majeure Events).

Unrestricted List of Force Majeure Events

Parties typically include force majeure clauses to protect the impacted party if an unforeseen harm outside of the party's control frustrates the party's performance. Therefore, many parties include open-ended or catch-all provisions to address the unforeseen nature of these events. For example, parties may choose to include:

- The phrases "including," "including, without limitation" and "including, but not limited to."
- The phrase "other [similar] events beyond the [reasonable] control of the Impacted Party" or something similar.

Similar Versus Dissimilar Events

Obligors include catch-all language to capture events that are either or both:

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- Similar to the listed force majeure events.
- Dissimilar to the listed force majeure events.

However, the parties should research the impact under state law of incorporating the catch-all language because including the catch-all language may have unintended consequences based on:

- **Similar events.** One consequence of including catch-all language is that a court may interpret the clause to capture only unlisted events that are similar to the listed events. This narrows the scope of the clause if the parties intended to capture dissimilar events.
- **Dissimilar events.** Another consequence of including catch-all language is that a court may interpret the clause to capture only unlisted events which are dissimilar to the listed events. This broadens the scope of the clause if the parties intended to capture only events similar to the listed events.

Acts of God

In addition to including open-ended or catch-all provisions, another way that obligors try to extend the scope of force majeure provisions is to add acts of God to the list of force majeure events. The obligor frequently includes acts of God to the list to cover natural disasters and events not specifically listed in the provision.

However, a party cannot assume that a court (especially if it generally narrowly construes force majeure provisions) will interpret the term acts of God to include:

- Risks that are dissimilar to the ones listed (see Similar Versus Dissimilar Events).
- Any risks not listed that the parties were aware of at the time of contract negotiations or new contracts entered into after the specified risk becomes well known and therefore foreseeable (such as new contracts entered into after the onset of COVID-19).

Finite List of Force Majeure Events

Parties sometimes choose to limit force majeure events to those specifically listed in the contract. The party least likely to be the impacted party is more likely to favor this approach. If the parties agree to include a finite list of force majeure events in the provision, they should research whether applicable statutory or common law might supersede the parties' decision to include the listed events.

Force Majeure Exclusions

In some cases, the parties go beyond negotiating a finite list of force majeure events and negotiate express force majeure exclusions. These include:

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- Changes in economic circumstances. Typically, both parties are unwilling to excuse performance, for example, if:
    - one party runs out of money; or
    - the performance of a fixed price contract becomes more expensive than anticipated.
- Subcontractor defaults:
    - sometimes only if the failure is due to one of the other listed events of force majeure (for example, a flood at a subcontractor's factory may constitute force majeure for the contractor); or
    - if the equipment or services being provided by the subcontractor are not readily available from other suppliers.
- Equipment failure, sometimes only if the impacted party used prudent practices in maintaining and operating the equipment.
- Banking system failure, including:
    - a currency restriction or moratorium that prohibits payments out of the country in the contract currency; or
    - the inability of a party to convert the local currency into the contract currency.

For more information, see Practice Note, EPC Contract Drafting Considerations: Force Majeure Provisions.

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