

Force Majeure Clauses in Contracts

Prepared by Philadelphia VIP with assistance from the Penn Law Entrepreneurship Legal Clinic

You may have read news stories or heard about “force majeure” (pronounced *faws-ma-zhur*) clauses, which are parts of a contract that allow for the cancellation of all or part of that contract because of an event neither party to the contract can control. The COVID-19 pandemic and the governmental orders that ceased the operations of almost all businesses have cast light on force majeure clauses in contracts. The FAQs below explain force majeure and several other defenses on which individuals and businesses may rely.

- What is a force majeure clause?

Force majeure clauses are clauses in contracts that help parties to the contract cancel their contractual obligations in the event that circumstances beyond their control occur and make it either impossible or too difficult to perform. When a force majeure event takes place, the party invoking the clause may suspend, defer, or be released from their duties arising out of the contract without any penalty or legal liability.

Force majeure refers to an event that is;

- Outside a party’s reasonable control and
- Prevents that party from performing its obligations under a contract.

Traditionally, force majeure clauses were intended to deal with unforeseen acts of God, wars, strikes, abnormal weather conditions, terrorist attacks, floods, fire and certain government action. Nowadays, these clauses are usually drafted to cover a wider range of circumstances that can have an impact on the interests of the parties to the contract. This language makes it possible for them to deal not only with impossibility of performance but also with commercial impracticability.

Generally, for an event to fall under the force majeure clause of a contract the event needs to not be within the contemplation of the parties when they made the contract and also outside the control of the contracting party. Traditionally, force majeure clauses covered all such events and left it to the parties or a court to determine if an event qualified. Court cases showed that there are three essential aspects of a valid force majeure event; (1) it happened with or without human intervention, (2) it could not be reasonably foreseen by the parties, and (3) parties could not have prevented its consequences.

More recently, the trend is to expressly provide for specific force majeure events in the contract. Courts tend to interpret force majeure clauses narrowly, meaning only the events listed will most likely be covered, yet with good lawyering, it is still possible to prove that the clause, when drafted, was intended to cover a similar situation that is not expressly stated in the contract.

In the event of ambiguity within the force majeure clause, the clause will be interpreted against the interests of the party that drafted it. Parties may contract out of this rule if they include language rejecting it.

- What are the consequences of a force majeure event?

As a consequence of the force majeure event written in the contract taking place, the affected party will be able to claim force majeure and enforce the force majeure clause. In order to invoke the force majeure clause, you need to inform the other party that the force majeure event has taken place and that you will use the clause for your benefit, to be released from your contractual obligations. If the other party agrees that the force majeure clause applies to the ongoing circumstances, then you will directly be released from your obligations. If not, you may need to bring a suit due to contractual dispute.

Consequence of force majeure claims depends on the language of the contract. It could mean putting obligations on pause until you are able to resume, suspending the portion of the contract that is affected by the force majeure event, terminating the contract, receiving compensation in return of non-performance and re-negotiating the contract. Some force majeure clauses even make it possible for the relief to change with time or at the option of the parties.

- Do I have a force majeure clause in my contract?

Maybe. An example of an exhaustive force majeure clause is:

"An event of force majeure is an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which by the exercise of reasonable diligence the party affected was unable to prevent provided that event or circumstance is limited to the following:

(a) riot, war, invasion, act of foreign enemies, hostilities (whether war be declared or not) acts of terrorism, civil war, rebellion, revolution, insurrection of military or usurped power, requisition or compulsory acquisition by any governmental or competent authority;

(b) ionising radiation or contamination, radio activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive assembly or nuclear component;

(c) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds;

(d) earthquakes, flood, fire or other physical natural disaster, but excluding weather conditions regardless of severity; and

(e) strikes at national level or industrial disputes at a national level, or strike or industrial disputes by labor not employed by the affected party, its subcontractors or its suppliers and which affect an essential portion of the works but excluding any industrial dispute which is specific to the performance of the works or this contract."¹

¹ DLA Piper, Force Majeure Clauses – Revisited, Asia Pacific Projects Update

If you are trying to trace the force majeure clause in your existing contract, some potential trigger terms are “Act of God”, “beyond the control of the parties”, “unforeseen event”, “without fault”. Do not forget to check the “impossibility” provision (if the contract has one), or the termination provision as the clause may be written under such provisions. It is also possible that force majeure clause has its own standalone provision. If you are drafting a new contract, we suggest you create a standalone provision for the force majeure clause and make sure it is in harmony with the rest of the contract.

- What are some other alternatives to rely on if you do not have a force majeure clause in your contract?

When there is not a force majeure clause in your contract, you are left with various other rules that directly apply to you if you fulfill their requirements without needing to have them written down in your contract. The doctrines of ‘impossibility of performance’, ‘impracticability of performance’ and ‘frustration of purpose’ are potential alternatives that could be available to you in case you do not have a force majeure clause in your contract. However, instead of trying to rely on these doctrines which do not have easy requirements to fulfill, it is possible for the parties to a contract to achieve flexibility through negotiating or re-negotiating (if the contract already exists) and including a force majeure clause in their contract.

In order to use the defense of impossibility of performance, even though absolute impossibility is not required, performance must present “extreme and unreasonable difficulty, expense, injury, or loss to one of the parties”.²

In order to use the defense of impracticability of performance, the non-occurrence of the event should be a basic assumption of the contract. If a party’s performance is practicable but is beyond the party’s capacity to perform it, such defense cannot be used and the party cannot be discharged from their obligations.³

In order to use the defense of frustration of purpose, the purpose that is frustrated must have been the principal purpose of the party in making the contract and without such purpose parties wouldn’t have entered into the contract.

In all such defenses to unfulfilled performance, the performing party whose performance has been affected by the superseding event, has an obligation to make reasonable efforts to overcome the hindrances to their performance.

However, some Pennsylvania courts have held otherwise. In *Hart*, court has ruled that a party cannot assert impossibility or impracticability when it has continued to proceed under the original agreement despite changed circumstances. Instead, they should either terminate the contract or seek a waiver of non-performance from the counterparty in order to assert the defense.⁴

² *Dorn v. Stanhope Steel, Inc.*, 368 Pa. Super. 557, 584 (1987)

³ *Craig Coal Min. Co. v. Romani*, 355 Pa. Super. 296, 300 (1986)

⁴ *Hart v. Arnold*, 885 Pa. Super. 316, 337 (2005)

Therefore, if you do not have a force majeure clause in your contract and you are the performing party whose performance has been affected and has become either too difficult or impossible to perform, we suggest you assert one of the defenses explained above that is best applicable to your circumstances in the hope that it will lead to re-negotiation. If the other party does not accept your defense, you can always take your dispute to the courts. In such an event, we recommend that you contact a lawyer or Philadelphia VIP.

- What are best practices for drafting a force majeure clause?

As courts tend to excuse only the events listed in the clause, it is important to include all the events you believe are necessary to be excused if they take place in the future. When you are drafting, to the extent it is possible, try to imagine any/all potential incidents that could take place and prevent you from performing your obligations arising out of the contract. If the pandemic thought us one thing, it is that life is likely to move to directions outside of what we can imagine. Therefore, it is important to expand beyond our anticipations when drafting the force majeure clauses in the future. Even so, it may not be possible to specify all of the critical force majeure events in the clause and hence a concluding catch-all phrase should be added at the end of the list, such as “any and other events including emergencies or non-emergencies beyond the affected party’s control”.

Examples of such events are:

- War
- Riot
- Fire
- Flood
- Hurricane
- Epidemic
- Pandemic
- Typhoon
- Lightening
- Earthquake
- Explosion
- Strike
- Lockout
- Slowdown
- Prolonged shortage of energy supplies
- State or governmental action

Still, we suggest you contact either a lawyer or Philadelphia VIP if you are negotiating a contract and are not sure whether the force majeure clause you drafted matches your needs.

- What could potentially prevent you from using a force majeure clause to cancel a contract?

Most contracts contain a “notice” provision, which sets specific steps a party has to take to inform the other party of an action relating to that contract.

Examples to such provisions are:

- *Notice of Force Majeure*. Each Party agrees to give the other Party **prompt** written notice of the occurrence of any Force Majeure Event, the nature thereof, and the extent to which the affected Party will be unable fully to perform its obligations hereunder. Each Party further agrees to use reasonable efforts to correct the Force Majeure Event as quickly as possible and to give the other Party prompt written notice when it is again fully able to perform such obligations.
- *Notice of Force Majeure*. A party (in this Agreement called the "Affected Party") will inform the other party in writing **within seven days of becoming affected** by any force majeure that has or is likely to have any substantial detrimental effect on the ability of the Affected Party to perform any or all of the terms and conditions contained in this Agreement and will give particulars of the force majeure and the likely duration of the force majeure and of any likely or resulting disability or effect of that force majeure.

To use a force majeure clause in a contract with a notice provision, the party using the clause must follow that notice provision. Failing to comply with a notice provision may cause force majeure relief to become unavailable. Key points to check in any notice provision are timing restrictions (notice must be provided in x number of days), any supporting information to be provided to the other party, the method of service of the notice (hand delivery, electronic delivery, etc.), and any other obligations going forward.

Another reason why you could be disallowed from getting relief could be a failure in taking reasonable steps to mitigate, if such mitigation efforts and steps are required by the contract. For example, if you are a supplier of certain material and due to the shortage of such material at your manufacturer you are not able to supply your customers, a reasonable mitigation effort would be to find another manufacturer in order to be able to continue supplying for your customers.

- What are the next steps if you have a force majeure clause in your contract and you think the force majeure event has taken place?

First step is to double-check the contract language on whether it applies to the circumstances that you believe have an effect on your performance. Then, if the language of the contract allows, you can move onto the next step. Then, in order to be able to declare force majeure, check the governing law of the contract, which is most likely Pennsylvania law. After making sure PA law allows for declaring force majeure, you need to establish causation. You must be able to show that force majeure event has prevented or hindered you from performing your contractual obligations. The force majeure event must be the substantial cause of your inability to perform. If you are also able to establish that it was the cause, lastly, you need to check the notice provisions as explained above.

In the alternative, lots of times force majeure issues lead to re-negotiated contracts. They are used by the party whose performance is affected by the triggering event in order to perform differently. Therefore, keep in mind that if you have a force majeure clause in your contract and you believe that your performance is affected by a force majeure event, you can try to use it as a leverage against the other party and re-negotiate your obligations arising out of the contract.

- How can you prevent someone from using a force majeure clause to get out of a contract?

As a first step, we suggest you have a conversation with the other party to the contract. Business is about relationships and communication; and it is presumable that both parties would like to continue working with each other after the circumstances that created the force majeure are gone.

- What happens if you receive a force majeure notice from another party about one of your contracts?

It depends on whether you want the clause to apply. If you do not want the force majeure clause to apply and would like the other party to continue their performance, you need to check the notice requirements to determine whether the party claiming force majeure is compliant and is entitled to relief. If so, you should then question causation. If the force majeure event is not the sole or substantial cause of their inability to perform, you have the right to oppose. Then, check mitigation requirements. If the claiming party has not taken necessary mitigation steps, you again do not need to agree to the declaration of force majeure.

Alternatively, is it possible that you would like the force majeure clause to apply and want to alter or cancel the contract. As explained above, you could use force majeure as a leverage to re-negotiate your contract. Most people find it much easier to deal with the other party on their own rather than taking their case to the courts.