

FORCE MAJEURE AND CONTRACTING STRATEGIES FOR THE COVID-19 ERA



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It is not news to anyone that the COVID-19 pandemic has had far-reaching and widespread effects on the world's economies, impacting travel, remote work, unemployment, and operations, as well as revealing the fragility of global supply chains. In responding to these challenges, companies have been re-examining their contracts to better protect themselves for the uncertainties of a post COVID-19 world. Particularly, practitioners have been focusing on the force majeure clause in their agreements to determine if the clause provides the necessary protection for matters that disrupt business that are outside their control. Force majeure clauses are often thought of as part of the "boilerplate" language in a contract that can easily be glossed over. The COVID-19 virus has breathed new life into the importance of these clauses in the performance of contracts.

FORCE MAJEURE CLAUSES IN THE UNITED STATES

For the unindoctrinated, the force majeure clause, included in most commercial contracts, can excuse a party's performance under the contract for certain unforeseeable circumstances which are not within the performing party's control. In the United States, the excuse of performance for a force majeure event must be evoked contractually, not statutorily or under common law. Force majeure clauses come in many shapes and sizes, may require notice, and may or may not completely cancel a party's obligations

under a contract. Economic difficulty and hardship are not sufficient to excuse performance. Ultimately, the ability to seek an excuse from performance is dependent on the language of the provision, the law of the jurisdiction that governs the contract, and the specific facts of the case.

When drafting agreements, practitioners should first determine if a force majeure clause is appropriate given the transaction and whether the provision actually benefits them. In some cases, the party receiving the goods or services under contract may decide not to include the clause because the contract is with the sole supplier or because there are inventory obligations in the agreement that should suspend the need for the clause. If a party decides to include a force majeure provision for a business or service, the party must look at the elements that are generally included in force majeure clauses and the best practices in drafting the clause.

ELEMENTS AND APPLICATIONS OF FORCE MAJEURE CLAUSES

Force majeure clauses will include some or all of the following elements:

- a list of events
- a "catch-all" phrase

- notice requirements
- mitigation obligations
- termination or postponement of performance

Let's begin by looking at two excerpts from force majeure clauses which provide a "list of events:"

Example 1

Force Majeure. In the event either party is unable to perform its obligations under the terms of this Agreement because of *acts of God, strikes, equipment or transmission failure or damage reasonably beyond its control, or other causes reasonably beyond its control*, such party shall not be liable for damages to the other for any damages resulting from such failure to perform or otherwise from such causes.

Example 2

Force Majeure. Neither the Custodian nor the Trust shall be liable for any failure or delay in performance of its obligations under this Agreement arising out of or caused, directly or indirectly, by circumstances beyond its reasonable control, *including, without limitation, acts of God; earthquakes; fires; floods; wars; civil or military disturbances; acts of terrorism; sabotage; strikes; epidemics; riots; power failures; computer failure and any such circumstances beyond its reasonable control as may cause interruption, loss or malfunction of utility, transportation, computer (hardware or software) or telephone communication service; accidents; labor disputes; acts of civil or military authority; governmental actions; or inability to obtain labor, material, equipment or transportation*; provided, however, that in the event of a failure or delay, the Custodian (i) shall not discriminate against the Fund in favor of any other customer of the Custodian in making computer time and personnel available to input or process the transactions contemplated by this Agreement, and (ii) shall use its best efforts to ameliorate the effects of any such failure or delay.

As reflected in these examples, the list of events can vary greatly and practitioners must acknowledge that there is no "one size fits all" provision. Looking at the excerpts, let's examine whether either could be invoked to suspend or cancel performance due to COVID-19.

INTERPRETATION BY THE COURTS

Interpretation of force majeure clauses differs from state to state.¹ In general, courts will interpret these clauses narrowly, looking closely at the events listed in the clauses. In Example 1, the list does not appear to include any language that could excuse performance due to COVID-19, while Example 2 specifically lists epidemics, governmental actions, and inability to obtain labor or materials—all of which could be interpreted to excuse performance due to COVID-19. Some would argue that both examples list "Acts of God" which should excuse performance, but as we will discuss below, whether COVID-19 is an Act of God and/or whether it could be invoked as the real cause of the inability to perform is debatable.

So, are the parties in Example 1 unable to invoke the force majeure clause because they did not list all possible events? Maybe. It is impossible, and unwise, to list each and every event that could excuse performance. The more you try to include everything and the kitchen sink, the more likely it is that an unenumerated event would be excluded as a force majeure event. The better practice is to examine your business, identify the actual risks that could prevent performance, craft a list of events that are relevant to the business, and then incorporate the "catch-all" language in an attempt to capture those events that are similar but not expressly listed.

The most common "catch-all" language is "causes beyond the reasonable control, including" or "including, without limitation." In some states, the catch-all language may mean force majeure exists and performance is excused, while other states will require more specificity in the language and will rely solely on the enumerated items. Practitioners should keep in mind that in some states there is surprisingly little case law on the interpretation of force

majeure provisions. The attached Appendix outlines the law in several states, including state specific requirements for force majeure clauses.

ACTS OF GOD

As mentioned above, including “Acts of God” in a force majeure clause may not be effective in excusing performance because of COVID-19. In general, courts define an Act of God as an unpreventable event caused exclusively by the forces of nature. As noted in the Appendix, some states further require that the event is not reasonably preventable by human foresight, strength or care.

The unanswered (and maybe unanswerable) question is whether COVID-19 is a natural event. According to various news sources, US intelligence and national security officials are investigating the possibility that the virus originated in a lab. If so, then COVID-19 would not qualify as having arisen from a natural event. The Centers for Disease Control has previously suggested that it came from an animal source. Does that qualify as a natural event? US case law does not provide sufficient guidance on this point since it generally refers to weather events but not disease.

Even if COVID-19 was found to be an Act of God, it still may not excuse performance for the same reason that simply including an epidemic or pandemic in the “list of events” may not excuse performance. There must also be a causal link between the event and the inability to perform. And this is where the greatest challenge arises. For most companies, it is not the virus itself that prevents performance, but rather the consequences of the virus—government orders that shut-down non-essential businesses, gaps in supply chain, and lack of labor or materials. All of these may be unintended effects of an ongoing global pandemic, but they are not the result of the pandemic itself. Consequently, litigants will face the uphill battle of demonstrating that COVID-19 is the direct (and in the case of Acts of God, the *sole*) event that caused the failure of performance. Aside from a shut-down of a business because employees are stricken by the virus, as has occurred in the meat

industry, COVID-19 itself is not often the direct cause of failed performance. All of this reinforces the need for practitioners to carefully draft the language of the force majeure clause so that the events listed would be the actual and proximate cause of the failure of performance.

NOTICE, MITIGATION AND TERMINATION OR DELAY IN PERFORMANCE

Assuming that the cause of the failure to perform is in the list of events or part of the catch-all clause, does this end our inquiry? In some cases, yes. While the force majeure clause in Example 1 does excuse performance and responsibility for damages, it does not answer the question of what next? In most commercial contracts, the parties are not contracting for a one-time supply or are at least hopeful for an ongoing relationship with the counter-party and even if faced with a force majeure event, the counter-party still needs the contracted goods or services. In order to address these situations, well-drafted force majeure clauses will include additional language to address what steps need to be taken once a force majeure event occurs. Let’s review one of these provisions.

Example 3

Force Majeure. No Party shall be deemed in default of this Agreement or, unless otherwise expressly provided therein, any Ancillary Agreement for any delay or failure to fulfill any obligation (other than a payment obligation) hereunder or there under *so long as and to the extent to which* any delay or failure in the fulfillment of such obligation is prevented, frustrated, hindered or delayed as a consequence of circumstances of Force Majeure. In the event of any such excused delay, the time for performance of such obligations (other than a payment obligation) *shall be extended for a period equal to the time lost by reason of the delay*. A Party claiming the benefit of this provision shall, as soon as reasonably practicable after the occurrence of any such event, (a) provide *written notice* to the other Party of the nature and extent of

any such force majeure condition; and (b) *use commercially reasonable efforts to remove any such causes and resume performance* under this Agreement and the Ancillary Agreements, as applicable, as soon as reasonably practicable. Notwithstanding the foregoing, if the Force Majeure continues for a period of three months or more after written notice is provided then the non-affected Party shall have the *right to terminate* this Agreement without recourse.

The above provision appears to be one where the parties' desired outcome was a delay in performance and a quick resolution of the cause for delay rather than an outright termination of the contract. The non-affected party agreed to a delay in performance but only "to the extent to which" delay or failure to perform existed, meaning that partial performance was required if available. The precursor to asking permission for delay includes written notice and efforts to remove the cause of delay. In most contracts, at a minimum, the non-affected party will require notice. Some may move directly from notice to a right to terminate, whereas others will require the non-performing party to cover or otherwise minimize the effect of the force majeure event. Aside from requiring notice, whether a contract requires mitigation, allows for a delay in performance, or has the right to terminate will depend on a number of factors, including the relative power of the parties, the perceived risk of a force majeure event, the market for the goods and services being purchased, and the overall relationship of the parties. This further underscores the importance of tailoring a force majeure provision to address the parties' specific circumstances rather than allowing a one-size-fits-all-clause in contracts.

In summary, below are some key considerations and drafting tips to keep in mind when drafting or invoking the force majeure clause:

- Does the contract include the force majeure clause? What events are identified and are these the correct events under the circumstances? Do the events include epidemics, pandemics,

health emergencies, governmental actions, and the like?

- Are you using the proper catch-all phrase?
- Is the inability to perform going to be linked directly and or proximately to one of the listed events?
- Was the inability to perform foreseeable? As noted in the Appendix, foreseeability of the event may impact whether a court will consider the event an excusable event.
- Have you reviewed the governing law clause and do you understand how courts in that jurisdiction interpret force majeure clauses? Is there an inherent requirement to mitigate damages?
- Does the clause allow either party to terminate or just the unaffected party?²

Drafting tips:

- Carefully review the list of events that are included. Do they represent the types of activities that are commonly included as force majeure events in your industry?
- Consider broadening some of the events. For example, in a contract for a venue rental, you may want to include "threats of terrorism" and not just "terrorist acts," since performance could be impacted by concerns which do not actually materialize.
- Determine whether the event would actually be considered unforeseeable. For example, if COVID-19 becomes a recurring event or your industry was previously affected by SARS or H1N1, a court could find that these are now foreseeable events that do not constitute a viable excuse. Consider including language that broadens pandemics or epidemics to include "future strains and/or related illness or disease" to reflect that the parties do not see these events as foreseeable.
- Consider including government actions or government emergencies.

- Consider including language to excuse other health-related events such as the flu, plagues, disease, emergencies or outbreaks.
- Improve the catch-all language. “Any event similar or dissimilar to the foregoing,” or “any reason whatsoever beyond the control of the party” may be more effective.
- Consider including specifics about mitigation and the types of mitigation efforts that are appropriate for the industry.
- Do not try to include everything and the kitchen sink. If you miss something, courts will be more likely to limit you to the listed events instead of allowing a broadening of the provision.

The force majeure provision deserves more attention than it has traditionally been given. Practitioners and clients will benefit from re-drafting the provision to customize and address the challenges faced in performance due to events such as COVID-19 and greater reliance on global supply chains. 🔥

Notes

- 1 How a force majeure provision is applied is highly dependent on the governing law of the contract. It is as important to look at the governing law provision in the contract as it is to review the force majeure clause. The accompanying Appendix makes it clear how intertwined the two are.
- 2 Note that this article does not discuss the alternative defenses available to a party in the event that no force majeure clause was included in the contract. Parties should understand whether the common law defenses such as impossibility, frustration of purpose or impracticability are available or if Article 2 of the UCC has been adopted and provides statutory defenses from breach.

APPENDIX

Interpretation of List (Narrow or Broad)	Catch-All	Act of God Definition	Foreseeable	Government Action	Magic Language	Mitigation	
Delaware	Construes force majeure provisions according to the provision's plain meaning. ¹	Requires specific language	Causes that are beyond the control of a party, and produce loss without the intervention of human agency. ²	Case law is undeveloped. No case states that the event must be unforeseeable; depends on language of the contract.	No case law on the subject	"Any reason whatsoever" has been accepted to broaden the clause. ³	No case law on the subject
Florida	Courts narrowly construe force majeure clauses; generally will only excuse a party's performance if the event is listed. ⁴	No case law on the subject	An unusual and extraordinary manifestation of the forces of nature that could not under normal conditions have been anticipated or expected. ⁵	Do not need to demonstrate that the event was unforeseeable - Events that merely frustrate performance are permissible if listed and outside the control of the party.	Can only be relied upon if the force majeure clause enumerates government prohibition or action.	No case law on the subject	Not required; force majeure cannot be invoked if event is not the sole factor for non-performance.
Illinois	No case law on the subject	An event that occurs exclusively by natural causes such as could not be prevented by human care, skill and foresight. ⁶	Can include foreseeable risks if identified. Places the impossibility doctrine into the written contract. ⁷ Force majeure clauses supersede the impossibility doctrine, ⁸ however boilerplate language will be treated similarly the doctrine of impossibility. ⁹	No case law on the subject	No case law on the subject	Duty to make an effort to resolve the event or inability to perform. ¹⁰	

APPENDIX

Interpretation of List (Narrow or Broad)	Catch-All	Act of God Definition	Foreseeable	Government Action	Magic Language	Mitigation
Massachusetts	No case law on the subject. The clause must be interpreted with reference to the previous clauses of the contract. ¹¹	No case law on the subject	A natural event that would not occur by the intervention of man, but proceeds from physical causes and is not in reason preventable by human foresight, strength or care. ¹² Includes the obligation to prove unforeseeability and an obligation of diligence by the non-performing party.	No case law on the subject	No case law on the subject	No case law on the subject
Minnesota	Construes force majeure provisions according to the provision's plain meaning.	No case law on the subject	An event resulting from force of nature must be unexpected, unforeseeable and sole cause of the loss. ¹³	No case law on the subject	No case law on the subject	No case law on the subject

APPENDIX

Interpretation of List (Narrow or Broad)

Catch-All

Act of God Definition

Foreseeable

Government Action

Magic Language

Mitigation

Courts narrowly construe force majeure clauses and generally will only excuse performance if the event is listed.¹⁵ Courts apply the rule of ejusdem generis-including only those things as the same character or class as the specific events mentioned.

Not to be construed to its widest extent; rather, such language is to be narrowly interpreted as contemplating only events or things of the same general character.

Natural necessity, which could not have been occasioned by the intervention of man, but proceeds from physical causes alone must also be unforeseeable.¹⁶

The event need not be absolutely unforeseeable, it is enough to show that the event makes performance impracticable.¹⁷

No case law on the subject

No case law on the subject

No case law on the subject

New Jersey

Courts narrowly construe force majeure clauses and generally will only excuse a party's performance if the event is listed.¹⁸ Courts apply the rule of ejusdem generis-including only those things as the same character or class as the specific events mentioned.

Phrases such as "for any reason" or "other similar events" will not broaden the meaning.¹⁹

Unusual, extraordinary, sudden, unexpected, and irresistible manifestation of forces of nature, occasioned exclusively by natural causes, and could not be prevented by human care, skill and foresight.²⁰

Must demonstrate the event was not foreseeable.²¹ Courts may look to industry practice of events that excuse performance.²²

Can only be relied upon if the force majeure clause enumerates government prohibition/action.²³

"Any cause whether similar or dissimilar to the foregoing," has been accepted to broaden the clause's meaning.²⁴

Must make an attempt to perform in order to invoke.²⁵

New York

APPENDIX

Interpretation of List (Narrow or Broad)	Catch-All	Act of God Definition	Foreseeable	Government Action	Magic Language	Mitigation
Pennsylvania	<p>Construes force majeure provisions according to the provision's plain meaning.</p> <p>Courts are reluctant to give intent to the catch all phrase.</p>	<p>Natural force of such inevitability and irresistibility that man cannot cope with it, either to predict it, forestall it, "or control it when it arrives to strew landscape with rack, wreckage, and ruin."²⁶</p> <p>The determination of Acts of God are not to be placed in the hands of juries.²⁷</p>	No case law on the subject	No case law on the subject	No case law on the subject	<p>Non-performing party must show what action it has taken to perform the contract.²⁸</p>
Washington DC	<p>Courts apply the rule of ejusdem generis-including only those things as the same character or class as the specific events mentioned.²⁹</p> <p>Catch all language is accepted to broaden the clause.³⁰</p>	<p>Direct, immediate and exclusive operation of forces of nature, uncontrolled or uninfluenced by power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight or prudence.³¹</p>	Parties must prove that the event was unanticipated. ³²	No case law on the subject	Not necessary	No case law on the subject

Appendix Notes

- 1 *Stroud v. Forest Gate Dev. Corp.*, No.Civ.A 20063-NC, Civ.A 2064-NC, 2004 WL 1087373, at *4 (Del. Ch. May 5, 2004).
- 2 *Truax v. Philadelphia, W. & B.R. Co.*, 3 *Houst.* 233 (Del. Sup. Ct. 1866).
- 3 *Stroud*, 2004 WL 1087373 at *5.
- 4 *In re Flying Cow Ranch HC, LLC*, Case No. 18-12681-BKC-MAM, 2018 WL 7500475, at *2 (Bankr. S.D. Fla. June 22, 2018).
- 5 38 Fla. Jur. 2d Negligence, § 10 Act of God.
- 6 *Welfelt v. Illinois Cent R Co.*, 149 Ill. App. 317 (Ill. App. Ct. 1909).
- 7 *U.S. v. Moore Am. Graphics, Inc.*, No. 84 C 6547, 1989 WL 81799 (N.D. Ill. 1989).
- 8 *N. Ind. Pub. Serv. Co., v. Carbon Cnty. Coal Corp.*, 799 F.2d 265, 276 (7th Cir. 1986).
- 9 *Commonwealth Edison*, 731 F. Supp. at 855.
- 10 *Commonwealth Edison v. Allied-General Nuclear Serv.*, 731 F. Supp. 850 (N.D. Ill. 1990).
- 11 *Baetjer v. New England Alcohol Co.*, 66 N.E.2d 798(Mass. 1946).
- 12 *Hecht v. Brown Wharf*, 107 N.E. 990 (Mass. 1915); *Bratton v. Rudnick* 186 N.E. 669, 671 (Mass. 1933) (defining act of God as “the action of an irresistible physical force, or the violence of natural phenomenon, not attributable to the conduct of man, not referable to participation by man through unreasonable failure to anticipate danger or to put forth protective instrumentalities, and overpowering all preventive measures exacted by the wisdom and foresight of prudent men in the light of the warnings of experience and the observations of general climatic conditions, prevailing customs, and all other available sources of information”).
- 13 *Vanden Broucke v. Lyon Cnty.*, 222 N.W.2d 792 (Minn. 1974).
- 14 *Suburban Newspapers of Greater St. Louis, Inc. v. Kroger Co.*, 886 F.2d 1060, 1062 (8th Cir.1989).
- 15 *Buono Sales, Inc. v. Chrysler Motors Corp.*, 363 F.2d 43, 47 (3 Cir.1966).
- 16 *Meyer Bros Hay and Grain Co. v. Nat’l Malting Co.*, 11 A.2d 840 (N.J. 1940).
- 17 *Facto v. Pantagis*, 915 A.2d 59 (N.J. Super. Ct. App. Div. 2007).
- 18 *Reade v. Stoneybrook Realty, LLC*, 63 A.D.3d 433, 434 (N.Y. App. Div. 2009); *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989); *Kel Kim Corp. v. Central Markets, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987).
- 19 *Constellation Energy Servs. of N.Y., Inc. v. New Water St. Corp.*, 146 A.D. 3d 557, 558 (N.Y. App. Div. 2017).
- 20 *Tel Oil Co. Inc. v. City of Schenectady*, 278 A.D.2d 571 (N.Y. App. Div. 2000).
- 21 *United States v. Brooks–Callaway Co.*, 318 U.S. 120, 122–23, (1943).
- 22 *Mitsubishi Int’l. Corp. v. Interstate Chem. Corp.*, No. 08 Civ. 194, 2008 WL 2139137, at *3 (S.D.N.Y. May 20, 2008).
- 23 *Id.*
- 24 *Castor Petroleum Ltd. v. Petroterminal De Panama, S.A.*, 107 A.D.3d 497, 498 (N.Y. App. Div. 2013).
- 25 *Phillips P.R. Core, Inc. v. Tradax Petrol. Ltd.*, 782 F.2d 314, 319 (2d Cir. 1985).
- 26 *Goldberg v. R. Grier Miller & Sons, Inc.*, 182 A.2d 759, 763 (Pa. 1962).
- 27 *Id.*
- 28 *Martin v. Pa., Dep’t of Env. Res.*, 548 A.2d 675 (Pa. Commw. Ct. 1988).
- 29 *Edwards v. United States*, 583 A.2d 661 (D.C. 1990).
- 30 *Eastern States Petroleum & Chemical Corp. v. Seaton*, 165 F. Supp 363 (D. D.C. 1958).
- 31 *Watts v. Smith*, 226 A2d 160 (D.C. 1967).
- 32 *United States v. Caterpillar, Inc.* 277 F. Supp. 73 (D. Conn. 2002).