

FORCE MAJEURE CLAUSES



(Sources: Google Image, image from the movie "Force Majeure")

A Force Majeure clause is often seen as a boiler-plate to many contracts but many are prone to overlook its importance.

What does "Force Majeure" mean?

"Force Majeure" is a French term having the meaning of "superior force" and such legal practice is originated from the French legal system. Today, it is commonly seen globally in contracts and agreements as a clause incorporated to "predict the unpredictable"^[1].

In the occurrence of such event which prevents one or both parties from fulfilling their contractual obligations under the contract, the Force Majeure clause will be effective to relieve, discharge and free both contracting parties from their non-performances or further obligations. In other meaning, this clause operates as another form of exclusion clause where it excludes the party from performing its contractual obligations given the circumstance which is outside one's control.

However, this clause can be drafted based on both contracting parties' mutual preferences to either only suspend the non-performance for the duration of the force majeure or to entirely terminate the agreement^{[2][3]}.

What constitutes as an event of Force Majeure?

Force Majeure is an event that occurs under circumstances deemed beyond the reasonable control of a party and may be categorised in the following three main categories:

- Natural disasters, such as hurricanes, earthquakes, tornadoes, floods, accidents, plagues, explosions, fires, storm, cyclone, landslide, drought;
- Human events, such as riots, wars (whether declared or not), civil war, or any other armed conflict, military or non-military interference by any third party, acts of terrorism or serious threats of terrorist attacks, sabotage or piracy, strike or boycott, acts of governments or any other authority whether lawful or unlawful, blockage, siege or sanctions and other serious upheavals; and
- Performances failure outside the contracting party's control, such as disruptions to telephone services, labor-related disputes, unavailability of raw materials and restrictions imposed by the government^{[4][5]}.

These events are non-exhaustive and is merely to illustrate examples of Force Majeure events more commonly known.



(Sources: Google Image, images of hurricanes, floods, riots and fires")

Main drafting principles when drafting the Force Majeure clause

It is needless to emphasis on the importance of certainty in agreements as it is the most essential and fundamental principle of all times as the contracting parties are entirely bound by the four corners of the agreement they have entered into.

By incorporating the Force Majeure clause, it ensures that certainty is obtained and thus filling the gaps within the grey areas and lacuna which directly prevents parties to be exposed to any potential disputes. Only parties privy to the contract may invoke or rely on the Force Majeure Clause.

Firstly, one should consider on the time factor which was mentioned earlier as to whether to suspend the obligations for good or to restore their obligations after a certain time period.

It is open to the contracting parties to decide based on the nature of the agreement they are entering into and it is unnecessary for parties to draft it in the manner mentioned above. Parties are free to defer and vary and may adopt the best arrangement that suits both parties and ensure that it is not commercially impracticable.

Moreover, to further ensure certainty, one should in their best effort define specifically what constitutes as Force Majeure events that would most probably have a direct effect on the contracting terms.

Lastly, one should bear in mind that this clause should not be drafted in a generic, ambiguous or vague manner as it would defeat the purpose of incorporating the clause because by drafting so, the clause serves no purpose in giving effective protection to a party and for worse, it may lead to potential disputes due to the uncertainty of the drafted clause.

¹ White & Case <https://www.whitecase.com/publications/article/how-predict-unpredictable-force-majeure-clauses-changing-political-landscapes>;

² International Business Law and Its Environment 8th Edition, Richard Schaffer, Filiberto Agusti, Lucien J. Dhooge, Beverley Earle: Books;

³ Trans-Lex.Org Law Research: <https://www.trans-lex.org/944000/force-majeure/>

⁴ Up Counsel <https://www.upcounsel.com/a-force-majeure-clause>

⁵ Trans-Lex.Org Law Research: <https://www.trans-lex.org/944000/force-majeure/>

**All information in this Newsletter is correct as at 31 October 2019 unless otherwise stated.*

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