

## BOILERPLATE “FORCE MAJEURE” CLAUSES

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A "force majeure" clause is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance inadvisable, commercially impracticable, illegal, or impossible. In the absence of a force majeure clause, parties to a contract are left to the mercy of the common law contract doctrines of "impracticability" and or "frustration of purpose," which rarely result in excuse of performance.

Instead of relying on the common law general principles, parties can better achieve flexibility during times of crisis through a carefully negotiated force majeure clause. But, this is not an easy job. Whereas, anticipation and specifying “Force Majeure Events” is very crucial and likewise determining which types of circumstances to be covered by the force majeure clause is essential.

Provisions often cover natural disasters like hurricanes, floods, earthquakes, and weather disturbances sometimes referred to as "acts of God." Other covered events may include war, terrorism or threats of terrorism, civil disorder, labor strikes or disruptions, fire, disease or medical epidemics or outbreaks, and curtailment of transportation facilities preventing or delaying acts. However, I believe that such events depend on the merits of each case. Don't cut and paste as you need to be careful when negotiating such events, as some may not apply to the concerned contract in your hands. As example in construction contracts in Japan, earthquake may not be taken as force majeure due to more advanced new construction models to control effects of earthquakes in new buildings. Or, labor strikes in countries where such strikes are taking place frequently and for no justification..

Generally, Courts tend to interpret force majeure clauses narrowly, that is, only the events listed and events similar to those listed will be covered. For example, while acts of terrorism might be a specified force majeure

event, it does not necessarily follow that a court would also excuse a party's performance based on "threats" of terrorism. Thus, it is especially important to specify any types of circumstances that you anticipate could prevent or impede your action.

Asking and answering these types of questions will help you anticipate and specify the most critical force majeure events. Even so, not all potential events can be specified or anticipated in the contract. A concluding catch-all phrase should be appended to the list, such as "and any other events, including emergencies or non-emergencies," to cover other unforeseeable events.

It is common to find boilerplate force majeure language in contracts limiting excuse of the parties' performance obligations only when it would be "impossible" to perform due to the unexpected circumstances. For greater flexibility, consider instead excusing performance when it would be "inadvisable, commercially impracticable, illegal, or impossible" to perform.

Additionally, even if you have negotiated a specified list of force majeure events, be sure to carefully use the proper language that supports your clear intention. Always take your time. Don't take the issue of Force Majeure, easily and for granted. Always look for achieving best results away from the "standard" clause you find in each contract. A carefully negotiated and drafted force majeure clause is an important tool for reducing the risk of liability, otherwise the risk is there. Force Majeure causes legal risk, if not properly drafted.