

# Thinking Of Bringing A *Force Majeure* Claim? Do Your Homework

WITH THE VARIETY OF UNPRECEDENTED environmental and economic challenges facing the global economy today, parties to commercial agreements have plenty of reasons to consider escaping from unprofitable contracts. Companies looking for an escape hatch may attempt to invoke the *force majeure* clauses in their contracts. However, *force majeure* clauses provide only a narrow means of excusing performance. Before relying on a *force majeure* clause, a company must carefully consider the applicable state's law and the language of its contract, which can significantly limit the application of the clause.

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## What Is *Force Majeure*?

Generally, once a party to a contract makes a promise, it must perform or pay damages for its failure to perform, even when unforeseen circumstances make performance burdensome. A *force majeure* clause allows parties to contract around this general rule and excuse non-performance of contractual obligations based upon the occurrence of certain events. A typical *force majeure* clause lists specific *force majeure* events, and contains a "catch-all" provision allowing similar events not explicitly enumerated to also excuse non-performance. Typical *force majeure* events include acts of God, such as floods, tornados, or fires, as well as strikes, wars, or acts of government. *Force majeure* clauses are strictly construed and provide a narrow defense to non-performance. See *Kel Kim Corp. v. Central Markets, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987).

## Know the Language of Your *Force Majeure* Clause and Applicable State Law

It is crucial to know whether the event or circumstance you intend to rely on in claiming *force majeure* is specifically listed in the clause or whether you will have to rely on the general "catch-all" language of the clause (if your contract has such catch-all language at all). The chances of success on a *force majeure* claim are greatly increased if the claim is made based

upon an event explicitly identified in the clause. Many courts have held that a party's performance will only be excused if the language of the *force majeure* clause specifically includes the event that actually prevents a party's performance. *Kel Kim Corp.*, 519 N.E.2d at 296; *In re Millers Cover Energy Co.*, 62 F.3d 155, 158 (6th Cir. 1995) (quoting *U.S. v. Panhandle Eastern Corp.*, 693 F. Supp. 88, 96 (D. Del. 1988)) ("[O]nly where a *force majeure* clause specifically includes the event alleged to have prevented performance, will a party be excused from performance."). If your contract is governed by the law of a state that takes this narrow approach to the application of *force majeure* clauses, the chances of success on a *force majeure* claim based on catch-all language will be very low.

Moreover, even those courts that take a broader approach to the application of catch-all language do not give such language an expansive meaning, but interpret the language to be confined to events similar to those enumerated. For instance, in the *Kel Kim* case cited above, the court ruled that the inability to procure liability insurance did not fall within the "other similar causes beyond the control of such party" language in the catch-all provision of the *force majeure* clause, because it was different in kind from the enumerated events pertaining to the company's day-to-day operations. See also *Morgantown Crossing, L.P. v. Mfrs. & Traders Trust Co.*, No. Civ.A. 03-CV-4707, 2004 WL 2579613, at \*5 (E.D. Penn. Nov. 10, 2004) (catch-all provision did not include governmental delay in issuing required permits, as delay was not of same kind or nature as enumerated events). As a result, before relying on catch-all language to excuse performance, it is important to know how courts applying the state law governing the contract have typically interpreted such language.

Notwithstanding the language of the contract, some courts also require that the *force majeure* event be unforeseeable in order to excuse performance. For example, courts in California and Rhode Island have suggested that, even if an event is specifically identified in the *force majeure* clause or covered by the catch-all language, the *force majeure* clause will

not excuse performance if the event was foreseeable at the time the parties entered into the contract. *URI Cogeneration Partners, L.P. v. Bd. of Governors for Higher Educ.*, 915 F. Supp. 1267, 1287 (D. R.I. 1996) (rejecting *force majeure* argument because failure to win zoning permission for construction project was foreseeable event); *Watson Labs., Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1113-14 (C.D. Cal. 2001) (holding that the shut-down of a plant by the Federal Drug Administration was foreseeable such that *force majeure* language referring to “regulatory, governmental . . . action” did not apply.).

Though courts disagree as to whether the *force majeure* event must be unforeseeable, they uniformly agree that the *force majeure* event must be outside of the party’s control in order to excuse performance. For example, in *Edington v. Creek Oil Co.*, 690 P.2d 970 (Mont. 1984), a government commission ordered a party to stop production under an oil and gas lease. The party sought to be excused from its obligations under the lease pursuant to the *force majeure* provision, which included “rules and regulations of any governmental body.” *Edington*, 690 P.2d at 973. The court found that the *force majeure* clause did not apply because the order of the commission was caused by the wrongdoing of the party, which could have easily cured its wrongdoing and been granted permission to resume production. *Id.* at 973-74. *See also Upjohn Co. v. Rachele Labs., Inc.*, 661 F.2d 1105, 1110 (6th Cir. 1981) (alleged *force majeure* event was caused by a manufacturing decision and thus was “[not] the equivalent of an act of God to which *force majeure* clauses traditionally apply”); *Macalloy Corp. v. Metallurg, Inc.*, 728 N.Y.S.2d 14 (N.Y. App. Div. 2001) (finding no *force majeure* where party voluntarily shut down plant due to financial considerations caused by EPA regulations). Therefore, if the *force majeure* event or circumstance was within the company’s control, a *force majeure* argument will almost certainly be unsuccessful.

### **Consider Whether The *Force Majeure* Clause Will Provide The Desired Relief**

If a party is looking to completely avoid its obligations under a contract, making an argument predicated on the *force majeure* clause may not accomplish the desired result. In many states, even if a party can successfully prove the occurrence of a *force majeure* event, the party is only excused from the obligations

directly affected by that event. *See, e.g., Idaho Power Co. v. Cogeneration, Inc.*, 9 P.3d 1204, 1214-15 (Idaho 2000) (while actions of government agencies in revoking required building permits were acts of civil authority as enumerated in *force majeure* clause, only obligations directly affected by the revocation were excused). Moreover, absent express language, an event of *force majeure* does not automatically terminate the contract. Instead, courts typically only excuse a party claiming *force majeure* from its obligations for as long as the *force majeure* event continues, and the party must make efforts to relieve itself of the *force majeure* event. *See, e.g., Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 859-60 (N.D. Ill. 1990) (party has duty to attempt to remove obstacle to performance).

Thus, a complete analysis of what a company hopes to achieve and whether a successful *force majeure* argument can produce the desired results should be considered before advancing a *force majeure* claim or defense. If it appears that reliance on the contractual *force majeure* clause will not achieve the company’s goals, related doctrines, such as the doctrines of commercial impracticability, impossibility of performance, and commercial frustration, may offer a better route. Under the laws of some states, however, a party cannot rely on these doctrines when there is a *force majeure* clause in the contract at issue. *See, e.g., Kentucky Utils. Co. v. South East Coal Co.*, 836 S.W.2d 392, 397-98 (Ky. 1992).

As shown above, there are a variety of ways that contract language and state law can significantly limit the application of a *force majeure* clause. As such, before engaging in a lengthy and expensive legal campaign, careful research and consideration of the clause are critical.

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