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“FORCE MAJEURE” Common Law Perspective

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Outline

- General Overview
- Examples
- Pitfalls & Practical Advice

General Overview

General Overview

- Draft detailed contracts to allocate risk
- Principles such as Foreseeability and Remoteness have made us very careful drafters
 - If we don't include language for each situation, liability cannot be allocated as intended
- But, some risks are so remote that neither party is willing to be liable

General Overview

- If a Force Majeure event occurs, neither party is liable for non-performance
- These clauses were developed because without them, courts would hold parties to a strict interpretation of contract
- Force Majeure clauses allow drafters to expand or narrow the scope of and burden of liability that extraordinary events create
- Overtime, boiler plate language developed as a standard list of force majeure events evolved

Examples

Examples: How does this affect my contract?



Examples:

How to use Force Majeure

1. Define “Force Majeure” in your contracts
2. Define how a Force Majeure event impacts parties’ obligations under the contract

Examples

Step 1: Define Force Majeure

“Force Majeure” means any circumstances beyond a party’s reasonable control and which by the exercise of due diligence, such party is unable to overcome, including, without limitation, war, national emergency, civil disturbance, theft (provided that reasonable security measures would not have prevented such theft), fire, flood, explosion, natural disaster, unusually severe weather conditions, prohibitive legislation or regulations, judicial or administrative decrees and failure of power or utility supplies (including telecommunications)

Examples

Step 2: Impact of Force Majeure event

Neither party will be liable to the other party for any delay in or failure to perform or comply with its obligations under this Agreement as a result of Force Majeure. The affected party shall promptly notify the other of the commencement and cessation of circumstances of Force Majeure. If the event of Force Majeure continues to prevent a party from performing or complying with its obligations under this Agreement for a period of more than [ninety (90) days] either party shall be entitled to terminate this Agreement without liability for termination and with immediate effect by notice in writing. If this Agreement is terminated according to this Section all orders for Products and/or Services placed prior to the date of termination will be deemed to have been cancelled and the Distributor shall pay the Supplier for all Products and Services already supplied, work-in-progress and the cost of materials reasonably ordered by the Supplier in the expectation of completing this Agreement.

Examples:

How does this affect my contract?

- The street parties are a Force Majeure “civil disturbance”
- The distributor is obligated to promptly notify me of the Force Majeure
- The distributor is not liable for the non-performance
- If the non-performance by the distributor continues for more than 90 days, I have the right to terminate the distribution agreement, and find another distributor

Pitfalls & Practical Advice

Pitfalls & Practical Advice: Modern Force Majeure

- Moving away from boiler plate clauses
- Negotiating industry-specific and transaction-specific clauses
- Standard clauses are being developed by “umbrella” industry organizations
- More emphasis on due diligence, mitigation, notice and termination
- Parties are no longer fully protected from liability in the event of a Force Majeure

Pitfalls & Practical Advice: How to use Force Majeure

1. Define “Force Majeure” with more detail and context
2. Allocate obligations to mitigate the effects of a Force Majeure event
3. When defining the effects of a Force Majeure on parties’ obligations, create liability for a lack of contingency planning

Pitfalls & Practical Advice Negotiating Force Majeure Clauses

- “Buyers”

Allocate risks to seller by:

- Narrowing the scope of Force Majeure events
- Increasing the mitigation requirements & notice requirements
- Improving the buyer’s ability to terminate the contract by creating timelines for recovery of service

Pitfalls & Practical Advice Negotiating Force Majeure Clauses

- “Sellers”

Allocate risk to buyer by:

- Widening the scope of Force Majeure events
- Narrowing seller’s onus to mitigation
- Restricting ability of other party to terminate contract

Pitfalls & Practical Advice: So you've got a Force Majeure clause, now what?

- What risk exposure does your client have?
- Does the clause also cover failures of your client's sub-contractors to perform in the event of their own Force Majeure?
- Does your client have a duty to mitigate against further damages?
- What insurance options do they have?
- What are their notice obligations?

Thank you

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