

# CLIENT ALERT

## Business Disruption and Commercial Contracts (Part 1): What Does The Force Majeure Clause Cover?

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COVID-19 likely will lead many contracting parties to consider declaring that a force majeure event has occurred when performance has become impossible or significantly more difficult. But the exact wording of the force majeure clause will matter a great deal in determining whether non-performance is legally excused. Force majeure clauses can be very different. You should consider carefully the language of a force majeure provision, and the questions below, before deciding on your response to a business disruption.

### 1. Who is excused?

A force majeure clause may excuse both parties' non-performance, may excuse only one party's non-performance, or may list different force majeure qualifying events for each party, such that some events will excuse non-performance by one party and different events will excuse non-performance by the other party.

Such examples include:

- **Excuses only one party's non-performance:** "Seller shall not be liable for any failure or delay of performance hereunder due to causes beyond its control . . . ."
- **Excuses either party's non-performance:** "Each Party shall be excused from the performance of its obligations under this Agreement to the extent that such performance is prevented by force majeure . . . ."
- **Specifies different force majeure events for the different parties:** "Either Party shall be excused from performance and shall not be in default in respect of any obligation hereunder to the extent that the failure to perform such obligation is due to a Natural Force Majeure Event. Additionally, the seller shall be excused from performance and shall not be in default in respect of any obligation under this Agreement to the extent that the failure to perform such obligation is due to a Political Force Majeure Event."

Nonetheless, in clauses where force majeure excuses only one party, the other party may be able to invoke related common law defenses.

### 2. Is the cause of the disruption covered by the express terms listed, or by a catch-all provision in the clause?

As discussed earlier, the cause of the disruption is often covered by the express terms in the contract. While many force majeure clauses state which events are covered, the parties should review their contract closely to determine whether the business disruption they are experiencing is in fact caused by the triggering event described in the express terms of the contract.

At times when the cause for the disruption is not covered explicitly in the clause, the cause may still be covered because of a catch-all provision. Many clauses will have a final catch-all provision. These provisions, like the clause as whole, may still generally be interpreted narrowly. Unless the provision specifically states otherwise, it likely will only extend to events of the same kind or nature as the particular events specifically listed.

Examples of language that may be limited to similar events include:

- “. . . or any other events or circumstances beyond the reasonable control of the party affected.”
- “. . . or all other similar causes.”

Examples of language that may allow for broader interpretation include:

- “. . . or any other events or circumstances not within the reasonable control of the party affected, whether similar or dissimilar to any of the foregoing.”
- “The doctrine of *ejusdem generis* shall not be applied to exclude any event dissimilar to the enumerated events, but which is beyond the reasonable control of a party.”
- “. . . or any reason whatsoever beyond the control of the parties.”

### 3. If covered by the catch all provision, was the force majeure event also unforeseeable?

Many courts use unforeseeability as a proxy for the scope of a force majeure clause even if that requirement is not stated expressly in the clause. If a force majeure event is specifically listed in a force majeure clause, it may not matter if the event was foreseeable or not at the time of contracting. Where, however, the event is one that may be covered by the catch-all provision, the question of foreseeability is more likely to arise. An event that was foreseeable at the time of contracting likely will not provide an excuse for non-performance, even if the event would otherwise qualify under a catch-all provision. The question of foreseeability is often a fact issue for the finder of fact to decide.

A force majeure clause may, however, provide that the event need not be unforeseeable to provide an excuse for non-performance. Thus, for example, if the clause includes language such as “whether foreseeable or not”, then it may not be necessary for the non-performing party to demonstrate unforeseeability.

### 4. What is the effect of delay or non-performance on the continuing obligations under the contract?

The occurrence of a force majeure event generally does not result in the complete termination of the contract and its continuing obligations, because such an event only provides an excuse to the extent it causes an inability to perform. Some provisions will specifically require performance to be resumed if possible after a delay, and parties should carefully consider the nature of the affected performance in determining what obligations continue.

Examples of provisions that discuss the continuing obligations after a force majeure event include:

- **Force Majeure provision allowing for delay only:** “In the event that any party is prevented, interrupted, or delayed in the performance of its obligations hereunder . . . said party shall be excused from the performance of its obligations hereunder, but only while and to the extent that it is actually so prevented, interrupted, and/or delayed.”

- **Force majeure provisions where performance is delayed and option to terminate is available:**
  - “In the event that either party is prevented from performing or is unable to perform any of its obligations under this Agreement (other than a payment obligation) . . . its performance shall be excused, and the time for the performance shall be extended for the period of delay or inability to perform due to such occurrences. Regardless of the excuse of Force Majeure, if such party is not able to perform within ninety (90) days after such event, the other party may terminate the Agreement.”
  - “Should a failure or delay in the Seller’s performance occur because of any of the foregoing, the Seller shall have the option of either canceling the Contract or delaying performance hereunder for any reasonable period of time during which time this Agreement remains in full force and effect.”

Force majeure clauses can be as varied as any other contract terms, and the exact wording of a force majeure clause will greatly affect the answers to each of the above questions, and to other questions affecting the parties’ rights and obligations. It is important that you know the language in the clause, and how courts may interpret the language, in order to make an informed decision in response to a business disruption. In addition, any response to a business disruption should also be informed by the law governing both the contract interpretation and commercial relationship. This guidance is [further discussed here](#).

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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