

# Lessons Learned – Force Majeure Clauses when an Act of God Strikes

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## ***When your business is hampered by Acts of God or other Force Majeure events, what rights do you have?***

Force majeure clauses are often overlooked in contract negotiations because they rarely come into play. Many business owners view force majeure clauses as *boilerplate* language that is not worth “fighting over” because they deal with worst-case scenarios and remote possibilities.

As this article discusses, force majeure clauses are very significant to the viability of a successful business. If poorly drafted, it can mean loss of revenue, unhappy customers, and worse yet, lawsuits. Many business owners wait until a disaster occurs, such as *Hurricane Sandy*, before they realize the importance of a well-drafted force majeure clause. By then, it is too late.

A “force majeure” clause excuses a party’s performance under a contract when such party’s performance is prevented by Acts of God (e.g. *severe weather, war, strike, terrorism, etc.*) or other specifically enumerated “force majeure events”.

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***When a force majeure defense is legitimately asserted, the party affected by the force majeure event is not at fault for his or her breach if such party’s failure is prevented by the force majeure event.***

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This means that your supplier of *widgets* is excused from delivering your shipment, and you are in an untenable position because:

- You are placed in a holding pattern;
- You have no visibility into the nature of the cause or extent of the interruption;
- You have no understanding of what they are doing to get your shipment fulfilled;
- You have only estimates as to when normal shipments will resume;

- You have no remedy, claim for damages or recourse;
- You cannot terminate the agreement for breach; and
- You must honor the contract when it resumes.

If this does not seem fair to you, you are right. Most force majeure clauses support this result.

### ***What do you do?***

Here are four (4) concepts to include in your next contract renewal:

#### Force Majeure Clause #1: Limit What Can be Excused by Force Majeure

Avoid general open ended categories of force majeure events, such as ***any event beyond a party's control***. The better practice is to be specific about the events that a party may rely on to justify a force majeure claim, and include exclusions. For example, a force majeure clause could exclude events caused in whole or in part by such party's: (1) suppliers or subcontractors; (2) financial hardship; (3) negligence; or (4) failure to order long-lead supplies. In addition, a well-drafted force majeure provision will require the party affected by the event to develop a "work-around" or alternative plan to mitigate against the adverse impact of such event.

#### Force Majeure Clause #2: Narrow the Scope of the Defense

People generally view force majeure clauses as clauses that permit a party to delay delivery or extend the time for performance; however, rarely are force majeure clauses limited in that regard. Most force majeure clauses are broadly written to excuse performance of ***any obligation***. This means that, for example, a party could claim that they are excused from providing insurance because of reasons beyond their control. The prudent practitioner will narrow the scope of the force majeure clause to situations that justifiably and adversely impact delivery or time for performance, rather than performance generally.

#### Force Majeure Clause #3: Require Full Documentation of Force Majeure Claims

The contract should require the party claiming force majeure to notify the other party telephonically within 24 hours of the event. Following such telephonic notice, a party claiming force majeure should be required to provide, in writing, a detailed description of the nature of the claim, why it occurred, how it impacts service, when it is expected to cease, and describe any alternative or mitigating actions that could be implemented to offset the impact of the event. The party should also be required to provide periodic updates, and be available to discuss the situation open and candidly.

#### Force Majeure Clause #4: Provide for an Out

Force majeure events are generally indefinite, and accordingly, can have severe business consequences if the force majeure period is prolonged for an unreasonable period of time. Accordingly, the contract should give the party not affected by the force majeure event the right to terminate the contract (or a particular scope) and seek alternative sources. This language should be integrated with the termination provisions of the contract in order to fairly allocate the costs associated with such termination.

Ignoring the significance of the force majeure clause during negotiations can be costly. The occurrence of a force majeure event can be catastrophic to a business that materially relies on the goods and services of others. Consider these concepts during your next contract renewal or negotiation.

If you have any additional questions, please contact:



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