

## Interpreting *Force Majeure* Clauses

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A *force majeure* clause (French for "superior force") is a contract provision that relieves the parties from performing their contractual obligations when certain circumstances beyond their control arise. The current COVID-19 pandemic, like other recent disasters, has already had a huge impact on society and the economy. Among its many other consequences, it is forcing organizations and businesses to consider the feasibility of upcoming events. Knowing how to interpret a force majeure clause will help your organization make informed decisions about whether you will be able to cancel your meeting without liability for cancellation fees, or whether it will be an option to hold a meeting, despite reduced attendance, without liability for attrition damages.

Ideally, all contracts made in connection with an upcoming event will include a force majeure, or impossibility, clause. In the absence of a force majeure clause, parties to a contract are left to the mercy of the narrow common law contract doctrines of "impracticability" and "frustration of purpose," which rarely result in an excuse of performance.

There are five main elements in a well-drafted force majeure clause:

- List of potential events
- Catch-all clause
- Standard for a force majeure event
- Effect of the force majeure clause
- Notification provision

### Lists of Events – Specificity Matters

Every force majeure clause includes a description of the types of circumstances covered by the clause. These may be very general and limited, such as "acts of God or government authorities, natural disasters, or other emergencies" or a long list of potential catastrophes. Provisions typically cover natural disasters like hurricanes, floods, earthquakes, and weather disturbances (sometimes referred to as "acts of God"), as well as any other regional risks, such as an avalanche or a tsunami. Other covered events may include war, terrorism or threats of terrorism, government regulations, civil disorder, labor strikes or disruptions, fire, disease or medical epidemics or outbreaks, and curtailment of transportation facilities preventing or delaying attendance by at least 25 percent of meeting

participants.

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.

When trying to invoke a force majeure clause, the likelihood of success increases the closer the circumstance is to an articulated event in the clause. Proclamations by government or international authorities, such as the declaration of a national or regional state of emergency, pandemic, or disaster, may be required to confirm that a circumstance has risen to the level anticipated by the contract. Without clear authority, you may find your organization in a dispute over whether the clause applies. Context and timing also matter. Your ability to successfully invoke a force majeure clause might increase or decrease, depending upon evolving circumstances, and will also depend upon the location of your event and attendees.

## A "Catch-all" Phrase – Anticipate the Unexpected

Recognizing that not all potential events can be specified or anticipated in a contract, a force majeure clause that is written generously will include language to expand the covered events beyond those listed in the contract. For example, it may introduce the list with a phrase like "including, but not limited to" or similar language to broaden the scope. Alternatively, or additionally, the clause may end the list with a "catch-all" phrase, such as "and any other events, including emergencies or non-emergencies," to cover other, unforeseeable events.

It is important to read the language in these expansive phrases carefully. Language appended after a comma can significantly alter the scope of the force majeure clause. For example, adding the words "or any other emergency beyond the parties' control" to the end of a list of specified force majeure events serves to narrow the scope of triggering events only to "emergencies." With such language, non-emergency circumstances making it inadvisable to hold a meeting would not be covered. Similarly, many clauses reference "unforeseen events," and the question then becomes whether the potential force majeure event would qualify as unforeseen. In the context of the COVID-19 pandemic, do the previous global outbreaks of H1N1 and SARS render this pandemic foreseeable? The answer may depend upon the time of execution of the contract and whether any other medical events were already included in the list. Broader language, such as "any other similar event beyond the parties' reasonable control," would neither limit the list nor restrict the unarticulated events to emergencies or unforeseeable events.

## The Standard of Performance – How Restrictive Is It?

It is common to find boilerplate force majeure language in meeting contracts that limit the excuse of

the parties' performance obligations only when they would be "impossible" to perform because of the unexpected circumstance. Impossibility is a high threshold; many circumstances will make holding a meeting inadvisable, even though it would still be possible to do so. For greater flexibility, look to see whether your clause excuses performance when it would be "inadvisable, commercially impracticable, illegal, or impossible" to perform. There also may be participation thresholds for performance, such as "events that prevent or unreasonably delay at least twenty-five percent (25%) of event attendees and guests from participating or attending," which effectively adjust the standard of performance.

Even at its most generous, a force majeure clause is still applicable only in an extraordinary circumstance. The phrase "commercially impracticable" is triggered when something is rendered excessively difficult, expensive, or harmful by the unforeseen event. The interpretation of this and the other, more restrictive standards is not always clear-cut. In order to prevail in a dispute, an organization will need to be able to marshal clear evidence of the relevant level of impact on its ability to perform under a contract.

## Excusing Performance, and Underperformance

Although a force majeure clause would typically allow for complete cancellation of a meeting without penalty, this will not always be true. It is important to read the clause carefully. Some clauses are drafted to require a refund of pre-paid fees, while others address only prospective payments. Similarly, if a force majeure event occurs during performance, the contract may provide for a pro-rated payment up to the date of termination.

As you review your force majeure clause, it may not be with an eye to cancelling your event, but to mitigating damages from an undersubscribed event. Because there are circumstances in which going ahead with a meeting is preferred, despite the fact that a force majeure event will likely result in lower-than-expected attendance, some force majeure clauses also provide for underperformance. Without such a protection, groups that fail to meet minimum room or food and beverage commitments will often risk incurring significant attrition fees. When going forward can be a viable option, it helps to have a force majeure clause that excuses liability associated not just with nonperformance (i.e., cancellation), but also with underperformance (i.e., failure to meet minimum guarantees).

## Notification

The force majeure clause may specify how and when the party invoking the force majeure clause must give notice to the other party. Typically, it will allow for a short notice period, such as five (5) or ten (10) days, between the event and notification of the applicability of the clause. The method of delivery may also be described, either in the clause or elsewhere in the contract. For events that are unfolding over a period of time, determining when to invoke the force majeure clause is an important consideration. From a contract perspective, it is helpful to wait until the circumstances fall clearly

within one of the articulated force majeure events. However, there may be business or other practical reasons for an organization to cancel an event before the force majeure clause would clearly apply. In these circumstances, an organization must balance the pros and cons of early cancellation with the possibility of forgoing a future excuse of performance under a force majeure clause. The COVID-19 pandemic, with its rapid escalation of government regulations in parallel to the proliferation of the virus, has introduced this dilemma for many organizations; it will be interesting to see how courts interpret the application of these clauses in this context.

## Takeaways

In a force majeure clause, every word matters and can change the impact of the clause's applicability. Fortunately for the world, these clauses are rarely interpreted. Unfortunately for us, that leaves us with limited guidance on how they may apply in any given context. The tools for assessing these contractual terms are (1) an understanding of the various elements, (2) the ability to interpret the scope of each element, and (3) an understanding that context is crucial. Counsel can advise on these matters and interpret how courts have applied similar language in analogous contexts. Before invoking a force majeure clause or determining the clause is not applicable, it is advisable to consult with legal counsel.