



MAY THE FORCE BE WITH YOU

a brief look at force majeure clauses in contracts

It is an accepted general principle of contract law that each party to an agreement is responsible for its non-performance, even if performance is beyond his power, and this was not, and could not have reasonably been foreseen at the time of signing the agreement. Since effective economic activity is not possible without reliable contractual promises, the importance of this principle is heavily emphasized in contract law. The classic concept of “force majeure” is an exception to this principle.

Force majeure is French for “superior force” and occurs when, without default of either party, a contractual obligation has not been performed because the circumstances in which the obligation is called for would render it impossible for performance, for example a riot, strike, or an event often referred to as an ‘act of God’ such as a hurricane or earthquake.

There are three essential elements of a force majeure event:

1. It can occur with or without human intervention.
2. It cannot have reasonably been foreseen by the parties; and
3. It was completely beyond the parties’ control and they could not have prevented its consequences.

A party cannot rely on a force majeure event which is caused by his/her own act or omission and the force majeure event must be a legal or physical restraint and not merely an economic one.

Force majeure clauses have become increasingly standard clauses in commercial contracts. However, given the current global environment, closer scrutiny must be taken of how these clauses impact the future of contractual arrangements. With the recent occurrence of unforeseen events such as the global recession and extreme environmental changes, greater consideration should be given to the language and applicability of force majeure clauses.

Increased awareness of our rapidly changing and sometimes unstable global environment has seen a departure from the traditional approach to drafting force majeure clauses. Modern clauses now contain re-negotiation provisions, obliging parties to re-negotiate and modify the terms of the original contract to fit any change of circumstances, so that there exists the possibility of contractual completion, though in a re-negotiated context.

Contracting parties should beware!

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