



WGAM - BOILERPLATE CLAUSES: FORCE MAJEURE

This is the second in our series looking at clauses, which lawyers call “Boilerplate”.

If you are used to contracts you will have heard the phrase “Force Majeure”. You might assume that it does not require much attention because of the general understanding that including a Force Majeure clause in a contract will protect a party from liability if unexpected things happen. After all a dictionary, will probably tell you that it is a legal noun meaning “irresistible force or compulsion, such as will excuse a party from performing his part of a contract. From the French meaning ‘superior force’ ”.

That definition is broadly right. A Force Majeure provision in a contract in effect says that a party may be excused from performing his obligations where a Force Majeure Event has occurred. In that situation the party excused is not in breach of contract. Force Majeure is, in effect an acknowledgement by the parties that in some circumstances obligations cannot be performed and that if those do arise there should be no liability.

However, the assumption that you need not think through Force Majeure carefully is false. If you fail to do so the costs and risks can be considerable.

The appearance of the two magic words Force Majeure in your contract will not of themselves guarantee appropriate protection. The term alone has no legal significance at all. Therefore, any contract where the term is used needs to state what will and will not amount to Force Majeure. Also, if the parties are to manage the exposures they face if a Force Majeure event occurs they should consider what each of them can or must do in that situation. This should be spelt out in the contract.

Defining Force Majeure

The contract must say what this in your context. Commercial people often have a very clear view of what a Force Majeure is but without a definition the Judge will deny all knowledge if he is asked! In most situations Force Majeure does more to protect a supplier than a buyer and this results in a tension with the supplier wanting Force Majeure to

include as many situations as possible and the buyer tending to look for the opposite. One can define Force Majeure generally e.g. “all circumstances outside a party’s reasonable control” or set out specifically the situations to be covered. The optimal approach varies according to the situation.

For example, a common debate is whether industrial relations issues will be a Force Majeure event. The solution is often to provide that national and industry wide issues are a Force Majeure event but those specific to the contracting party are not because they ought to be within his control if he is managing his business properly.

As you would expect other foreseeable eventualities attract similar debates and negotiations with the outcomes depending on industry norms and of course the bargaining power of the parties.

Entitlements in the event of a Force Majeure

Having included a good definition, what happens if such a Force Majeure event does arise?

Again what is appropriate varies widely and depends largely on the situation. The impact of a Force Majeure in the context of an agreement for sale of commoditised easily substitutable goods will be very different to that on the outsourcing of a very specialist IT function or the writing of bespoke software. However, in most cases, the issues to think about include:

- ||| Communication: - The party first discovering the Force Majeure event must be obliged to notify the other straightaway and keep him up to date with developments. In the case of any major contract the parties should probably meet to discuss how to best handle the situation.
- ||| Alternatives action - Could taking alternative action avert or mitigate the impact of the Force Majeure event? For example in a goods storage contract, it may be possible to find an alternative location to store the goods. An exclusive goods supply agreement might permit the buyer to source elsewhere temporarily.

- ||| Who pays for what? - Although the nature of Force Majeure is that the parties agree no one is to blame so there will be no damages payable, you should agree how the costs of varying the contract to mitigate the effects of Force Majeure will be borne. Parties will often agree that neither should profit from dealing with the Force Majeure event and then split costs in some way.
- ||| How Serious? - The extent of the impact of the Force Majeure event obviously affects what your response should be but also what rights you ought to have.
- ||| How Long? - There comes a point where a Force Majeure Event has continued so long one or both parties must be allowed to terminate. How long that is will depend on the nature of the contract and needs of the parties. It could be as long as one year or as short as one day!

In conclusion, Force Majeure clauses matter. In today's economic climate it is especially important to manage exposure so that where you are the supplier you are not liable where events outside your control mean that you cannot perform your obligations.

Equally, as a purchaser, you will wish to ensure that your supplier cannot get off the hook too easily if unusual events occur. You will want him to keep trying to fulfil his obligations at least to a sensible extent. Both parties need a clear understanding of their rights and what happens if a Force Majeure Event does occur.

If you wish to discuss anything arising out of this article please call



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By the way, for those of you that took part in our competition (or for those with enquiring minds) we can now confirm that "WGAM" stands for "Who Gives A Monkey's"?