

## [Force Majeure Clause Drafting](#)

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Both the Uniform Commercial Code and *Restatement (Second) of Contracts* expressly permit the parties to a contract to allocate risks as they see fit. This is commonly done by including a so-called force majeure clause in the contract that lists a series of events that will excuse performance. This practice note discusses force majeure clauses and issues to consider when drafting such clauses.

A typical force majeure clause includes a statement that the occurrence of certain events or circumstances will excuse performance; a listing of the events or circumstances; and a listing of obligations imposed on the party claiming to be excused that typically relate to keeping the other party informed about the force majeure event. An example of a force majeure clause containing these elements is as follows:

- A. No party will be liable for nonperformance of any of its obligations under the agreement if its nonperformance was due to a Force Majeure Event as defined in paragraph (B) of this Article, on condition that such party complies with the conditions in paragraph (C) of this Article.
- B. A Force Majeure Event shall mean any act of God; war; riot; civil strife; act of terrorism, domestic or foreign; embargo; governmental rule, regulation or decree; flood, fire, hurricane, tornado, or other casualty; earthquake; strike, lockout, or other labor disturbance; the unavailability of labor or materials to the extent beyond the control of the party affected; or any other events or circumstances not within the reasonable control of the party affected, whether similar or dissimilar to any of the foregoing.
- C. Upon occurrence of a Force Majeure Event, the non-performing party shall promptly notify the other party that a Force Majeure Event has occurred, its anticipated effect on performance, including its expected duration. The non-performing party shall furnish the other party with periodic reports regarding the progress of the Force Majeure Event. The non-performing party shall use reasonable diligence to minimize damages and to resume performance.

For the reasons explained below, such a clause may be unnecessary and could result in diminishing the parties' existing rights. However, if a party has a specific concern about disruption in performance it should include a force majeure clause addressing such concerns directly.

For more information, see [Merger Clause and Force Majeure Clause Drafting](#) and [Risk Allocation in Commercial Contracts](#).

### **Consideration of Whether a Force Majeure Clause Is Necessary**

There is a significant question as to whether force majeure clauses, as described above, should be routinely included in contracts. To answer that question, it is important to consider that without a force majeure clause in a contract, in most jurisdictions, performance of a contractual duty will be excused when it is "impracticable." According to the *Restatement (Second) of Contracts*, impracticability is when a party's duty to perform is discharged when that performance is made impracticable through no fault of the party, but is as a result of the occurrence of an event, which event's non-occurrence was a basic assumption upon which the contract was made.

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To establish commercial impracticability, the following requirements must be established:

- 1 The supervening event must make performance excessively burdensome (i.e., it can only be performed with extreme and unreasonable difficulty, expense, and loss, but increased cost alone is generally not enough).
- 2 The nonoccurrence of the event must have been a basic assumption of the contract (i.e., if the event was of such reasonable likelihood that the obligor should have guarded against it, its non-occurrence was not a basic assumption of the contract).
- 3 The event must have occurred without the fault of the promisor seeking to be excused (i.e., if he or she was responsible for a substantial share of the loss, or failed to pursue affirmative efforts to overcome the effects of a supervening event, the impracticability excuse will not be available).
- 4 The increased risk caused by the supervening event must not have been allocated by the contract to the promisor.

Contractual force majeure clauses had greater utility prior to the advent of the doctrine of impracticability, because the common law required performance of the contract regardless of the circumstances, with only classic exceptions (e.g., death or destruction of subject matter). However, under the modern view of the doctrine of impracticability, *any* event or contingency that the parties assumed would not occur but has occurred, and which has made performance impracticable, provides an excuse for nonperformance. Parties seeking to list force majeure events typically mention events that fit the above description of impracticability, which, in all likelihood, *are already excused* pursuant to the UCC or the *Restatement (Second) of Contracts* without a force majeure clause.

### **Pitfalls of Drafting Force Majeure Clauses**

#### ***An Incomplete Listing of Events***

If the parties decide to include a force majeure clause in the contract, an attempt to list every contingency that should be considered a force majeure event is, itself, an impossibility since no drafter is omniscient. The canon of construction or interpretation *expressio unius est exclusio alterius* would exclude any item **not** specifically listed. Therefore, an incomplete listing may unwittingly surrender some of the protections against risks that are available under the UCC or via the common law without a force majeure clause.

#### ***Catch-All Needs to Draft Around Eiusdem Generis***

The conventional wisdom counsels drafters to precede or follow any listing of force majeure events with a catch-all provision in an attempt to capture events beyond the ones specifically listed, but drafting the catch-all presents its own challenges. If it merely says “. . . or any other events or circumstances beyond the reasonable control of the party affected,” the canon of construction or interpretation *eiusdem generis* likely would limit the meaning of the catch-all to the same type of events as those listed specifically. As such, the catch-all needs to deal with *eiusdem generis* directly by attempting to include dissimilar events or circumstances. Example: “. . . or any other events or circumstances not within the reasonable control of the party affected, whether similar or dissimilar to any of the foregoing.”

#### **Drafting with the Client's Needs in Mind**

There is no reason the parties need to limit a force majeure clause to classic force majeure contingencies grounded in unforeseeability beyond the parties' reasonable control. The parties are free to allocate the risks as they see fit, and it is possible that the client may not be willing to assume the risk of performing in the face of certain clearly foreseeable events. The obvious drafting solution is to expressly condition the duty upon the nonoccurrence of such an event.

For example, one or both parties may not be willing to assume certain market risks, perhaps a market price exceeding a certain price level. Instead of relying upon a general, omnibus force majeure clause to, hopefully,

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protect the client, it is in the client's interest for the drafter to expressly enumerate *the specific risks* the client does not wish to assume and to draft a risk management clause that expressly avoids such risks. Such a risk management clause could excuse the specifically listed risks in addition to "any and all events, regardless of their dissimilarity to the foregoing, deemed to be impracticable under the law." Client may require that the vendor take appropriate preventative measures and reasonable actions against foreseeable events (e.g. power failures). A client may also consider including the right to terminate the contract after a specific period of time has elapsed after a force majeure event if an indefinite suspension of performance is unacceptable. Suggested language:

Vendor shall have in place disaster recovery plans to deal with a loss of electric power or telecommunication services. In the event of a power failure, Vendor shall have adequate backup power sources to immediately continue its operations for at least ( ) more hours (the "Back Up Power Period"). The failure of electric power or Vendor's backup power source shall not be considered a Force Majeure Event until after the Back Up Power Period. In the event a Force Majeure Event continues for more than ( ) days in any ( ) period, then the (Client) may terminate this Agreement upon written notice to (Vendor).

### The Limits of the Impracticability Defense, and the Benefits of a Risk Allocation Clause

[\*BRC Rubber & Plastics v. Cont'l Carbon Co., 2013 U.S. Dist. LEXIS 78861 \(N.D. Ind. 2013\)\*](#) illustrates a common scenario where the application of the impracticability defense is precluded. In that case, seller claimed it was excused from shipping buyer's order because the demand for the product exceeded its ability to produce it. One of the two reactors that seller used to produce the product was down for maintenance for several weeks due to routine annual maintenance. But routine annual maintenance, the court explained, is not the kind of "impossibility" that the parties could not have anticipated. Accordingly, the defense was not available to the seller.

But note that the parties could have instead drafted a risk allocation clause that excused the seller from the obligation to supply the product to the extent production falls below a certain level because of routine annual maintenance. **A freely drafted risk allocation clause need not condition its application on foreseeability.** Instead of including a traditional force majeure clause that does little more than list events that are generally considered unforeseeable, prudent drafters will insert a clause establishing that the impracticability defense of the UCC is available to the parties, but in addition, they will enumerate specific contingencies that might realistically interfere with their clients' ability to perform – and these vary from business to business – regardless of whether those contingencies fit the accepted definition of impracticability. Parties can negotiate for relief in their obligation to perform when any such contingencies occur.

### Related Content

#### Practice Notes

- [Merger Clause and Force Majeure Clause Drafting](#)
- [Risk Allocation in Commercial Contracts](#)
- [Risk Assessment](#)
- [Excuses for Nonperformance: Conditions Following Contract Formation](#)
- [Excuses for Nonperformance: Conditions Preceding Contract Formation](#)
- [Commercial Contract Drafting and Review](#)
- [Key Provisions of Sales and Purchase Agreements](#)

### Annotated Forms

## Force Majeure Clause Drafting

- [Force Majeure Clauses](#)
- [Risk of Loss Clauses](#)
- [Special Circumstances Requiring Timely Delivery of Goods Clause](#)
- [Time for Delivery Clauses](#)

### **Checklists**

- [Avoiding Key Risk Allocation Pitfalls When Drafting Commercial Contracts](#)
- [Commercial Contract Drafting and Review Checklist](#)
- [Drafting a Sale of Goods Agreement Checklist](#)

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