



## Force Majeure, are you protected from unforeseeable circumstances?

Suppose you enter into a Purchase Order for \$10,000,000.00 of product. The product is to be delivered in August and you have 120 days to complete the project. If you do not complete your contract in 120 days you will incur liquidated damages of \$10,000.00 a day, plus breach of contract damages. Your supplier advises you on August 1 that it cannot provide the product and they are not responsible because of Force Majeure.

What is Force Majeure? What does it really mean? Can the application of Force Majeure leave you vulnerable to damages? Force Majeure means something along the lines of an act of God or a superior force. The clause shows up in construction contracts to state that performance of a contract is excused because performance has become impossible or impracticable as a result of an event that the parties could not have anticipated or controlled. It is used as a defense against a breach of contract claim. Force Majeure events that are typically in a contract are war, riots, fire, flood, earthquake, hurricane, explosion, strikes, lockouts, energy shortages or governmental intervention that impedes any party from performing their obligations. This is by no means an exhaustive list, but is an illustration of some of the events that can be listed in a Force Majeure provision.

Texas courts are in agreement that the scope and effect of a Force Majeure clause depends on the “specific language” in the Force Majeure clause of the contract. A good Force Majeure provision should specifically list the events deemed to be covered. It is important for a party to understand which events are listed under the Force Majeure clause because the courts will look only to the events stated in the clause to determine if performance is excused.

What if a contract does not include a Force Majeure provision? Texas courts have recognized what is referred to as “common law” principles that can be implemented to assist the party asking to be forgiven from performance. However, the common law concept of Force Majeure

is limited to the defense of "impossibility". The defense of impossibility may be applicable if the party's performance is made impossible without his fault by the occurrence of an unforeseeable event. What is an unforeseeable event? As you may imagine an unforeseeable event has been heavily litigated. However, a classic example of an unforeseeable event is when a building or worksite is destroyed due to a natural disaster. However, without a Force Majeure clause, it usually comes down to a case-by-case situation where the facts determine the foreseeability.

In the scenario presented, there are a few items to consider. One, make sure you have a Force Majeure clause in your contract with the general or owner that is broad enough to give you protection. Two, have your supplier explain to you in writing the Force Majeure event that stopped them from delivering the product. Three, review your contract with your supplier to determine if the event is one that is covered in the Force Majeure clause. In all likelihood, you will need to review this with your attorney to determine what actions should be taken next.

**Do not ignore or take the Force Majeure clause for granted.**

These materials should not be used as a substitute for legal services. Consult with an attorney.