

# FORCE MAJEURE BOILERPLATE CLAUSE

## Need to know

A force majeure clause provides a way for a party to terminate or vary their contractual obligations because an event which is (usually) outside the control of that party has affected their performance of the contract. The sample Force Majeure clause must be used together with a clause which defines a “Force Majeure Event.”

## THE SAMPLE CLAUSE

### Force Majeure

- (a) *If a party is unable to perform an obligation under this [deed/agreement] because of a Force Majeure Event, then:*
- (i) *as soon as reasonably practicable (and in any event no later than [10/[insert number]] Business Days) after the Force Majeure Event arises, that party must notify the other party of the extent to which the notifying party is unable to perform its obligation;*
  - (ii) *where a party complies with clause (a)(i), that party's obligation to perform those obligations will be suspended for the duration of the delay arising directly out of the Force Majeure Event; and*
  - (iii) *in all cases, the parties must use their best endeavours to minimise the impact of any Force Majeure Event.*
- (b) *Neither party is excused from any obligation to pay money because of a Force Majeure Event, despite any other provision of this [deed/agreement].*
- (c) *If a delay by either party arising directly out of a Force Majeure Event continues for more than [30/[insert number]] Business Days, the other party may, at its discretion:*
- (i) *reject [**describe what is to be affected, eg “the Products”**] affected by that Force Majeure Event by giving [10/[insert number]] Business Days notice to the delaying party; or*
  - (ii) *terminate the [deed/agreement] by giving [10/[insert number]] Business Days notice to the delaying party.*

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## 1 What is this clause and why is it used?

### 1.1 What is a force majeure clause?

A force majeure clause provides a basis for the termination or variation of a contract should an event occur which makes performance impractical.

The term “force majeure” itself comes from the French words meaning “major strength.” Typically both significant human acts (such as strikes or war) and natural disasters (such as an earthquake) will be encompassed by a force majeure clause.

### 1.2 How does this clause work?

The sample clause provides for one party to notify another of its inability to perform due to a “Force Majeure Event” .

Upon such notification, the notifying party’s obligations are suspended. Should the delay from the Force Majeure Event continue beyond a defined period then the notified party has a right to reject performance or terminate the contract.

In addition to inserting the sample Force Majeure clause in the contract, the term “Force Majeure Event” must be defined by inserting one of the sample G+T Force Majeure Event definition clauses.

### 1.3 Why is this clause used?

Commercial contracts in Australia often contain an express force majeure clause by which the parties reallocate the risk of non-performance by agreement.<sup>1</sup> This is because, short of frustration,<sup>2</sup> the common law does not generally recognise a legal doctrine of force majeure by which impracticability of performance is a valid ground for the discharge of a party’s obligations.<sup>3</sup>

The clause usually strikes a balance between preventing a performing party from claiming that the contract has been frustrated by an event (thereby bringing the contract to an end) and giving that party some latitude in meeting its obligations in the circumstances while keeping

the contract on foot. Where that balance lies may be closely negotiated.

These clauses are particularly common in long term contracts as impracticalities of performance may become increasingly difficult to predict with time.

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## 2 How effective is it?

A force majeure clause will generally be effective to vary or terminate the contract as the parties intend. However there are some potential limitations on the effectiveness of such a clause.

### 2.1 Contracting out of common law frustration

The extent to which a force majeure clause will effectively amount to the parties contracting out of the common law doctrine of frustration will be a question of construction in each case. As a general principle, parties can effectively exclude the operation of the common law doctrine of frustration by:

- (a) providing for the risk to be allocated to a party, such that the event is no longer ‘unforeseen’; or
- (b) through the court’s inference that such a result is intended.

However, if a contractual provision does not deal with the particular event then frustration remains operative.<sup>4</sup> Further, broad force majeure clauses, for example one dealing with “delay howsoever occasioned,” may be interpreted to not apply to an interruption which is in the nature of an event of frustration where that could not have been within the contemplation of the parties when the contract was made.<sup>5</sup>

In those circumstances, and seemingly where an express clause does not provide “full and complete” provision for an event but only provides for some of the possible legal consequences,<sup>6</sup> then common law frustration is not excluded.

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## 2.2 A force majeure clause will not usually be read as including a party's own negligence

In the absence of a clear indication to the contrary, a force majeure clause will probably not be construed to cover events brought about by a party's own negligence or wilful default. This is the case even though a specified event would in other contexts not be limited to an event occurring without negligence.<sup>7</sup>

## 2.3 A force majeure clause may not be effective where there is a "partial force majeure"

A "partial force majeure" occurs when an event causes a supplier's stocks to be reduced such that it cannot satisfy *all* the acquirers of those goods that it has contracted with, but could fully satisfy *some* of them. The issue then is whether, with regard to each contract there has been a force majeure event: ie has the event caused the failure to supply to a particular acquirer, or has the failure arisen from the supplier's decision to favour others with the limited supply remaining?

English authority has supported the allocation of the remaining goods pro-rata, holding that 'no party is entitled to more than its pro rata share'.<sup>8</sup> However other authority suggests that the supplier may allocate remaining goods in any manner it likes, so long as it is reasonable and that, if this occurs, the effective cause of the shortage is not the seller's appropriation, but whatever caused the shortage".<sup>9</sup> Australian Courts have had limited interaction with the issue.<sup>10</sup>

Where this may arise, the prudent course is to specifically provide within the force majeure clause an entitlement and mechanism for pro-rata allocation of reduced periodic supply or such other express mechanism as may be negotiated.<sup>11</sup>

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## 3 Drafting and reviewing the clause

The process of negotiating the precise boundaries of force majeure provisions may be an important part of the risk allocation between the parties, and the G+T clauses will need to be

tailored to the circumstances of the particular transaction.

Some guidance on drafting force majeure clauses is provided below. In addition, you should consider:

- (a) whether the ordinary limitations in section 2 above are intended to apply and, if not, additional specific drafting to ensure that they do not;
- (b) the link, if any, between the force majeure provisions and other defined events or obligations under the agreement to ensure that the clauses are consistent; and
- (c) the interrelationship in the agreement with other risk allocation devices such as renegotiation clauses and express rights of termination.

### 3.1 Should I always include a force majeure clause and what happens if I don't?

A force majeure clause should ordinarily be included in an ongoing contract, particularly in a long term contract where impracticalities of performance may be difficult to predict over the contract's lifetime. If a force majeure clause is not included, the risk of impracticability of performance will lie with the performing party. Where the unforeseen event is severe enough, that party may be able to claim that the contract has been brought to an end by frustration.

### 3.2 Should I always include definition of "force majeure event" and what happens if I don't?

It is not recommended that "force majeure" be used as an undefined term in a force majeure clause because its meaning is unclear. Instead, a definition and / or list of the circumstances said to constitute a force majeure event should be stipulated in the definitions section of the contract.

It has been said that the precise meaning of the term "force majeure," if it has one, has eluded lawyers for years.<sup>12</sup> This uncertainty is because, while force majeure is a doctrine well-known in continental legal systems,<sup>13</sup> there is no corresponding doctrine in English law.<sup>14</sup>

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Despite this, the words “force majeure” have been considered in a number of cases,<sup>15</sup> and it has been held that an agreement which simply contained the phrase ‘subject to force majeure’ would be valid and enforceable.”<sup>16</sup> The words will be construed by a court by considering their context and the nature and general terms of the contract.<sup>17</sup> However, in practice, the words are rarely unqualified<sup>18</sup> and it is recommended that the term be defined.

### 3.3 Definition: broad or specific?

The G+T *short form – broad – outside control force majeure definition clause* defines **Force Majeure Event** to mean any event or circumstance which:

- (a) is not within the reasonable control of the Affected Party or any of its Related Bodies Corporate [*or any of their subcontractors*];
- (b) [*directly or indirectly and*] alone or when taken together with any other such events, causes the Affected Party to fail to perform on time any of its obligations under this agreement; and
- (c) is not reasonably able to be prevented by the Affected Party taking reasonable precautions and cannot reasonably be circumvented by the Affected Party.

The other two G+T definition clauses also define **Force Majeure Event** in the same terms set out above, but differ from the clause above as follows:

- *full form – broad – outside control*: this definition also includes a non-exhaustive list of events or circumstances which will constitute force majeure events provided they meet the above definition (fire, flood, breakage of machinery etc).
- *short form – specific list*: this definition provides for the insertion of an exhaustive list of events or circumstances which will constitute force majeure provided they meet the above definition.

All three definition clauses contain an option to insert a list of events or circumstances which will

constitute exceptions to the definition of **Force Majeure Event**.

If acting for the supplier of goods, then a broad, inclusive definition of Force Majeure Event may be preferred.

If acting for the acquirer of goods, a narrower, exclusive definition may be preferred. When acting for the acquirer, you should attempt to identify as Force Majeure Events only the types of events or circumstances which are directly relevant to the transaction. Wide, catch-all provisions such as “including but not limited to”, “any similar event” or “act of God” should be avoided to the extent possible.

### 3.4 Definition: limiting to events not reasonably able to be prevented

The G+T definition of Force Majeure Event limits these to events not reasonably able to be prevented by taking reasonable precautions. Other formulas may use similar phrases such as events which could not be prevented by the use of “good engineering and operating practice”<sup>19</sup> or by a “reasonably prudent person.” When drafting the clause, consider who will need to prove these matters and how they might be proved.<sup>20</sup>

### 3.5 Definition: link between the event and ability to perform

When drafting the definition, consider also the link that needs to be drawn between the event and the ability to perform. Should the link be limited to direct causes or include indirect causes, and how should the cumulative effect of multiple Force Majeure Events be treated? The G+T clause provides for these matters, but they should be considered in each case and the clause amended if appropriate.

### 3.6 Notice

A force majeure clause will ordinarily state the steps which must be taken on occurrence of a Force Majeure Event in order to indicate that the clause is intended to be relied upon. Ordinarily this will require the giving of notice. The following matters should be considered:

- what timeframe will be specified for the giving of notice? Generally, an acquirer of

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goods will want to limit that period and make it specific; a supplier may press for a less specific phrase such as “as soon as reasonably practical”.

- what level of particularity is required in the notice in specifying the Force Majeure Event? Again, the parties will have differing interests and the position may need to be negotiated.
- what is the effect of a notice which doesn't meet the agreed requirements. For example, will the notice simply be invalid (meaning that the force majeure provisions cannot be called upon) or will other contractual provisions provide to perfect the notice?

## 3.7 Consequences of invoking the force majeure provisions

The clause will deal with the consequences of a force majeure event. However, the following matters should be considered:

- what are the short term and long term effects of the Force Majeure Event? Short term events may need to result in a suspension of obligations, but if the events continue beyond a certain period the clause may need to provide for the contract to be terminated (or for one or both parties to be granted a right to terminate in those circumstances).
- wording should ordinarily be used that refers to the duration of the inhibiting effects of the Force Majeure Event, rather than the event itself because the event may be over in a short time but the consequences of it may remain.
- should the affected party be under an express duty to minimise the disruption caused by Force Majeure Event? If so, how is this duty limited (eg is it obliged to spend money or pursue legal rights to minimise the disruption)?
- are there any linked agreements (such as on-supply arrangements) that will also be affected? Do these agreements provide for appropriate relief in the case of a Force

Majeure Event arising under the head contract?

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## 4 Other practical considerations

### 4.1 Interpretation

The general approach to the meaning of commercial contracts in Australia, namely that they will be determined by what a reasonable businessperson would have understood them to mean,<sup>21</sup> applies to the interpretation of force majeure clauses.<sup>22</sup> They are unlikely to be construed strictly.<sup>23</sup>

### 4.2 Reliance and proof

A party seeking to rely on a force majeure clause has the burden of proof to establish that the clause should be construed to include the circumstances relied on, and must prove the facts which establish those circumstances.<sup>24</sup> If expert evidence of a standard of practice is necessary this may be expensive or difficult to obtain.

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## ENDNOTES

<sup>1</sup> *Mackay Sugar Ltd v Sugar Australia Pty Ltd* [2013] QSC 223 at [119] per Jackson J.

<sup>2</sup> Frustration occurs when, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract: *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696 at 729 per Lord Radcliffe, adopted in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

<sup>3</sup> *Hyundai Merchant Marine Co Limited v Dark Brook Coal (Sales) Pty Limited* [2006] FCA 1324 per Kiefel J, cited with approval in *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QCA 128 at [38] (Fraser JA; Muir JA and Ann Lyons J agreeing) and by Basten JA in *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 at [223] (a decision overturned on appeal to the High Court without discussion of the force majeure point).

<sup>4</sup> see eg *Intertradex SA v Lesieur Torteaux SARL* [1978] 2 Lloyd's Rep 509 at 515

<sup>5</sup> see eg *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119; cited with approval in *Scanlan's New Neon Limited v Tooheys Limited* (1943) 67 CLR 169 at 179. See also Treitel, *Frustration and Force Majeure*, paragraph 12-010.

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<sup>6</sup> see eg Treitel, *Frustration and Force Majeure*, paragraph 12-012ff. See also Yates, "Drafting Force Majeure and Related Clauses" (1991) 3 *Journal of Contract Law* 186 at 194ff.

<sup>7</sup> A construction that does not include negligence is the UK position: see *Chitty on Contracts* (32<sup>nd</sup> edn, London, Sweet & Maxwell, 2015) at 15-153 citing *Gyllenhammar & Partners International Ltd v Sour Brodogradevna Industrija* [1989] 2 Lloyd's Rep 403 at 406, *Sonat Offshore SA v Amerada Hess Developments Ltd* [1988] 1 Lloyd's Rep 145 and *The Super Servant Two* [1990] 1 Lloyd's Rep 1.

<sup>8</sup> *Bremer Handelsgesellschaft mbH v. Vanden-Avenne Izegem PVBA* [1978] 2 Lloyd's Rep 109.

<sup>9</sup> Donaldson J in *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd's Rep 509.

<sup>10</sup> For more on partial force majeure, see M Darwin and S Jones, When 'Force Majeure' partially restricts performance, Herbert Smith Freehills, 11 November 2013. The authors cite *Bowring & Walker Pty Ltd v Jacksons Corio Meat Packing (1965) Pty Ltd* [1972] NSWLR 227 as a "similar situation" in the Australian context.

<sup>11</sup> cf as generally concluded in M Darwin and S Jones, When 'Force Majeure' partially restricts performance, Herbert Smith Freehills, 11 November 2013.

<sup>12</sup> *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd's Rep 16 at 28 per Donaldson J.

<sup>13</sup> being first used in the Napoleonic Code.

<sup>14</sup> *Hyundai Merchant Marine Co Limited v Dark Brook Coal (Sales) Pty Limited* [2006] FCA 1324 at [61] per Kiefel J.

<sup>15</sup> *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 per Basten JA. In *Matsoukis v Priestman & Co* (1915) 1 KB 681 (the earliest English case to consider the meaning of the phrase as a stand-alone term) Bailhache J expressly did not attempt to give any definition to the words "force majeure", but nonetheless stated that he ought to give them a meaning more extensive than "act of God". In *Lebeaupin v Richard Crispin & Co* [1920] 2 KB 714 McCardie J held that a wide definition in a French legal dictionary suggested the meaning of the phrase as often employed in English contracts.

<sup>16</sup> *British Electrical & Associated Industries (Cardiff) Ltd v Patley Pressings Ltd* [1953] 1 All ER 94 per McNair J at [97].

<sup>17</sup> In *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 Basten JA approved a statement of McCardie J in *Lebeaupin v Richard Crispin & Co* [1920] 2 KB 714 at 720 to this effect, sounding particular caution where the words "force majeure" appear only in the clause's heading. In *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 the High Court overturned the New South Wales Court of Appeal decision but without consideration of the force majeure point.

<sup>18</sup> *Sonat Offshore SA v Amerada Hess Development Ltd* [1988] 1 Lloyd's Rep 145

<sup>19</sup> See eg *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors* [2009] QCA 262.

<sup>20</sup> See section 4.2 (**Interpretation of force majeure clauses**).

<sup>21</sup> As stated and restated repeatedly by the High Court, most recently in *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 per French CJ, Hayne, Crennan and Kiefel JJ.

<sup>22</sup> Three recent Queensland Court of Appeal decisions support this proposition: *Callide Power Management Pty Ltd v Callide Coalfields (Sales) Pty Ltd* [2008] QCA 182; *AGL Sales (Qld) Pty Ltd v Dawson Sales Pty Ltd & Ors* [2009] QCA 262;

and *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QCA 128.

<sup>23</sup> cf *SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Ltd Inc* [2005] EWHC 2528 in which Clarke J stated that a force majeure clause was "an exceptions clause which is to be construed strictly". However, even accepting that force majeure clauses are exclusion clauses, such clauses are not construed strictly as a matter of course in Australia: see *Darlington Futures Ltd v Delco Australia Pty Ltd* [1986] HCA 82. The three Queensland Court of Appeal cases referred to in the note above, do not mention the concepts of contra proferentem construction or strict construction when considering the interpretation of exclusion clauses.

<sup>24</sup> *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 at [48] referred to with apparent approval in *Ausgrid v Redbank Project Pty Ltd* [2013] NSWSC 1596 at [33].