

Contracts for the Next Catastrophe: Advanced Drafting Tactics

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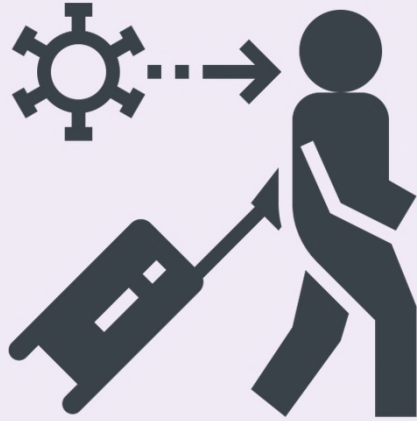
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I. RISKS TO THE SUPPLY CHAIN



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Supply Chain Risks

'supply chain':

1. A **network** between a company and its suppliers to produce and distribute a specific product or service to the final customer.
2. The **steps** it takes to get the product or service from its original state to the customer.⁽¹⁾

⁽¹⁾ www.investopedia.com

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Supply Chain Risks

- Over the past few decades, companies have focused on reducing inventories and **optimizing supply chains**. Delivery has become on-demand and production schedules are just-in-time.
- Increased **complexity and specialization** have made companies and economies across the globe more interconnected and dependent on each other.
- The **risks of disruption** due to adverse events on a global scale have never been more **apparent** and are **accelerating** in **number** and **impact**.

Supply Chain Risks

- These risks include widespread **epidemics** in regions where supply chain manufacturing is concentrated; full stop global **pandemics** such as COVID-19; significantly increasing episodes of mass flooding, heat waves, droughts, fires, Category Four and Five hurricanes, and other **extreme weather** events attributable to climate change; **geopolitical** instability including economic confrontations between major powers, such as an all-out **trade war** between China and the US; industry or infrastructure-wide ransomware or **cyberwarfare** attacks; breakdowns in the **financial** and banking system.

Supply Chain Risks

- Of the top 12 pandemics in recorded history, **two** of those [H1N1 and COVID-19] have occurred within the **last 10 years**, in addition to a number of recent large scale epidemics such as SARS-CoV and MERS-CoV.
- The **past five years** have been the **hottest** on record globally in the **last 100** years.

Who Bears the Risk of Disruption?

In the case of supply chains and the production of goods and services generally, the new standard will be:

- **More disruption.**
- **Longer and higher-impact disruption.**
- **Fewer sources of supply.**

In the context of contracts for products and services, the question is a simple one: **Which party bears the risk of a force majeure or other existential or unexpected event?**

II. FORCE MAJEURE PRINCIPLES

Force Majeure Principles

- The legal principle of **force majeure** ("greater or important force") can permit a party impacted by a force majeure event to **delay** or **excuse** contractual obligations that are prevented by the event.⁽²⁾
- These extreme events are known as "**force majeure events**" and commonly include floods, fires, earthquakes, and other acts of God, terrorism, wars, strikes and lockouts, governmental actions and regulations, and shortages of power, infrastructure or transportation.

(2) Restatement of Contracts 2d, § 261; U.C.C. § 2-615. It may also be worth noting that "le majeur" also means the middle finger in French.

Force Majeure Principles

- **Force majeure** is rooted in three universal theories of contract law which state that performance may be excused if, **due to a supervening event**:
 - **Doctrine of Impossibility**: Performance is made actually or legally **impossible**. The thing cannot be done.
 - **Frustration of Purpose**: The thing can be done but the **reason** for doing so no longer exists. The underlying purpose of the contract cannot be achieved and neither party is at fault.

Force Majeure Principles

- **Doctrine of Impracticability**: Performance is possible and the purpose can be fulfilled, but doing so has become **economically senseless**.⁽³⁾

(3) P.J.M. Declercq, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability, 15 J.L. & Com. 213, 215 (1995).

Force Majeure Principles

- **Examples:**

- **Impossibility:** An earthquake destroys a manufacturing facility, making it impossible for the seller to install new industrial machines in the building.
- **Frustration of Purpose:** Since the manufacturing facility has been destroyed, the essential purpose for building new worker dormitories for that facility has been negated.
- **Impracticability:** A large chemical spill caused by the earthquake contaminates the property, making it cost-prohibitive and impracticable to remediate and construct a new facility at that site.

Force Majeure Principles

- These exceptions to performance are based on the occurrence of events, the **non-occurrence** of which was a "**basic assumption** on which the contract was made".⁽⁴⁾
- The non-performing party must show that the **supervening event** was (i) not due to its own fault, and (ii) could not have been foreseen or guarded against in the contract.⁽⁵⁾

(4) Restatement 2d of Contracts, Chapter 11, § Scope

(5) *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 902 (N.Y. 1987).

Force Majeure Principles

- **Economic Loss:** Economic loss or hardship is **not** sufficient to invoke the defense of impossibility⁽⁶⁾ or frustration⁽⁷⁾, but can be sufficient for impracticability if it is severe⁽⁸⁾.

(6) See, e.g., *407 E. 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (N.Y. 1968) ("financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy", is insufficient to excuse performance).

(7) See, e.g., *A + E Television Networks, LLC v. Wish Factory Inc.*, 2016 WL 8136110, at *12 (S.D.N.Y., March 11, 2016).

(8) See, e.g., *Aluminum Co. of Am. v. Essex Grp., Inc.*, 499 F. Supp. 53, 56 (W.D. Pa. 1980) (a \$60 million unforeseen loss to seller was sufficient to invoke a commercial impracticability defense).

Force Majeure Principles

- **Gap Fillers:** These doctrines are generally held to be "gap fillers" to be used **in the absence** of unambiguous contract language [including force majeure clauses] that allocates the risk of an event as between the parties.⁽⁹⁾
- **Contrary Language:** These rules excusing performance are applicable "**unless the language or the circumstances indicate the contrary**".⁽¹⁰⁾

(9) See, e.g., *R & B Falcon Corp. v. American Exploration Co.*, 154 F. Supp. 2d 969 (S.D. Tex. 2001); *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F. Supp. 850 (N.D. Ill. 1990). This is especially the case in negotiated clauses as opposed to mere boilerplate.

(10) Restatement 2d of Contracts, § 261, comment (c), § 265, comment (b).

Force Majeure Principles

Statutory Versions: UCC Section 2-615

- Non-performance by seller **excused** if performance has been made **impracticable** by (i) an **unforeseen** event not contemplated by the parties that alters the essential nature of the performance, or (ii) compliance with government regulations.
- Where **partial performance** is possible, the seller must allocate the goods in a **fair and reasonable manner** across its customers;
- This rule is overridden 'so far as seller may have **assumed a greater [contractual] obligation.**'⁽¹¹⁾

(11) U.C.C. § 2-615.

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Force Majeure Principles

Statutory Versions: Other State Codes

- A number of states have other codified versions of the default common law principles.
- For example, California Civil Code Section 1511(2) provides that performance is excused "when it is prevented or delayed by **an irresistible, superhuman cause, or by the act of public enemies** of this state or of the United States, unless the parties have expressly **agreed to the contrary.**"⁽¹²⁾

(12) Cal. Civ. Code § 1511(2)

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Contracting Against Force Majeure

- Parties may contract to override or supplement the common law or statutory rules with **force majeure clauses** which establish **what qualifies** as a force majeure and the **actions** required of each party if the event occurs.⁽¹³⁾
- **Force majeure clauses** allow parties to negotiate:
 - the **scope of qualifying events** and **excusable obligations**;
 - the non-performing party's **notice** and **mitigation** requirements; and
 - the **options** and **remedies** available to each party.

(13) Restatement 2d of Contracts, § 261, comment (c), 265, comment (a), *supra*.

Contracting Against Force Majeure

CORE POINT 1:

- **Common law principles** can excuse the performance of a party from its contractual obligations in the case of **supervening events** not within the contemplation of the parties.
- To counteract this outcome the relevant parties must draft and include "**contrary language**" in their contract dealing with these force majeure events.
- The entire objective is to expressly **shift the risk** of unexpected events to the intended party and to have that allocation enforced.

III. FORCE MAJEURE CLAUSE

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Indicative Clause

"Force Majeure: No party shall be liable for a failure or delay in performing any of its obligations under this Agreement to the extent that such failure or delay is due to causes beyond the reasonable control of the affected party, including but not limited to: (a) unusually severe weather or other acts of God; (b) fire, explosion or earthquake; (c) war, invasion, terrorism, riot or other civil unrest; (d) governmental laws, orders, restrictions, embargoes or blockages; (e) national or regional emergency; (f) highly infectious diseases, epidemics, pandemics; (g) injunctions, strikes, lockouts, or other industrial disturbances, (h) inability to obtain or use necessary transportation, power or infrastructure, (i) inability to obtain or use necessary products or materials, or (j) other causes whether similar or dissimilar to the foregoing ("force majeure"), provided that the affected party promptly notifies the other party of the force majeure in writing and exercises reasonable efforts to resolve such causes and resume performance as soon as possible. If such force majeure event(s) continue for more than sixty (60) calendar days in the aggregate during any 12-month period, the other party may terminate this Agreement in its sole discretion by written notice to the affected party."

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Rules of Construction

- **Force majeure** clauses are interpreted under the same rules governing any other contractual provision. Unambiguous contract language is generally enforced by the courts as written.⁽¹⁴⁾
- While this varies by state, in general US courts interpret force majeure provisions **quite narrowly**, focused on the specific express boundaries written into the contract.⁽¹⁵⁾

(14) *E.g., Buenz v. Frontline Transp. Co.*, 227 Ill. 2d 302, 308, 882 N.E.2d 525 (2008); *Vintage, LLC v. Laws Constr. Corp.*, 13 N.Y.3d 847, 849 (2009).

(15) *See, e.g., Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436, 438 (3d Dep't 2011) ("When the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect and scope of force majeure"); *Watson Labs. Inc. v. Rhone-Poulenc Rorer, Inc.*, 178 F. Supp. 2d 1099, 1111 (C.D. Cal. 2001).

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General Structure of Clause

Force majeure clauses in general have **five parts**:

- (1) **Delay or excuse** of performance if a force majeure event occurs;
- (2) A **specific list of events** that qualify as force majeure events;
- (3) **Notice** obligations;
- (4) The extent of the non-performing party's **obligation to mitigate**; and
- (5) **Remedies** of the parties if the force majeure event continues past a stated period, including **termination** rights.

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Core Factors

- **Seller is the Sole Beneficiary:** The seller is being relieved of its contractual obligations under the force majeure clause. This is the **sole** purpose of the clause.
- **No Breach:** Seller is deemed **not to have breached** the contract and is therefore **not liable for** damages. The buyer has **no claims** unless otherwise expressly provided in the FM clause clause.⁽¹⁶⁾

(16) Force majeure provisions operate as an excuse for non-performance and must be asserted as an affirmative defense. 14 Arthur L. Corbin, John E. Murray Jr., Timothy Murray & Joseph Perillo, Corbin on Contracts § 7.1.7 (2018); 30 Richard A. Lord, Williston on Contracts § 77:31 (4th Ed., 2020). As a result the affected party [the Seller in this case] generally bears the burden of proof to establish that defense, including whether the event was within its reasonable or other control as required by the contract. *E.g.*, *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 436 (Tex. App. 1993).

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Core Factors

- **Not Mutual in Fact:** These clauses are often "mutual" but **only the seller** as the breaching party usually benefits. This concept of **mutuality** is generally false and undermines the position of the buyer.
- **Too Broadly Drafted:** Most boilerplate force majeure clauses are much too broadly and ambiguously drafted from the standpoint of the buyer.
- **Buyer Not Excused from Performance:** Most boilerplate force majeure clauses are silent on the corresponding obligations of the buyer to continue to perform.

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Core Factors

- **Point of view [POV] of Buyer:** The following materials are relevant to both parties but in general address the issues from the point of view of the buyer.
- **Note** also that the seller at any point of the supply chain often is also the buyer of upstream goods and services from its suppliers in the chain. The tactics being discussed will assist the seller in dealing with those suppliers and in turn assist in avoiding disruption in its downstream performance for its buyer.

Core Factors

- * *For convenience, in these materials the contracting parties are referred to as 'seller' and 'buyer', generally in the context of the manufacturing and supply of products or raw materials in a supply chain.*

These concepts however apply equally to a service agreement where one party is obligated to perform services for the other party.

IV. NEXT CATASTROPHE DRAFTING TACTICS

Which party bears the risk of a force majeure or other existential or unexpected event?

FOUR MAIN CLASSES OF TRANSACTIONS

Drafting tactics for force majeure clauses are best understood in context. For these purposes we are using **four different classes** of transactions ranked by **degree of connectedness** between the parties:

Class 1 [Commodities]: Seller of commodity goods or materials. Buyer has choice of a broad group of other sellers. Objective: cut your losses if any issues.

Class 3 [Deal Terms]: Seller of standard interchangeable goods or materials. Buyer has choice in the market but quality or pricing or long term supply guarantees in this deal are worth protecting. Objective: Protect favorable deal terms.

FOUR CLASSES OF TRANSACTIONS

Class 7 [Product Sourcing]: Seller of necessary goods or materials in a market with limited sources or long lead times or a more complex product design or supply chain. Access or change of sellers more difficult. Objective: Continued sourcing.

Class 11 [Sole Supply of Critical Components]: Seller is the sole supplier or one of only a few suppliers of critical components or products, including patented technologies and manufacturing processes. These may include jointly developed components or products, shared trade secrets, and technology licenses between the parties. Objective: Only source.

FOUR CLASSES OF TRANSACTIONS

- These categories of transactions are not exclusive and much will depend in a particular case on other factors, generally concentrated around the concept of **leverage**.
- For example, in a Class 11 transaction, Seller may be the sole source of supply but Buyer may be its **largest customer** by far or may be deemed essential to **validate** Seller's technologies in the market, giving Buyer substantial leverage in the deal.

(1) FORCE MAJEURE OR NOT?

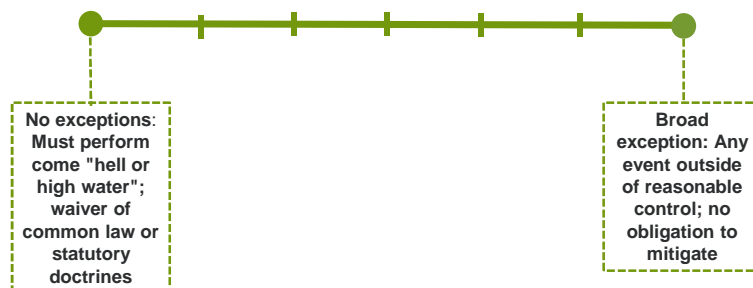
The first issue is **whether to permit** any force majeure exception to the performance of Seller:

- The default rule in US law is that contracting parties are **strictly obligated** to perform under the contract, and failure to do so is a breach of contract.⁽¹⁷⁾
- **Exceptions** to this strict obligation either must be stated in the contract itself or be subject to a judicial or statutory exception **not contradicted** by the language of the contract.

(17) "As [Oliver Wendell] Holmes pointed out a century ago, you can bind yourself to perform acts over which you have no control." *Field Container Corp. v. I.C.C.*, 712 F.2d 250, 257 (7th Cir. 1983). See Restatement of Contracts 2d, Chapter 11, § Scope, *supra*.

(1) FORCE MAJEURE OR NOT?

- In the context of a force majeure, the obligation of a party to perform can fall along the following **spectrum**:



(1) HIGH OR HIGH WATER

Hell or High Water:

- **No Outs:** Buyer may be able to negotiate language which holds Seller responsible for **any failure or delay in performance**, including upon the occurrence of any force majeure event. These are known as "**hell or high water**" clauses.
- **Factors:** Whether Buyer will do so depends on the **transaction level** involved and what **relative leverage** Buyer has.⁽¹⁸⁾

(18) For example, if Buyer can freely move to other suppliers [Classes 1 and 3] this type of clause may not be necessary. It may be considered for more critical components [Classes 7 and 11] depending on the status of the Seller.

(1) HIGH OR HIGH WATER

▪ Hell or High Water Example:

"No event of force majeure, nor any other occurrence of any nature whatsoever, shall excuse Seller from performance of all of its obligations hereunder, and all risks (including risks of impossibility, frustration of purpose, and impracticability) are hereby expressly assumed by Seller. Upon the occurrence of event which causes any delay or failure of performance by Seller for any reason, Seller shall be deemed liable and in breach of its obligations under this Agreement."

(1) HELL OR HIGH WATER

- There are no published decisions addressing the enforceability of "**hell or high water**" provisions per se in the general force majeure context.
- US courts however do permit these type of clauses for certain contracts, including government contracting and leasing agreements, even where performance is deemed impossible.⁽¹⁹⁾

(19) See, e.g., 30 Williston on Contracts § 77:54 (4th ed.); *RNJ Interstate Corp. v. United States*, 181 F.3d 1329, 1331 (Fed. Cir. 1999). In government contracting these provisions are known as "Permits and Responsibility Clauses".

(1) HELL OR HIGH WATER

- It is essential in such cases that an unconditional assumption of risk provision be expressly set forth in the contract to be effective.
- Provided the language is "**plain, unequivocal, and unqualified**", a party **can assume** the very risk that makes performance impossible, at least in the absence of manifest unreasonableness, bad faith or unconscionability.⁽²⁰⁾

(20) Note that force majeure clauses in sales of goods are limited by U.C.C. Sections 1-102(c), 1-203 and 2-302, which prohibit agreements that are manifestly unreasonable, in bad faith, or unconscionable. In the absence of such conditions, however, the cited U.C.C. § 2-615 permits the Seller to "[assume] a greater [contractual] obligation" and override the statutory protection against commercial impracticability.

(1) HELL OR HIGH WATER

- **It is not sufficient to simply omit having a force majeure clause in the contract.**
- Where there is no force majeure clause in the contract and no express language requiring strict performance and a clear assumption of risks, the default **common law doctrines** of impossibility, frustration of purpose or impracticability [or similar statutory rules] can be applicable to excuse the affected party.

(1) EXPRESS WAIVER

- **Waiver:** A similar or combined approach is an **express waiver** in the contract of the applicable common law and statutory doctrines:
- **For example:**

"No event of force majeure, nor any other occurrence of any kind or nature whatsoever whether foreseeable or unforeseeable, shall excuse Seller from performance of its obligations hereunder. All doctrines of force majeure, whether statutory or otherwise, including without limitation, impossibility, frustration of purpose, commercial or other impracticability, or any other similar rights arising applicable law, are hereby expressly and irrevocably waived."

(1) EXPRESS WAIVER

- In this context the courts have held that a seller is **entitled to use its bargaining power** to contract out of liability by extracting a force majeure clause. An express waiver by the Seller of force majeure doctrines otherwise excusing its liability and contracting into liability should be equally enforceable if willingly given.⁽²¹⁾

(21) See generally *InterPetrol Bermuda Ltd.*, 719 F.2d 992, 1000 (9th Cir. 1983); *Jon-T Chemicals, Inc. v. Freeport Chemical Company*, 704 F.2d 1412 (5th Cir. 1983) (parties retain the utmost freedom to anticipate business risks and allocate them accordingly). Note also that courts moreover rarely have public policy concerns surrounding force majeure clauses. See *Brunner & O'Connor on Construction Law* § 19:60 (2020) ("Because force majeure clauses do not exculpate a party for bad behavior but only from bad luck, they rarely invoke public policy concerns or judicial ire").

(2) FORCE MAJEURE - Scoping Issues

- The first two parts of the force majeure clause are
 - (1) scope of the **excuse or deferral** of the obligation and
 - (2) scope of the **force majeure events** that trigger the clause.
- The **excuse or deferral clause** breaks down into the following core components: (i) **excuse**⁽²²⁾ **versus deferral** of performance; (ii) **causation**; (iii) conditions of **control**; (iv) categorical **exceptions** from force majeure events; (v) **listed** force majeure events.

(22) For convenience both are referred to as "excuse" unless otherwise indicated.

(2) FORCE MAJEURE - Excuse

(i) Excuse versus Deferral:

Examples:

"**No party shall be liable** for a failure or delay in performing any of its obligations under this Agreement..."

"A party shall be **temporarily relieved** in the performance of its obligations hereunder if such performance is prevented or delayed..."

"A party will **temporarily excused for any default or delay or failure** in performance to the extent the delay or failure is caused by ..."

(2) FORCE MAJEURE - Excuse

(i) Excuse versus Deferral:

- Force majeure clauses take one of two approaches: the party is either excused from **liability** due to the event or is temporarily relieved or excused from its performance **obligations**.
- In most cases this may not be a material distinction [i.e., "temporarily excused"]. However an excuse from liability is less precise and more ambiguous than temporary relief if the parties intend that the performance occur at a **later time**.

(2) FORCE MAJEURE - Excuse

(i) Excuse versus Deferral:

- The clause also may need to be coordinated with the **expiration term of the contract**.
- If performance is critical to the Buyer [for example in a Class 11 transaction], the term of the contract may need to be **extended** or **post-termination performance** be required in order to avoid a complete excuse of performance by the Seller due to timing out during the force majeure period.⁽²³⁾

(23) See *Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 31 N.E.3d 80 (N.Y. 2015) (suspension of performance and rights due to governmental order under force majeure clause did not extend term of lease).

(2) FORCE MAJEURE - Excuse

(ii) Causation:

- There needs to be a **direct causal link** between the force majeure event and the Sellers' nonperformance.⁽²⁴⁾
- For example:
 - Indirect Causation: A company cancels a conference following a terrorist attack citing a general fear of flying. The cancellation was not directly caused by the terrorist attack negating the qualifying force majeure event.⁽²⁵⁾

(24) See *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, *Gulf Oil Corp. v. F.E.R.C.*, 706 F.2d 444, 453 (3d. Cir. 1983) (non-performing party had to "establish that the pipe damage and mechanical breakdowns in issue would not have occurred if there had not been a hurricane."

(25) *OWBR LLC v. Clear Channel Communications Inc.*, 266 F. Supp. 2d 1214 (D. Haw. 2003).

(2) FORCE MAJEURE - Excuse

(ii) Causation:

- Negligence or Fault: A flood destroys a warehouse. The owner of the warehouse was negligent in failing to take proper precautions against flooding. The negligence would negate the qualifying force majeure event.⁽²⁶⁾

(26) *TGI Office Automation v. Nat'l Electronic Transit Corp.*, United States District Court for the Eastern District of New York, Sep. 14, 2015 (13-CV-3404)).

(2) FORCE MAJEURE - Excuse

(ii) Causation:

- **"caused by [the event]"**: This language requires **direct causation** of the delay by the force majeure event. Be cautious of broader terminology such as **"arising out of"**, **"related to"** or **"in connection with"** the force majeure event, which can significantly undermine the causation link and expand the scope of the clause.⁽²⁷⁾

(27) See generally *Coregis Ins. Co. v. American Health Found.*, 241 F.3d 123, 128-129 (2d Cir. 2001); *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999); *MAK Mktg. v. Kalapos*, 620 F. Supp. 2d 295, 306 (D. Conn. 2009).

(2) FORCE MAJEURE - Excuse

(ii) Causation:

- Consider narrowing the causation language further to cases where seller's non-performance was:
 - caused **directly** by the inciting force majeure event; and
 - at **no fault or negligence** of the seller.
- Example: "Any delay or failure of Seller to perform its obligations under this Agreement will be temporarily excused if and to the extent that the delay or failure was caused **directly** by a Force Majeure Event without Seller's **fault or negligence**."

(2) FORCE MAJEURE - Excuse

(ii) Causation:

- **"to the extent"**: This is limiting language intended to require the Seller to continue performance to the extent not impeded by the force majeure.⁽²⁸⁾ This represents a **more limited** risk reallocation to Buyer
- Example: Seller excused from performance 'solely to the extent [made necessary] [prevented] by such Force Majeure Event.'

(28) *Aquila v. C.W. Mining*, 545 F.3d 1258, 1264 (10th Cir. 2008)(performance excused per the contract only "to the extent" made necessary by the force majeure).

(2) FORCE MAJEURE - Excuse

(iii) Outside Control of Seller:

- **Example:**

"due to causes beyond the **reasonable control** of the affected party..."

- **Boilerplate:** This is very common boilerplate language in force majeure clauses, but there is no definitive standard for the term "**reasonable**" and its interpretation is entirely dependent on the particular facts of the case.

(2) FORCE MAJEURE - Excuse

(iii) Outside Control of Seller:

- "**Outside of the control**" of a party is generally interpreted to mean a sudden and unforeseeable event, not circumstances where a party could have taken steps to avoid the force majeure event and protect itself from risk.⁽²⁹⁾

(29) See, e.g., 30 Williston on Contracts § 77:31 (noting that a party seeking the benefits of a force majeure clause must show that performance is impossible "in spite of skill, diligence, and good faith" to continue to perform); *Butler v. Nepple*, 54 Cal.2d 589, 599 (1960) (requiring a party invoking force majeure to demonstrate that they made 'sufficient' or 'reasonable' efforts to avoid the consequences of a force majeure event, including (for example) seeking an alternate supplier or pursuing other methods of performance); *Heritage Commons Partners v. Vill. of Summit*, 730 F. Supp. 821, 824 (N.D. Ill. 1990) (explaining that parties have a duty "to take reasonable measures to prevent conditions constituting force majeure from arising, and to cure them if they do arise").

(2) FORCE MAJEURE - Excuse

(iii) Outside Control of Seller:

- If a buyer, consider whether a **more stringent** objective standard should be used.
- This could include a **higher level of control or effort** or an express requirement that the relevant event could not have been **foreseeable**.

(2) FORCE MAJEURE - Excuse

(iii) Outside Control of Seller:

- Examples - More stringent language:

"beyond the control of [Seller] with the exercise of [due diligence][best efforts] and without the fault or negligence of [Seller)]..."

"beyond the reasonable control of [Seller], and which by the exercise of due foresight could not have avoided, and by the exercise of due diligence could not have been overcome."

(2) FORCE MAJEURE - Excuse

(iii) Outside Control of Seller:

- The **order and location** of the **outside of control clause** can be important when **specific classes** of force majeure events are listed [below].
- There has been extensive litigation as to whether the outside of control requirement (i) **covers all listed and general events** or (ii) whether a specific **listed event** is deemed **per se** to be a force majeure trigger whether or not it was within the reasonable control of the affected party.⁽³¹⁾

(31) *E.g., Watson Laboratories, Inc. v. Rhone-Poulenc Rorer*, 178 F. Supp. 2d 1099, 1110 (C.D. Cal. 2001)(US courts tend to interpret the reasonable control language to apply to all events but proper drafting can be binding if unambiguous); *Nissho-Iwai Co. v. Occidental Crude Sales, Inc.*, 729 F.2d 1530, 1539-40 (5th Cir. 1984).

(2) FORCE MAJEURE - Excuse

(iii) Outside Control of Seller: Examples:

- **Control requirement for all events:** "The obligations of a party are excused for any failure or delay in performance which is (i) beyond the reasonable control of such party and (ii) caused by: _____ and _____; or any other cause beyond such reasonable control of such party."
- **More limited control requirement:** "The obligations of a party are excused for any failure or delay in performance caused by: _____ and _____; or by any other cause which is beyond the reasonable control of such party."

(2) FORCE MAJEURE - Excuse

(iv) Excluded Classes of Events:

Buyer can and should also **expressly exclude** certain classes of events from force majeure. These could include one or more of the following:

- any payment obligations of Seller;
- indemnification and defense obligations of Seller;
- financial hardship generally;
- changes in cost or availability of materials, components or services;

(2) FORCE MAJEURE - Excuse

(iv) Excluded Classes of Events:

- any changes in market conditions;
- Seller's contract disputes or any acts or omissions of Seller's upstream suppliers.

Example: "Notwithstanding any contrary provision hereof, Buyer and Seller acknowledge and agree that none of the following events or conditions will excuse or delay the performance by Seller of any of its obligations under this Agreement or be deemed to be a force majeure event for any purpose:

_____."

(2) FORCE MAJEURE - FM Events

(v) Express Force Majeure Events:

- The force majeure clause will either
 - (i) contain an unrestricted **general events** clause, or
 - (ii) will list a finite **series of specific classes of events** intended to qualify as force majeure events,

subject to any express limitations in the clause such as (i) control of the affected party, (ii) due diligence and (iii) foreseeability.

(2) FORCE MAJEURE - FM Events

Unrestricted Clause: Defines force majeure events using broad language relating to **causation, unforeseeability and unavailability:**

- generally **pro seller**
- similar application as the default rules
- offers greater flexibility, but may invite unpredictable judicial intervention

Finite List: Defines force majeure events more precisely using a **set list of specific events**.

- generally **pro buyer**
- more clarity, but narrower application
- in practice often has catch-all language.

(2) FORCE MAJEURE - FM Events

(v) Unrestricted Clause Example:

"A 'Force Majeure Event' shall be defined as any event which is not with the reasonable control of Seller [and which, by the exercise of due diligence of Seller, could not have been prevented or is unable to be overcome]."

(2) FORCE MAJEURE - FM Events

(v) Finite List Clauses:

- Listed events can be industry, geographic and context specific, but are usually selected from the following categories:
 - weather-related (floods, hail, tornadoes, hurricanes);
 - naturally-occurring non-weather-related (volcanoes, tidal waves, pandemics, epidemic diseases, pest outbreaks, and earthquakes);
 - governmental and regulatory acts (regulations; sanctions, embargoes, orders, court actions, expropriation, confiscation and nationalization);

(2) FORCE MAJEURE - FM Events

(v) Finite List Clauses:

- acts of war and other violent conflict (acts of war, blockade, riots, acts of terrorism);
- combustion (fire, explosion, implosion);
- interruption of trade or society (interruption of transportation or other infrastructure, labor strikes, shortage of labor, equipment, components or materials, power shortage).

(2) FORCE MAJEURE - Catch-All

- If the specific events listed in the clause are sufficiently exhaustive, **the majority rule** in the US is that any class of events omitted from the list is outside the scope of the contract and is **not** a force majeure event.⁽³²⁾
- As a result, sellers or other probable affected parties often demand the addition of a **catch-all** phase in an effort to **expand the scope** to include relief for other unavoidable and unpredictable events.

(32) See, e.g., *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902–03 (1987) ("only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused"); *In re Cablevision Consumer Litigation*, 864 F. Supp. 2d 258 (E.D. N.Y. 2012); *Tug Blarney, LLC v. Ridge Contracting, Inc.*, 14 F. Supp. 3d 1255, 1276 (D. Alaska 2014).

(2) FORCE MAJEURE - Catch-All

- **Common catch-all language** is inserted at the end of the finite events list and indicated by words such as:
 - "including [without limitation]";
 - "other events [whether similar or dissimilar] to the foregoing";
 - "other events beyond the [reasonable] control of the seller"; and
 - "acts of God"⁽³³⁾

(33) An act of God has been defined as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature, such as an earthquake, flood, or tornado, without the interference of any human agency." Black's Law Dictionary 37 (8th ed. 1999).

(2) FORCE MAJEURE - Catch-All

Catch-all Caveat 1: ejusdem generis

- A force majeure **catch-all clause** is generally subject to the legal maxim of **ejusdem generis**: that general words following a list of specific things are not given expansive meaning but are deemed to include only things of the same type, class or nature.⁽³⁴⁾
- To override this rule, parties will include the following type of language: "[specific list]; and (x) other **similar or dissimilar** events beyond the [reasonable] control of the Seller."

(34) E.g., *Kel Kim Corp. v. Central Markets, Inc.*, 70 N.Y.2d 900, 903 (N.Y. 1987), *supra*; *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176, 185 (Tex. Ct. App. 2018).

(2) FORCE MAJEURE - Catch-All

Catch-all Caveat 2: Common Law Defenses

- Another tactic is to **insert** common law defenses into the force majeure provision, essentially a non-allocation of risk:

"The parties shall be excused from any failures or delays in performance under this Agreement if such performance is impossible or commercially impracticable or in the event of a frustration of purpose, as a direct result of any [unforeseen] event or cause beyond the reasonable control of the affected party."

(2) FORCE MAJEURE - Catch-All

Catch-all Caveat 2: Common Law Defenses

- Default common law rules [impossibility; frustration of purpose; impracticability] in addition are generally held to be **gap fillers** in the absence of **contrary language** of a force majeure clause covering the matter.
- Where the applicability of the force majeure provision is unambiguous, it will generally be controlling.⁽³⁵⁾

(35) See, e.g., *Commonwealth Edison Co. v. Allied-General Nuclear Services*, 731 F. Supp. 850 (N.D. Ill. 1990); *Northern Indiana Public Service Co. v. Carbon County Coal Corp.*, 799 F.2d 265, 276 (7th Cir. 1986); Restatement of Contracts 2d, § 261, 265.

(2) FORCE MAJEURE - Catch-All

Catch-all Caveat 2: Common Law Defenses

- However to minimize the risk that these defenses would be permitted - especially frustration of purpose - the following type of clause should be considered:
- **Example:** "The foregoing force majeure provisions are intended to be exclusive and a party shall be fully liable for any other failure or delay in performance of any kind or nature notwithstanding the circumstances; and to the fullest extent not prohibited by applicable law, the parties intend that any defenses based on impossibility, frustration of purpose, impracticability or any similar doctrine be and are hereby superseded."

(2) FORCE MAJEURE - Foreseeability

Foreseeability:

- It is in the interest of affected party to **not qualify** the force majeure clause with foreseeability conditions, in order to maximize the scope of the clause.
- It is entirely possible to relieve a party by contract from supervening force majeure events whether such events were foreseeable or not.⁽³⁶⁾

(36) In re Mona Lisa at Celebration, LLC, 436 B.R. 179, 194 (Bankr. M.D. Fla. 2010). Stein v. Paradigm Mirasol, LLC, 586 F.3d 849 (11th Cir.2009).

(2) FORCE MAJEURE - Foreseeability

Foreseeability:

- In the **absence** of clear language, US courts in general:
 - Read in a foreseeability requirement when analyzing non-specific catch-all language;
 - Do not read in a foreseeability requirement when analyzing a specific list of force majeure events, on the ground that the parties have decided that such specific events are per se unforeseeable.⁽³⁷⁾

(37) See, e.g., *InterPetrof Bermuda Ltd. v. Kaiser Aluminum Int'l Corp.*, 719 F.2d 992, 1000 (9th Cir. 1983), *supra*; *In re Mona Lisa at Celebration, LLC*, 436 B.R. 179, 194 (Bankr. M.D. Fla. 2010), *supra*; *Veath v. Specialty Grains, Inc.*, 190 Ill. App. 3d 787, 797-98 (1989); *Harper v. N. Lancaster, LLC*, 132 N.E.3d 555, at *1 (2019); *Kyocera Corp v. Hemlock Semiconductor, LLC*, 886 N.W.2d 445, 451 (Mich. Ct. App., 2015); *PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 19 (5th Cir. 1990)

(2) FORCE MAJEURE - Foreseeability

Foreseeability:

- **Best Practice:** Expressly include or remove the foreseeability factor.
 - **Pro-Buyer:** require foreseeability
 - **Pro-Seller:** omit foreseeability

Key Factors

Key factors: Optionality and Speed

- A well-designed force majeure clause can provide a company the optionality and nimbleness to absorb shocks, whether as a seller or buyer:
- **Optionality:** A menu of rights and remedies from which to choose the best response under the circumstances.
- **Speed:** The means of asserting those rights and remedies quickly and unambiguously without judicial intervention (if possible).

Example: Independent Review

- **List of Force Majeure Events:** When preparing the set of force majeure events, the challenge is to define qualifying events with enough specificity to anticipate how the provision will be applied by the courts, while providing enough flexibility to cover an unexpected or new type of event. The scope of the force majeure events therefore is **inherently subject to challenge**.
- **Independent Review:** Parties should consider including an **alternative dispute resolution mechanism** in which an agreed upon independent third party can finally determine whether or not an event qualifies.

Example: Independent Review

Example:

"Any controversy or claim regarding whether any event or occurrence comes within the definition of 'Force Majeure Event' hereunder shall be settled by expedited arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Time is of the essence for any arbitration under this section and arbitration hearings shall take place within [30] days of filing and awards rendered within [60] days. Arbitrator(s) shall agree to these limits prior to accepting appointment."

(3) NOTICE

- The contract should state **the manner and timing in which the seller must deliver notice to buyer** of the occurrence of a qualifying force majeure event.
- Seller usually must:
 - give written notice of the qualifying force majeure event within a specified time [number of days, "reasonable time," "promptly"]; and
 - describe in detail the cause and nature of the claimed force majeure event and the period of time the occurrence is expected to continue.

(3) NOTICE - Example

Example:

'seller shall give written notice to the other party within [_____] calendar days of the occurrence of a Force Majeure Event, stating the nature and extent of the event, detailing its effects on Seller's performance, and providing a good faith estimate of the period of time the occurrence is expected to continue. For the avoidance of doubt, Seller acknowledges and agrees that in the absence of delivery of the foregoing written notice to Buyer, in no event shall Buyer be deemed to have actual or constructive knowledge of the occurrence of a Force Majeure Event, or the effects of such event on Seller's obligations hereunder."

(4) MITIGATION

Obligation to Mitigate:

- Even when an event qualifies as a "force majeure event", the seller still should be required to take steps to mitigate its non-performance.
- **Timing:** Condition precedent. Seller must **first** comply with its mitigation obligations in order to be deemed not liable and not in breach for non-performance under the contract.
- **Affirmative Covenant:** This obligation therefore acts like an **affirmative covenant** of seller. If an unavoidable force majeure event occurs, seller has an affirmative covenant to mitigate.

(4) MITIGATION

- **General Rule: Delay without liability.** Unless the contract provides otherwise:
- The force majeure clause will suspend the Seller's performance for as long as a force majeure event prevents performance.
- Seller is not liable for:
 - Additional costs incurred by Buyer as a result of the delay, or
 - any liquidated or other damages for the excused or delayed non-performance (unless the contract provides otherwise).

(4) MITIGATION: Precautionary and Post-facto Measures

- The force majeure clause should expressly require the Seller to undertake mitigation efforts to:
 - **take precautionary measures to minimize the effects** of an otherwise unavoidable event⁽³⁸⁾; and
 - **make efforts to end the delay in its performance and resume performance after the event has occurred.**

(38) *McDevitt & Street Co. v. Marriott Corp.*, 713 F. Supp. 906 (E.D. Va. 1989), order aff'd in part, rev'd in part on other grounds, 911 F.2d 723 (4th Cir. 1990) (court denied a contractor's claim for an extension of time because the contractor failed to take precautionary actions that could have prevented weather damage caused by a hurricane.)

(4) MITIGATION: General Standards of Effort

- The standard for the extent and type of mitigation measures varies but is most commonly generic.
- Typical qualifying language may describe the efforts seller must take as: "all necessary", "diligent", "best", "reasonable", "commercially reasonable"
- **Example:**
"Seller shall use all [necessary/best/ commercially reasonable] efforts to end the failure or delay [as soon as reasonable/practicable] and ensure the effects of the Force Majeure Event are minimized."

(4) MITIGATION: General Standards

- US courts in their interpretation of these modifiers are **inconsistent** and frequently so **fact specific** as to reveal no clear pattern of any being obviously pro-buyer or pro-seller. ⁽³⁹⁾
- Note while that "**best efforts**" clauses are usually enforceable, a number of jurisdictions, including Texas and Illinois, have held such clauses to be illusory and unenforceable unless subject to express measurable performance guidelines.

(39) E.g., *In re IBP, Inc. S'holders Litig.*, 789 A.2d 14 (Del. Ch. 2001) (no consensus established by the courts).

(40) For Texas, see, e.g., *Ehringer v. McData Servs. Corp.*, 646 F.3d 321, 327 (5th Cir. 2011); for Illinois, see, e.g., *Gentieu v. Tony Stone Images/Chicago, Inc.*, 255 F. Supp. 2d 838, 867 (N.D. Ill. 2003). Note that in such instances the courts discard the clause entirely, rather substituting another standard of performance. In this regard the law in New York is also still evolving. See, e.g., *Hard Rock Cafe Int'l, (USA), Inc. v. Hard Rock Hotel Holdings, LLC*, 2011 U.S. Dist. LEXIS 76897 (S.D.N.Y. July 11, 2011).

(4) MITIGATION: Core Point

Core Point 2:

- Parties - and particularly buyers - should **be wary of general or "naked" mitigation standards**. They can be ambiguous by design and invite certain litigation and uncertain outcomes if and when a force majeure event occurs.
- It is essential for buyers and other parties on the receiving end of a force majeure provision - especially in connection with Class 7 and Class 11 transactions involving critical components and materials - to engage in a detailed consideration and drafting protocols to maximize its position.

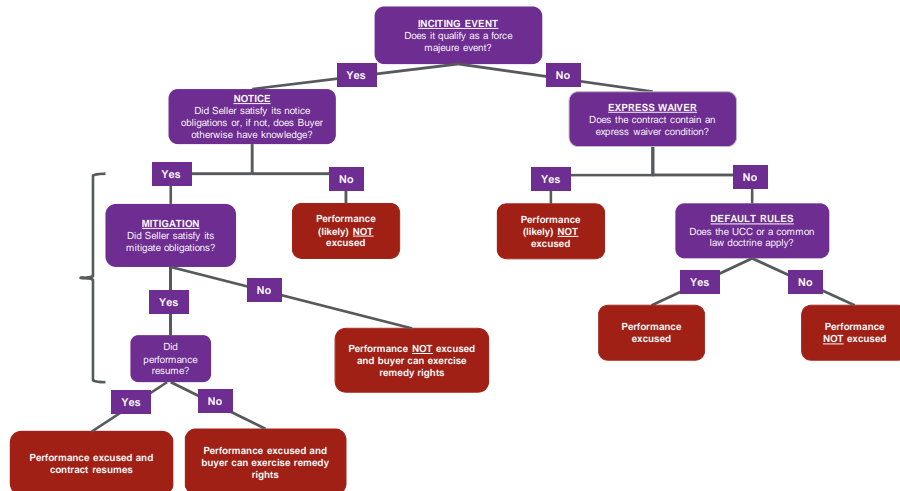
(4) MITIGATION: Core Point

Core Point 2:

This could include provisions that:

- require the non-performing party [Seller] to pursue **secondary and tertiary** means of fulfilling its obligations under the contract.
- provide the Buyer with remedies which allow it to immediately cover and even to obtain the capabilities to perform on its own behalf the non-performing party's [Seller] obligations.

General Flowchart of Clause



大成 DENTONS

(4) MITIGATION - Period

- During the **mitigation period**, three possible outcomes are possible:
 - (1) Seller will satisfy its mitigation obligations and end the delay in a timely matter (in which case Seller is not liable for breach and the contract can proceed as contemplated);
 - (2) Seller will satisfy its mitigation obligation, but is unable to end the delay (in which case Seller is still not liable for breach but buyer can exercise remedy rights);
 - (3) Seller will fail to satisfy its mitigation obligation and end the delay (in which case Seller is liable for breach and buyer can exercise remedy rights).

大成 DENTONS

(4) MITIGATION - Period

- At T_0 (the time at which the force majeure event occurs and performance is first delayed) Buyer cannot know which of the four scenarios will come to pass.
- **All of the risk at T_0 sits with the Buyer.**
A force majeure has occurred; performance is delayed; Buyer does not yet know if Seller will be able to resume or if Seller will be liable for its non-performance.
- Therefore buyer must protect itself against multiple possible eventualities. **To do so, Buyer should draft the clause to have certain rights which onset at T_0 .**

(4) MITIGATION - Additional Rights of Buyer

- For example, at T_0 , the contract should provide for:
 - **Suspension of all or certain of Buyer obligations** under the contract, including in particular any purchase or requirements obligations.
 - **Suspension of any and any exclusive dealing or non-competition** or similar restrictions to which Buyer may be subject under the contract.
 - The right of Buyer to **cover in the market**, such that if buyer can fill its open purchase orders before seller, buyer can cancel any open purchase orders without penalty.

(4) MITIGATION - Additional Rights of Buyer

Additional Buyer Rights:

- Depending on the type of transaction between Seller and Buyer, the Buyer should consider **additional express rights** as necessary to minimize any damages from the force majeure and maximize its freedom to operate.
- The following are a nonexclusive list of possible options to be considered in appropriate circumstances:

(4) MITIGATION - Additional Rights of Buyer

Supply Chain Sourcing by Seller:

- Seller will be required to purchase substitute component and raw material from alternative suppliers at the Buyer prices required under the contract.
- **Example:**
"During the period of any Force Majeure Event, Buyer may require Seller to provide goods from other sources in quality, quantities and at a time requested by Buyer and at the prices paid by Buyer under this Agreement."

(4) MITIGATION - Additional Rights of Buyer

Seller Reimbursement:

- Seller will be required to reimburse Buyer for its purchase of substitute component and raw material from alternative suppliers at pricing and costs that are higher than the Buyer prices in the contract.

[Example to follow]

(4) MITIGATION - Additional Rights of Buyer

▪ **Example:**

"During the period of any Force Majeure Event, Buyer may purchase the Components from other sources without liability to Seller, and Seller shall reimburse Buyer for all [reasonable] additional costs and expenses incurred by Buyer in obtaining such substitute [goods/services], including but not limited to any pricing differentials and costs of redesign and tooling and other incidental costs, [provided that the aggregate maximum reimbursable amount shall not exceed \$[____]] or [maximum percentage about Buyer pricing]. "

(4) MITIGATION - Additional Rights of Buyer

Business Continuity Plan:

- Seller shall be required to enter into and comply with a **business continuity and/or disaster recovery (BC/DR) plan** that is acceptable to Buyer.
- **Example:** "Upon the occurrence of any Force Majeure Event, Seller shall use all [necessary/best/reasonable] efforts to end the failure or delay [as soon as reasonable/practicable] and ensure the effects of the Force Majeure Event are minimized, including full compliance with and initiation of the procedures of the business continuity and disaster recovery plan set forth on Exhibit A."

(4) MITIGATION - Additional Rights of Buyer

- **BC/DR plans** address **how goods and services may be provided** to the buyer in the case of a force majeure event. These plans may address any number of issues in detail, including for example:
 - **Coverage:** If seller's facilities are impacted, must it turn to backup, or alternative third party, facilities for manufacturing, procurement, assembly, storage and warehousing activities? Is it required to replace tooling and equipment necessary for the manufacture of the product?

(4) MITIGATION - Additional Rights of Buyer

- Workarounds: If possible, must workloads be shifted from an impacted region to another geographical region; must the sequencing of the job be altered to avoid delay?

(4) MITIGATION - Step-In Rights - Manufacturing

Step-In Manufacturing Rights: Right of Buyer to **step-in** and **control** the **manufacturing and supply functions** of Seller products in the event of a **force majeure** or **other triggering event**. The following is indicative only of this type of clause:

- Triggering events could include for example an epidemic failure rate [high percentage of defective components] or the intentional breach of Seller. The right would be **immediately applicable** upon the trigger and exercised by the Buyer upon notice.

(4) MITIGATION - Step-In Rights - Manufacturing

- Seller would be required to **disclose** and **deliver** to Buyer and its subcontractors the **designs, processes, specifications, tooling** and **materials** used by Seller and necessary to manufacture and supply the applicable product or products.
- The manufacturing and supply functions would be performed **directly** by Buyer or its affiliates or third party **subcontractors**.

(4) MITIGATION - Step-In Rights - Manufacturing

- Seller would grant Buyer and its subcontractors a **nonexclusive intellectual property license**, effective as of the triggering event:
 - to **use the designs, processes, specifications, tooling and materials** of Seller and other IP rights to manufacture or have made, sell and distribute the products; and
 - to **incorporate** the manufactured products as components into Buyer's products for later sale or distribution.

(4) MITIGATION - Step-In Rights - Manufacturing

- The **term** of the manufacturing step-in rights and license could be for the **period of the force majeure** or triggering event plus a reasonable additional transition period, or could continue for the **remaining term** of the contract.
- The IP license would include a right of sublicense and would either be **royalty-free** or at a **negotiated rate** [subject to offset for any Buyer claims].

(4) MITIGATION - Step-In Rights - Manufacturing

- All necessary designs, specifications and other IP for the products could be placed into a **third party escrow** and updated to permit Buyer access upon the triggering event.
- The use of the Seller IP by the Buyer or its subcontractors would be subject to standard **confidentiality** restrictions.
- Buyer or its subcontractor also would have the right to **purchase raw materials and other parts inventories** held by Seller at a price to be determined.

(4) MITIGATION - Step-In Rights - Manufacturing

- **Seller personnel** also could be required to provide a reasonable level of **technical consulting support** to Buyer and its subcontractors for a stated time period following trigger.
- Buyer would have the additional right to directly access **subcontractors** and **third party suppliers** of Seller to perform the manufacturing and supply functions for the products. [See Step-In Rights - Upstream Suppliers, below]

(4) MITIGATION - Step-In Rights - Manufacturing

- The Buyer also could have the **right of termination** of the contract with survival of the manufacturing step-in rights and license for a stated time period.

(4) MITIGATION - Step-In Rights - Upstream Suppliers

Step-In Supplier Rights: Right of Buyer to **access critical components and materials** from **upstream suppliers** of **Seller** in the event of force majeure or other triggering event.

The following is indicative only of this type of clause:

- Buyer would have the **direct right to purchase** critical components and materials ("components") from **upstream suppliers** and subcontractors of Seller.

(4) MITIGATION - Step-In Rights - Upstream Suppliers

- This right could be for **components and materials** in general, or only for those made by a limited number or even a single third party supplier. This also would include components **specifically designed** for Buyer.
- Seller would **disclose in writing** to Buyer the identity and all relevant information concerning each supplier or subcontractor supplying the relevant components to Seller for use in manufacturing Buyer products, to be updated regularly.

(4) MITIGATION - Step-In Rights - Upstream Suppliers

- Seller would also provide Buyer with **copies of all supply agreements** and exhibits including pricing, as updated from time to time.
- The **supply agreement** between Seller and its upstream supplier or subcontractor would require the following:
 - (i) All supply agreements would need to be in writing.
 - (ii) Buyer would be a third party beneficiary of the supply agreement with the right but not the obligation to directly enforce such terms including the right of purchase the components directly from the supplier or subcontractor.

(4) MITIGATION - Efficient Breach

Efficient Breach: Under common law a contract party has the unilateral power to breach an agreement in exchange for its liability for damages to the other party (an "**efficient**" or "**economic**" breach). In situations where the scope of the force majeure clause may not excuse the Seller, efficient breach may be an option for the Seller.

- Carve-out **intentional breach** of contract and any **breach of the force majeure clause** by the Seller from any **limitation of liability** clause, including the **consequential** damages and **lost profits** exclusions, which would then subject the breaching Seller to unlimited damages.

(4) MITIGATION - Efficient Breach

Efficient Breach:

- Include intentional breach and breach of the force majeure clause in the **indemnification and defense** provisions of the contract, to require Seller to fund and pay for any downstream third party claims arising from the breach.
- Depending on the positioning of the Buyer, Buyer may consider broader indemnification and defense provisions for any **third party claims** against Buyer caused by the Seller's **force majeure**, even if without fault, as pure risk allocation as between the parties.

(5) REMEDIES: Delay and Termination

In addition to the remedies covered in the above sections:

- **Termination Right for Nonperformance:**
Buyer has the right to terminate the contract if Seller's non-performance continues for a specified period of time. This is particularly important [for example] where Buyer is subject to exclusivity or non-compete provisions obligating it to use Seller as its sole supplier.

(5) REMEDIES: Delay and Termination

- **Example:**

"In the event that the Seller's failure or delay remains uncured for a period of [_____] days following written notice given by Seller of force majeure under this Section, the Buyer may terminate this Agreement and cancel all outstanding orders in its sole discretion upon [_____] days' written notice without penalty."

(5) REMEDIES: Delay and Termination

- **Termination for Convenience:** The contract generally can provide for termination for convenience upon X days' notice. This obviously offers **backdoor** out of a contract with a party who is unable to perform for force majeure or any other reason.
- **Seller Termination:** If Seller maintains a termination right [for convenience or otherwise], Buyer if possible should negotiate for post-termination assistance to minimize the immediate impact of such termination, such as an obligation by Seller to continue to fulfill orders for a period post-termination. #

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