

Force Majeure

By Barbara Ardell, **Paladin Associates Inc**
www.PaladinAssociatesInc.com

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The current economic situation is challenging sourcing professionals in many ways. Force majeure is one issue that may present new challenges in today's business environment.

The Yale Law Library describes **force majeure** as follows:

Force Majeure literally means "greater force". These clauses excuse a party from liability if some unforeseen [sic] event beyond the control of that party [emphasis added] prevents it from performing its obligations under the contract. Typically, force majeure clauses cover natural disasters or other "Acts of God", war, or the failure of third parties—such as suppliers and subcontractors—to perform their obligations to the contracting party. It is important to remember that force majeure clauses are intended to excuse a party only if the failure to perform could not be avoided by the exercise of due care by that party.

A sales colleague of mine lost his job recently when a customer invoked force majeure and walked from the contract. The customer's industry has been hard hit by the economic downturn and they believed that constituted force majeure. The seller chose not to pursue the issue legally.

Might this clause also be applied on the buy side in today's circumstances? One could easily envision a manufacturer unable to fulfill orders without the short-term credit necessary to purchase raw materials, leaving the buyer scrambling for substitutes without economic recourse. Could a buyer also use this clause to his/her advantage to avoid taking or paying penalties when demand for a supplier's product is reduced due to the economic crisis? Applicability would, of course, be dependent on the exact wording of the clause.

Donald Trump recently invoked force majeure to delay loan repayment on a Chicago condo development. "Would you consider the biggest depression we have had in this country since 1929 to be such an event?" he asked in an interview, adding, "A depression is not within the control of the borrower." The lender's attorneys disagree calling this claim. Obviously, there is no clear legal opinion.

My associate, Rob Patton, commented that the situation is not completely unprecedented. Recall that force majeure was very much in vogue in 1973-74 during the first "oil shock". Many suppliers used it to renege on supply commitments, put buyers on allocations, etc.

As sourcing professionals strive to manage risk, we must take a broad view and consider the applicability of this common clause to the current economic situation. At the same time, we must recognize that contracts cannot anticipate every eventuality. This means that we must truly understand our strategic suppliers situations (including their supply chains). This will help us to take preventive actions where appropriate. However, we must also maintain constructive relationships with these suppliers so that when the unexpected occurs we can negotiate win-win solutions. As Rob Patton points out, "The legal side becomes very academic when you start shutting plants down for lack of supply. At that point who cares who wins legally ten years down the road!"

Have you encountered a claim of force majeure in the current economic downturn? If so, please share your experience with us. Opinions are also welcome.

Barbara Ardell - **Paladin Associates Inc.**
Vice President

www.PaladinAssociatesInc.com

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