CLIENT ALERTS & INSIGHTS

Force Majeure Claims - Contract Provisions, Notices, and Ordinary Business Risk

NOVEMBER 4, 2024

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Force majeure contract provisions and force majeure notices have been top of mind more times in recent memory than we care to count. The recent short-lived port strike, two devastating hurricanes, and the Francis Scott Key Bridge impact in Baltimore are just recent examples in a five-year list that includes two wars and a global pandemic. These dramatic unforeseen events cause transportation and logistics providers, as well as their shippers, to closely examine contract terms and the language of notices while scrambling to determine how to continue business uninterrupted.

The true meaning of force majeure sometimes goes missing in those stressful circumstances. Force majeure is essentially a defense to performing as a service provider otherwise committed to do. This means that it saves the service provider from claims of contract breach and resulting damages. It does not, however, mean that failure to perform may continue indefinitely or that it is excused for mere business inconvenience or increased cost.

Force Majeure Events - Most transportation contracts today contain force majeure provisions. The typical structure includes trigger language and also process language. For example, non-performance may be excused by a negotiated list of events such as acts of God, fire, riots, wars, and strikes. Also, the process of what must be done is often expressed such as requiring notice within three days of the force majeure event and possibly allowing the other party to terminate if performance does not commence within a certain number of days. If the circumstances that prohibited performance end then performance must commence without delay.

Ordinary Business Risk - The force majeure event must physically or legally prohibit performance of services in order to be effective. Increased cost of service is insufficient even if it means losing money on a load. Intangible contract requirements are also not excused from performance such as maintenance of insurance or providing defense and indemnity.

Assessing Force Majeure in Real Time - The top six questions when considering possible force majeure circumstances are: (1) What are the triggering events; (2) Are those events happening; (3) Do those in fact prevent performance; (4) Is performance required despite the events; (5) What steps must be taken to claim force majeure; and (5) How long does force majeure last?

Force majeure is not a free-for-all. This is key. It is a concept intended to be fair and equitable by recognizing that unforeseen events can happen, and when they do, parties are best served by communicating with one another under a basic set of ground rules.

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