

force majeure

This information pack is the first in a series that will be produced in association with the Performing Arts Touring Alliance (PATA), Australia's peak body for the national performing arts touring sector.



Summary of Key Points

- A Force Majeure clause should define the Force Majeure Events and set out the consequences on the parties' rights and obligations. A Force Majeure Event does not necessarily terminate the contract.
- To qualify as an event of Force Majeure, the event must be one which was beyond the reasonable control of both parties to the contract.
- A Force Majeure clause may include one or more conditions precedent – requirements which must be met for the operation of the Force Majeure clause.
- Force Majeure should not be confused with events which "frustrate" a contract (for example, a theatre burning down), where an unforeseen event makes performance of contractual obligations radically different or impossible.

1. What is Force Majeure?

"Force Majeure" literally means "superior strength". In contracts, *Force Majeure* has come to mean an extraordinary event or circumstance beyond the control of either party that delays or prevents one or both parties from fulfilling their obligations in contract, freeing both parties from any liability or obligations during the continuance of the event of *Force Majeure*. This might include, for example, a strike, crime or "Act of God" such as flooding, earthquake, cyclone or volcanic eruption.

Force Majeure is not a recognised doctrine under Australian law. Instead, *Force Majeure* is used as a contractual provision to manage risk in the event the parties are unable to perform the contract. As a contractual term, it is up to the parties to determine the scope and effect of the *Force Majeure* provision.

In practice, *Force Majeure* has come to operate almost as an exclusion clause, i.e., one which excuses a party from performing his obligations for a period of time or altogether. These clauses are commonly used in Venue Hire Agreements, Agreements between Presenters and Tour Coordinators or Producers, Co-Production Agreements, Sponsorship Agreements and Agreements between Producers and Leading Performers (i.e., "Stars") where the Standard Performers Contract [1] is not used.

2. How is Force Majeure defined?

Force Majeure contractual provisions generally contain three essential elements:

- it can occur with or without human intervention;
- it cannot reasonably be foreseen by the parties;
- it is completely beyond the control of the parties and they could not have prevented its consequences.

Generally the provisions refer to a legal or physical restraint, not an economic one (such as having insufficient funds to perform obligations or substantial price rises in the cost of goods), although they can be drafted to include these.

3. The Force Majeure clause

As a contractual provision, the scope and effect of a *Force Majeure* clause in a contract is a question of construction. For this reason, parties should not under-estimate the importance and protective value of a well-drafted *Force Majeure* clause.

There are generally two aspects to the operation of *Force Majeure* clauses:

- the definition of *Force Majeure Events*; and
- the operative clause that sets out the consequences of a *Force Majeure Event* on the parties' rights and obligations.

It is open to contracting parties to agree that the occurrence of certain events (*Force Majeure Events*) will:

- excuse a party from the performance of its obligations under the contract;
- may vary the obligations of the parties; or
- may suspend or discharge the contract if the *Force Majeure Event* continues for more than a stipulated time.

4. Defining the Force Majeure Events

To be effective, a *Force Majeure* clause should refer to and specify agreed events that will qualify as events of *Force Majeure* for the purpose of the contract.

Without an agreed list of *Force Majeure Events*, it is difficult to interpret or identify an event as one that warrants the applica-

tion of the *Force Majeure* clause. Instead, what constitutes *Force Majeure* will differ depending on the terms of the contract and should be tailored to the parties (e.g., Customer/Venue, Venue/Presenter, Tour Coordinator/Producer or Producer/Artist).

Force Majeure Events may include the following:

- an Act of God;
- physical disability;
- the acts or regulations of public authorities;
- changes in legislation which affect the performance of the obligations of the parties to the contract;
- civil tumult, civil disturbance or civil strife;
- war, enemy acts, military disturbances;
- epidemics;
- terrorism;
- strikes, lock-outs, combinations of workmen;
- interruption or delay of transportation services;
- breach of contract on the part of any third party; or
- any cause beyond the reasonable control of a party.

Parties dealing with multiple contracts (e.g., Presenter/Tour Coordinator, Tour Coordinator/Producer) should also take care to ensure consistency in respect of *Force Majeure*, bearing in mind that *Force Majeure Events* may necessarily differ according to the parties.

5. *Force Majeure* Conditions Precedent

Force Majeure clauses are often drafted to include a number of conditions which must be met before a party is able to rely on the clause. For example, *Force Majeure Events* may be restricted to those events which the party:

- did not cause;
- cannot control or influence; and
- could not have prevented or avoided through prudent management processes, policies and precautions including the use of alternative resources, the procuring of services from another source and work around plans.

The *Force Majeure Event* should materially affect the ability of a party to perform the contract, i.e., the *Force Majeure Event* should have hindered, prevented or delayed the performance of the contract. If the primary obligation of the contract can still be performed, then *Force Majeure* should not apply - even if the event was unforeseen.

6. Setting out the consequences of *Force Majeure*

In addition to defining the *Force Majeure Events*, an effective *Force Majeure* clause will set out the consequences on the parties' rights and obligations.

Operative clauses need to be carefully constructed so as to ensure that the parties are aware of their obligations upon the occurrence of a *Force Majeure Event*. These obligations may include the requirement to give notice to the other party of the *Force Majeure Event*, the impact of that event on the ability of the affected party to perform their contractual obligations and the expected period of delay.

Typically, the consequence of the operation of the *Force Majeure* clause is that the affected parties' obligations are suspended or varied for the period of the *Force Majeure Event*. This may include financial obligations such as obligations to pay or reimburse money (i.e., rent, standard charges, labour costs etc.). Where a *Force Majeure Event* continues for an extended period (or beyond an agreed number of performances), the parties may have the right to terminate the contract.

A party who seeks to rely on a *Force Majeure* clause will generally bear the burden of proving the occurrence of the event which falls within the scope of the *Force Majeure* clause, the impact of the event and that the party has taken reasonable steps to prevent the event.

7. *Force Majeure* and venue maintenance

To qualify as an event of *Force Majeure*, the event must normally be one which was beyond the reasonable control of the both parties to the contract. The party seeking to rely on the *Force Majeure* will also need to meet any conditions precedent relating to the taking of appropriate precautions.

Where a venue owner contracts direct with a producer or promoter, a failure by the owner to properly maintain and keep a theatre venue in a state of good repair and condition which leads to the producer or promoter not being able to present the Show (e.g., because the roof is leaking badly or the flying system doesn't work), is unlikely to amount to a *Force Majeure Event* as this was a matter within the control of one of the parties (the owner).

8. *Force Majeure* and Frustration

Events of *Force Majeure* should not be confused with events which frustrate a contract, for example, a theatre burning down.

Frustration occurs where the occurrence of an unforeseen external event makes the performance of a contract radically different to that contemplated at the time the contract was entered into. Frustration includes situations where performance becomes impossible or where performance is commercially unfeasible or physically impossible, rather than instances where the obligations are more burdensome than originally anticipated.

The consequence of frustration is that the contract is automatically terminated at the point upon the occurrence of the frustrating event. This only affects future obligations and does not discharge obligations owing at the time of the frustrating event. Owing to the uncertainty surrounding the consequences of frustration, *Force Majeure* clauses are often used by parties as a means of allocating risk.

9. Termination and Cancellation

In addition to an effective *Force Majeure* clause, parties should ensure that appropriate termination provisions are included in the contract. This may, for example, include a termination for convenience clause which allows either party to terminate the agreement on the giving of notice. It is also important to specify the consequences of termination of the contract as a result of termination for convenience or termination for breach.

Parties should also ensure they are familiar with the LPA Ticketing Code of Practice which deals with cancelled and rescheduled events and the provisions of the *Competition and Consumer Act 2010* which may operate to render unfair contract terms void.

10. What does a *Force Majeure* clause look like?

The following is an example of a *Force Majeure* clause in a Theatre Hire Agreement. Please note, this clause is an example only and should not be used or adapted without careful revision to ensure they are appropriate under the circumstances and are consistent with any third party obligations.

Force Majeure

Definition:

For the purpose of this clause an “Event of Force Majeure” means an event or circumstance which is in the nature of “Force Majeure” including, but not limited to, fire, flood, storm, accidents, plague, earthquakes, riots, explosions, wars, hostilities, labour disputes and industrial actions which prevent a party from complying with its obligations under this Agreement, and which that party:

- i. did not cause;*
- ii. cannot control or influence; and*
- iii. could not have prevented or avoided through prudent management processes, policies and precautions including the use of alternative resources, the procuring of services from another source and work around plans.*

Effect:

The obligations of a party directly affected by an Event of Force Majeure and any corresponding entitlement of another party will

be suspended to the extent and for so long as the performance of the affected party's obligations are prevented or delayed by the Event of Force Majeure.

An Obligation to pay money is not excused by the Event of Force Majeure.

Notification:

The affected party must notify the other party if the Event of Force Majeure prevents (or is likely to prevent) it from complying with any of its obligations under this Agreement as soon as it becomes aware of the Event of Force Majeure.

Obligations to Re-commence Performance:

The affected party must:

- i. use its best endeavours to work around or overcome the effect of the Event of Force Majeure;*
- ii. keep the other party informed of continuation and expected duration of the Event of Force Majeure and of measures taken to comply with this clause; and*
- iii. re-commence performance of its obligations as soon as possible after the Event of Force Majeure has ceased to exist.*
- iv. If a party is delayed in performing its obligations under this Agreement due to the circumstances beyond its reasonable control (and without fault or negligence by that party), then the time within which such obligation must be performed is extended for the period of such delay. This clause does not operate to allow the Hirer to conduct the Performances on any date or at any time other than those specified in this Agreement.”*

[1] Note here that the Standard Performers Contract makes no mention of Force Majeure as the Performers Collective Agreement and the Fair Work Act contain stand-down provisions which producers can employ if Force Majeure events occur.

DISCLAIMER

The information contained in this information sheet is intended as general commentary and should not be regarded as a substitute for legal advice. Should you require specific advice or assistance in drafting a Force Majeure clause, please contact the authors directly.

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