

## ***Force Majeure: Escaping Contractual Obligations by Divine Intervention***

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*Marine Digest and Transportation News***

Our industry is particularly susceptible to the nasty effects of nature, the whims of international politics, labor disputes, and numerous other unanticipated circumstances. Many maritime contracts, including bills of lading and service contracts, often try to accommodate the unpredictable. They include provisions freeing participants from their contractual obligations or liability based on events of *force majeure*. Depending on the source of form documentation (or its author's penchant), you sometimes see those provisions cast in terms of *vis major*, or the more contemporary "Act of God."

So what kind of circumstance constitutes *force majeure* (or one of its cousins)? What kind of event is so extraordinary that the law will let someone off the hook for acts or omissions that otherwise would amount to actionable negligence or breach of contract? The French term literally means "greater force" (*vis major* is the Latin version). Courts have come up with some colorful language to answer those questions more pragmatically, usually in the context of defendants who thought loss-causing circumstances were beyond their control.

For example, courts have opined that "An act of God is a natural phenomenon so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against." *Force majeure* is branded "a natural and inevitable necessity, and one arising wholly above the control of human agencies, and which occurs independently of human action or neglect." Pretty tough standards, huh?

Parties to maritime contracts can, and often do, specify what does and doesn't amount to an obligation or liability nullifying circumstance. Once parties have shaken hands over a definition, courts usually won't disturb their agreement when an unforeseen event materializes. So if you spell out in a contract what will constitute an event of *force majeure* and what won't, courts won't be excited about broadening the definition.

The law actually provides a default concept of *force majeure* by way of doctrines known simply as "impossibility" or "impracticability." In other words, even if parties don't include a specific provision in their contract, the law won't necessarily hold someone's feet to the fire for failing to fulfill a contractual obligation that turned out to be impossible (or illegal). "Act of God" also is an independent legal concept, usually asserted as a defense to negligence suits.

Regarding lost/damaged cargo, the U.S. Carriage of Goods by Sea Act (COGSA) provides carriers and others a "peril of the sea" defense, which works much like *force majeure* or Act of God. The big difference is that, again, parties to a contract can pre-decide who gets to pick up the tab for a *force majeure* event. Such agreed provisions will trump COGSA's version of the concept.

It's not enough to say "a storm caused the loss and, gee, what could be more uncontrollable and natural an event than a raging tempest at sea?" True, weather conditions are uncontrollable, but sailing a ship into them certainly isn't. To escape liability, those in charge have to demonstrate the storm wasn't reasonably predictable with available technology. If a skipper runs his boat through bad weather to save time, don't expect a court to be sympathetic to a *force majeure* defense.

The federal court sitting in the Eastern District of Missouri recently made this point clear. A barge broke from its mooring in the Mississippi River causing all kinds of headaches for cargo owners and others. In response to the lawsuit, the barge's owner pleaded *vis major*, claiming that river stages and flows caused the break away. The court rejected the defense, ruling that the river conditions were not unprecedented. Moreover, for a successful *vis major* showing, the defendant must demonstrate it couldn't have prevented the detachment. It apparently couldn't. The party asserting *vis major* bears the burden of proving circumstances truly were beyond its control.

The Eastern District of Louisiana took a look at a *force majeure* clause in a bill of lading issued for the barge transport of steel coils, again on the Mississippi. This time, the barge sprung a hull leak, allowing water to infiltrate cargo holds where the coils were stowed. True, hull deterioration is a natural process, one which is tough to predict or measure precisely. But the law imposes a nondelegable duty on carriers to operate seaworthy vessels, so the defense was unavailable. You can't just say the unseaworthiness was caused by natural causes and hope to escape liability under *force majeure*.

Understandably, courts are reluctant to expand or define broadly circumstances constituting *force majeure*. If parties want to allocate risk among themselves, fine. But expect the law to apply these liability relieving principles sparingly.

***Ref: American River Transportation Co. v. Paragon Marine Services, 213 F.Supp.2d 1035 (E.D. MO 2002); Sumitomo Marine & Fire Ins. Co. v. Barge ACBL 1346, et al, 2001 WL 263083 (E.D. La)***