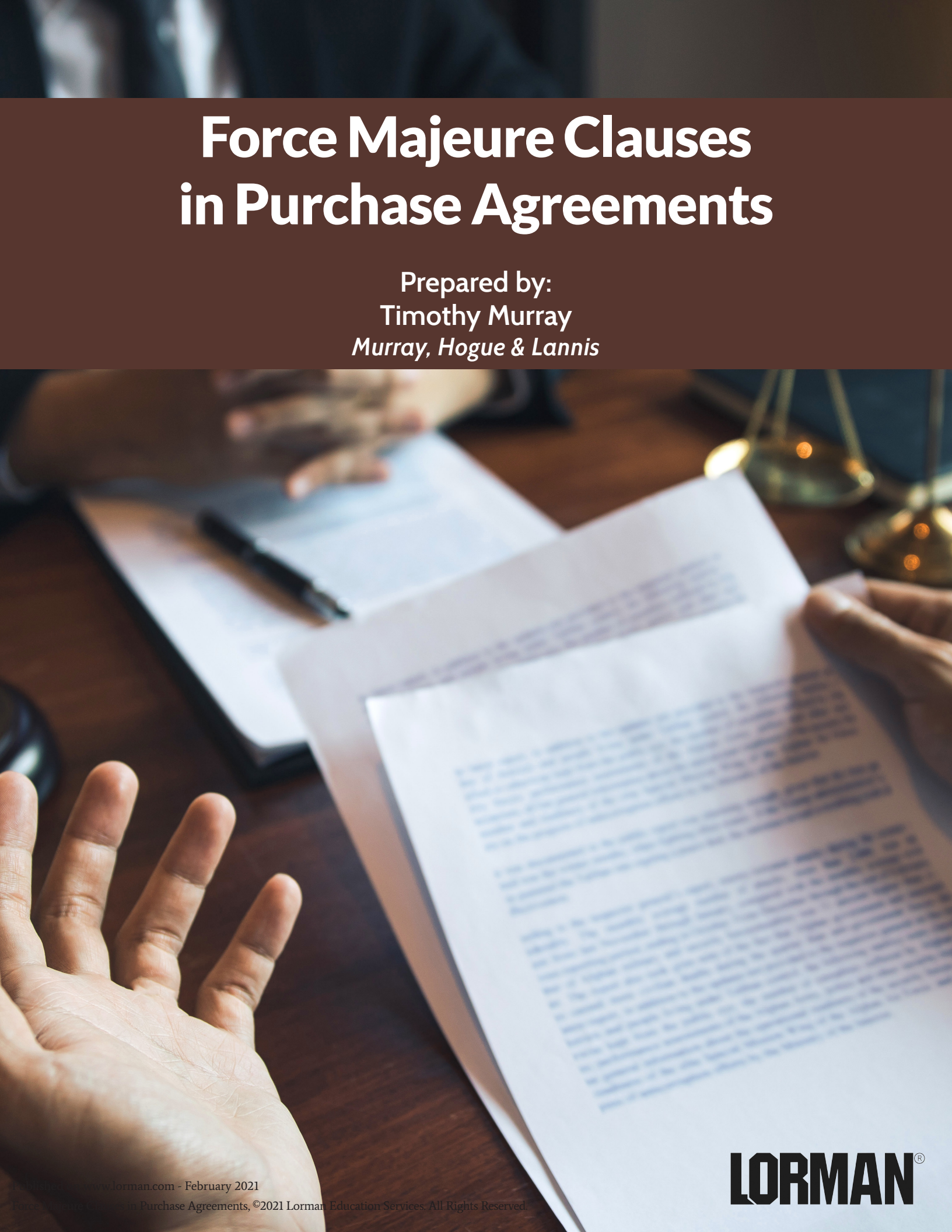

Force Majeure Clauses in Purchase Agreements

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FORCE MAJEURE CLAUSES

Parties should not assume that they always need a force majeure clause. Sometimes, these clauses don't add anything to what the law already provides, and they can actually take away rights that parties get automatically. Without such a clause, contracting parties automatically get the benefit of two related gap-filler doctrines that can excuse a party's obligations when an unanticipated, supervening event fundamentally alters the nature of the parties' contract: (1) impossibility, or as it is commonly called nowadays, impracticability, and (2) frustration of purpose.

Impossibility/impracticability: The doctrine of impossibility can be traced to *Taylor v. Caldwell*,[1] where the owner of a music hall was excused of liability for failing to make the hall available due to an accidental fire that destroyed the building. Literal impossibility was required to excuse a party's performance under this doctrine (*e.g.*, death or destruction of the subject matter), so contractual force majeure clauses that expanded the reasons to be excused from performance became all the rage.

Modern contract law (both at common law and under the U.C.C.) has repackaged the impossibility doctrine as "impracticability," though sometimes it's still called "impossibility," and now, literal impossibility is no longer required.

Impracticability occurs when a party is excused of his or her responsibilities because performance has been made excessively burdensome—impracticable—by a supervening event that was not caused by the party seeking to be excused and that is inconsistent with the basic assumption of the parties at the time the contract was made. The supervening event has to be unforeseeable (but not inconceivable)—that is, so unlikely that a reasonable party would not have guarded against it in the contract.

Frustration of purpose: This aptly named doctrine focuses on the parties' ***purpose*** in making their contract. It has nothing to do with a party's inability to perform—it applies when a supervening event fundamentally changes the nature of a contract and makes one party's performance worthless to the other. The best explanation for it is an example. In the landmark case of *Krell v. Henry*,[2] Henry rented a room from Krell for the purpose of viewing the coronation of King Edward VII. But the King fell ill, and the coronation was postponed. The very *purpose* of the contract—a room with a view of the coronation—was frustrated, and performance was excused.

THE GAP-FILLER DOCTRINES CAN BE LOST BY CONTRACT

Parties can lose the benefit of these gap-filler doctrines by including a force majeure or other clause that covers the same ground. The esteemed Judge Richard Posner wrote: "If . . . the parties include a force majeure clause in the contract, the clause supersedes the [impossibility] doctrine. . . . . [L]ike most contract doctrines, the doctrine of impossibility is an 'off-the-rack'

[1] 3B. & S. 826, 32 L.J., Q.B. 164 [1863].
[2] 2 K.B. 740 [1903].

provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision."[3]

In *Aquila, Inc. v. C. W. Mining*,[4] the court held that CWM could not invoke these gap-filler doctrines to be excused of its contractual obligation to supply coal because the parties' contract contained a force majeure clause that expressly spelled out when supervening events would excuse performance. The terms of the force majeure clause—including a notice requirement—had not been satisfied, so "CWM cannot rely on common law defenses and the U.C.C., thereby circumventing the terms and limitations that the parties negotiated in the Contract."[5]

The principle stated in the Aquila case may not be universally accepted, and it is difficult to say whether most courts would treat the issue the same way:

> A drafter of a force majeure clause should be aware of the issue of exclusivity because it is within the drafter's power to determine whether the clause has a trumping effect or merely a supplementary effect on the legal doctrine. Noteworthy in this context is the approach taken by the U.C.C. in Section 2-719: in order for a remedy to be exclusive, it must be expressly agreed upon. This article posed the question whether the agreement of the parties to include a force majeure clause in their contract, in itself, indicates that greater liability or specific risk allocation was contemplated. It seems that such a presumption is not made and that exclusivity must be expressly agreed upon.[6]

But see the following case—holding that the protections of the gap-filler doctrines can be lost by contractual provisions other than traditional force majeure clauses. *Trs. of Conneaut Lake Park, Inc. v. Park Restoration, LLC (In re Trs. of Conneaut Lake Park, Inc.).*[7] Conneaut Lake Park (TCLP) contracted with Park Restoration for the latter to provide operational and management services to one of its buildings, called the Beach Club. The parties' contract provided: "In the Event of termination for any reason, Park Restoration warrants and represents that it will vacate the premises ensuring that it is in broom clean condition without any damage to any equipment or property." Subsequently, the Beach Club was destroyed by a fire. TCLP filed an adversary proceeding claiming breach of contract because Park Restoration failed to honor its obligation to return the premises in "broom clean" condition "without any damage." Park Restoration argued that its obligations under the contract were excused under the doctrine of impossibility of performance because the existence of the Beach Club was necessary to carry out the purpose of the contract. The court rejected this argument because the plain words of the contract required Park Restoration to leave the premises "in broom clean condition without any

[3] Commonwealth Edison Co. v. Allied-General Nuclear Services, 731 F. Supp. 850, 855 (N.D. Ill. 1990).
[4] 2007 U.S. Dist. LEXIS 80276 (D. Utah 2007).
[5] Id. at *16
[6] P.J.M. Declercq, Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability, 15 J.L. & Com. 213, 227-228 (1995).
[7] 564 B.R. 495 (Bankr. W.D. Pa. 2017).

damage." The parties' express allocation of risk left no room for the gap-filler doctrines of impossibility or impracticability to excuse Park Restoration of its obligations.

A GENERIC FORCE MAJEURE CLAUSE MAY NOT PROVIDE AS MUCH PROTECTION AS THE GAP-FILLER DOCTRINES

In drafting force majeure clauses, parties sometimes characterize force majeure events as a generic listing of "unforeseen" contingencies that fit the description of impracticability. But those contingencies are often excused even without a force majeure clause. Why bother having the clause if it merely restates what the law already provides?

Attempts to list *every* contingency that might be considered a force majeure event are likely to fail. Listing every possible "impossibility" contingency is, itself, an impossibility since no drafter is omniscient. Nevertheless, the canon of construction *expressio unius est exclusio alterius* would exclude any item that is not specifically listed. There are ways to draft around that.

DRAFTING FORCE MAJEURE CLAUSES

I. If your clause mirrors the doctrines of impossibility/impracticability, why have it? Your force majeure clause shouldn't mirror the doctrine of impracticability—if it did, it's not necessary. Stop thinking in terms of impossibility/impracticability. It's *your* contract—you can make any contingency an occasion to excuse your client's performance even if it doesn't fit the classic definition of impossibility/impracticability. More on this in number III below.

II. Listing force majeure events—Part I: Draft around the canons of construction. The clause will list as force majeure events general contingencies (discussed in this section), and it should also list contingencies specific to your client (discussed below). With respect to the general listing, there are an infinite variety of lists.[8] If you list some contingencies, the canon of construction *expressio unius est exclusio alterius* would exclude any item not specifically listed. Therefore, an incomplete listing may unwittingly surrender some of the protections that the common law and the U.C.C. provide without a force majeure clause.

The conventional wisdom counsels drafters to accompany any listing of force majeure events with a catch-all provision in an attempt to capture events beyond the ones specifically listed. But drafting the catch-all presents its own challenges. If it merely says ". . . or any other

[8] Here's one suggested by Corbin on Contracts:

> Neither party shall be responsible for any resulting loss if the fulfillment of any of the terms or provisions of this agreement is delayed or prevented by revolutions, insurrections, riots, wars, acts of enemies, national emergency, strikes, floods, fires, acts of god, or by any cause not within the control of the party whose performance is interfered with, which by the exercise of reasonable diligence such party is unable to prevent, whether of the class of causes enumerated above or not.

Corbin on Contracts § 74.19 (2017).

events or circumstances beyond the reasonable control of the party affected," the canon of construction or interpretation *ejusdem generis* likely would limit the meaning of the catch-all to the same type of events as those listed specifically. So, the catch-all needs to make clear that it is not limited the same type of events. Example: ". . . or any other events or circumstances not within the reasonable control of the party affected, whether similar or dissimilar to any of the foregoing."

III. Listing force majeure events—Part II: Talk to the client. Don't limit your force majeure provision to traditional force majeure events—include any events that might make performance excessively difficult. Often, the most important "drafting" is the part where the lawyer listens to the client before putting a single word on paper. Ask your client what might go wrong in the course of performance to make it intolerably burdensome to the client. Urge your client not assume things will go as planned after the contract is signed—clients generally aren't as pessimistic as lawyers. There's no excuse for missing the big risks:

●If your client is contracting to supply a product, what might happen to interfere with its production or supply?

●What might make the price of the components intolerable? Perhaps your client will need to be excused from performing if the price of a particular raw material exceeds a certain level.

●If your client's supply of a product depends on a raw material from a sole source of supply, the continued availability of that raw material ought to be listed as an express condition to your client's performance obligations (and *call* it an "express condition" so that there is no doubt in the event of a dispute).

In the absence of a specific contractual provision, courts are loathe to characterize financial hardship due to a supervening event as a force majeure event. For example, take the case of *Kyocera Corp. v. Hemlock Semiconductor, LLC*:[9]

> A producer of solar panels contracted under a "take-or-pay" arrangement to purchase from a third party supply polysilicon that was used in the manufacture of solar panels. The contract contained a force majeure clause that included the following: "Neither Buyer nor Seller shall be liable for delays or failures in performance of its obligations under this Agreement that arise out of or result from causes beyond such party's control, including without limitation: … acts of the Government … ." The producer claimed that China provided illegal subsidies to Chinese companies and engaged in "large-scale dumping," and the U.S. reciprocated with tariffs, causing the price of polysilicon to which the parties agreed in 2008 to rise significantly higher than the market price. The court held that the risk of such a change in market prices—no matter the cause—

[9] 2015 Mich. App. LEXIS 2249 (Mich. Ct. App. Dec. 3, 2015).

> was expressly assumed by plaintiff in its take-or-pay contract with defendant.[10]

The lesson: if you want your client to be discharged of its obligation to perform in the event of a specific contingency, *spell it out plainly*. Don't be afraid to spell it out. And don't hide what you want in the niceties of a generic listing of force majeure events—a court may not agree that the particular risk is encompassed by it. If you limit your contingencies to "unforeseen" or "impracticable" events, you run the risk that a court may not assume the contingency was either "unforeseen" nor "impracticable." Get specific.

IV. The nuts and bolts. When a force majeure event occurs, the contract needs to require the affected party to give notice and to keep the other party apprised of the progress of the event. Your clause might contain language similar to this:

> Upon occurrence of a Force Majeure Event (as defined below), the non-performing party shall promptly notify the other party that a Force Majeure Event has occurred and its anticipated effect on performance, including its expected duration. The non-performing party shall furnish the other party with periodic reports regarding the progress of the Force Majeure Event. The non-performing party shall use reasonable diligence to minimize damages and to resume performance.

You may want to impose time limits on the duty to notify, and even make notification an express condition to invoking the force majeure clause.

When a force majeure event occurs, should it discharge the affected party's obligations altogether or merely serve as an excusable delay to give the party additional time to complete performance? If it is to be an excusable delay, how much time? Spell out the timing: don't allow the delay to extend indefinitely, and don't use terms like "reasonable time"—that's an invitation for a jury trial.

Perhaps some events should allow immediate discharge while others should merely serve as an excusable delay for a stated period of time. Spell it out.

You don't have to deal with all supervening events that affect your client in a force majeure clause itself. Any number of other clauses can spell out how certain supervening events are dealt with. For example, you could include a flexible-pricing clause that allows your client to pass on increased costs to the other party.

You can also have a sort-of reverse force majeure clause that makes clear that an otherwise-impracticable event will *not* be grounds for relief.[11]

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[10] John E. Murray and Timothy Murray, Corbin on Contracts Desk Edition § 74.13 (2017).

[11] For example:

> In the event the demised premises are damaged or destroyed by fire or other casualty, or damaged by the demolition of any portion of the building necessitated

CONCLUSION

In contracting, clients generally concentrate on getting a good deal--attorneys focus a lot on protecting clients in the event things go wrong. The harm from a botched force majeure clause can be enormous. Avoid the temptation to draft these clauses by cutting and pasting from other contracts without tailoring the language to the present transaction. There are no shortcuts to meticulous drafting when it comes to force majeure clauses.

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> by the enforcement of any law or Ordinance, or declared unsafe by any public authority, the Landlord shall, at own cost and expense, immediately repair, reconstruct and replace the demised premises, including improvements, extensions, alterations and additions to building made by Landlord or Tenant, all such work to be done in compliance with State Laws and City Ordinances. …

Marcovich Land Corp. v. J. J. Newberry Co., 413 N.E.2d 935, 939 (Ind. App. 1980).