



*"The Perfect Fit for  
Your Business"™*

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## **Force Majeure—** originating in the Old French, meaning “irresistible force,” or, from Roman law, an “act of God.”

Hurricane Katrina has devastated much of Louisiana, Mississippi and Alabama’s Gulf Coast. Courts, banks and many other businesses are shut down. The increasing incidence of natural disasters, as well as Hurricane Katrina, should prompt those businesses that rely upon information technology services provided by third parties to take a careful look at the “force majeure” section in their contracts.

### **Boilerplate**

Most force majeure provisions are located in the “miscellaneous” article of a contract. Many regard (or disregard) the sections in that miscellaneous article, often buried at the end, as immaterial or irrelevant “boilerplate.” Nothing could be further from the truth. Many of these provisions can significantly affect the outcome of a dispute between contracting parties.

A typical force majeure provision might read like this:

Neither party will be liable for any default or delay in the performance of its obligations under this agreement (except for the payment of money) if and to the extent such default or delay is caused, directly or indirectly, by acts of God, governmental acts, accidents, wars (declared or undeclared), terrorism, threats of terrorism, acts of a public enemy, epidemics or quarantines, riots or civil unrest, labor disputes, fires, storms, earthquakes, floods or elements of nature, Federal, state or municipal actions or regulations, failure or refusal by any regulatory or other agency to act upon or grant permits or licenses, or any other cause beyond the reasonable control of such party;

*provided, however,* that such default or delay could not have been prevented by commercially reasonable precautions and cannot reasonably be circumvented by the nonperforming party through the use of commercially reasonable alternative sources, workaround plans or other means.

What do these words mean? Essentially, a party's performance is excused (*i.e.*, nonperformance is not a breach of the contract) if the failure to perform is caused by an event that the nonperforming party cannot control. The particular provision quoted above includes a qualification, not found in all force majeure clauses, that places a duty upon the nonperforming party to take reasonable precautions to avoid interference by an uncontrollable event and to plan for such a contingency. The proviso basically requires the nonperforming party to have a viable business recovery plan (BRP) and to execute that plan before it can avail itself of the defense of excused performance.

## **Meltdown**

Excusing performance in the event of a disaster, whether natural or otherwise, is fine and good until it materially interferes with business. Then what does one do? First, and foremost, one must plan for the inevitable business interruption and in such an event successfully implement that plan.

### *Business Recovery Planning*

Actually, both an outsourcing business and its service provider must have a BRP. And, the outsourcing business should make sure that its plan properly integrates with that of its vendor.

In doing this diligence, the business should understand that, in a business interruption caused by an event beyond the service provider's reasonable control, the service provider's BRP most likely would not result, even if fully and successfully implemented, in the total and immediate resumption of services. Rather, the provider will have prioritized services based upon a mission critical evaluation. Mission critical functions will be restored first. Other business functions may, or may not, be restored; and, if they are restored, the timing may not be acceptable to the outsourcing business.

In any event, a business needs to identify for itself the mission critical nature of the functions that it outsources and to evaluate whether a vendor's BRP restores those functions in accordance with its business needs. The outsourcing business must, upon the occurrence of a disaster, closely monitor invocation of the vendor's BRP and the vendor's successful execution of that plan.

### *Back-up Options*

In the event that one's technology services provider is prevented from resuming services within an acceptable timeframe, one must have redundancy, a backup plan. Part of such a plan must contemplate how to reconcile the contractual relationship with the service provider that is out of business for more time than business requirements can tolerate.

There are a couple of alternatives. First, one might have a backup provider, and the primary provider may forgo payments (or maybe even make up the difference, if any) while an interim provider steps into the breach.<sup>1</sup> Another option is to have the right to terminate the contract in such an event and move to a new provider. An example of wording for such a right follows:

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<sup>1</sup> One must watch carefully how an outsourcing agreement addresses payments in the event of a force majeure. Some vendors' contracts do not excuse payments for services not rendered during a disaster when such payments are not transaction-driven charges. For example, a vendor might insist on payment of the full amount of monthly minimums rather than a pro rata amount.

If (a) either party fails to perform its obligations under this agreement to prevent or circumvent a default or delay in the performance of its obligations under this agreement that is caused by an event beyond such party's reasonable control and (b) there is, as a result of that event or failure, a material adverse effect upon the non-terminating party's performance under this agreement, then the other party may, by giving prior written notice thereof to the non-terminating party, terminate this agreement as of the date specified in such notice.

Of course, termination may not be a realistic alternative because of the costs of converting to a new service provider. But, it should be an option.<sup>2</sup>

### **“Oh, What a Tangled Web We Weave”**

While the above quote from Sir Walter Scott's work is often used in connection with the Internet, here reference is to the complex fabric woven by a contract's many provisions. Several provisions – not just “force majeure” language – determine how a contract governs actions in the event of a business interruption, whether caused by a natural disaster or some internal or external malfunction. Define requirements in the event of a disaster and ensure that an information technology outsourcing contract gives flexibility to satisfy them when the service provider experiences a business interruption.

#### **OTHER CLIENT NEWSLETTERS**

Last month's “Ouch!” edition addressed the importance in today's environment of data security accountability as it relates to both service providers and their customers.

May 2005's client newsletter “C<sup>3</sup>=The Right Word” provides 3 simple rules—*be clear, be concise, be complete*—toward drafting better contracts.

The March 2005 newsletter presented the “dark side” of arbitration and suggested a mediation alternative that provides a viable alternative dispute resolution (ADR) mechanism that preserves the elements that distinguish the U.S. legal system.

“Data Processors, Forced to Reevaluate Pricing Strategies?”—the December 2004 newsletter—examines the effect of changes in the length of IT agreements and in risk shifting provisions on the pricing strategies of data processors.

Client newsletters are available at <http://www.carpenterlaw.net/newsletters/archivednewsletters.html>.

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<sup>2</sup> For such a termination right to be viable, the service provider must have an obligation to continue performance of its obligations under its contract (including not only providing services, but also implementing and executing its BRP) for a reasonable period of time or until conversion can be completed.