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WRITERS STRIKE

HOW WILL FORCE MAJEURE IMPACT WRITERS STRIKE? IT'S COMPLICATED

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MAY 10, 2023 6:00AM PT

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With the writers strike now underway in Hollywood and the studios beginning to suspend some overall and first-look deals, the clock has begun ticking on the introduction of two words that instill fear in the hearts of lawyers everywhere: force majeure.

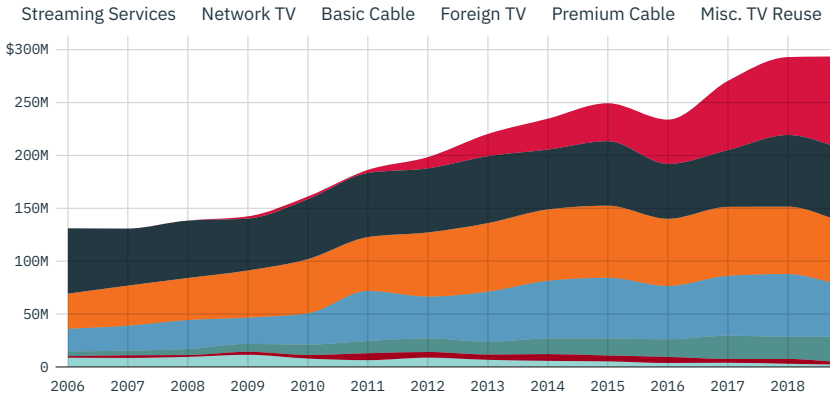
The term, which literally means "greater force" or "greater power" when taken from its native French, is one of the most ubiquitous but least understood concepts in the entertainment space.

Does a strike constitute a force majeure event? Is the answer an unqualified yes? No, it is not — though it certainly may be for some.

There is no monolithic version that enshrines either what qualifies as a force majeure event or which defines whether a party may claim itself excused from performing its side of the contractual obligations because such event has been cited.

Basically, whatever is within the applicable definition of what qualifies as a force majeure event can be deemed one, and some definitions are exceedingly broad — the good old “including, but not limited to” phrase often creating a nigh-infinite universe beyond a few enumerated examples.

Annual Value of TV Residuals by Format



SOURCE: WRITERS GUILD OF AMERICA WEST

But how the force majeure event affects the contractual performance, and how it is interpreted as doing so, raises plenty of questions. Does the event "impede" or "prevent?" Does the event literally make it impossible to perform, extremely difficult or just more expensive?

The answers to those questions make a HUGE difference, as does the controlling contractual language. Who has the right to declare it in the first place, what must they do to effect it and when? Because force majeure provisions are not often assiduously scrutinized, analyzed and negotiated, they can leave painfully open the concepts of suspension (i.e., putting the performance on delay, including payments) and termination. Read that contract but also know those industry practices, and understand why the party citing it is doing so.

The Association of Talent Agents’ summary of major guild force majeure provisions, available to read here courtesy of Deadline, is complicated yet provides some insight as to when and how a guild force majeure event can be declared and processed. Force majeure provisions that are NOT guild mandated may be no less complicated but may also give less guidance on how and when to proceed — the lack of precision being the stuff of which litigation is made.

For clarity, guild- and union-covered services are subject to the applicable collective bargaining agreement (CBA) terms, and to the extent a contract under guild/union

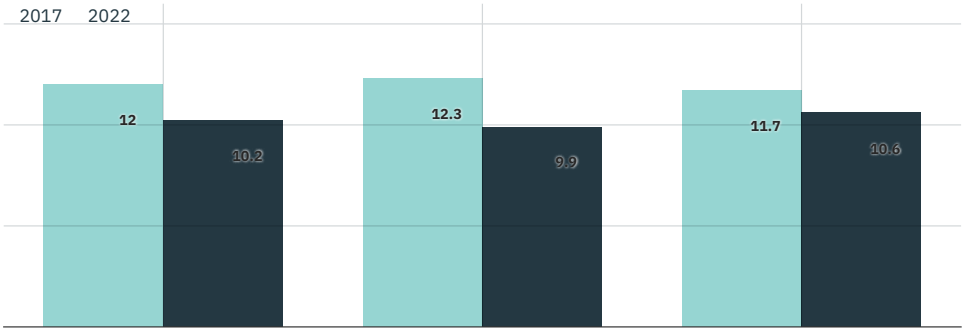
for you, but they probably can't make it worse.

Force majeure events such as strikes have also historically given studios, production companies and networks the ability to rid themselves of a less than productive or undesirable talent relationship (such as first looks and overall agreements). The studio gave Talent X a $5 million development deal, subject to force majeure termination. If that deal wasn't bearing fruit, is it even a question to be rid of it when you can, under whatever pretext? Or even because you're the new regime and want to wash your hands of the prior leadership and its agenda?

Often a force majeure suspension or termination occurs even though the event does not prevent either party from performing. You read that right: Parties may contractually get out of performing predicated upon a force majeure event — even when they can perform.

What if a studio's "distribution generally" is affected — does that mean it not account or pay for distribution that is ongoing? Can they force majeure your *production* out of existence because they are prevented from *distributing* it at the time? Definitely maybe.

Average Number of Live-Action Scripted Episodes Per Show by Genre



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Can a director refuse to perform on a show that elects to continue shooting, even in violation of a writers strike? Can a striking writer do non-union writing? Can a struck union-signatory company produce non-union content? The questions could go on and on, and the answers are not always easy to come by and require deep working knowledge of the applicable agreements, policies and practices.

If you want to hang your hat on litigation decisions, don't bother. It's relatively rare that litigation based upon force majeure gets to a formal court determination, and when it's arbitrated it may be private and non-binding upon third parties, and thus of no or little/limited avail. Nobody — not guilds, not studios — wants binding precedent that is not in their favor, and so there is ample incentive to settle and wrest what you can from the situation, lest an adverse decision become the pattern for all similarly situated.

Gregg Ramer is an experienced entertainment attorney practicing in Los Angeles.

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