

Bulletin #65, Force Majeure – A Clause for Our Times

On September 13, 2001, a client contacted me regarding a project that had been disrupted by the tragic events of September 11. The contract between my client and its customer set a specific production schedule, and had incentives and penalties if certain deadlines were not met. My client's customer was demanding completion on schedule, and threatening to enforce penalties.

Since one of my client's key subcontractors was stuck in North Carolina during the shutdown of air travel, and was unable to return to Minnesota to complete the project on time, my client knew the first set of deadlines would be missed. Panicked, my client called and asked for help. Upon review of the contract, I realized that, fortunately, the following clause had been inserted in the contract:

Force Majeure: Contractor shall not be responsible or penalized for not completing Services to the extent delays or failure in completion is due to events or circumstances outside its control...

Since the suspension of air travel was certainly a circumstance beyond anyone's control, we were able to avoid the late penalties and set new deadlines. The project was completed with some delay; however, the client received all of its bonuses, and was able to maintain a good working relationship with the customer.

As this story demonstrates, in an increasingly uncertain world, force majeure clauses can make all of the difference.

Definitions

Black's Law Dictionary defines "force majeure" as a clause "allocating the risk of loss if performance becomes impossible or impracticable, especially as a result of an event or effect that the parties could not have anticipated or controlled." Similar clauses are also described as "act of God" or "unforeseen delay" clauses. The goal of all of these clauses is essentially the same — to protect a party when delays are imposed as a result of events outside of a party's control.

When to Use These Clauses

When a contract contains either rewards or penalties for meeting deadlines, force majeure clauses are essential. Otherwise, the contractor will be held accountable for meeting a deadline, even if the delay is caused by forces outside its control.

Standard construction contracts deal with these unforeseen delays. For example, the Standard Agreement and General Conditions Between Owner and Constructor from ConsensusDocs addresses the issue directly:

6.3.1 If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be

entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8.

ConsensusDocs 200 (2011 Ed., revised 2019); see also AIA Document A201-2017, Section 8.3.1. Whether it is a standard ConsensusDocs clause or a negotiated provision added to the contract, a contractor needs contractual provisions, which limit its responsibility for events outside its control, if an owner imposes deadlines.

Expanded Clause

While my client was able to successfully use the simple clause referenced above after the events of September 11, other clients have opted for the following more detailed, and comprehensive force majeure clause.

Delay or Non-Performance. Contractor shall not be liable for failure or delay in performance hereunder due in whole or in part to strikes, work stoppages, epidemics, pandemics, fires, acts of terrorism, accidents, wars, rebellions, civil commotion, public strife, acts of any government, whether legal or otherwise, acts of public enemies, force majeure, inability to secure or delay in securing transportation, inability to obtain or delays in obtaining goods, materials, qualified labor, or any other causes beyond the Contractor's reasonable control; this specifically includes delays or inability to obtain product because of the actions of the Contractor's suppliers or subcontractors.

While this example may be "overkill," it does demonstrate the extent to which some contractors are now seeking to avoid liability in the event of disruption beyond their control.

Must Be Outside Contractor's Control

There are limits to force majeure clauses. A force majeure or act of God clause does not allow a contractor to avoid responsibility for any delay on a project. Indeed, courts have looked to

whether the delays were truly the result of actions beyond the contractor's control. See *Unicover World Trade Corporation v. Tri-State Mint*, 1994 WL 383244 (D.Wy. 1993). The acts of September 11 were obviously beyond anyone's control. If the delay was reasonably foreseeable and within a contractor's control, then the contractor will be unable to claim the protection of a force majeure clause, and be liable under the contract for delay.

Conclusion

In these troubled times, our government leaders have advised us to "prepare" for disruptions in our lives through purchasing duct tape, plastic, water and food. At the same time, we also should be vigilant in protecting our businesses. The presence of force majeure type clauses can be an invaluable tool in avoiding conflict and solving problems when business is disrupted.