

Editor's Note: The devastating 2005 hurricane season wreaked unthinkable havoc on the Gulf Coast region of the country. While the rebuilding process continues, contractors should consider including force majeure clauses in future contracts to protect their businesses from possible catastrophes—both man-made and acts of God. The following three articles contain detailed information on force majeure. Contractors, of course, should seek advice of legal counsel in all contract negotiations.

FORCE MAJEURE CLAUSES: THE Basics

BY DENISE L. NESTEL

Construction contracts uniformly stipulate that contractors must diligently pursue work until completion, or face damages and possible termination. The one-two punch of Katrina and Rita sparked a renewed interest in force majeure clauses, particularly the protection available when work cannot be pursued because of events beyond control.

What is a force majeure clause?

A force majeure event is an uncontrollable, unavoidable event that makes a party's performance impossible. A force majeure clause excuses nonperformance when impossibility results from a cause stated in the contract.

What qualifies as a force majeure event?

In conversation, force majeure is often used synonymously with acts of God or forces of nature. However, on a construction project, a force majeure event is, quite simply, whatever the contract says that it is. Not all uncontrollable conditions or

events that make performance impossible are contractual force majeure events.

If a contract limits force majeure events to acts of God, then the event must be exclusively nonhuman and without human intervention. This is not the case in most construction contracts.

In construction contracts, a force majeure event often includes acts of God and forces of nature, but also "man-made" events such as strikes, civil unrest, terrorism, inability to obtain resources, actions of governing authorities, enactment of governmental regulations, etc. The common denominator is that these events are beyond the control of the party seeking excuse from its failure to

perform. In rare occasions, a contract simply defines force majeure loosely to include "anything beyond the parties' control."

What is not a force majeure?

Often, if a contract defines force majeure events, unless language expands that list by stating "including without limitation," then an event not specified in the clause may not excuse nonperformance. For example, if the contract defines force majeure as a flood or hurricane, then a lightning strike may not excuse nonperformance unless a phrase such as "including without limitation" is in the clause.

Do all contracts have force majeure clauses, and, if so, where are they located?

Not all contracts contain force majeure clauses. Even if protection from force majeure events exists, the clause may not be captioned "force majeure" or include this term. Instead, the risk of impossibility due to uncontrolled events is often addressed in "delay" or "changes" clauses.

Must a force majeure event be unforeseeable?

Usually, contracts require that a force

majeure event must be not only beyond control of the party seeking protection, but also be unforeseeable. Foreseeability is determined at the time of entering the contract, not at the time the event occurs.

What if the contract has no force majeure clause?

The majority of jurisdictions hold that a force majeure event discharges the party's performance even if there is no force majeure clause because the party did not assume the risk of performance under any and all circumstances. A minority of jurisdictions hold that, in the absence of a force majeure clause, the party prevented from performing will be held liable for nonperformance consistent with the terms of the contract addressing default or nonperformance.

What relief can a contractor expect if a force majeure occurs?

The party seeking protection under a force majeure clause has the burden of proving the force majeure event exists and that it is preventing performance. A force majeure event can prevent performance, in whole or in part, temporarily or permanently. Typically, the relief pertains to the whole

project. A hurricane, for example, requires demobilization of the project.

But, as some contracts recognize, a force majeure may stop just part of the work and provide an excuse for only the affected part. For example, the contract may provide that only those acts subject to the force majeure are excused, but construction may continue in other areas, or that other types of work, such as purchasing of materials, must continue.

A force majeure clause provides an excuse only so long as the impact of the force majeure prevents performance. Occasionally, a force majeure clause allows the affected party to terminate the contract if the force majeure is of a specified duration.

Does a force majeure clause provide compensation?

Rarely is there any direct compensation. Most force majeure clauses only provide relief in the form of an extension of time without penalty or without assessment of liquidated damages for a period equal to the force majeure. Clauses seldom provide any compensation for the costs to demobilize and remobilize; to repair work; for the escalation of material and labor prices; or the

premium demanded by transporters still operating in the affected areas. However, the contractor should review the changes or claims clause to see if it may still be able to recoup costs.

A force majeure is not the same as commercial impracticability.

Most construction contract force majeure clauses do not provide relief merely because the bargain has become more burdensome or prices have escalated, making the contract commercially impracticable. For example, material price spikes due to regional or national material shortages are generally not considered force majeure.

Force majeure clauses can often be negotiated.

Since force majeure events are, by definition, not expected to occur, upstream parties may agree to extend the protections of a force majeure clause in terms of what qualifies as a force majeure, and what relief is available.

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