Drafting Force Majeure Provisions in Construction Contracts

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A force majeure clause addresses events that are beyond the control of the parties, such as a natural disaster, and defines the parties’ obligations during such events. A well-drafted force majeure clause in a construction contract can minimize or avoid the delay and disputes caused by a significant unexpected occurrence.

This practice note discusses the following:

- Why Have a Force Majeure Clause in a Construction Contract
- Sample Force Majeure Clause
- Defining a Force Majeure Event
- Suspension of Performance, Including Compensation
- Response Obligations
- Termination Rights

For further information on drafting construction contracts, such as an owner and contractor agreement see Drafting an Owner-Contractor Agreement. For more on owner-contractor agreements, see 1-3 Construction Law P 3.05.

Why Have a Force Majeure Clause in a Construction Contract

Force majeure clauses add predictability to dealing with the unexpected. Courts have fashioned the common law doctrines of impracticality and frustration of purpose to determine when the occurrence of the unusual excuses performance under a contract. But the general nature of these doctrines leaves uncertainty as to how they will be applied. Additionally, these doctrines do not often result in a party being able to refuse performance. This can be of particular concern to a contractor because it tends to have more performance obligations than the project owner, whose obligations may be confined to providing site access, payment, and limited project information and approvals. Force majeure clauses also tend to be more important to contractors because construction contracts often contain clauses that enable the owner to suspend or terminate the project for convenience. However, a force majeure clause still benefits an owner because it adds certainty as to when the contractor can and cannot invoke its right to suspend or terminate performance. Further, force majeure clauses can be used to clarify basic requirements regarding what the parties must do with respect to responding to a force majeure event. Putting these requirements in place encourages a more efficient and effective response and thereby lessens project disruption.

Sample Force Majeure Clause

An example of a basic force majeure clause is as follows:

Neither party shall be liable for any failure or delay in performing its obligations under this Agreement if and to the extent that such failure or delay is caused by a Force Majeure event. A Force Majeure event means, in relation to either party, any event or circumstance beyond the reasonable control of that party including act of God, fire, explosion, flood, epidemic, power failure,
governmental actions, war or threat of war, acts of terrorism, national emergency, riot, civil disturbance, sabotage, labor disputes and strikes (other than in respect of the workforce of the party affected). A party affected by the Force Majeure (the “Affected Party”) shall immediately notify the other party (“Non-Affected Party”) in writing of the event, giving sufficient details thereof and the likely duration of the delay. The Affected Party shall use all commercially reasonable efforts to recommence performance of its obligations under this Agreement as soon as reasonably possible.

As further discussed in this practice note, the project owner or contractor may wish to make certain modifications to this basic language to better define the parameters of any excused performance.

**Defining a Force Majeure Event**

As noted above, events that are typically included in the definition of force majeure include:

- War (declared or undeclared), riot or similar civil disturbance, acts of the public enemy (including acts of terrorism), sabotage and blockade
- Acts or failures to act of governmental authorities
- National emergencies or natural disasters such as flooding, lightning, landslide, earthquake, fire, drought, explosion, epidemic and quarantine, hurricane, and tornado
- Labor disputes and strikes (other than with regard to the workforce of the party affected)
- Unavailability of fuel, power, or raw materials.

A force majeure clause is not intended to cover occurrences within the reasonable control of a party. Thus, it is recommended that the list of included events be prefaced with lead-in language establishing that events qualify as force majeure events only if they are outside the reasonable control of the affected party and were not caused by the negligence or malfeasance of that party. Similarly, with respect to a listed event that can be caused by a party’s actions, it is good practice to specifically note that the event will not qualify as force majeure event if it is caused by the fault of the affected party. This has been done above with regard to work stoppages and is appropriate to do with respect to the provision of materials or governmental action as well.

The parties should also consider whether they want this list of events in the definition of a force majeure to be exhaustive. Stating that the list is exhaustive may provide certainty regarding the events that would be considered a force majeure event for the other party. Such certainty, however, works against a party when an event off the list but out of its control impacts its performance. When determining whether the list should be exhaustive, a party should consider the likelihood that such an event may arise given the nature of the project and that the above noted lead-in language (if included) offers some protection against unwanted events from being read into the force majeure clause. Additionally, if there is any borderline event that the parties wish to treat a certain way, it should be expressly included in the list of included or excluded events accordingly. An example is expressly excluding weather conditions that could reasonably have been expected where the work is being performed.

**Suspension of Performance, Including Compensation**

Once the events that constitute a force majeure are clearly defined, the parties must focus on what happens during the time a force majeure event is occurring. Typically, it will be stated that a party shall not be liable for any failure or delay in performing its obligations to the extent that such failure or delay is caused by a force majeure. For the sake of clarity, it is recommended that the parties state that the suspension of the affected party’s performance must be of no greater scope and duration than reasonably necessary to overcome the effects of the force majeure event.

Additionally, there may be certain performance obligations that a party will want to try to exclude from a force majeure clause. For example, it is not uncommon for the force majeure clause to state that a force majeure event shall not suspend the owner’s obligation to make payment under the contract for work performed.

When the contractor’s performance is delayed by a force majeure event, as indicated above, it will receive a commensurate extension to complete the project. While the contractor may have safeguards in place to guard against the effects of garden variety delay, these may not protect it from the delay caused by a force majeure. For this reason, it is common to see language providing that upon a certain amount of force majeure caused delay (e.g., 20 days in the aggregate), the contractor will be entitled to time related costs, such as general conditions costs.
Response Obligations

To minimize the impact of a force majeure event, the parties should also include provisions that require:

- Notice by the affected party to the other party of a force majeure event to be given within a specific time from the occurrence of the event
- Submission by the affected party of a plan for addressing the event—and—
- Commercially reasonable efforts by both parties to overcome or mitigate the effects of the event

The parties should also address who is responsible for care of the site during a force majeure event. Typically, this will be the contractor, as on most projects, it is the contractor who has control of the site and resources at the ready to maintain it. Where this is the case, the force majeure clause may also provide that the owner may direct the contractor to repair damage to the project caused by the force majeure event at the owner’s expense. Further, to guard against abuse of force majeure rights, the parties should require the affected party to provide immediate notice after the force majeure event ends.

Termination Rights

Certain force majeure events may have debilitating impacts that last for a long period of time. When a party plans for a project, it makes plans based on the project occurring during a certain time frame. Thus, it is good practice to define when a party may terminate the agreement because of a prolonged suspension of the affected party’s performance. An example of such a provision is as follows:

If the affected party is relieved from the obligation to perform because of a force majeure event for a period of one hundred eighty (180) days or more in the aggregate, then the other party may terminate this contract upon five days’ notice. Nothing herein shall terminate the owner’s obligation to make payment for work performed.

How long a party will agree to stand idly by is often a function of the scheduling assumptions it has built into its project planning. For further information on drafting construction contracts, such as an owner and contractor agreement see Drafting an Owner-Contractor Agreement. For more on owner-contractor agreements, see 1-3 Construction Law P 3.05.