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Force Majeure and Our Changing World

Force Majeure and Our Changing World: Coronavirus, Terrorism and Other Things Beyond Your Control

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Force Majeure clauses, erroneously referred to from time to time as “acts of god” clauses, are contract provisions which should be modified to reflect our changing world. Force majeure provisions typically allow for an extension of time (although not increased compensation) for delays which were beyond the control of the owner or contractor, which could not reasonably have been anticipated and which could not be mitigated.

There are three major issues which have arisen in recent years which should be addressed in force majeure clauses:

1. Pandemics
2. Terrorism
3. Computer hacking

The classic force majeure event is unanticipated weather events. I have often given the example of an inch of rain in Seattle in November is not force majeure. It is an event that could have reasonably been anticipated and arguably mitigated. However, an inch of rain in Los Angeles in August may very well be a force majeure event. Even then, if everyone saw the rain event coming days in advance, there may be issues of mitigation. If the building was already closed in and outdoor drainage did its job, there may be no force majeure event at all.

Also keep in mind that force majeure is generally not an excuse to performance, it simply provides you with

additional time to perform. However, force majeure is a first cousin to the doctrine of “impossibility”, which is very difficult to prove.

There is case law that indicates that if you don’t specify what constitutes force majeure in the contract clause, the event impacting you may not be deemed force majeure. If all that is called out in your clause is weather and labor strikes, those may be the only force majeure events that count. Even if you have a catch-all phrase, such as “all other issues beyond the control of contractor”, you may still be limited in your assertion of false claims. Lord Tenterden’s Rule states “Where general words follow the enumeration of particular classes of persons or things, the general words will be construed as applicable only as applicable only to persons or things of the same general nature or class as those enumerated.” In short, the specific list may overcome the general catch-all.

We all know that weather can stop a project in its tracks. The question to be answered is who bears the burden and the cost of the delay.

1. Pandemics

As I write this, there is no place where coronavirus is not a frequent topic of conversation. As with the drafting of all contract clauses, it is critical that the terms be clearly defined. By example, as of the date of this writing, the CDC has not yet declared the Covid-19 (popularly known as the Coronavirus) to be a pandemic. The term pandemic itself is very vague. Yet, pandemic or not, the virus has slowed business around the world and will imminently impede deliveries of materials from China and elsewhere.

If you are the plumber and the high-grade bathroom fixtures are still on hold since the plant in China which makes the fixtures is closed for three months and shipping is another two months after that, what should you

do. Your force majeure clause does list pandemics as the basis for a schedule extension. If there is only once source of the fixtures, you may have a force majeure delay claim. If you can buy the fixtures elsewhere at three times the price, you may not have a force majeure event, as you are obliged to mitigate the problem. If the fixtures were not called out in the specifications, you should immediately find an equal fixture for the architect's or owner's approval.

As with the other two force majeure topics addressed in this article, the issue is not just impact of a pandemic on the people who catch it. One could argue that the only issue with a pandemic force majeure clause occurs when you can't find enough workers who are not ill with the pandemic virus. The bigger issue is the ripple effect of the pandemic.

I have used the term "ripple effect" in force majeure clauses. Although that term is certainly vague, it may be expressive enough to allow a court to one day determine that the clause should be read broadly. "Ripple effect" may be subject to interpretive challenges, but one needs to cover the event when the pandemic causes the factory to shut down or the freighter to stay in port. Court's read excuses narrowly, so be broad in your definition. In fact, don't be afraid to give an example in the force majeure clause ("i.e. Delays to manufacturing or shipping delays").

Sometimes a pandemic can simply drive the prices of items up. In the last few days some hand sanitizers have gone up ten times in price. Materials, particularly those that only have a few sources, can be subject to massive escalation. A force majeure clause does not address sky-rocketing prices. This is simply a reminder that a clause which addresses such possible price increases may be in order.

2. Terrorism

Not only do viruses attack us, sometimes people who are aggressive can take actions which delay your work. A terrorist attack unrelated to your company or its work can lead to the slowing or shut down of transportation systems. A terrorist sets off a bomb at the airport, the shipping port, a local subway or a local power plant will impact your ability to finish a project. An equally significant event could be the pirating of a ship on which your materials are located, but here is where definitional problems occur. A pirating event might be

considered a purely economic event and not a terrorism event.

Must a terrorist attack have political ramifications or is any act which attacks the functioning of society a terrorist attack? One could of course define "terrorism" within the clause itself.

Much like I have addressed the impact on prices of a pandemic, the same issue of hyperinflated prices can result from terrorism. This too requires a separate clause.

For all the drafting challenges, a clause which even mentions "terrorism or the ripple effect of terrorism" is far better than what I see in most contracts.

3. Hacking

Computer viruses, hacking, malware, ransomware, and other computer related problems are probably the equal of weather as a current problem for companies and when it hits, the impact is far worse than a bit of bad weather.

More than ever, computers are at the core of construction. CAD, digital pictures and videos, drones, robot installers, tablet-based systems running off the project WIFI.

Computer problems are here and now. There are new systems every day, including augmented reality systems and systems run by AI. It could all crash in a second. Yet, find me a standard contract which addresses hacking in a force majeure clause.

Hacking does not have to occur on your computer. Your cloud system exists remotely and could stop working remotely, meaning your company comes to a stop here and now even though your computers are just fine. Once again, the issue is not just that your company is hacked. The issue may be that your vendor is hacked or your bank is hacked. In the event of ransomware, fixing the issue can take days and weeks. No issue cries out more for contract risk management than the computer hacking.

Given the enormous risks resulting from hacking, you should have a force majeure clause that anticipates these issues and gives you the ability to buy some time (assuming you can email or text the other parties to your contract).

Other Issues

With a little brainstorming you can identify many other force majeure issues. I'll just note one for my southern California brethren. You might want to include earthquakes in your force majeure clause, particularly since earthquakes really aren't weather. The "big one" will bring many contractors and subcontractors to a dead stop.

Also, if you are in litigation, the defense of "force majeure" is an affirmative defense that must be set forth specifically in your answer.

Conclusion

The time has come to update your force majeure clause to reflect the realities of our times. Stay healthy.

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