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## Force Majeure Contract Clauses

by Andrew L. Smith



After the devastation and chaos caused by Hurricane Katrina members of the construction industry have learned the hard way that unanticipated events and natural disasters can have enormous impacts on the price of materials and the cost of labor. Such factors can significantly impact the bottom line of any construction project agreement. One way to plan against these risks is to use a force majeure clause in the construction contract.

A force majeure clause in a contract defines the scope of unforeseeable events that might excuse nonperformance by a party. The term force majeure used in drafting project documents comes originally from the Code Napoléon of France and means "superior force." Force majeure clauses are included in commercial contracts to provide flexibility in a volatile economy.

The following is a common example of such a clause:

*A party shall not be liable for any failure of or delay in the performance of this Agreement for the period that such failure or delay is due to causes beyond its reasonable control, including but not limited to, acts of God, war, strikes or labor disputes, embargoes, government orders or any other force majeure event.*

The exact terms and scope of a force majeure clause are left to the negotiation skills of the parties to the contract. The clause can state that the contract is temporarily suspended, or that it is terminated if the event of force majeure continues for a prescribed period of time. A general list of force majeure events might include war, terrorism, riots, fire, flood, hurricane, typhoon, earthquake, lightning, explosion, strikes, lockouts, slowdowns, prolonged shortage of energy supplies, and acts of state or governmental action prohibiting or impeding any party from performing its respective obligations under the contract. Courts tend to interpret force majeure clauses narrowly. Indeed, only the events listed and events similar to those listed will be covered.

Importantly, in the absence of a force majeure clause, parties to a contract are left to the mercy of the narrow common law contract doctrines of impracticability, impossibility, and frustration of purpose, which rarely excuse nonperformance. Therefore, it is imperative to draft a clause tailored to the subject matter of the contract between the parties.

When drafting a well-written force majeure clause, the following factors should be considered in analyzing the facts specific to each project and each contract:

- What is the definition of force majeure events?
- What happens when a triggering event occurs?
- What notice is required to communicate a force majeure event?



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- Who can suspend performance and when?
- How does a force majeure event impact the contractual obligations of the parties?
- What happens if the force majeure event continues for more than a specified period of time?

## Common Law Requirements

To use a force majeure clause as an excuse for nonperformance, the nonperforming party bears the burden of proving that the event was beyond the party's control and without its fault or negligence. *Stand Energy Corp. v. Cinergy Servs.*, 144 Ohio App. 3d 410, 760 N.E.2d 453 (2001). Mistaken assumptions about future events or worsening economic conditions, however, do not qualify as a force majeure. "When a party assumes the risk of certain contingencies in entering a contract, \* \* \* such contingencies cannot later constitute a 'force majeure.'" *Dunaj v. Glassmeyer*, 61 Ohio Misc. 2d 493, 497, 580 N.E.2d 98 (1990).

A party cannot be excused from performance merely because performance may prove difficult, burdensome, or economically disadvantageous. *Stand Energy Corp. v. Cinergy Services, Inc.*, 144 Ohio App.3d 410, 760 N.E.2d 453 (2001), citing *State ex rel. Jewett v. Sayre*, 91 Ohio St. 85, 109 N.E. 636 (1914). The inability to purchase a commodity at an advantageous price is not a contingency beyond a party's control. *Id.* If it were, fixed-price contracts, where the parties allocate the risk of price rises in a fluctuating market, would serve no purpose. *Id.*

The Ohio Supreme Court in *Piqua v. Morris*, 98 Ohio St. 42, 120 N.E. 300 (1918), explained:

*The term 'Act of God' in its legal significance, means any irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning and unprecedented floods. It is such a disaster arising from such causes, and which could not have been reasonably anticipated, guarded against or resisted. It must be due directly and exclusively to such a natural cause without human intervention. It must proceed from the violence of nature or the force of the elements alone, and with which the agency of man had nothing to do.*

For example, in *Stand Energy Corp.*, the plaintiff refused to perform under the contract, which would have required it to "purchase power at high market prices and provide it to Cinergy at a low contract price," because of "unseasonably hot temperatures \* \* \*, record demand for power and unprecedented high hourly prices for electric power." At trial, Stand Energy's president testified that she had relied upon force majeure to preserve the economic vitality of the company, and to save the jobs of fifty employees. The court held "[t]he inability to purchase a commodity at an advantageous price is not a contingency beyond a party's control," and may not subsequently constitute a force majeure. In *Stand*, there was no evidence of a refusal to work by employees or independent contractors.

In *Milton Taylor Constr. Co. v. Ohio Dept. of Trans.*, 61 Ohio App. 3d 222, 572 N.E.2d 712 (1988), the Franklin County Court of Appeals held that two inches of rainfall in 24 hours did not constitute a force majeure event. The contractor was building a culvert under a roadway. After completion of the project, the contractor sought reimbursement from ODOT under the contract documents for the additional expenses associated with repairing work caused by the rain. The court held the heavy rainfall did not constitute an act of God based on the testimony establishing that rainfall of that severity could occur every year. Further, the court indicated that the rainfall could reasonably have been expected and was not an unforeseeable event.



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Likewise, in *Fiber Crete Construction Corp. v. L.W.L.*, 3rd Dist. No. 2-86-24, 1987 Ohio App. Lexis 9290, the court considered contractor's claim that damage to a construction project was caused by severe weather and not misuse of equipment. In denying the contractor's claim, the court held:

*An Act of God, or vis major, is an irresistible disaster, the result of natural causes, such as earthquakes, violent storms, lightning or unprecedented floods, which could not have been anticipated. The evidence here is of a light snow and a freeze at night on December 30th. This change in weather conditions is not unusual in Auglaize or adjoining counties in the closing days of December. The variation in the weather was ordinary and normal, not extraordinary in nature. Such a change in the weather is common knowledge and one to be anticipated in the community.*

*Id.* at \*6.

In addition, the court noted to constitute an unexpected vis major it is essential that the event be the sole cause of the damage without human intervention. The human intervention in *Fiber Crete* was the exposure of the equipment to the snow without a cover and the contractor's failure to watch or check its operation overnight. Indeed, "failure to do so is not excused by normal changes in the weather such as may be anticipated in the heart of the winter season." *Id.*

## Points to Remember

A force majeure clause in a contract defines the scope of unforeseeable events that can excuse nonperformance by a party. In the absence of a force majeure clause, parties to a contract are left to the mercy of the narrow common law contract doctrines. Thus it is imperative to draft a clause tailored to the subject matter of the contract between the parties.

In sum, reliance upon a force majeure clause requires one or more of the following conditions be fulfilled:

1. The specified event is beyond the control of the claiming parties;
2. The event prevents or delays, in whole or in part, the performance of the contract;
3. The event makes performance of the contract imprudent, substantially more difficult, or substantially more expensive;
4. The event was not due to the fault or negligence of the claiming party; and
5. The claiming party has exercised reasonable diligence to overcome or remove the specified force majeure event (i.e. mitigation of damages).

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