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Construction Litigation Committee

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**Damages Issue** Winter 2006 Vol. 15 No. 2



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When a hurricane brings a construction project to a stop, who pays for the delay? When access to a security-sensitive construction site is severely restricted because of newly promulgated, post-9/11 terrorism security measures, who pays for the contractor's loss of productivity? When worldwide natural disasters cause the price

## Force Majeure: Risk Allocation for Unforeseeable Events

By Timothy S. Taylor and Allison O. Kahn



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of building materials to skyrocket, who should bear the extra costs? The answers to these questions should be found in the force majeure provisions of the parties' contracts.

Force majeure, or the Latin expression *vis major*, describes the particular circumstances that may excuse per-

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## Force Majeure

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formance under a contract when an act of God or some other supervening event occurs beyond the control of either of the parties.<sup>1</sup> In determining whether a force majeure event has occurred, the test is “whether under the particular circumstances there was such an insuperable interference occurring without the party’s intervention as could not have been prevented by the exercise of prudence, diligence and care.”<sup>2</sup> In other words, the force majeure event has to be (1) not reasonably foreseeable in the ordinary course of the industry and (2) beyond the reasonable control of the party.<sup>3</sup>

### Drafting the Force Majeure Clause

Force majeure clauses can shift the risk allocation from the promisor, who is providing the labor, materials, or service, to the promisee, who has agreed to pay for and accept the labor, materials, or service.<sup>4</sup> For example, a contractor may demand that a force majeure clause be inserted into the general contract to allo-

cate to the owner the risk of loss in the event that unforeseeable delays occur for reasons beyond the control of the contractor. Similarly, a subcontractor or supplier may place a force majeure clause in its subcontract or supply contract to shift the risk to the contractor for unforeseeable delays that are beyond their control. In the absence of a force majeure clause, the performance risk is presumed to rest with the promisor.<sup>5</sup>

Enforceability of a force majeure clause is determined by the intent of the parties, which is evidenced by the language in the contract.<sup>6</sup> The terms of the contract will be enforced with common law rules merely filling in gaps left by the document.<sup>7</sup> “In other words, when the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.”<sup>8</sup> Consequently, parties to a construction contract should draft the force majeure provision with care, mindful of the risks that they may encounter, especially in light of lessons learned from recent disasters.

For example, a force majeure clause may provide that:

Neither party will be liable for any breach or failure to perform under this Agreement or any other documents incorporated by reference herein if such breach or failure to perform is due to acts beyond the reasonable control of such party, which include by way of illustration, acts of God or public enemy, acts of Federal, state or local government, either in its sovereign or contractual capacity, fire, floods, civil disobedience, strikes, lock-outs, freight embargoes, inclement weather, or any other cause or conditions beyond such party’s reasonable control; provided, however, that the party which has been so affected will (i) promptly give written notice to the other of the fact that it is unable to so perform and the cause(s) therefore; and (ii) resume its performance under this Agreement immediately upon the cessation of such cause(s).<sup>9</sup>

As illustrated in this example, force majeure clauses often contain catchall phrases such as “or any other cause or conditions beyond such party’s reasonable control.” Such a catchall phrase must be construed within the context

established by the list of force majeure events that precedes it.<sup>10</sup> Although such a broad term would suggest an expansive interpretation, the term will be limited to events similar to those specifically enumerated. In addition, the party seeking relief under the force majeure clause must show it exercised reasonable diligence to avoid the event.<sup>11</sup>

Parties also should contract for the remedies available upon occurrence of force majeure events. Often, construction contracts and supply contracts will grant time extensions but no monetary relief. For example, a force majeure clause may permit an extension of the completion date but prohibit a contractor from claiming damages resulting from delay.<sup>12</sup> However, parties are free to contract otherwise. The negotiation of a force majeure clause should accurately reflect the ability of the parties to accept and allocate risk. Therefore, a contractor in a project located in a state where extreme weather conditions are possible may want to build a contingency risk into the price of the contract or negotiate terms for monetary relief in the event of delays resulting from such events.

#### **Hurricanes and Natural Disasters**

Parties to a construction contract should also consider whether to make provision for the impact of force majeure events on the cost of construction supplies.

Until recently, the inflation in building materials has been driven in large part by the rapid industrialization of nations like China and India, as well as by the enormous reconstruction efforts in Iraq and Afghanistan.<sup>13</sup> However, the devastation of hurricanes and other natural disasters in the 2004 and 2005 hurricane seasons has caused fuel prices to skyrocket, and costs for lumber, plywood, cement, and steel are also expected to rise. Past natural disasters, such as Hurricane Andrew in 1992, inflated the price of building materials. Hurricane Andrew destroyed more than 28,000 housing units and was largely responsible for pushing the cost of plywood up 44.6 percent and the price of Southern pine framing lumber up 16.7 percent, according to the National Association of Home Builders. Compare those statistics with the roughly 200,000 homes

destroyed in the City of New Orleans by Hurricane Katrina and the picture starts to become clear. We can expect increases in the costs of most construction materials, including concrete, lumber, steel, and drywall. Furthermore, the rising fuel prices will no doubt increase the production and distribution costs of these materials.<sup>14</sup>

There can be no mistake that hurricanes and similar natural disasters will trigger a force majeure clause in a contract. However, a contract that only allows for time extensions is of no help to contractors, subcontractors, and suppliers facing potentially record-breaking increases in material costs and fuel

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expenses. Similarly, a contract that allows a contractor an extension of time or damages for delay usually will not cover the costs of construction materials that increase drastically as a result of the force majeure event. Consequently, to be protected, the party responsible for supplying such materials needs to include separate escalation clauses in its contract to absorb increases to material or labor costs. These clauses usually reference a general inflation index or a specific materials/industry index to be adjusted at specific intervals, that is, monthly, annually, and so on.<sup>15</sup>

Therefore, in the event that a project suffers massive increases in materials costs, such a provision allows the contractor to seek an increase in the agreed-upon price for these materials.

#### **Terrorism and Government Policy**

Since the unfortunate events of September 11, 2001, terrorism has become a well-known force majeure event. Terrorism can impact a construction project directly, as was the case in New York City, or indirectly, by affecting market conditions and increasing government security and regulation.

The issue of whether increased governmental antiterrorism security measures constitute a force majeure excuse for contractor delay was at issue in the recent decision of *Broward County v. Brooks Builders, Inc.*<sup>16</sup> Brooks Builders, the contractor, filed suit against Broward County seeking compensation for delay damages on a project for construction of a fire station adjacent to the Fort Lauderdale airport. Although the project was not inherently complex, its location—adjacent to an active airport runway—presented significant challenges and numerous delays. Some of the delays were caused by a considerable increase in security measures on the active airport runway after the September 11, 2001, terrorist attacks. These delays occurred daily as the construction workers spent a substantial amount of time gaining access to the worksite through the security gates. The contract expressly required the contractor to comply with all airport security measures, but the contractor argued it could not have anticipated the extra measures put in place after 9/11.

The court found that although the parties may not have foreseen the extraordinary delays due to the September 11 terrorist attacks, their contract nonetheless had multiple provisions suggesting that the risk of loss for unexpected delays was to be borne by the contractor. Nevertheless, the contractor claimed relief under the following force majeure provision:

In the event that the Contractor is ordered by the Engineer, in writing, to suspend work for some unforeseen cause not otherwise provided for in the contract and over which the Contractor has no control, the

Contractor may be reimbursed for actual money expended on the work during that period for shutdown. . . . No provision of this article shall be construed as entitling the Contractor to compensation for delays due to inclement weather, for suspensions made at the request of the Contractor, or for any other delay provided for in the contract, plans, or specifications.

The court disagreed with the contractor's interpretation of this provision, because the gate access delays resulted from the increased security measures implemented by the government, not from any order by the engineer. However, the court's ruling suggests that had the contract contained a force majeure clause allocating risk of governmental interference to the county, then the contractor could have recovered damages resulting from delay.

Courts traditionally have found that government policies that indirectly affect the economic conditions and profitability of a contract are not force majeure events. For example, in *Seaboard Lumber Co. v. United States*,<sup>17</sup> Seaboard entered into a timber contract with the U.S. government to harvest timber on government lands. At the time the contracts were executed in September 1980, there was a housing boom, and the price of timber was high. However, between 1981 and 1983, the government allowed interest rates to rise in order to combat inflation, which led to a softening of the housing and lumber markets. This arguably caused many contractors to run into financial difficulties. Seaboard sought relief from the courts in order to invoke a force majeure clause in its contract for "acts of Government," which granted relief to the contractor where

[the contractor] experiences delay in starting scheduled operations or interruption in active operations either of which stops removal of Included Timber from Sale Area through curtailment in felling and buckling, yarding, skidding and loading, hauling or road construction, as scheduled under B6.31, for 10 or more consecutive calendar days during a Normal Operating Season due to causes beyond Purchaser's control, including but not limited to

acts of God, acts of the public enemy, acts of Government, labor disputes, fires, insurrections or floods.

Seaboard sought to invoke the force majeure clause for "acts of Government" that made its timber contract costly and unprofitable. Specifically, Seaboard argued that there were a number of government acts that occurred during the early 1980s that affected its contract—for example, new monetary control procedures and the deregulation of savings institutions—which led to an increase in interest rates and a slump in the timber market.

The court found that the force majeure clause listing "acts of Government" as an excuse for performance was not to be interpreted so broadly as to include government fiscal or monetary policy. Government acts or policies that were complained of had no more than an attenuated effect on the contract at issue and at most made performance of the contract unprofitable. Government policies that affect the profitability of a contract but do not preclude performance should not be considered "acts of Government" in the context of force majeure. Finally, the court reassured, "A force majeure clause is not intended to buffer a party against the normal risks of a contract. The normal risk of a fixed-price contract is that the market price will change."<sup>18</sup>

### Force Majeure Insurance

Almost by definition, the damages resulting from a force majeure event can be disastrous. However, perhaps the best solution for allocating risk is for the owner to assume the risk and then insure against it. Force majeure insurance may include coverage for project completion, performance coverage, and delayed completion.<sup>19</sup> Although a project is usually protected by "all-risk" insurance provided by the contractor, all-risk insurance usually does nothing more than cover the expense of repairing the work in place. However, it does not provide coverage for damages incurred by the owner for the delays incurred in completing the project, which often can be substantial. Therefore, force majeure insurance may be the best way to protect owners who are concerned about their investment

from unforeseen delay damages resulting from force majeure events.

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### Endnotes

1. See *R&B Falcon Corp. v. Am. Exploration Co.*, 154 F. Supp. 2d 969, 973 (S.D. Tex. 2001).
2. See *Mathes v. City of Long Beach*, 263 P.2d 472, 477 (Cal. Ct. App. 1953).
3. See *Stroud v. Forest Gate Dev. Corp.*, 2004 WL 1087373 (Del. Ch. 2004).
4. See *In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp. 440, 459 (E.D. Va. 1981) ("the risk of a contingency that affects performance is presumed to rest on the promisor. However, the parties may agree to shift a particular risk to the promisee, or to allocate the various risks between them as they see fit.").
5. *Id.*
6. See *R&B Falcon Corp.*, 154 F. Supp. 2d at 973.
7. *Id.*
8. *Id.* citing *Sun Operating Ltd. v. Holt*, 984 S.W.2d 277, 283 (Tex. App. 1998).
9. 12 WEST'S PENNSYLVANIA FORMS, COMMERCIAL TRANSACTIONS § 2301, form 12.5.
10. See *Stroud*, 2004 WL 1087373 at 5; see also *Matador Drilling Co. v. Post*, 662 F.2d 1190, 1198 (5th Cir. 1981) (requiring party claiming force majeure to demonstrate that event of same general character as those specifically listed in clause occurred).
11. See *Stroud*, 2004 WL 1087373 at 5.
12. Wm. Cary Wright, *Force Majeure Clauses and the Insurability of Force Majeure Risks*, CONSTR. LAW., Fall 2003, at 17.
13. James Temple, *Cost of Building Expected to Rise*, CONTRA COSTA TIMES (S.F.), Sept. 9, 2005, at 2.
14. *The Katrina Premium: Facing Higher Construction Costs, Governments Need to Scrutinize Needs More Closely*, FORT WAYNE NEWS SENTINEL, Sept. 13, 2005, at A6.
15. Laurence P. Lubka, *What Can I Do About Those Steel Prices?*, CLAIMS RESOURCE, Fall 2004.
16. 908 So. 2d 536 (Fla. 4th Dist. Ct. App. 2005).
17. 308 F.3d 1283 (Fed. Cir. 2002).
18. *Id.* citing *N. Ind. Pub. Serv. Co. v. Barbon County Coal Co.*, 799 F.2d 265, 275 (7th Cir. 1986).
19. PHIL BRUNER & PATRICK O'CONNOR, BRUNER AND O'CONNOR ON CONSTRUCTION LAW, § 11.126 (2002); Wright, *supra* note 13.

## Force Majeure Delays

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Force majeure is the concept of excusing contractual performance as a result of unforeseen circumstances. Although force majeure clauses traditionally have encompassed extraordinary events identified as "acts of God," the actual application of the term may have a much wider or narrower scope, depending on the specific wording of the contract at issue.<sup>1</sup> This article will examine case law relating to

force majeure, identify recent issues regarding force majeure provisions, and suggest situations that should be considered when drafting a force majeure clause in this era of uncertainty.<sup>2</sup>

The term "force majeure" originates in Napoleonic law, although the concept is found in many of the great legal traditions.<sup>3</sup> Force majeure is essentially the "prevention of a party's performance that is caused by an unforeseen, supervening event not within the control of either party."<sup>4</sup> No uniform set of events constitutes force majeure. Instead, force majeure provides "a flexible concept that permits the parties to formulate an agreement to address their unique course of dealings and industry idiosyncrasies."<sup>5</sup> A common misconception is that force majeure applies when the total destruction of the subject of the contract occurs; for example, a hurricane destroys a construction site. Although this is true, the scope of force majeure often extends much further. The doctrine of force majeure has developed, generally, from "physical impossibility" to "frustration of purpose" and more recently to "commercial impracticability." If the contract is able to be performed, but the underlying purpose of the contract no longer exists, the concept of frustration of purpose is implicated. In the case of commercial impracticability, performance is still possible, and the purpose of the contract can still be fulfilled. Due to changes in circumstances, however, the performance of the promisor's obligations has become economically senseless.

The September 11, 2001, terrorist attacks on the United

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States placed a new importance on properly contracting for force majeure possibilities. Similarly, Hurricane Katrina may change the way lawyers approach drafting force majeure clauses. The practitioner drafting construction contracts not only must appreciate the concept of force majeure, but also must be ever mindful of the location of the project and the laws that will govern the parties.

### Purpose of a Force Majeure Clause

Force majeure provisions serve two purposes: they allocate risk and they provide notice to the parties of events that may suspend or excuse performance. The possible risks in the performance of a contract, however, are so numerous that they often cannot reasonably be considered at contract execution. For instance, many insured parties thought that the term "acts of war" would apply in the event of a terrorist attack. Courts, however, have not followed this logic.

In a construction context, force majeure "refer[s] to certain circumstances and events that are recognized as being above and beyond the control of contracting parties and that could not reasonably have been foreseen or avoided by the due care of either of the parties."<sup>6</sup> Though a force majeure event may allow an extension to a completion date, it normally does not permit a contractor to recover losses or damages resulting from the delay.<sup>7</sup> Most importantly, force majeure clauses are "constructed in each circumstance with exacting attention to the specific wording of the provisions as the scope and effect of the clause may vary with each contract."<sup>8</sup> Thus, careful drafting is essential, with due consideration of all perils that may befall a construction project.

### Foreseeability

To constitute force majeure and excuse performance or justify nonperformance, the event must have been unforeseeable at the time of contracting. The rationale is that a party's failure to contractually protect itself from a foreseeable contingency is essentially an assumption of that risk.<sup>9</sup>

Foreseeability is complicated by ambiguity that may become apparent when the parties seek to apply the clause to a particular event.<sup>10</sup> Situations may be foreseeable generally, but not specifically.<sup>11</sup> A hurricane hitting the Gulf Coast may be anticipated, although the effects of Hurricane Katrina likely may not be.<sup>12</sup> A court may find an event foreseeable or unforeseeable depending on the type of inquiry the judge conducts.

An oil crisis in some cases may be foreseeable.<sup>13</sup> However, a court may consider the same oil crisis unforeseeable if the court focuses on the specific causes of the crisis or on the crisis's specific effects on the contract at issue. If the court tests foreseeability by asking specific questions, then it is more likely that the disruptive event will be considered unforeseeable.<sup>14</sup>

On the other hand, if the court conducts a more general inquiry regarding the overall event, then it is more likely that the event will be deemed foreseeable.<sup>15</sup> The concept of foreseeability is even vaguer in the wake of recent terrorist attacks around the world. A court may not be receptive to an argument that a future terrorist attack was not foreseeable regardless of the job site location.

Courts have held that the foreseeability test should not be applied if it is not specified within the force majeure provision that an event must be unforeseeable.<sup>16</sup> In drafting a force majeure clause, it may be better to expressly eliminate the notion of foreseeability and avoid the potential for court inquiry.<sup>17</sup>

Another option available to drafters seeking to broaden force majeure via the foreseeability application is to focus the language on the effects of a disruptive event, rather than specifically enumerating all potential events. For example, a force majeure clause could be drafted to focus on the unavailability of construction materials (as an effect of Hurricane Katrina) rather than attempting to draft a provision that specifically contemplates a category five hurricane. With such a clause, the courts are more likely to focus on the foreseeability resulting from the disruptive event, which is more likely to lead to a conclusion of unforeseeability, thereby satisfying the force majeure requirement.<sup>18</sup> By focusing on the effects, the contracting parties need not attempt to predict the nature of a future terrorist event or devastating weather.

#### Control

Force majeure clauses often exclude events that are “reasonably within the control of either party.”<sup>19</sup> The principle of “control” subsumes the legal issues of contractual assumption of risk, foreseeability, legal control, actual physical control, fault and negligence, and avoidance and mitigation.<sup>20</sup>

The Fifth Circuit has held that the term “reasonable control” involves two related concepts.<sup>21</sup> First, a party may not affirmatively cause a force majeure event. Second, a party may not rely on an event excusing performance if the party could have taken reasonable measures to prevent the event.<sup>22</sup>

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The control requirement is not mandated by law.<sup>23</sup> Therefore, parties may contract out of the control requirement by omitting it from their force majeure clause.<sup>24</sup> Parties are free to set their own standards for measuring the performance of contractual obligations as long as those criteria are not “manifestly unreasonable.”<sup>25</sup> The “manifestly unreasonable” standard will determine whether a party’s inducement of an event, either

affirmatively or negligently, may preclude a legitimate claim for nonperformance. Affirmative inducement of an event pertains to the Fifth Circuit’s first notion of “reasonable control”—that of causing the force majeure event. Negligent inducement of an event relates to the other notion of “reasonable control”—that of failing to take reasonable steps to prevent the occurrence of a disruptive event.<sup>26</sup>

Under U.S. law, “it is quite clear that financial impediments provide no excuse; these are regarded as ‘subjective’ rather than ‘objective’ impossibility and there is unanimity in the case law and in doctrine that subjective impossibility provides no excuse.”<sup>27</sup> The contracting parties’ financial ability to perform is a basic assumption and only may be excused by a bankruptcy decree.<sup>28</sup>

#### Force Majeure Today

The traditional boilerplate language of force majeure clauses is too general and vague for modern circumstances. It is no longer sufficient for parties to insert this language in the miscellaneous section of a contract and hope that such an event will not happen. Parties in today’s climate should use specific and detailed language in carefully defining the scope and effect of a force majeure clause.

Although it is true that many force majeure clauses tend to include acts of man such as riots and wars, courts tend to narrowly interpret such language and limit its application to the events specifically listed. The seminal case holding that an act of terrorism did not constitute an act of war, *Pan American World Airways, Inc. v. Aetna Casualty & Surety Co.*,<sup>29</sup> did so in the context of a coverage exclusion for liability insurance. In reaching its decision, the court noted that an ambiguity in an insurance policy should be decided in favor of the insured. Broad force majeure provisions, however, have been held to apply to terrorist attacks.

In *World Trade Center LLC v. Fitzgerald*,<sup>30</sup> a tenant at one of the destroyed twin towers sued to recoup a portion of its rent payments allegedly paid in contemplation of future benefits under the lease. The broad force majeure provision in *World Trade Center LLC*, however, excused nonperformance resulting from “the acts of third parties.”<sup>31</sup> The court held that the claim was barred by the force majeure provision, which expressly excused performance of the lessor “under circumstances such as those presented by the events of September 11, 2001.”<sup>32</sup> The court also stated that “[t]he defendants are sophisticated commercial tenants and there is no reason to excuse them from the operation of the force majeure clause which they freely negotiated.”<sup>33</sup>

Although the *World Trade Center LLC* contract pertained to direct damages occasioned by the terrorist attacks, many other cases involve the attempt to apply force majeure provisions to the economic downturn following September 11, 2001.

*OWBR v. Clear Channel Communications, Inc.*<sup>34</sup> involved a very broad force majeure provision including excusing performance when the contract is “inadvisable” to perform. The plaintiff sued the defendant for breach of its contract to rent 500 hotel rooms for a music festival in February 2002. The defendant argued that force majeure excused its performance

because of the economic downturn following September 11th and its inability to sell tickets and rooms made it "inadvisable" to continue the music festival. Despite this broad force majeure provision, the court held that "when looked at in the context of the Force Majeure clause, the events of September 11 did not render performance under the agreement in February of the following year objectively inadvisable."<sup>35</sup> The court based its opinion in part on the fact that "Black's Law Dictionary defines a force majeure clause as a 'contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect the parties could not have anticipated or controlled.'"<sup>36</sup> The court reasoned that while the "specific language used in the Force Majeure provision is significant, the term 'inadvisable' may not be divorced from the remainder of the clause."<sup>37</sup>

*Sub-Zero Freezer Company v. Cunard Line Limited*<sup>38</sup> illustrates the importance of including a force majeure provision in all contracts. In *Sub-Zero*, the plaintiff reserved an entire cruise ship to sail the Mediterranean the first week of October 2001. In the three weeks between the September 11th terrorist attacks and the scheduled departure date, many of plaintiff's employees and guests informed the company that they would not attend the cruise due to safety concerns. The defendant refused to reschedule the cruise and also refused to refund the prepayment amount. The plaintiff was left without recourse because the contract did not contain a force majeure provision. The court stated that "[i]t is understandable that [plaintiff was] reluctant to cruise the eastern Mediterranean in the immediate aftermath of September 11. It does not follow, however, that plaintiff can rewrite the contract to insert provisions it failed to bargain for in the original agreement."<sup>39</sup>

Rather than discuss the concept and scope of force majeure, courts have continued to focus on the exact terminology of the force majeure provision. In *Broward County v. Brooks Builders*,<sup>40</sup> post-September 11, 2001 airport security measures caused substantial delays to an airport construction project. Although most force majeure provisions would seem applicable to this situation, the court pointed out "there are numerous provisions in the construction contract suggesting that any risk of loss for unexpected changes in conditions was to be fully assumed by [the contractor]."<sup>41</sup> This express contract language prohibited the contractor from recovering for additional delays that were clearly out of its control and a result of the increased airport security measures after September 11, 2001.

#### *Codification of Force Majeure in the United States*

Different states approach force majeure in different ways. Twenty-seven states<sup>42</sup> mention force majeure at some point in their state code.<sup>43</sup> A large number of those states, however, make no more than a passing reference to force majeure. For instance, thirteen of the above-mentioned states refer to force majeure in only one section of their code while not defining the term at all.<sup>44</sup> A few states include more detailed statutory language when referring to a situation involving a force majeure. Only seven states provide a definition of force majeure within their code, and

typically the definition is specifically tailored for the area of the code where the definition is found.

Some definitions are very general. For instance, Virginia simply defines force majeure in its "Emergency Petroleum Products Supply Act" as "an act of God or any other cause not reasonably within the control of the supplier."<sup>45</sup> The Virginia definition eliminates the foreseeability prong, focuses solely on the issue of control, and does not list specific causes that may qualify. Arizona similarly does not list specific causes that may qualify under the definition. Arizona defines force majeure in a chapter of its code dealing with the sale of land by public auction as "an act of God or of nature, a superior or overpowering force or an event or effect that cannot reasonably be anticipated or controlled and that prevents access to the sale location for conduct of a sale."<sup>46</sup> This definition requires both control and foreseeability.

Other statutes are extremely specific in what may qualify as a force majeure under their definition. Pennsylvania allows the Pennsylvania Public Utility Commission to either modify existing underlying obligations of electric distribution companies or recommend to the General Assembly elimination of underlying obligations by claiming a force majeure "if it determines that alternative energy resources are not reasonably available in sufficient quantities in the marketplace for the electric distribution companies . . . to meet their obligations."<sup>47</sup>

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The remaining four state statutes are very similar and list very specifically what may constitute a force majeure. Hawaii defines force majeure in a "Mining and Minerals" statute as

any fire, explosion, flood, volcanic activity, seismic or tidal wave, mobilization, war (whether declared or undeclared), act of any belligerent [of] any such war, riot, rebellion, the elements, power shortages, strike, lock-out, difference of workers, any cause which prevents the economic mining of the lease, or any other cause beyond the reasonable control of the party affected, whether or not of the nature or character hereinabove specifically enumerated.<sup>48</sup>

Similarly, Colorado, in a "Transportation" statute dealing with "Design-Build Contracts," defines force majeure as meaning

any fire, explosion, action of the elements, strike, interruption of transportation, rationing, shortage of

labor, equipment, or materials, court action, illegality, unusually severe weather, act of God, act of war, or any other cause that is beyond the control of the party performing work . . . and that could not have been prevented by the party while exercising reasonable diligence.<sup>49</sup>

A Texas "Public Utility" statute defines force majeure as

a major event or combination of major events, including new or expanded state or federal statutory or regulatory requirements; hurricanes, tornadoes, ice storms, or other natural disasters; or acts of war, terrorism, or civil disturbance, beyond the control of an electric utility. . . . The term does not include any changes in general economic conditions such as inflation, interest rates, or other factors of general application.<sup>50</sup>

Finally, Georgia defines force majeure in a statute dealing with "Income Taxes" as any

(A) Explosions, implosions, fires, conflagrations, accidents, or contamination;

(B) Unusual and unforeseeable weather conditions such as floods, torrential rain, hail, tornadoes, hurricanes, lightning, or other natural calamities or acts of God;

(C) Acts of war (whether or not declared), carnage, blockade, or embargo;

(D) Acts of public enemy, acts or threats of terrorism or threats from terrorists, riot, public disorder, or violent demonstrations;

(E) Strikes or other labor disturbances; or

(F) Expropriation, requisition, confiscation, impoundment, seizure, nationalization, or compulsory acquisition of the site of a qualified project or any part thereof; but such term shall not include any event or circumstance that could have been prevented, overcome, or remedied in whole or in part by the taxpayer through the exercise of reasonable diligence and due care, nor shall such term include the unavailability of funds.<sup>51</sup>

### The term "force majeure" is not used in the AIA A201 (1997) General Conditions.

All four of the statutes that list more specifically what may constitute a force majeure require that the event be beyond the control of the appropriate party. However, only the Georgia statute, in part B dealing with weather conditions, retains the requirement of unforeseeability. In the case of a devastating hurricane such as Hurricane Katrina, this omission in the

Hawaii and Colorado statutes may prove significant.<sup>52</sup> This is so because it is much easier to argue that a hurricane hitting the Gulf Coast is foreseeable, although proving that the damage could have been prevented or avoided is much more difficult.

### Standard Contract Documents

There are several domestic organizations that produce standardized contracts for commercial and construction-related transactions. Among these standardized documents, the AIA,<sup>53</sup> AGC,<sup>54</sup> and EJCDC<sup>55</sup> are the most common.

The AIA documents are probably the most widely used set of standardized construction documents in the United States, and perhaps the world. Interestingly, however, the term "force majeure" is not used in the AIA A201 (1997) General Conditions. The AIA addresses force majeure in Article 8—Time, and specifically section 8.3, entitled "Delays and Extensions of Time." Section 8.3 states:

**8.3.1** If the Contractor is delayed at any time in the commencement or progress of the Work by an act or neglect of the Owner or Architect, or of an employee of either, or of a separate contractor employed by the Owner, or by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties or other causes beyond the Contractor's control, or by delay authorized by the Owner pending mediation and arbitration, or by other causes which the Architect determines may justify delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

**8.3.2** Claims relating to time shall be made in accordance with applicable provisions of Paragraph 4.3.

**8.3.3** This Paragraph 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.

A sample of cases interpreting the phrase "other causes beyond the Contractor's control" follows. As can be seen, the concept "other causes beyond the Contractor's control" is much broader than the traditional "acts of God" concept of force majeure.

For example, in *St. Joe Paper Company v. State of Florida Department of Environmental Regulation*,<sup>56</sup> a paper company entered into a stipulation with the department, providing for an extension of time in which to comply with a new environmental regulation. The stipulation included a force majeure clause that included "any cause . . . not within the reasonable control of the company." The paper company installed equipment in an attempt to comply with the regulation, but because of a design error, the equipment failed to work and the department assessed liquidated damages against the paper company. The paper company filed a motion requesting the court to make a determination that a force majeure had occurred, entitling it to a reduced penalty under the stipulation. The court held that the force majeure provision was unambiguous and that a force majeure had occurred. Thus, the paper company received the reduced penalty.

In contrast, *S.J. Lemoine, Inc. v. St. Landry Parish Sch. Bd.*<sup>57</sup> illustrates circumstances that did not amount to "causes beyond the contractor's control," as contemplated by AIA section 8.3.1. The contractor argued that rain and cold weather justified damages for twenty-nine days of delay in a thirteen-month construction schedule. The contractor, however, produced no evidence that the twenty-nine days of rain and cold were above average. Thus, the court held that the bad weather was not a "valid excuse" justifying any portion of the claimed delay in performance. Although the delays were caused by "acts of God," they were contemplated "acts of God" and, thus, dealing with the consequences of the weather effects was within the control of the contractor.

Like the AIA documents, the standard form AGC documents do not use the term "force majeure," but the concept is addressed in article 6.3. This provision is similar to the AIA provision, although it specifically addresses hazardous materials and concealed or unknown conditions. Like the AIA documents, the AGC documents do not preclude the contractor from recovering damages as a consequence of a force majeure event beyond the control of both the contractor and owner. Under article 6.3.2, the contractor is entitled to a time extension and its actual cost without a fee as a consequence of a traditional force majeure event.

This approach is not taken by the EJCDC documents, which limit a contractor's remedy to a time extension when the force majeure event is beyond the control of both the owner and contractor.

#### **Force Majeure Insurance**

Separate insurance can be obtained to cover force majeure events. Force majeure insurance falls under many different types and names of coverage. Available policies may include project completion, performance coverage, delayed completion, or force majeure insurance.<sup>58</sup> The policies are designed to supplement builder's risk policies that may only apply to losses resulting in physical damage to the property. Delayed completion coverage picks up where builder's risk policies leave off, thereby transferring otherwise uninsured risks. The risks involved include typical force majeure events such as "losses resulting from strikes and labor disputes, changes in law (e.g., safety codes or emission standards), acts of God, trade embargoes, adverse weather conditions and off-site physical damage to materials or equipment."<sup>59</sup> A delayed completion policy may respond to a contractor's liquidated damages but will typically not cover risks or loss as a result of insolvency or faulty design. Also, parties should check for "time deductibles," which may "range from 45 to 90 days after the contract completion date."<sup>60</sup>

Force majeure events can be included within project completion coverage whenever available. The covered contract usually defines force majeure for the project completion policy. Parties wishing to cover events not mentioned in the contract are advised to add a more comprehensive force majeure definition to the policy. As a standard matter, project completion coverage features numerous exclusions, such as war, riots, civil unrest, strikes, and assorted political risks. One should be cautioned that modifying a policy to cover completion

delays caused by political events does not replace the need for political risk insurance for the project. Also, the standard project completion coverage excludes nuclear events. Finally, as a practical matter, some suggest listing all potential force majeure events and concluding with a general clause stating:

**Unforeseeable and severe floods, lightning, storms, and other meteorological events may qualify as force majeure events in the United States.**

"any other event outside of the control of the parties." It should be cautioned, however, that the scope of the clause may then be limited under principles of *expressio unius est exclusio alterius*<sup>61</sup> to events of the specific type listed.

#### **International Force Majeure**

##### ***Force Majeure Provisions May Be Interpreted Differently by Foreign Courts***

Even when construction contracts drafted in foreign jurisdictions appear to closely resemble corresponding forms from U.S.-based projects, the differences between the courts' interpretations of such contracts may be dramatic. The risk associated with force majeure provisions may be accentuated in international transactions because of uncertainty regarding inconsistencies between jurisdictions. It is absolutely essential that, when negotiating force majeure clauses in foreign jurisdictions, the parties "invest the time and effort necessary to research and fully understand in advance the local conditions and circumstances that are outside of [their] control and that could adversely impact project construction and operation."<sup>62</sup>

For example, on most U.S.-based projects, contractors may accept terms providing that strikers on-site will not qualify as force majeure (theorizing that the contractor should be able to control the risk). Few contractors, however, should agree to similar terms in foreign jurisdictions because local work rules make controlling this risk much more problematic. Therefore, a party to an international contract wisely may wish to negotiate for additional time and financial contingencies to absorb any strike-oriented delays, if unable to obtain force majeure relief within the contract itself.<sup>63</sup>

Adverse weather conditions may provide another area for different interpretation between U.S.-based and international contracts. Unforeseeable and severe floods, lightning, storms, and other meteorological events may qualify as force majeure events in the United States. However, in some jurisdictions (for example, the Philippines and several Latin American countries), such weather events occur with such regular frequency during certain seasons of the year that they may not be considered "unforeseeable." Instead, the contractor is expected to establish its construction timetable after considering events

such as rainy seasons, unusual periods of heat and cold, and even critical port or transportation-related weather conditions.<sup>64</sup>

Similar to the AIA and AGC documents in the United States, standardized international construction documents also exist, including FIDIC and UNIDROIT. FIDIC produces contracts primarily for international engineering and construction projects. The FIDIC's force majeure provision allows for a very broad application. The force majeure provision also calls for the contractor to notify the owner of both the existence of the force majeure event and alternative means of performance. UNIDROIT, on the other hand, applies force majeure rigidly.<sup>65</sup> Only total impossibility will suffice as grounds for excuse.<sup>66</sup> UNIDROIT requires (1) "an impediment beyond [the party's] control," (2) "[the party] could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract, or (3) to have avoided or overcome it or its consequences."<sup>67</sup>

### Drafting Force Majeure Provisions in Today's World

As discussed, the force majeure provisions of pre-September 11 agreements are unlikely to protect against acts of terrorism. Although standard force majeure clauses include "acts of war," such clauses are typically narrowly interpreted by courts and do not apply to guerilla or terrorist groups. Unless acts are performed by a nation or sovereign entity, it is questionable that an "acts of war" force majeure clause will apply. Other less-common force majeure language such as "insurrection" or "hostilities" also fails to encompass terrorism. Though such language would seem to be subject to a broad interpretation, courts have actually analyzed both terms as narrowly as "acts of war."<sup>68</sup>

Therefore, force majeure clauses need to be drafted differently in today's world to adequately protect clients. The most straightforward change is to insert the phrase "acts of terrorism" as a designated force majeure event. This language may be further broadened by including the language "whether actual or threatened" in reference to the terrorist acts. Such a phrase would benefit clients by covering work stoppages caused by false alarms and threats similar to those seen shortly after September 11. Broadening terrorist acts to include threatened acts also would give clients the discretion to protect their employees by stopping work after a terrorist scare without subjecting themselves to contractual liability for delay.<sup>69</sup>

One potential danger, however, in drafting force majeure provisions to include "acts of terrorism" is the fact that, although the term "terrorism" is commonplace in the media and society, the term has not been directly interpreted and scrutinized judicially.<sup>70</sup> As a result, clients may benefit from additional broadening language. For example, the phrase "acts of a public enemy" is increasingly more common in force majeure provisions. Other terms that force majeure drafters should add in light of post-September 11 biological warfare fears may include "epidemics" and "quarantines." Another benefit that such broadening language may provide to clients is protection against acts by deranged individuals as well as acts by organized groups of terrorists. Finally, any force majeure clause also should include a catchall phrase such as "or other causes similar to those enumerated." This catchall phrase,

inserted at the end of the list of enumerated force majeure events, may help to "capture" events similar to those listed but that "defy exact definition."<sup>71</sup>

In considering the increased importance of force majeure clauses, counsel should take advantage of the freedom to contract enjoyed by the parties. The parties should draft and negotiate force majeure clauses that are pertinent to their particular circumstances and fairly allocate the risks to the party best suited to cover or insure the risk. ■

### Endnotes

1. Kerry Powell, *What Is Force Majeure?* HEAVY CONSTR. NEWS 110 (June 2001).

2. There are many excellent papers and law review articles that address the development and treatment of the concept of force majeure in the context of comparative legal systems, which is beyond the scope of this article. See Philip L. Bruner, *Force Majeure and Unforeseen Ground Conditions in the New Millennium: Unifying Principles and Tales of Iron Wars*, 17 INT'L CONSTR. L. REV. 45 (2000); Dr. Theo Rauh, *Legal Consequences of Force Majeure Under German, Swiss, English, and United States Law*, 25 DENV. J. INT'L L. & POL'Y 151 (Fall 1996).

3. The tension between holding one to its contractual obligation and excusing one's performance due to supervening events is best known in the French doctrine of force majeure. It also is known in the British concept of frustration of purpose and the widely accepted international doctrine of "changed circumstances." See Philip L. Bruner, *Force Majeure Under International Law and International Construction Model Forms*, 12 INT'L CONSTR. L. REV. 274 (1995).

4. Richard J. Ruszat II, *Force Majeure*, 104:5 BUS. CREDIT 54 (May 1, 2002).

5. *Id.*

6. Powell, *supra* note 1, at 110.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*, citing Marvin O. Young, *Construction and Enforcement of Long-Term Coal Supply Agreements—Coping with Conditions Arising from Foreseeable and Unforeseeable Events—Force Majeure and Gross Inequities Clauses*, 27 ROCKY MTN. MIN. L. INST. 127, 133-34 (1982). See also Stephen G. York, *Re: The Impracticability Doctrine of the UCC*, 29 DUQ. L. REV. 221, 223 n.13 (1991).

11. York, *supra* note 10, at 223.

12. According to a recent briefing by the commander of the Corps of Engineers, there was a .05 percent likelihood of the effect of an event such as Hurricane Katrina occurring in New Orleans. Lieutenant General Carl Strock, Commander, U.S. Army Corps of Engineers, and Chief of Engineers, Defense Department Special Briefing on Efforts to Mitigate Infrastructure Damage from Hurricane Katrina, Sept. 2, 2005, <http://www.defenselink.mil/transcripts/2005/tr20050902-3847.html> [hereinafter Briefing].

13. P.J.M. Declercq, *Modern Analysis of the Legal Effect of Force Majeure Clauses in Situations of Commercial Impracticability*, 15 J.L. & COM. 213, 239 (Fall 1995).

14. *Id.* at 237.

15. *Id.*

16. See *Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1248 (5th Cir. 1990) ("Because the clause labeled 'force majeure' in the Lease does not mandate that the force majeure event be unforeseeable or beyond the control of [the nonperforming party] before performance is excused, the district court erred when it supplied those terms as a rule of law"); *Sabine Corp. v. Ong W., Inc.*, 725 F. Supp. 1157, 1170 (W.D. Okla. 1989); *Kodiak 1981 Drilling P'ship v. Delhi Gas Pipeline Corp.*, 736 S.W.2d 715, 720-21 (Tex. App. 1987) (judicially insert-

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