



Creative Solutions

MEDIATION: A UNIQUE TOOL FOR RESOLVING CONSTRUCTION DISPUTES

Disputes on construction projects are hardly a new phenomenon, although their number and complexity have been increasing dramatically in recent years. This increase has begun to focus attention on alternative methods by which the industry can resolve disputes, as the delays and costs associated with the traditional resort to litigation have become more significant. In recognizing the cost and the time commitment involved in litigation, and generally in the arbitration of major disputes, the construction industry has begun to turn more frequently to mediation as a remedy for resolution of disputes.

Mediation vs. Arbitration

Although they are commonly considered within the package of alternate dispute remedies, there are a number of significant differences between mediation and arbitration, which are often misunderstood. Mediation is appropriate when the parties are prepared to compromise and are motivated to reach a timely and mutually satisfactory agreement with the help of a neutral person, or where the parties plan to continue their relationship after the dispute has been resolved. Arbitration, on the other hand, is more commonly used when feelings are such that the parties have no likeli-

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Risk Allocation and *Force Majeure* Provisions in Leases

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Force majeure is a common excuse for non-performance in many leases. Nevertheless, in lease negotiations, the *force majeure* provision is often relegated to the status of “one-of-those-obscure-miscellaneous-provisions-at-the-back-of-the-lease” of a purely legal nature. Consequently, not much time is spent on, or thought given to, negotiating the *force majeure* provision. While on its face, *force majeure* may appear to be a purely legal concept, *force majeure* as an excuse for non-performance under a lease can have a significant impact on the terms of a business deal. Furthermore, as recent events (including 9/11 and the 2005 hurricane season) prove, *force majeure* events are real factors to consider in the negotiation of a lease. Therefore, both landlord’s counsel and tenant’s counsel should give the *force majeure* provision in any lease careful consideration. This article focuses on the *force majeure* provision as a means of allocating risk under a lease, and provides practical pointers for both landlord’s counsel and tenant’s counsel.

While negotiating the *force majeure* provision in a lease as a means of risk allocation, the parties must consider (a) what qualifies as a *force majeure* event entitling a party to claim an excuse for non-performance; (b) the period for which non-performance is excused as a result of the *force majeure* event; (c) which obligations under the lease may be excused by the occurrence of a *force majeure* event; (d) requiring the non-performing party to give notice of the *force majeure* event and (e) requiring the non-performing party to take reasonable steps to mitigate the effects of the *force majeure* event.

What Is the Qualifying Event?

A *force majeure* event sometimes is considered synonymous with an “Act of God.” Such a definition, however, is too narrow in that it limits the qualifying event to an act occasioned solely by the sudden, unexpected raw forces of nature and excludes any event resulting from human agency, even when due to the negligence or willful acts of third persons. By this definition, a fire set by lightning would be a qualifying event, but a fire set by an arsonist would not.

A much broader definition of a *force majeure* event would be any event beyond the reasonable control of the non-performing party. However, although this definition expands the class of qualifying events beyond Acts of God to include events resulting from human agency, it may be too broad in its reach. Such a definition could include foreseeable events, such as seasonal weather and long lead times in ordering certain materials or securing governmental approvals, for which the obligor could plan, and, therefore, should assume the risk. In addition, such a definition includes events that are peculiar to the obligor, such as internal labor problems or financial inability.

A carefully drafted definition—one that is neither too narrow nor too broad—defines the qualifying event as one that is outside the reasonable control of the non-performing party, is unforeseeable and would affect any similarly situated person in the same manner. Such a definition includes Acts of God and events resulting from human agency, but excludes events that the non-performing party should have reasonably anticipated or that are peculiar to the non-performing party.

For What Period Should Non-Performance Be Excused?

If a *force majeure* event prevents a party from performing an obligation, the time for performance may be extended by a period of time equal either to (1) the duration of the *force majeure* event or (2) the actual delay caused in performing the obligation. The first standard is more easily determined and avoids arguments about the *force majeure* event’s effect on the critical path of performance. However, the second standard is more equitable, given that a *force majeure* event’s effect on the critical path of performance may be shorter than the duration of the event itself.

In addition, with respect to some obligations, it may be appropriate for the obligor to insist that

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Risk Allocation

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the period for performance be extended by a period that is longer than the actual delay caused by, and longer than the duration of, the *force majeure* event itself. Typically, this is the case where the particular obligation to be performed is sensitive to external factors that vary on a seasonal basis, and where the obligor expects to perform such obligation during a season when such external conditions are optimal. For example, consider a tenant that sells children's clothing. The tenant has undertaken an obligation to open a new store for business initially during the "back-to-school" season, but is unable to so open for business as a result of a *force majeure* event. This tenant may want the right to delay opening until the Christmas shopping season. Such an extension may be longer than the duration of the *force majeure* event and the actual delay it caused. In negotiating extensions for the period of performance, the obligor's counsel should give special consideration to such obligations as may be necessary under the circumstances.

Which Obligations Should Be Excused?

The occurrence of a *force majeure* event need not excuse non-performance for all obligations owed at a particular time. For example, the landlord that has budgeted for a rent stream to start by a date certain may be willing to recognize *force majeure* as an excuse to the tenant's obligation to open for business initially, but not to the tenant's obligation to commence paying rent. A party's success in excluding application of *force majeure* as an excuse for non-performance will depend upon the party's relative bargaining power and the nature of the particular obligation.

Where the obligee is unsuccessful in excluding *force majeure* as an excuse for non-performance of a particular obligation, an appropriate compromise may be a limit or cap on the period of delay attributable to the *force majeure* event and/or providing for a right of termination if the period of delay extends beyond an agreed-upon outside date. This is particularly important where performance may be delayed indefinitely by a *force majeure* event, notwithstanding the party's good faith and diligent efforts. Consider, for example, a situation where the tenant's obligation to commence paying rent under a lease is conditioned upon *force majeure* events and where the lease also obligates the landlord to secure a special use permit for the tenant. Despite the landlord's good faith and diligent efforts in applying for and prosecuting the

request for the special use permit, the jurisdictional authority might not grant the permit because of the nature of the special use or the particular user itself. Unless there is a limit to the period of delay in the commencement of rent for a *force majeure* event or the landlord has a right to terminate the lease for failure to secure the permit, the landlord could be bound indefinitely under the lease to a tenant that will never be obligated to commence paying rent. This may be perfectly acceptable to the tenant that is content to wait in the wings without incurring any financial obligation while the landlord continues to spend its time and money in attempting to secure the special use permit.

Requiring Notice

The obligee should require notice from the obligor within a short number of days after the occurrence of any alleged *force majeure* event that the obligor intends to claim as an excuse for non-performance. Furthermore, such notice should specify the period of delay that the obligor anticipates as a result of the alleged *force majeure* event. This type of notice permits the obligee to track the *force majeure* event and the resultant delay; gives the obligee an opportunity to take action, if possible, to reduce the delay in the obligor's performance or otherwise to reduce the obligee's risk of loss resulting therefrom; and eliminates the possibility that the obligor may attempt to take advantage of a coincidental *force majeure* event after the fact of a delay in performance as an excuse for non-performance where the obligor's failure to perform was not in fact caused by the *force majeure* event.

To ensure compliance with such a notice requirement, the obligee may want to make giving such notice an absolute condition to the obligor's right to claim *force majeure* as an excuse for non-performance. The obligor, however, may not want to assume the risk of losing *force majeure* protection altogether by reason of failure to give the notice. The parties may strike a compromise by agreeing that the obligor's failure to give the notice results in loss of the obligor's right to claim *force majeure* as an excuse for non-performance only for the period of time that the obligor fails to give the notice as required. This compromise will reduce each party's exposure to undesirable risk.

Requiring Mitigation

Even where the event itself is beyond the obligor's reasonable control, there should be no excuse for the obligor's failure to perform to the extent that the obligor could have taken reasonable steps to mitigate the effect of the *force majeure* event. In order to reduce the risk that the non-performing party rests on its laurels when its performance of an obligation is

hindered or prevented by a *force majeure* event, the obligee should require that the obligor not be entitled to claim *force majeure* as an excuse for non-performance to the extent that the delay in its performance caused by the *force majeure* event could have been avoided by the obligor's reasonable efforts.

Conclusion

Force majeure as an excuse for non-performance under a lease can have a significant impact on the terms of a business deal. As suggested by this article, counsel can craft a *force majeure* provision that is designed to fairly allocate risk in an effort to preserve the business deal. ■

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SAMPLE *Force Majeure* PROVISION

If either Landlord or Tenant is delayed in performing any obligation hereunder by any cause beyond the reasonable control of the party required to perform such obligation, the time period for performing such obligation shall be extended by a period of time equal to the period of the delay. For the purpose of this Section:

(i) A cause shall be beyond the reasonable control of a party when such cause would affect any person similarly situated (such as, but not limited to, war, civil disorder, catastrophic weather, a power outage, labor strike or truckers' strike) but shall not be beyond the reasonable control of such party when reasonably foreseeable or peculiar to such party (such as, but not limited to, financial inability or ordering materials requiring a long lead time).

(ii) This Section shall not excuse any rental obligations, nor delay the Commencement Date for any time period in excess of thirty (30) days.

(iii) In the event of any occurrence which a party believes constitutes a cause beyond the reasonable control of such party pursuant to this Section, such party shall give prompt notice in writing to the other party as soon as reasonably possible after the onset of such event, which notice shall state the occurrence and the nature of such cause, the anticipated period of delay and the steps being taken by such party to mitigate the effects of such delay. A party's failure to give said notice as and when required hereunder shall reduce the extension in the period for performing to which the party would otherwise be entitled under this Section on a day-for-day basis. Neither party shall be entitled to the benefit of this Section to the extent that the period of delay resulting from a cause beyond the party's reasonable control could have been reduced or avoided by such party's reasonable efforts.