

Force Majeure Clauses: What It Means for Building Owners

An Often-Overlooked Clause Can Have Big Impacts on Leases,
Real Estate Contracts and Construction Contracts

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The logo for Gould+Ratner, featuring the text "gould+ratner" in a white, lowercase, sans-serif font. The text is positioned on a dark blue background that is split into two rectangular sections by a vertical line. The left section is black, and the right section is a medium blue.

Force Majeure in General

Definition of Force Majeure

- Literal translation is “superior force”
- Also sometimes referred to as “Act of God”
- Found in most all leases and contracts, including:
 - construction contracts
 - service contracts
 - supply contracts for office buildings

How Does a Force Majeure Clause Operate?

- Allows one party to limit its obligations to perform during period of Force Majeure
- Extends time for performance

Requirements of Force Majeure

- Inability to perform caused directly by:
 - Fire
 - Earthquake
 - Explosion
 - Flood
 - Hurricane
 - The elements
 - Act of God or the public enemy
 - Actions, restrictions, limitations or interference of governmental authorities or agents
 - Enforcement of legal requirements
 - War, terrorist act or acts, invasion; insurrection; rebellion
 - Riots; strikes or lockouts
 - Inability to perform, control or prevent which is beyond the reasonable control of that party
 - Pandemic?
 - Other listed events

Requirements of Force Majeure (cont.)

- Event not foreseeable and could not have been mitigated
- Event is unavoidable
- Financial inability to perform generally not excused by Force Majeure

What to Look for in a Force Majeure Clause

- What events are listed in force majeure clause
- Where does the force majeure clause apply
 - A provision that overrides all other provisions (a notwithstanding provision)
 - Only applicable where referenced
- What obligations are affected
 - Increased time to perform
 - Released from obligation to perform
- Must notice be given of force majeure
- Is there a time limit on effect of force majeure

Force Majeure Clauses in Leases

Where to Find Clause in Lease

- Generally found in definition section or miscellaneous section of lease
- Could be called “Act of God” or “Unavoidable Delay”
- Following are some lease Force Majeure provisions:

Where to Find Clause in Lease (cont.)

- Notwithstanding anything in this Lease, neither party shall be chargeable with, or liable to the other for any failure to perform or delay caused by any of the following (“**Force Majeure Delays**”): fire; earthquake; explosion; flood; hurricane; the elements; act of God or the public enemy; actions, restrictions, limitations or interference of governmental authorities or agents; enforcement of Requirements; war, terrorist act or acts, invasion; insurrection; rebellion; riots; strikes or lockouts; inability to perform, control or prevent which is beyond the reasonable control of that party; and any such failure or delay due to said causes or any of them shall not be deemed a breach of or default in the performance of this Lease by that Party; provided, however, lack of funds shall not be deemed a Force Majeure Delay nor may Force Majeure Delays be used to excuse payment of Rent when due.

Where to Find Clause in Lease (cont.)

- Any prevention, delay or stoppage due to strikes, lockouts, labor disputes, acts of God, acts of war, terrorist acts, inability to obtain services, labor, or materials or reasonable substitutes therefor, governmental actions, civil commotions, fire or other casualty, and other causes beyond the reasonable control of the party obligated to perform, except with respect to the obligations imposed with regard to Rent and other charges to be paid by Tenant pursuant to this Lease (collectively, a “**Force Majeure**”), notwithstanding anything to the contrary contained in this Lease, shall excuse the performance of such party for a period equal to any such prevention, delay or stoppage and, therefore, if this Lease specifies a time period for performance of an obligation of either party, that time period shall be extended by the period of any delay in such party’s performance caused by a Force Majeure.

Where to Find Clause in Lease (cont.)

- **Unavoidable Delays.** Landlord's inability to fulfill or delay in fulfilling any of its obligations under this Lease expressly or impliedly to be performed by Landlord or Landlord's inability to make or delay in making any repairs, additions, alterations, improvements or decorations or Landlord's inability to supply or delay in supplying any equipment or fixtures, if Landlord's inability or delay is due to or arises by reason of strikes, labor troubles or by accident, or by any cause whatsoever beyond Landlord's reasonable control, including governmental preemption in connection with a national emergency, Requirements or shortages, or unavailability of labor, fuel, steam, water, electricity or materials, or delays caused by Tenant or other tenants, utility companies, mechanical breakdown, acts of God, enemy action, civil commotion, fire or other casualty.

Where to Find Clause in Lease (cont.)

- This Lease and the obligation of Tenant to pay Rent and to perform all of the other covenants and agreements of Tenant hereunder shall not be affected, impaired or excused by any Unavoidable Delays. Landlord shall use reasonable efforts to promptly notify Tenant of any Unavoidable Delay which prevents Landlord from fulfilling any of its obligations under this Lease.

Rent Payment

- Most lease provisions specifically provide that force majeure does not exclude payment of rent
- Notwithstanding that Force Majeure does not apply, Landlord from a business standpoint may want to consider tenant's current requests for abatement in light of:
 - Need to retain the tenant
 - Its obligations under its loan agreement
 - Is this a lease modification requiring lender consent?
 - Can Landlord recover the abatement by amortizing abatement of term of lease or extending term?

Commencement Date & Completion of Tenant Improvement Work *(for leases where landlord work or tenant improvement work not completed)*

- Is Commencement Date a date certain or after expiration of period for construction?
- Is Tenant work period conditioned upon completion of Landlord work?
- Period for completion of tenant work
- Penalties for landlord failure to complete work by a date certain or within a described period

Casualty, Condemnation and Interruption of Service

- These provisions are a form of Force Majeure
- The condemnation provision gives each party right to terminate lease in certain eminent domain actions
- The casualty provision gives Landlord and possibly the Tenant the right to terminate the lease after a fire or other casualty damage to the property and provides a time period for restoration
- The interruption of services relieves Landlord from the obligation to provide services under certain events, with possibly rent abatement after a period of time

Other Lease Provisions Possibly Affected by Force Majeure

- Continuous operation provisions
- Period to obtain Tenant permits and licenses
- Period to complete plans or remove liens
- Period to complete repairs by Landlord or Tenant or for Landlord completion of restoration following casualty or condemnation
- Period to cure Tenant non-monetary defaults
- Period to obtain Certificate of Occupancy

Lease Provisions Possibly Not Covered by Force Majeure

- Period for exercise of options such as renewal, expansion, early termination
- Landlord period to review plans and other matters related to construction
- Period for Landlord to approve sublease or assignment
- Period to deliver financials or other reports
- Period or date to deliver or reduce security deposit or letter of credit
- Period to obtain lender approval or deliver SNDA
- Period to fund draw for Tenant Improvement Allowance

Force Majeure Clauses in Construction Contracts

How Does a Force Majeure Clause Operate in Construction?

- Found in most construction contracts, including form contracts from:
 - AIA
 - ConsensusDocs
 - EJCDC
- Addresses what happens when construction is delayed by unforeseeable events of nature or political events
- Can impact Landlord/General Contractor agreement to either buildout a premises or perform construction services in furtherance of a lease

Where to Find Clause in Construction Contracts

- Generally found in definition section or miscellaneous section of construction contract
- Standard American Institute of Architect (AIA) Force Majeure Provision:

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended 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 Article 15.

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

What to Look for in Construction Contracts

- Look at the contractual language that may specifically define what is included, or excluded, in a force majeure “event”:
 - Act of God, governmental order, terrorism, extreme weather condition, etc.
 - Important to understand whether the definition is an exhaustive list or non-exhaustive (i.e., “including but not limited to” which leaves the door open to other similar types of events that may not be specifically identified)
 - Look for whether the definition contains “epidemics” or “pandemics”

Other Force Majeure Issues in Construction

- Foreseeability
 - The “event” must be unforeseeable and outside of a party’s control, which prevents an individual from fulfilling contractual obligations
 - Traditionally an epidemic or pandemic like COVID-19 would be unforeseeable and thus a force majeure “event”
 - Possible that COVID-19 may be considered an “Act of God” or depending on the locality covered by the “governmental order” inclusion.
 - Although steps are being taken to reduce the further spread of the COVID-19 virus, health officials have stated that widespread COVID-19 virus event may return in the future

Other Force Majeure Issues in Construction (cont.)

- Party must be prevented from further performance
 - Simply not wanting to perform due to increased costs or inefficiencies resulting from the “event” is not sufficient
 - Executive Order issued by Illinois Gov. Pritzker exempts construction from inclusion in the Stay Home Order and deems it essential
 - Definition may change and may impact whether a governmental order applies to the definition of force majeure

Other Force Majeure Issues in Construction (cont.)

- Abide by notice requirements
 - Although largely dependent on the contract language, relief due to a force majeure event can be conditioned on notice to the opposing part
 - Language may bar relief if notice is improper or not within a certain time period

What Relief May be Sought by a Contractor

- In response to a force majeure event, a contractor may seek:
 - Extension of time
 - Cost increases
 - Suspension of services until a time when the event has subsided
 - Termination of services (typically dependent on services being suspended for a pre-determined time period)

How Should Force Majeure Provisions be Modified

§ 8.3 Delays and Extensions of Time

§ 8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or other causes beyond the Contractor's control; ~~or~~ (4) by delay authorized by the Owner pending mediation and binding dispute resolution; ~~or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine. provided (a) the delay impacts the critical path, (b) Contractor is not responsible for a concurrent delay and (c) Contractor has made reasonable efforts to re-sequence its work to minimize delay, then the Contract Time shall be adjusted for such reasonable time as Owner's Representative and Architect determine to account for the loss of time resulting from such delay.~~

In addition, provided (a) the delay impacts the critical path, (b) Contractor is not responsible for a concurrent delay and (c) Contractor has made reasonable efforts to re-sequence its work to minimize any delay, Contractor shall be entitled to compensation for the cost of delay. No such Change Order extending the Contract Time shall result in any increase in compensation to Contractor (or Guaranteed Maximum Price, if applicable) unless approved by properly executed Change Order. Under no circumstances shall the Contractor be entitled to additional extended home office overhead.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents. Notwithstanding the foregoing, Contractor shall not be entitled to additional compensation on account of any delay unless Contractor is entitled to an extension of the Contract Time pursuant to Section 8.3.1.

Future Construction Contracts and Best Practices

- Future construction contracts considerations
 - Special consideration must be given to force majeure language to account for possible changes in existing governmental orders that may prevent construction from being performed
 - Foreseeability of future disruptions due to COVID-19 should be taken into account
 - Inquire as to possibility of insurance coverage that may be available
- Best Practices
 - Focus on a complete definition of what constitutes an event of force majeure
 - Understand notice requirements by taking into account previously unforeseeable events that are now foreseeable
 - Require certain mitigation efforts to take place for extension of time claim to be valid
 - Tie claims for additional compensation to approval of extension of time
 - Clearly identify how risks will be allocated

Business Interruption Coverage for Losses Related to COVID-19

Impact on Ability to Operate in Leased Premises

Business Interruption Coverage Provided as Part of Property Policy

- Designed to cover loss of income incurred by organization due to slowdown or suspension of operations at premises from a covered event
- Loss of income and extra expenses
- Review of insuring agreement critical

Business Interruption Coverage Provided as Part of Property Policy (cont.)

- Dealing with COVID-19
- What is a covered event?
 - Direct physical loss or damage to covered property/location
 - Civil authority prevents access to premises
 - government-mandated closure
 - prohibited access to premises
- Exclusions – Any losses resulting from a virus or bacteria?

Questions?

Thank you!

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