

Adapting Force Majeure To A Predictably Unpredictable World

By **Corey Boock and Kyle Hamilton** (December 13, 2024)

The 2024 hurricane system was predicted as above normal. Potential Trump administration tariffs may affect materials, equipment costs and supply chain. New swine flu strains have hit the U.S. These are all events that have happened or are predicted — but are they foreseeable and are the impacts foreseeable?

When negotiating a contract, parties nearly always discuss what constitutes successful performance. Sophisticated parties, however, often spend as much time, if not more, discussing what happens if the contract is not successful. Those parties want to know what their worst case scenario could be and how much money or time they could lose if something goes catastrophically wrong.

What if the contractor fails to perform the work up to the standards required by the owner? What if the contractor begins work and finds that the project site has an unknown site condition? What if the contractor's actions damage a third party's property? What if the owner has damages beyond anything the contractor could have anticipated, including the value of the contract?

For these and many other risk-related provisions, the terms of the contract become very important and should be tailored to the specific project and project goals and needs. With many of these risks, they are foreseeable and, accordingly, the contract can allocate them between the parties, either shifting the risk over to one side or by risk sharing.

However, sometimes there are delays and costs that relate to an event that is not foreseeable or likely and that neither party caused. These are generally known as events of force majeure.

Force majeure is a concept that has traditionally been used to allocate risk and responsibility for losses or delays caused by unforeseen disruptions outside the control of either party.

A prototypical force majeure is an "act of God," referring to events such as earthquakes, floods or other extreme weather conditions that theoretically could not be caused by man or reliably foreseen.

Force majeure also includes unexpected and unforeseen third-party actions like labor disputes, strikes or terrorist attacks, in each case, to the extent not caused by the party seeking relief for force majeure.

The broadest force majeure clauses sometimes included "any other events reasonably beyond the control" of the party seeking relief. A force majeure provision may be as simple as the following:

In the event either party is unable to perform its obligations under the terms of this Agreement because of acts of God, strikes, or equipment failure or damage



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reasonably beyond its control, or other causes reasonably beyond its control, such party shall not be liable for damages to the other for any damages resulting from such failure to perform or otherwise from such causes.

However, events of force majeure are not necessarily as unforeseeable as in the past, and some are becoming less so. Climate change has led to an increase in frequency and intensity of extreme weather, often resulting in disasters.

The United Nations' Intergovernmental Panel on Climate Change found that disasters fueled by the climate crisis are already worse than scientists originally predicted.[1] Further, our modeling systems have become more sophisticated and accurate.

In May, the National Oceanic and Atmospheric Administration predicted an 85% chance of an above-normal hurricane season, forecasting a range of 17 to 25 total named storms, with eight to 23 of those forecast to become hurricanes, including four to seven major hurricanes. The forecasters said they had a 70% confidence in these ranges.[2]

Climate change has led to recent U.S. droughts being the most expansive in decades. In 2012, the U.S. faced its most extensive drought since the 1930s, with 81% of the contiguous U.S. under at least abnormally dry conditions, according to the Center for Climate and Energy Solutions.[3]

California experienced drought from December 2011 to March 2019. In 2020, over a dozen western and central states experienced prolonged droughts that were exacerbated by heat waves.[4]

This expansive drought, combined with record-breaking heat, led to multiple devastating wildfires across the country. The general consensus among the scientific community is that severe weather events will continue to increase in frequency and intensity.

When COVID-19 arrived in the U.S., contractors were faced with lockdown orders, supply chain issues, increased costs and changes to the workforce. The experience was eye-opening for many parties, showing that a global health crisis is not only possible, but can be devastating to projects.

The years since the COVID-19 pandemic began have also seen wars and conflicts globally, and strikes, protests, and riots domestically. For many, events of force majeure are now expected, with the only question being what type of force majeure event will occur, when it will happen, and how much the cost and schedule will be affected.

As a result, parties — owners, contractors, lenders and their lawyers — are paying much more attention to the force majeure provisions in their contracts and taking more time prior to contract execution to consider and negotiate the nuances of their force majeure clauses.

Severe Weather

As severe weather becomes more common, the current trend is to draft the definition of force majeure events tailored to the location, the climate, the duration of the contract, and the project specifications.

Rather than including generic language regarding floods, earthquakes or hurricanes, parties will be more specific. For example, in a relatively wet climate, which includes long-term operation and maintenance, on a project rated to withstand a one-in-100-year flood, the

parties may agree that a one-in-250-year flood would be considered an event of force majeure.

In a region which regularly weathers Category 1-3 hurricanes with a project that is to be designed to that standard, the parties may determine that a Category 4 hurricane is an event of force majeure.

Or on a project site in a quake zone with certain seismic design requirements, parties may determine that only seismic events in excess of a magnitude of 5.0 on the Richter scale would qualify as force majeure. These types of provisions can be very specific to the needs of the project, the locality and the climate in the area. Consider the following example:

Force Majeure Event means the occurrence of any of the following events or circumstances which directly causes either Party to be unable to perform all or a material part of its obligations under this Agreement:

...

(a) any tornado, hurricane, uncontrolled fire in an area of combustible vegetation, lightning, one in a 100-year flood or other natural disaster;

(b) a seismic event in excess of a magnitude 3.5 on the Richter Scale, where (i) such Earthquakes, ground shaking, liquefaction, settlement, or ground movements directly impact, and cause damage to, temporary or permanent works of the Project; and (ii) such event is not insured or required to be insured under the terms of the Contract Documents;

...

Excluding:

(x) any physical destruction or damage, or delays to the Work which occur by action of the elements or weather events, except as specified in subsection (a) or (b);

COVID-19 and Pandemics

During COVID-19, we saw, for one of the first times, contracts executed while an event of force majeure was ongoing from contract inception.

At what point would effects of the pandemic constitute an event of force majeure? Would renewed lockdown mandates entitle a contractor to relief? Or additional supply chain issues? Would new strains or variants of COVID-19 be considered a new event of force majeure or was COVID-19, then a fairly known quantity, excluded from force majeure altogether?

Many parties prepared nuanced definitions of force majeure as it related to COVID-19 or pandemics in general. Consider the following example:

Force Majeure Event means any event listed in subsections (a) through (g) below, subject to the exclusions listed in subsections (i) through (vi) below, which has a material, adverse and direct impact on Design-Builder's obligations under this Agreement:

...

excluding:

...

(vi) social distancing requirements and stay-at-home orders associated with COVID-19 or other comparable impacts on the Work related to the COVID-19 or other pandemic shall not be considered a Force Majeure Event except to the extent of requirements imposed by Applicable Law that are materially different from those in effect on the applicable Setting Date.

Social Conflict

When Russia invaded Ukraine in 2022, many projects saw sudden sharp increases in price. The availability of certain materials caused unexpected delays. As the war carried on, some parties executing new agreements elected to exclude conflicts related to the Russia-Ukraine war as events of force majeure, while still allowing for new wars, conflicts, invasions or embargos to be considered.

Similar tailored drafting could be used for domestic events such as trucker strikes this year, or other future civil or political unrest that could affect a project's workflow. Consider the following example:

Force Majeure Event means any event listed in subsections (a) through (g) below... which has a material, adverse and direct impact on Contractor's obligations under this Agreement:

...

(c) any war, civil war, invasion, blockade, embargo, violent act of foreign enemy armed conflict or act of terrorism, excluding conflict relating to the conflict between Russia and Ukraine which began with Russia invading Ukraine in February 2022;

Insurance Considerations

The new and nuanced focus on force majeure is occurring at a time when a so-called antidote to some force majeure issues — insurance — is becoming harder to access and exorbitantly expensive.

For instance, for those seeking insurance products focusing on hurricanes, flooding or fire, it is a tremendous struggle to find available and cost-effective insurance. Consequently, where insurance is not available to address force majeure, it means that the risk may be stranded with the party allocated that risk.

Contract Implications

As the construction and infrastructure industry grapples with these complex and ever-present issues, we can anticipate continued focus on force majeure provisions, moving them from generalized, monolithic provisions to very focused contract terms that address or may prenegotiate potential time and compensation relief.

As an example, in some COVID-19-era contracts, some contracts specifically called out what elements of overhead, e.g., certain job titles or equipment rentals, might be compensable

with caps on a party's exposure.

Similarly, it is becoming more common to address when and how long-term event may result in a contract termination. Ultimately, parties are looking to negotiate ways to share the monetary and schedule risk in manners that align the parties' interests to collaborate towards a solution to the event.

Conclusion

As the climate and political landscape gets more complicated, and the size and nature of projects get larger and more expensive, force majeure provisions providing relief and allocating responsibility for unavoidable damage or delays are likely going to be triggered more frequently.

As such, the negotiation on the front end and the interpretation of the contract provisions will be absolutely crucial — for owners, contractors and financiers. Parties should look very closely at the words in their force majeure clauses, and ensure the contract and technical requirements all work together to provide appropriate risk allocation between the parties.

Force majeure events are no longer primarily unforeseen and will happen eventually, and knowing in advance how your project will handle the fallout will help smooth tough project challenges before they happen and set expectations.

However, with these many contractual issues with far-reaching implications, an ever-changing force majeure world will likely keep engineers, contractors and lawyers busy for some time.

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[1] [Is climate change making disasters worse?](https://www.worldwildlife.org) (worldwildlife.org).

[2] [NOAA predicts above-normal 2024 Atlantic hurricane season](https://www.noaa.gov) | National Oceanic and Atmospheric Administration.

[3] [Drought and Climate Change - Center for Climate and Energy Solutions](https://www.c2es.org) Center for Climate and Energy Solutions (c2es.org).

[4] Id.