Force Majeure examples

Mark Grieco

griecom@me.com

Below you will find three force majeure clauses.

I. The first clause is a classic, mutual, force majeure clause using the words “acts of God”. It is broadly written and allows for a limitation of liability, in addition to a delay.

Force Majeure. The parties agree that the other shall not be liable for any losses, damages, including consequential damages, delays or failures to perform in whole or in part resulting from causes beyond the control of either party including, but not limited to, acts of God, acts or omissions of supplier, fires, strikes, insurrections, riots, embargoes, delays in transportation, inability to obtain supplies, or requirements or regulations of any government or other civil or military authority. Delays or non-performance excused by this provision shall not excuse payment of any amount due hereunder owed at the time of the occurrence.

II. The second clause shows force majeure without the classic words “acts of God” it is also one-sided, in favor of the buyer. It limits the consequences of force majeure to a delay. You will note that “pandemic” has been included.

Force Majeure. Strikes, fires, accidents, earthquakes, floods, pandemics or other causes beyond the control of Buyer which shall affect the Buyer’s ability to receive and use the material ordered shall constitute valid ground for delay of shipment upon this order, upon notification to the Seller, pursuant to the notice provision of this agreement, and without penalty to the Buyer; except that a cancellation for such causes may not be made without reimbursement to the Seller for expenditures actually made for labor and materials upon the authority of this order.

III. The final clause is a modern, complicated force majeure definition and clause that shows how companies are writing it to handle both what is, and what is not, force majeure. This version is mutual. Coronavirus has been added to the language.

Force Majeure. A “Force Majeure Event” shall mean any earthquake, volcanic eruption, landslide, flood (provided that the flooding shall reach or exceed the 100-year flood level; otherwise flooding shall not be eligible to constitute a Force Majeure Event), hurricane, cyclone, tornado or other catastrophic natural disaster; epidemic or plague, including coronavirus; fire, explosion or radioactive or chemical contamination; and war, hostilities, belligerence, blockade, act of terrorism, sabotage, civil commotion, civil disturbances, riot, revolution, or insurrection [or any other event or circumstance], that in each case: (i) is beyond the reasonable control of the Affected Party and its subcontractors or its other contractors and was not promoted, requested or caused by the Affected Party or any of its subcontractors or other contractors; (ii) is without fault or negligence on the part of the Affected Party or its subcontractors or other contractors and is not the direct or indirect result of a breach by the Affected Party or its subcontractors or its other contractors of any of its obligations hereunder; (iii) could not have been (including by reasonable anticipation) avoided or overcome by the Affected Party or its subcontractors or its other contractors acting in a reasonable, diligent and prudent manner; and (iv) directly prevents or delays the Affected Party in its performance of all (or part) of its obligations under this Contract.

Notwithstanding anything to the contrary in the foregoing and for the avoidance of doubt, the following shall not constitute Force Majeure Events: (i) late or interrupted delivery of, or failure of, any Contractor Party’s tools, machinery, equipment, spare parts or consumables or Materials, except to the extent caused by any event or circumstance that would otherwise qualify as a Force Majeure Event; (ii) non-performance or delay in performance by any Contractor Party unless such non-performance or delay is caused directly by a Force Majeure Event; (iii) boycotts, strikes, lockouts, other industrial disturbances or unavailability of, or with respect to, laborers or Contractor Parties, or collective bargaining agreements of any Contractor Party resulting in a delay or stoppage of the Work; or (iv)economic hardship or changes in market conditions or any inability or failure to pay money, any inability to raise financing or any change in price.

IV. As a precaution, all future contracts should consider language such as you will see below. Each company should consult their attorney prior to including any language. Care should be taken to ensure the wording is correct for your organization. For example, several of the terms below will need to be defined contractually.

Coronavirus Covid-19. The parties are aware that the global Coronavirus Covid-19 pandemic is occurring world-wide. Should the pandemic occur, during the term of this Agreement, the parties agree that the Force Majeure provisions shall be triggered, as set forth above. Additionally, the parties agree that they have amended their Policies and Procedures, as well as any agreements with subcontractors or independent contractors, to take into account such an event. Any forecast made by Buyer shall be considered null and void. The effective date of this Agreement may be extended by mutual agreement of the parties. The pricing from Supplier shall continue, in full force and effect, after the Force Majeure delay ends. Supplier shall not use the event to raise pricing or put buyer on allocation. Any warranty term for already delivered goods, or services provided, shall be extended for the period of force majeure. For items identified by Buyer as “mission critical”, “essential services” or good or services related to utilities, health care or medical supplies, Supplier shall not be excused from delivery pursuant to this event.