Document ID#: 547200610038

AMERICAN BAR ASSOCIATION -- SECTION OF TAXATION

2006 Joint Fall CLE Meeting

TITLE: Force Majeure Clauses in Leases

AUTHOR: Frome, Richard

PANEL: The Force is With You - Force Majeure and Rent Insurance Interactions

DATE: 10/21/06

COMMITTEE: Leasing RP

FORCE MAJEURE CLAUSES IN LEASES
Richard M. Frome

ABA-RPPT-Fall CLE Meeting
Denver, CO
October 21, 2006

In this section of our program we will focus on the actual force majeure provision of a lease.

I. Some background

The concept of some uncontrollable event relieving a party from its obligations goes back at least to Hammurabi, 1800 BCE, whose Code relieved carriers whose goods were seized by enemy armies.

The French speak of force majeure without defining it (perhaps because it's clearer when you speak French? The literal definition is "Superior Force."). Supposedly, their theory is, since it is the fault of neither party (probably an implicit criterion) it should neither benefit nor penalize either party.

In England, force majeure, without more, means Acts of God. California's Contract Code for state dealings defines Acts of God as only earthquake greater than 3.5 on the Richter Scale and tidal wave. The Restatement of Torts defines Acts of God as force of nature, extraordinary, with resulting harm different from mere negligence. It differs from force majeure which originates in human agency rather than purely a natural force.

There is an underlying requirement that the party claiming it used prudence, diligence and care, both in anticipating and avoiding the event and, once the event occurs, trying to overcome it.

The doctrines of impossibility or frustration are equitable principles implying something not reasonably foreseeable or controllable, yielding extreme and substantial hardship. Yet, it is less absolute than impossibility, which is not possible to overcome, the doctrine of frustration contemplates unreasonable expense or difficulty(although the distinction is not clear in the cases). And, voluntarily disabling oneself renders the defense unavailable.

II. What should be an event entitling a party to relief?

Area affected. A major hurricane would usually qualify, as would a tornado, in fact most Acts of God, flood, earthquake, typhoon, tsunami. But even in those instances, there should be some standard of relevance. A tornado may have little impact if landlord could easily or for very few dollars more buy materials two towns over. Obviously, a large storm like Andrew or Katrina devastates entire areas, but most events do not.

How could this relevance be defined? Construction contracts are major consumers of the idea of delay, so some guidance would be expected to be found in American Institute of Architects (AIA) and other construction contracts. The basic AIA contract, AIA Form A201, General Conditions, contemplates relief if Contractor is delayed in starting or conducting the work due to

> "labor disputes, fire, [other specific events]…or other causes beyond the Contractor's control" resulting in such delay in the relevant dates as the architect finds justifies delay.

Weather. For weather-based delays, A201 requires (paragraph 4.3.7.2) that the weather condition be (i) abnormal for the period of time, and (ii) could not have been reasonably anticipated, plus (iii) had an adverse effect on the construction schedule.

These are classic force majeure concepts. Note the 'abnormal' requirement. A typical day of snow in winter in the Twin Cities should not be a delay basis, the contractor should have assumed that in its schedule. But a huge storm closing down town for a week may be treated differently, unless even then they occur every month in winter.

Here was a good definition: "Force Majeure" shall mean fire, tornado, flood, hurricane, explosion, war, terrorism, earthquake, civil disturbance, strike, labor troubles [wildcat events, picketing], unavoidable casualties. As to weather, monthly rain or snow (or cold?) (or heat?) more than x% in excess of the maximum listed for that month by the National Oceanic and Atmospheric Administration or successor agency weather reporting for the year preceding the date of the lease.

Notice. A201 also requires notice of a delay claim within 21 days after it occurs or contractor becomes aware of its effect on the job (par. 4.3.2). But, more interesting, par. 4.3.7.1 provides that most notices are to include estimated cost and of probable effect of delay on schedule dates. The 21 day provision is intended to give the contractor time to determine the impact of the delay, and is probably reasonable when building a building which will take 2 years but it sounds like a long time in a leasing situation. [There is another organization, Associated General Contractors (AGC), whose comparable form contract provision calls for 14 days notice, as well as prompt notice of the fact of delay, suggesting that these dates are negotiable and variable].

These two concepts, **notice and delay,** are interesting in a lease context. Shouldn't the party claiming delay protection be required to notify the other as soon as possible of the occurrence of a delay claim, and the expected length of time it will continue. This will give the other party an opportunity to try to determine what available alternatives it can turn to. So, for example, if Landlord's air conditioning compressors break down, but its spare parts manufacturer is closed due to fire so that replacement parts will not be available for 60 days, tenant may decide to reschedule a 2 day conference, or move it to an alternate location or even rent a hotel suite. But if Landlord expects to have a

temporary portable compressor system hooked up within three days, tenant may just stick to its schedule and location on site.

For believers in lease provisions specifically requiring the parties to act fairly, the force majeure clause should expressly require this detailed information, in order to avoid some local building manager refusing all information on the theory that silence is always golden. Spelling this out also minimizes the ability of the party claiming delay to keep silent and later unfairly invent added time which is found to have been incurred but without a clear reason, so the party says let's throw it into the force majeure event.

Other causes. Another difference between AIA and AGC forms is AGC excludes strikes involving the contractor. Why should a party which decides it cannot resolve a labor dispute for reasons personal to it then be allowed to pass along the pain of that decision to the innocent third party owner or tenant. AGC also expressly includes as delay events, delay caused by governmental agencies, unusual transportation events, unavoidable accidents or circumstances. Another form includes epidemics; is this paranoia or foresight! What about stating as a reason, default by the other party; is that needed in a lease? It would seem implicit as a defense to a claim by the other party, such as a default claim for damages made by a tenant based on lack of hvac when tenant itself broke the system, or landlord's claim of default due to delay in making a repair by tenant when landlord has delayed approving the repair plans. On the other hand, it is always comforting to have a written statement to point to in a dispute ["the other party, or anyone for whom the other party is responsible, delays, disrupts or interferes with first party's performance"].

.**Overtime.** There is a traditional aversion by landlords to overtime labor. Since it can cost double time, even triple time, and efficiency suffers so it is in fact even more expensive, any hope that delays or deferrals in performance due to force majeure will be met by overtime or additional staffing, expedited deliveries, or similar response, will need to be expressed in the lease. A fall-back is that tenant (or whichever is the other party) may offer to pay the incremental added costs, if that party were to have an especially urgent requirement for expedited completion.

Listing causes. Some provisions go further and include enumerations such as "delay attributable to strikes, labor troubles, or any cause whatsoever including, but not limited to, …." This goes far beyond the quite broad standard defined as "beyond landlord's reasonable control."

Do not forget the interpretation rule of ejusdem generis, which you recall holds that in case of words of general application followed by specific words, the specific limit the general to those similar, although not necessarily identical, to the specific. Applied to the preceding paragraph, "any cause" would not mean literally everything but would be limited to things similar to those listed. An unsatisfactory result in terms of vagueness and trying to guide a client. But it is not unknown for a court to find that a specific cause is not on the list and therefore was not covered by the relief under the force majeure clause.

The better course would seem to be, sadly for those who would like to see leases get shorter, to list all you can think of and then also throw in an "all other" as broad as one can get away with.

III. Trying to Overcome the Problem

How far. Even assuming the clause is not the worst, but defines events as those "beyond the party's control" to one degree or another, should it also include language requiring that it is to be limited "to the extent" the event renders performance by the excused party incapable of performance using all reasonable means. Even more snugly, once could add "using all means and expenditures which do not require effort or cost inordinate in the circumstances." [Is it clear enough that the word 'inordinate' means excessive, or should it use another adjective? But doesn't 'extraordinary' merely cover all beyond the ordinary. So that 'unreasonable' is perhaps the best standard? Reasonableness has been a lawyer's fallback since seemingly the beginning of time, or at least the beginning of law school].

It is difficult to avoid reasonableness type standards and resulting softness in definition, but even then some thought should be given to whether there are issues of particular concern to the particular client [the usual suspects: December for a retailer, April for an accounting firm, market week, year end deal closings, etc.]. In these instances, the affected party may have an unusual need which uniquely makes its idea of 'reasonable' different from that of the general public, not to mention that of the party required to perform.

Affected party might want to preserve the right (to borrow a concept from minimizing interference clauses) to require the relieved party to incur even unusual expenditure if affected party will pay the incremental additional cost. One could ask whether relieved party should not be required to comply with any reasonable request to incur added expense which would be an operating expense [would such an expense be an operating expense? Would it be considered an expense for benefit of one particular tenant so that it falls under an exclusion, or would it be considered an expense for benefit of one tenant but which would be equally available to all tenants which were in need of the expense; project-wide expenses seem less problematic than the issue of unusual expense for the one tenant with a major closing impending].

It may be better for the affected party with a deadline to have the right to accomplish the performance itself, as if it were a right to cure provision but without any default requirement, but that of course assumes the matter being performed is something local, and not the base building electrical system or elevators or the like. And, if the cure is of something which the relieved party was obligated to furnish, shouldn't the relieved party reimburse the affected party, at least as to the extent of the ordinary non-overtime costs.

Notice [again]. As noted in the construction contract context, above, in order to evaluate the actions of the party seeking relief, it would be helpful to have a requirement to "notify

promptly [sooner?, immediately?, within 24 hours after it becomes aware of the force majeure event?] the affected party of the facts based upon which relief is being claimed, the details of the actions being taken by the first party and the anticipated date upon which the performance is expected to be accomplished." This will also permit the affected party to consider its alternatives of self help or added payment, relocation, or simply to claim that the efforts being undertaken are insufficient in the circumstances.

Analogy. The subject is in many respects similar to the considerations involved in initial build-out or construction by Landlord. Those situations, construction of one kind or another, involve possible delay by the constructing party measured against the need to move in by the affected party. So, all of the concepts applied in those circumstances should be considered. Possibly this can be done simply by a cross reference, wouldn't that be convenient.

Savings. One final thought. What if the party seeking relief saves money as a result of delayed performance? Does the affected party share in the saving? In the even of a building wide multiple-tenanted building's HVAC interruption, any saving will pass into operating expenses (just hope it is not your base year). But what if for some reason the affected party does not share in that, but the other party is saving thousands per day in energy cost while the HVAC system is out of service, in the midst of a boiling hot summer. Or the saved payroll costs during a strike. This may deserve some pass along consideration if the lease merits a lot of time on such topics.

Summary

Some clauses are attached.

The basic rules of force majeure clauses are

1. They should list as many likely events as possible
2. They should include some version of "all other causes"
3. Affected party should try to limit or tighten the definitions
4 Affected party should try to get the other's agreement to incur effort and cost
5 Affected party should try to get the right to be fully informed and updated
6 Affected party should try to get the right to cure with the other paying all or part

Richard M. Frome ©
New York, New York
October, 2006

CLAUSES

1. [An interesting baseball-team stadium lease clause, but with no notice and diligence concepts]. "Force Majeure" means the occurrence of any of the following for the period of time, if any, that the performance of a Party's material obligations under this Lease is actually, materially, and reasonably delayed or prevented thereby: acts of God, lock-outs, acts of the public enemy, the confiscation or seizure by any government or public authority (excluding the stadium owner authprity), insurrections, wars or war-like action (whether actual and pending or expected), arrests or other restraints of government (civil or military) blockades, embargoes, strikes, labor unrest or disputes, unavailability of labor or materials, epidemics, landslides, lightning, earthquakes, fires, hurricanes, storms, floods, wash-outs, explosions, any delays occasioned by arbitration actions and proceedings under the Arbitration Procedures specified in this Lease, civil disturbance or disobedience, riot, sabotage, terrorism, threats of sabotage or terrorism or any other cause, whether of the kind herein enumerated or otherwise, that is not within the reasonable anticipated or control of the Party claiming the right to delay performance on account of such occurrence and which, in any event, is not a result of the intentional act, negligence or willful misconduct of the Party claiming the right to delay performance on account of such occurrence. As to Landlord, actions of the Landlord shall not be considered actions of a Governmental Authority for purposes of Force Majeure. Notwithstanding the foregoing, "force majeure" shall not include (i) any strikes or lock-outs or other labor disputes related to Tenant's trade organizations, or (ii) economic hardship.

2. [A modest clause]. This Lease and the obligation of Tenant to pay rent hereunder, and the obligation of each party to perform and comply with all of the other covenants and agreements hereunder on its part to be performed or complied with, shall not be affected or excused because of the other party's delay or failure to perform any of the covenants and agreements hereunder on the part of the other to be performed for reasons beyond the reasonable control of such other party which reasons are generally being encountered at the time in Comparable Buildings [defined somewhere in the Lease, may or my not be appropriate here], including, without limiting the generality of the foregoing, strikes, lockouts or labor problems, governmental preemption, laws, conditions of supply and demand which have been or shall be affected by war or other emergency or general market conditions or otherwise; provided, however, that this Section shall not apply to, and nothing contained in this Section shall affect or impair either party's rights and remedies pursuant to, Articles [fire, condemnation, cure, abatement] hereof, or any offset rights or rights to credit expressly given to Tenant in this Lease, and further, in no event shall any delay or failure of payment of rent or other money, whatever the cause, be either considered as a reason beyond a party's reasonable control or to any extent excused by operation of this Section.

3. [A pretty good clause with diligence and notice]. A. Except as otherwise expressly set forth herein, in the event either party hereto shall be delayed or hindered in, or prevented from, the performance of any act or rendering any service required under this Lease, by reason of strikes, inability to procure materials, failure of power, restrictive governmental laws or regulations, riot, insurrection, war or other reasons of a similar or dissimilar nature which are beyond the reasonable control of the party (collectively referred to herein as "Event"), then the performance of any such act or rendering of any such service shall be excused for the period of the resulting delay and the period of the performance or rendering shall be extended for a period equivalent to the period of such delay. Notwithstanding the foregoing, this paragraph shall not be applied so as to excuse or delay payment of any monies by one party to the other, including rent.

B. Except in the instance described in a provision of this Lease expressly referring to this Section, nothing contained in this Section shall be applied so as to: (i) permit any delay or time extension due to shortage of funds; or (ii) excuse any nonpayment or delay in payment of rent, or (iii) limit either party's rights under right-to-cure-other's-default as if this Section were not contained in this Lease. It shall be a condition to either party's claim of the benefit of this Section that such party ("Claiming Party") notify the other in writing within 48 hours after the occurrence of the Event, and within 24 hours after request shall advise the other party in writing of its good faith estimate of the time which will be required until the delay is ended. Claiming Party shall have no liability to the other if the good faith estimated time of cure of the delay is not met but Claiming Party shall advise the other in writing whenever Claiming Party learns that any material additional time shall be required (and promptly upon request shall advise the other party of any latest estimated time of cure of the delay and the actions being taken to cure the delay).