

March 29, 2016

# Identifying “Acts of God” in the Age of Climate Change and Political Upheaval



**Richard Reizen**

Litigation

Corporate

Construction

Real Estate

By Richard S. Reizen and Jordan M. Hanson

The British humorist Alan Coren satirically and accurately pointed out that the Act of God provisions in insurance policies mean “roughly that you cannot be insured for the accidents that are most likely to happen to you.” In the era of climate change, 1,000-year floods that occur every year, and political instability throughout the world, Mr. Coren’s humor is especially apropos to drafting Force Majeure provisions.

Most construction contracts (including commonly used AIA, ConsensusDocs and EJCDC form contracts) contain boilerplate Force Majeure or Act of God provisions addressing what happens when construction is delayed by unforeseeable events of nature (floods, earthquakes, fire or other unanticipated weather) or political events (war, strike or revolution). However, it is crucial that construction contracts clearly identify events of Force Majeure and their impact on contract terms. They should also allocate the risks of delay caused by Force Majeure events.

Since we have often thought about Force Majeure events as unforeseeable natural or political events, it is important to re-examine what is reasonably foreseeable in a changing climate for instance. If a Super El Nino is forecast before a contract is signed, should a contractor have foreseen that certain parts of the country will get heavy rainfall and be barred from getting extensions for rain delays on projects in those geographic areas? Should contractors building in an area that has had several 1,000-year floods in the last few years still be able to classify such floods in that manner? In a global economy, where companies build projects in unstable hotspots like the Middle East, what happens if there is a revolution which has been brewing for years? When reports indicate that climate change is accelerating and that sections of coastline may be underwater in the not so distant future, contracts will increasingly need to address Force Majeure issues with specificity.

In general, all Force Majeure provisions should do the following

- Describe with as much specificity as possible what constitutes a triggering Force Majeure event
- Identify how long the event has to last before relief can be sought
- Set forth the method and timing of notice to be given by the owner or contractor invoking the Force Majeure provision
- Provide whether the event justifies the cancellation of the contract, an excusable delay or a price increase of some kind

Additionally, the allocation for Force Majeure risks should be clearly identified and, if possible, insurance for such risks should be purchased. (Obviously, it may either be too expensive or otherwise not possible to purchase insurance for all Force Majeure risks on a project.)

Because of the boilerplate nature of Force Majeure provisions, many drafters do not consider such provisions with the same care as scope or cost provisions. Another Brit not nearly as funny as Mr. Coren, Benjamin Disraeli, said, “Circumstances are beyond human

control, but our conduct is in our own power.”

Because Force Majeure events are, by definition, beyond our control, and because what may have been an event of Force Majeure in the past may be foreseeable now, the type of conduct “in our power” as owners or contractors is a well-drafted and specific Force Majeure and risk-allocation clause.