



CONSTRUCTION CLIENT ALERT

COVID-19: Impact on Force Majeure in Construction Contracts

By Adam C. Doverspike and Andrew R. Polly
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As the novel coronavirus (COVID-19) continues to spread, contractors are already experiencing supply-chain disruptions and workforce shortages. Some are facing even more drastic disruptions. Earlier this week, for example, the Mayor of Boston [banned all construction](#) for at least 14 days. Other localities may follow suit in the coming days to slow the spread of COVID-19.

Delay And Force Majeure Clauses: Construction companies can protect themselves against supply-chain disruptions, workforce shortages, and construction bans through the delay clause in their contracts, sometimes referred to as a “force majeure” clause. A force majeure clause is a common contractual provision that relieves a party’s obligations under the contract when circumstances beyond the party’s control arise. The clauses typically cover unforeseen “acts of God.” If drafted appropriately, force majeure clauses act as a critical safety net to help contractors deal with unforeseen events such as a natural disaster.

Force majeure clauses can be drafted generally or specifically. General force majeure clauses usually cover events out of the parties’ control that (i) materially affect performance and (ii) were unforeseeable at the time of contracting. Specific force majeure clauses, on the other hand, include a list of “triggering events” that may excuse performance. Pandemics are not normally included in a list of triggering events (though epidemics sometimes are included), but a “catch-all” clause in a force majeure provision may justify delay.

AIA Form Construction Contracts: The standard industry construction contracts include a general force majeure clause with a catch-all provision. The most frequently used form construction contract, the AIA A201-2017 General Conditions of the Contract for Construction, includes a catch-all force majeure clause. The A201 standard language states that delays may be warranted under a “catch-all” for “causes beyond the [c]ontractor’s control” or “causes that the [c]ontractor asserts, and the [a]rchitect determines, justify delay.” A delay caused by a governmental order banning construction would likely fall within the first catch-all clause, while a delay more tangentially caused by COVID-19 would have to be approved by the architect under the second catch-all clause.

Even if a contractor is able to justify delay under the force majeure clause in its contracts, the standard AIA language only grants contractors an opportunity for an equitable extension of time; it does not expressly mention an increase in the contract price. This means contractors evoking a delay clause may not be able to obtain additional payments for salary, overhead, and other daily operating costs.

Treatment of Force Majeure Clauses: Whether COVID-19 constitutes a force majeure event will be determined by the terms and language contained in the applicable construction contract. Courts in various jurisdictions treat the clauses differently, but most courts will likely consider a few key questions when determining whether a delay exercised under a force majeure clause is justified, including the following:

- Does the contractual language provide an opening for COVID-19 to be considered a cause for delay (either as a specific triggering event or through catch-all language)?
- Was the outbreak and spread of COVID-19 unforeseeable at the time of contracting?
- Was there a causal link between the COVID-19 outbreak and the resulting delay or non-performance?
- Was the pandemic so severe to excuse non-performance?

When a delay is caused by a governmental order banning construction, a court will likely answer each of the above questions in the affirmative. The outcome in other cases will, of course, depend on the facts and circumstances that (i) existed at the time of contracting and (ii) caused the delay or non-performance.

Planned construction projects are unlikely to continue at full speed for the foreseeable future. Now is the time for contractors and project owners alike to review the force majeure provisions in their construction contracts and potentially seek a contract modification. When conducting their reviews, it is also important to pay close attention to any notice requirements within the contracts and to assess whether a justified delay will result only in equitable extensions of time, or also a potential increase in the contract price.

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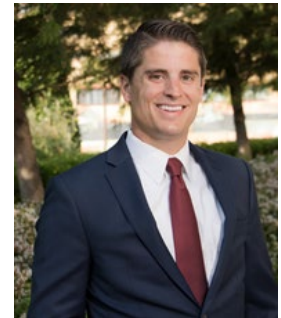
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