

COVID-19 Construction Alert: Force Majeure and Notice Provisions in Construction Contracts Take Center Stage in the Age of COVID-19

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Before the advent of COVID-19, nobody paid much attention to force majeure clauses in construction contracts. These clauses were often boilerplate provisions, tucked away in the general conditions part of the contract documents, barely on the radar screen. How the world of construction contracting has changed in only a matter of months. Now, everybody – owners, contractors, subcontractors and suppliers -- are interested in force majeure, including, among other things, whether an “epidemic” is expressly covered as a force majeure event.

To appreciate the importance of force majeure in the context of COVID-19, owners and contractors need to understand four things: (a) the purpose of the clause; (b) the particulars of the clause; (c) the importance of notice; and (d) the ramifications of the clause.

“Force majeure” translates from French as “a superior force.” *Black’s Law Dictionary* defines force majeure as “[a]n event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars).”

Simply stated, in the context of a construction contract, a force majeure event is an event that could not have been reasonably foreseen and prevents a contractor from performing its obligations under the contract. Such events are addressed in what is commonly referred to as a force majeure clause. This is a negotiated contract provision that allows a party to delay, suspend or terminate performance under the contract when certain circumstances occur that are beyond the party’s control, thus

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rendering contract performance impracticable, impossible or even illegal. By negotiating these “certain circumstances,” parties can anticipate in advance when performance of contractual obligations will be excused.

When one talks about force majeure events, one thinks of things such as war, riots, invasion, famine, civil commotion, epidemics, extreme weather, floods, strikes, fire and government action. These, however, are just examples. To determine the precise impact of a particular force majeure clause, one needs to look at the express terms of the particular contract in question. Those terms vary depending on the parties, counsel and negotiation involved.

Two common construction contract forms and the Federal Acquisition Regulations (FAR) include typical force majeure clauses:

- The standard language of AIA Document A201-2017, General Conditions of the Contract for Construction, provides in Section 8.3.1: If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, *or other causes beyond the Contractor’s control*; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine. (Emphasis added.)

As written, this clause only provides for an extension of time for performance and does not list many specific events that trigger it. Both aspects may be negotiated on behalf of the owner and contractor (since AIA forms are seldom utilized without editing by counsel). While an owner is likely to argue that “epidemics” are not specifically cited in the A201, a contractor may argue that Subsection (3) – “other causes beyond the Contractor’s control” – is a sufficient catch-all to cover events such as COVID-19.

- ConsensusDocs 200, another form contract document, contains an analogous force majeure provision in Section 6.3.1: If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Date of Substantial Completion or the Date of Final Completion. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fire; (i) Terrorism; (j) *epidemics*; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated . . . (Emphasis added.)

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While not as popular as the AIA documents, ConsensusDocs typically adopt a contractor's perspective by default (thus, the extensive list of force majeure events). Like the AIA form, the ConsensusDocs form may be edited and negotiated. Owner's counsel may try to limit the number and type of force majeure events, while contractor's counsel is likely to push back. As the clause stands in its unadulterated form, unlike the A201, it specifically calls out "epidemics" in Subsection (j).

- Finally, FAR 52.249-14 (48 C.F.R. 52.249-14), Excusable Delays, governs federal contracts and provides as follows: (a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) *epidemics*, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance. (Emphasis added.)

Unlike the AIA and ConsensusDocs forms, the FAR is a federal regulation with which government contractors must live (*i.e.*, there is no negotiation). Notably, the regulation specifically identifies "epidemics" as a force majeure event in Subsection (5).

All three force majeure clauses provide a contractor with only an extension of time if the triggering event occurs and the contractor provides timely notice in accordance with the terms and conditions of the contract (or regulation, if applicable). If the contractor faces an unanticipated delay due to a force majeure event, it needs to send notice of the delay in the time and manner required by the contract. New Jersey courts interpret contractual notice provisions strictly, and owners are going to be mindful of the notice requirements in defending against the contractor's claims.

The ramifications of a force majeure clause vary depending on the specific contract provision at issue. For example, none of the above contract provisions affords the contractor who provides timely notice with any relief other than an extension of time. This is an issue that is subject to negotiation between the owner and contractor. Contractors may seek to recover damages or other financial remuneration as a result of force majeure, including, for example, costs of demobilization or remobilization. Owners, on the other hand, prefer "no damage for delay" clauses – to the extent they are allowed by law – since they purport to limit a contractor's remedy to an extension of time.

Even if they are limited to a contractual extension of time, a contractor may negotiate the ability to terminate the contract if a force majeure event continues uninterrupted for a certain number of days. In response, an owner, aware that all parties wish to 'stanch the bleeding' will negotiate to maximize the consecutive number of days a force majeure event transpires before allowing a contractor to terminate (and possibly recover "termination costs").

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In sum, numerous contractual provisions come into play when considering the impact of a force majeure event, such as COVID-19 or a governmental business shut-down order, on a contractor or owner. These provisions need to be evaluated carefully in light of the surrounding facts and circumstances of a particular construction project.

Please contact the author of this Alert, **Steven Nudelman** snudelman@greenbaumlaw.com | 732.476.2428, for assistance with your construction contracts, including drafting, negotiation or review, or for an analysis of the impact of COVID-19 as a possible force majeure event on a construction project. Mr. Nudelman is a member of the firm's **Construction Practice Group**.