



March 23, 2020

FAQ: COVID-19 and *Force Majeure* Provisions' Impact on Construction Projects

With increasing frequency, states and local governments have ordered nonessential workers to remain at home to slow the spread of COVID-19. Others have ordered social distancing (a deliberate increase in the physical space between people to avoid spreading illness). Many who have been exposed to the new coronavirus and who are at risk for getting COVID-19 are advised to practice self-quarantine.

As the virus continues to spread, all sectors, including construction, will suffer significant economic impacts. The ramifications to the construction industry from the impacted supply chain are unavoidable. Now, and for the foreseeable future, *force majeure* claims will be increasingly made on construction projects while the COVID-19 epidemic continues. Below is a list of FAQs from our construction practitioners to assist with the assessment of *force majeure* provisions and claims during this unprecedented time.

Q. Does the contract have to explicitly state that a “pandemic” or “virus” qualifies as a *force majeure* event?

A. *Force majeure* events are usually set out with specificity in the contracts—and they can be different from contract to contract, but generally include certain categories:

- *Acts of God*: Earthquakes, fires, explosions, storms, biological contaminations, landslides, power shortages, etc.
- *Acts of governments*: Embargo, trade sanctions, “an imposed quarantine”
- *Acts of war*: Declared or not, revolution, riot, terrorism
- *Other causes beyond a party’s control*: The AIA series of documents allow a contractor to request an extension of time for, among other things, “causes beyond a contractor’s control.” These can be as varied as “unavoidable casualties” to “unusual delay in deliveries.” The current AIA A201-2017 also allows a contractor to request an extension of time for “other causes that the Contractor asserts.”

Given the wide variety of *force majeure* clauses, to determine whether they have been invoked is a fact-intensive inquiry that depends not only on the language in the contract, but also the state in which the contract will be enforced. This is especially important not only with general contractors and owners, but general contractors and critical subcontractors.

Q. Are there any steps that should be taken prior to invoking a *force majeure* provision?

A. Many contracts include a provision requiring written notice prior to invoking the *force majeure* provision.

Q. How are *force majeure* provisions generally interpreted?

A. *Force majeure* provisions are construed narrowly to limit damages where the parties’ reasonable expectations have been frustrated by a situation out of their control and are generally confined to those events set forth in

the contract (“fire” etc.). They are interpreted in keeping with the spirit of the clause: What was it really meant to do—operationally?

Q. How does COVID-19 fit with most *force majeure* language?

A. *Force majeure* language is different from contract to contract. Some *force majeure* provisions list “pandemic” or “epidemic” as *force majeure* events. Because the World Health Organization has declared COVID-19 a pandemic, succeeding on a *force majeure* claim is easier where your contract includes “pandemic” or “epidemic” in its *force majeure* language. Even without “pandemic” or “epidemic” language in your contract, COVID-19 may be covered under the “Act of Government” provision if the area of the project has initiated stay-at-home and/or social distancing orders.

COVID-19 also may qualify as an “Act of God” (if allowed under your contract) but proving an “Act of God” is more difficult than proving an “Act of Government.” As noted above, the current AIA General Conditions also have a catch-all provision for an extension of time for “other causes that the Contractor asserts.”

Q. Do different states have different requirements for invoking *force majeure* provisions?

A. Yes. In some states, unless the event is explicitly stated in the contract, the party seeking to invoke the *force majeure* provision must show the exercise of reasonable diligence to overcome the *force majeure* event. “Reasonable diligence” is viewed as what an ordinary, prudent person in the same or similar circumstances (e.g. experienced contractor, subcontractor or supplier) would do. In others, a party seeking to invoke the *force majeure* provision must show the event was unforeseeable and occurred outside of their control.

Q. Are there common law applications that would not require a party to invoke a *force majeure* provision?

A. Potentially. The common law affirmative defenses to claims for breach of contract provide a fact-intensive potential alternative for relief to a party seeking the benefits of a *force majeure*-type event without invoking a *force majeure* contract claim. These include impossibility and prevention of performance. Again, these are very fact intensive and must be interpreted in every state and situation.

Q. Do you have any recommendations for projects that were suffering from delays prior to the onset of COVID-19?

A. Yes. Projects suffering from delays prior to the onset of COVID-19 should have adequate documentation of delays and causes prior to March 2020. Any delay analysis involving COVID-19 must include an evaluation of any concurrent delay that existed prior to the time of the potential COVID-related delay.

Additional Information

If you’d like to discuss your situation further, please contact a member of our [Construction Practice Group](#).