

Force Majeure Provisions: COVID-19

Over the last year, many industries have experienced supply delays and workforce shortages resulting from the spread of COVID-19. The construction industry certainly was not immune to these issues. The current situation serves as a good reminder to review and understand contract provisions that cover unforeseen construction delays.

Most construction contracts contain a “force majeure” provision allowing a contractor to delay or stop performance under the contract due to certain, unforeseen circumstances. While there is little question that the outbreak of COVID-19 is an unforeseen circumstance, the party that bears the risk and loss for any resulting construction delays will be dictated by the language of the controlling written agreement. For example, the General Conditions provisions in AIA contracts contain the following language:

8.3.1 If the Contractor is delayed at any time in the commencement of progress of the Work by (1) an act or neglect of the Owner or Contractor, 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. AIA Document A201-2017 (emphasis added).

Similarly, ConsensusDocs outlines force majeure events in its standard contract forms:

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 Contract Time. 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. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8. ConsensusDocs 200 (2011, revised 2017) (emphasis added).

Under the AIA and ConsensusDocs contract language, it would be difficult for an owner to dispute that the COVID-19 outbreak's disruption to deliveries or construction was somehow within the contractor's control, particularly given the explicit mention of "epidemics" in the ConsensusDocs contract language.

However, force majeure provisions are often revised from their original form, and these revised clauses can transfer additional risk to contractors. In some jurisdictions, courts narrowly interpret force majeure clauses. *See, e.g., Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987) (holding that force majeure excuses nonperformance "only if the force majeure clause specifically includes the event that actually prevents a party's performance"). If the unforeseen event that results in a construction delay is not specifically described in the force majeure provision or does not fall within a broader catch-all category in the force majeure provision, the contractor may be unable to avoid contract liability for construction delays. Additionally, some force majeure provisions place additional burdens on the contracting parties such as notice requirements and submission of mitigation plans to invoke protection under the force majeure provision. *See, e.g., United States v. BASF-Inmont Corp.*, 819 F.Supp. 601 (E.D. Mich. 1993) (force majeure provision required submission of a mitigation plan within 20 days of giving notice of force majeure event).

In the last year, courts have begun issuing decisions interpreting force majeure provisions in the context of COVID-19. In late 2020, a federal court in New York determined that the force majeure provision in a contract between an art dealer and an auctioneer excused the performance of the auctioneer after New York's governor issued an emergency order prohibiting non-essential business operation. *See JN Contemporary Art LLC v. Phillips Auctioneers LLC*, 2020 WL 7405262 (S.D.N.Y. Dec. 16, 2020). The contract between the parties specifically included "natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack [and] nuclear or chemical contamination" in the force majeure provision. Notably, the provision made no mention of "pandemic" or "epidemic." The court determined that the auctioneer's performance under the contract should be excused because COVID-19 is indisputably a "natural disaster" and falls within the scope of the force majeure provision. It is important to note that any legal decision on the question of whether COVID-19 constitutes a force majeure event will depend on the language of the particular force majeure provision and the applicable law of the jurisdiction.

Force majeure provisions can be a valuable tool in preventing contract liability that could arise because of COVID-19-induced construction delays. However, force majeure provisions vary greatly in scope and allocation of risk. It is crucial that contractors review their current construction contracts in order to better understand any force majeure provisions and to plan for potential construction delays resulting from the spread of COVID-19.