

FAO'S - DESIGN PROFESSIONALS AND COVID-19

General Information

The spread of COVID-19 has disrupted, and will continue to disrupt, the construction industry. A recent survey conducted by the Associated General Contractors of America states that 28% of member firms have already halted or delayed work on projects due to COVID-19, while 11% of firms report possible delays in jobs scheduled to start a month or more out. In these uncertain times, many design professionals will be scrutinizing their contracts in order to clarify their own liabilities and those of their clients, including force majeure clauses, common law doctrines and contractual damages provisions.

Force Majeure Clauses

- **What is a force majeure clause?**

The term force majeure comes from the French language, where it translates to “superior force.” In general terms, force majeure means an exceptional, unforeseen event or circumstance that is beyond the reasonable control of a contracting party and which prevents or impedes their performance of the contract. Generally it cannot be an event that the party could reasonably have avoided or overcome, or an event attributable to the other party.

In essence, force majeure provisions are contractual risk shifting provisions which allocate risk in situations that were unforeseen at the time of contracting. A typical force majeure clause will have multiple elements all of which must be met in order to invoke the clause. First, force majeure clauses will usually define what constitutes a triggering events. Second, force majeure clauses usually include the specific relief granted if a triggering event occurs. Third, force majeure clauses generally include procedural obligations that must be followed.

- **How do I find a force majeure clause in my contract?**

More often than not, construction contracts do not use the term “force majeure.” Neither the AIA nor ConsensusDocs form contract documents use the term. By way of example, force majeure language appears in §8.3.1 of 2017 AIA form A201, General Conditions of the Contract for Construction and §8.2 of ConsensusDocs Form 250 entitled “Standard Agreement Between Design Professional and Consultant.” Another version is found in 2017 AIA form B101 § 3.1.3 entitled “Scope of Architects Basic Services.”

- **How do I find what constitutes a triggering event under a force majeure clause?**

In general, construction contracts can be relatively vague as to what circumstances qualify as a triggering event and there is very little case law with respect to pandemics. Under the AIA contracts, the parties would need to agree that COVID-19 qualifies as a triggering event under the wording that is present in the relevant contract such as “other causes that the Contractor asserts, and the Architect determines, justify delay” or “reasonable cause.” By contrast, ConsensusDocs Form 200 entitled “Standard Agreement and General Conditions Between Owner and Contractor (Lump Sum)” specifically lists epidemics at § 6.3 as a basis for extension of time. Section 12.03 of the EJCDC Form C-700 also specifically lists epidemics. Mere impracticality or unanticipated difficulty, however, is usually not enough to excuse performance under force majeure clause of contract.

- **What relief can I get under a force majeure clause?**

The most common relief offered under a force majeure clause in the construction context is an extension of time.

- **What about financial compensation for costs like overhead or consequential damages associated with those delays?**

It depends on what the contract says. Many contracts have “no damage for delays” clauses and/or “waiver of consequential damages” clauses that may prevent recovery of any delay-related expenses and only provide an increase in the allotted schedule time.

- **What are typical procedural hurdles to invoking a force majeure clause?**

The most common procedural step to invoke a force majeure clause is notice. Notice clauses are more typically found in contractor contracts than in design professional contracts, but can be found in either. In conjunction with notice, a party may be required to provide documentation. For instance, 2017 AIA form A201 requires at §15.1.6.1: “If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor’s Claim shall include an estimate of cost and of probable effect of delay on progress of the Work.”

Other Bases for Contractual Relief

- **What if my contract does not have a force majeure clause?**

Most states provide some relief to parties to a contract in the absence of a force majeure clause. Typically, when performance of a contract would be illegal because of a statute, a regulation, or other official action that has occurred since the contract was signed, the promisor is discharged without liability, pursuant to common-law doctrine of impossibility. If the parties included a force majeure clause in the contract, however, the clause supersedes the doctrine.

- **What if I can still technically perform under a contract but it would be economically difficult or impractical to do so?**

The doctrine of impracticability may provide an avenue for relief. In order to prevail on a defense of commercial impracticability, a party must establish the following: "(i) a supervening event, either an 'act of God' or an act of a third party, made performance impracticable, (ii) the non-occurrence of the event was a basic assumption upon which the contract was based; (iii) the occurrence of the event was not the party's fault; and (iv) the party did not assume the risk of the event's occurrence." *L.W. Matteson, Inc. v. United States*, 61 Fed. Cl. 296, 320 (2004). Even if a party is able to meet these criteria, however, your underlying contract could still waive this defense.

Moving Forward

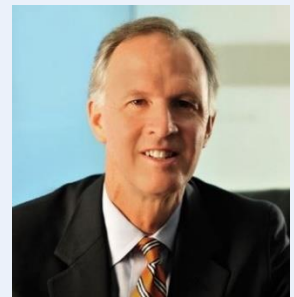
We are advising clients to review their contracts carefully and to consider attempting to negotiate with other parties in good faith in advance of any potential issues to avoid problems in the future with payment or performance.



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