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Pardon the French but Is COVID-19 Covered by the *Force Majeure* Clause of Your Construction Contract?

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As the CDC issues guidelines progressively cautioning against attending activities with more than 1000, then 500, then 250, and now 50 people, it was only a matter of time before the coronavirus (COVID-19) impacted construction projects. On March 16, 2020, Boston became the first city to shutter all construction sites (other than emergency street and utility work) to protect public safety. Given the projections being issued by the National Institutes of Health, others, without a doubt, are sure to follow. To mitigate the consequences of these drastic COVID-19 related limitations, owners, contractors, subcontractors and suppliers should be actively evaluating how to protect themselves from the consequences of this unprecedented pandemic.

Force Majeure is French for “superior force” and describes an event that cannot be anticipated or controlled that prevents a contracting party from fulfilling its bargained for obligations. Because construction projects generally are performed over an extended duration and are subject to a myriad of physical and economic circumstances, construction contracts typically contain an express provision (*Force Majeure* clause) should unforeseen and uncontrollable events be encountered. The essence of such a provision is premised on the foreseeability of an event; whether causation is beyond the fault or control of the party seeking the benefit of the clause; and unavoidability through the exercise of due diligence and mitigation. *Force Majeure* provisions are not one size fits all and are not without risk to the party invoking protection of the clause.

Is COVID-19 a *Force Majeure* event and, if so, what is your remedy? The answer depends on the unique terms of your contract and the law governing your project. For example, a contractor might argue for a time extension due to the impact of COVID-19 under certain provisions of form construction contracts, “the Contract Time extended by Change Order for such reasonable time as the Architect may determine” (AIA A201-2017), an “equitable extension” (ConsensusDocs 200), “an equitable adjustment” (EJCDC-700) or “the completion time shall be revised, subject to the rights of the Government under the termination clause of this contract” (FAR 52.249-14). Moreover, most *Force Majeure* clauses require written notice within a fairly short number of days after commencement of the event – an especially important consideration in states which strictly construe notice provisions. Also, while some provisions (such as the Federal Acquisition Regulations) expressly call out “epidemics” and “quarantine restrictions” as *Force Majeure* events, many other contract clauses are more generic using terms such as “acts of God.”

To compound matters, *Force Majeure* provisions cannot be blithely invoked. In some settings, what later may be interpreted by a court as a wrongful invocation of the *Force Majeure* clause can be deemed a breach or repudiation and may permit another contracting party to declare termination of your contract or the project (typically not an intended objective of the party invoking the clause). To hedge against those potentially unwanted consequences, owners and contractors likely will consider additional and different potential remedies (some of which can afford both affirmative relief as well as time extensions) under distinct contractual provisions and/or legal doctrines such as:

- Impossibility
- Commercial Impracticability

- Frustration of Purpose/Performance
- Constructive Change
- Change in Law or Regulations Making Performance More Timely or Expensive

For construction contracts in the planning or negotiation stage, we urge owners and contractors to expressly address COVID-19 concerns in the remedy granting provisions of the contract (e.g., including as *Force Majeure* events epidemics, pandemics, quarantines, and “public health events of international concern (PHEIC)” as well as supply chain delays from countries or regions affected by such events). We also suggest that owners and contractors discuss with their respective insurance producers to see if there are any insurance programs they now have or can purchase that might cover losses related to COVID-19 issues.

To assist your navigation of construction and infrastructure projects in this ever-changing sea of regulatory and health-related concerns, Saul Ewing Arnstein & Lehr has formed a multi-disciplinary COVID-19 Task Force to provide pertinent legal guidance to our clients. In order to share the most useful and comprehensive information, our Task Force has created a [Coronavirus \(COVID-19\) Resource Page](#) on our website to help educate organizations and employers and provide links to valuable resources. Our resource page will be regularly updated with new materials and guidance.

Please feel free to contact the authors if you have questions about the impact of COVID-19 on your projects or would like to discuss your specific needs. We are all in this together and we stand ready to assist you.

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