



LEGAL UPDATE Mar 4, 2020

# Managing Project Risk Associated with the Coronavirus Outbreak Through Force Majeure Provisions

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Globally, many developers and contractors are scrambling to identify available contractual relief as the Coronavirus (COVID-19) disrupts cross-border supply chains. US businesses will recall a similar effort just eighteen months ago, when the Trump Administration announced increased tariffs on \$300 billion of Chinese goods. That trade war prompted companies to scrutinize remedies and mitigate associated project risks by tapping alternative sources originating in other Asian countries and Canada. Once again, construction industry stakeholders should reexamine delay provisions in pending and future contracts to mitigate risks arising from project disruptions caused by COVID-19.

This article provides an overview of US case law interpreting the doctrine of *force majeure* in the context of disease-related delay claims. Drawing on that guidance, we then identify practical considerations for applying existing *force majeure* or related delay provisions and how they may be modified for future projects.

## Project Risk Associated with the Spread of the Coronavirus

Reports of a slowdown in the construction industry have been growing in the past weeks across multiple respected industry publications, including *Engineering News-Record*.<sup>[1]</sup> Because of its severity, the Coronavirus outbreak is expected to disrupt

supply chains across the globe in the construction industry, as well as in manufacturing and other sectors. This ranges from worker shortages, transportation disruptions, and closures of production plants and ports of entry to restrictive governmental action, such as bans on travel and mandated quarantines. Yet the full impact remains largely speculative as scientists and construction executives assess the daily breaking news. As recently observed by the Chief Economist of the Associated General Contractors of America (AGC):

The coronavirus outbreak continues to spread globally each day but the impact on U.S. construction remains speculative. So far, there do not appear to be any reports of cancelled, deferred or interrupted construction projects, nor of delays or shortages of construction equipment, parts or materials. However, the disruption to Chinese production and shipping is increasing, adding to the likelihood that some construction products and projects will be affected.[2]

To cut out much of the media's speculation and potential misinformation, readers may check the official CDC and WHO guidelines at [CDC Coronavirus Disease 2019 \(COVID-19\)](#) and [WHO Coronavirus Disease \(COVID-19\) Outbreak](#) webpages.

## **What is a *Force Majeure* Provision and Where is it Buried in Your Contracts?**

*Force majeure* clauses operate to excuse performance obligations or to extend time of performance on a contract when an unforeseeable event, or one that is “beyond the contractor’s control,” causes project delay. While not well standardized in the United States, such provisions often include both “acts of God” and “acts of Governmental Entities,” as well as an assortment of other possible delaying events. Two of the most commonly-used industry published contracts forms—The ConsensusDocs® Coalition (ConsensusDocs®) and the American Institute of Architects (AIA®)—do not use the term “*force majeure*.” Instead, the operative language is in the overall delay provisions of the contracts.

In the AIA® suite of contracts, the delay provision is found in the AIA Document A201™ - 2017, “General Conditions of the Contract for Construction,” incorporated into many of the contract forms. In particular, Section 8.3.1, “Delays and Extensions of Time,” describes some *force majeure*-type events which may permit an extension to the Contract Time:

### **§ 8.3 Delays and Extensions of Time**

**§ 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.*

**§ 8.3.2** *Claims relating to time shall be made in accordance with applicable provisions of Article 15.*

**§ 8.3.3** *This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.*

Similarly, ConsensusDocs® describes various *force majeure* type events in the main agreement between the Owner and Constructor—but also specifically identifies “epidemics.” The ConsensusDocs® 200, “Standard Agreement and General Conditions Between Owner and Constructor (©2011, Revised May 2017) includes a nonexclusive list of thirteen *force majeure* events in Section 6.3.1, “Delays and Extensions of Time.” This provision cites “epidemics” in addition to a more general reference to “transportation delays not reasonably foreseeable” as shown below in the excerpted provision:

#### **6.3. DELAYS AND EXTENSIONS OF TIME**

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.

6.3.2 In addition, if Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, Constructor shall be entitled to an equitable adjustment in the Contract Price subject to §6.6.

6.3.3 NOTICE OF DELAYS If delays to the Work are encountered for any reason, Constructor shall provide prompt written notice to Owner of the cause of such delays after Constructor first recognizes the delay. The Parties each agree to take reasonable steps to mitigate the effect of such delays.

The nine causes listed in ConsensusDocs® Section 6.3.1's subsections (e) through (m) are customary *force majeure* events. Like the AIA®, the above Section 6.3.2 of the ConsensusDocs® provides for an equitable adjustment to the contract time, but not the contract price, should a *force majeure* event occur.

## **US Case Law Interpreting Delay Claims Predicated Upon Disease Outbreak**

While the question of whether a particular disease outbreak constitutes a *force majeure* event turns on the language of the provision and applicable law, there is not extensive published case law in the United States involving disease outbreak. In the relatively small number of judicial opinions that have analyzed whether a certain disease outbreak constituted a *force majeure* event, courts have focused on the extent to which the outbreak was an unforeseeable event precipitating a dramatic change in market conditions.

In a 2003 case involving the supply of hogs from three farms, the court noted that an outbreak of Porcine Reproductive and Respiratory Syndrome (PRRS) which affected hog production constituted a *force majeure* event for purposes of summary judgment. [3] In *SNB Farms, Inc. v. Swift & Co.*, the contract at issue provided: “[w]here either party claims an excuse for nonperformance under this Section, it must give prompt telephonic notice, promptly confirmed by written notice, of the occurrence and

estimated duration of the *Force Majeure* Event to the other party; and shall give prompt written notice when the *Force Majeure* Event has been remedied and performance can recommence hereunder”[4] (applying Colorado law). At issue on summary judgment was whether the non-performing parties had provided sufficient notice, as required under the *force majeure* clause, to be entitled to the excuse of *force majeure*. For one breaching party that had notified the non-breaching party of PRRS in a letter and orally, the court held that the notification question was appropriate for a jury to decide.[5] However, for the remaining two breaching parties, who did not raise the PRRS issue or claim *force majeure* in their quarterly estimates, the court held that they were precluded from asserting the defense.[6] Accordingly, summary judgment was appropriate against those two entities.

By contrast, in *Rexing Quality Eggs v. Rembrandt Enterprises, Inc.*, a federal court in Indiana applying Iowa law held that falling consumer demand did not constitute a *force majeure* clause.[7] In reaching its holding, however, the court noted “[u]nlike the avian flu example, which may plausibly constitute an unforeseeable event precipitating a dramatic change in market conditions, a change in purchaser demand—even a substantial change—is a foreseeable part of doing business.”[8]

Regardless of whether it is ultimately declared a pandemic, courts may logically find the Coronavirus outbreak to be beyond the “reasonable control of the party” and fall within the meaning of “acts of God.”[9] If the quarantines and travel restrictions put into place by governments render the contractor or subcontractor unable to perform, these actions may constitute a valid “Governmental Entities” act excusing performance.[10] For some construction project stakeholders holding contracts that are silent with respect to disease-related delay, they must rely upon these more general contractual language referring to events beyond its control, acts of God or Governmental Entities.

A more compelling claim of *force majeure* delay caused by the Coronavirus outbreak is found in construction contracts that specifically identify “disease,” “epidemic,” or “pandemic” in the definition of a *force majeure* or delay event. This is especially crucial in some jurisdictions, such as New York, where courts have ruled that a delay beyond the control of the claiming party may only excuse performance if the event has been expressly listed in the governing delay or *force majeure* clause.[11]

The fact that currently 61 countries have reported COVID-19 cases to the World Health Organization distinguishes it from other epidemics.[12] With that, courts in the United States may be more willing to find that both the outbreak and governmental

responses were unforeseeable or beyond the control of either party. Notably, this is only the sixth time that the WHO has declared a disease outbreak to be a Public Health Emergency of International Concern (PHEIC) since being vested with that authority in 2005, two years after the SARS outbreak.

## **Practical Considerations for Modifying *Force Majeure*-Related Provisions**

Below are some practical issues businesses should consider when reviewing or re-negotiating their *force majeure* clauses:

- Does your contract specifically include some reference to delay caused by disease, such as quarantine, outbreak of disease, epidemic, or pandemic? Or does it only generally reference events that are beyond the parties' control?
- If a *force majeure* event occurs, does it entitle the contractor to an equitable adjustment in the contract time?
- If a *force majeure* event occurs, is the contractor also entitled to an equitable adjustment in the contract price? Should any entitlement to an increase in the contract price be limited to the contractor's direct costs?
- Consider whether the contractual definition of a *force majeure* event should include both epidemic and an increase in tariffs, given the recent volatility in the tariff wars and the extent to which the project's supply chain originates outside of the United States.

Below we provide a sample robust definition of *force majeure* that includes both disease and tariffs:

*"Force Majeure* Event includes, but is not limited to, any intervening act of God or public enemy, war, invasion, act of terror, hurricane force winds, tornados, strikes or labor disputes, riot or other public disorder, disease outbreak, epidemic, pandemic, or other declaration of public health emergency, quarantine restriction, and any act of any governmental body or authority that results in the imposition of a tariff or duty on imported materials required under the Contract Documents which was not applicable as of the Effective Date of this Agreement."

Owners, contractors, and subcontractors should carefully negotiate the definition of *force majeure* to allocate the risk in a commercially reasonable manner. Rather than seeking to shift the risk disproportionately to the party with the weaker bargaining strength, parties should consider an allocation of risk that is both fair and furthers the shared goal of achieving successful project delivery.

Seyfarth Shaw's Workplace Safety and Environmental Group has organized a Coronavirus task force that presented a webinar, "Coronavirus Part 2: Preparing for a Potential Pandemic -- New Employer Challenges," on March 2, 2020. This webinar updated employers about the latest information on coronavirus. You can [view the slides](#) and [view to the recording](#).

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[1] <https://www.enr.com/articles/48595-supply-chain-impacts-rise-as-china-coronavirus-spreads>.

[2] Ken Simonson, *Coronavirus impacts loom but have yet to affect construction inputs or projects*, AGC Data Digest, Vol. 20, No. 8, Feb 17-28, 2020.

[3] No. C01-2077, 2003 WL 22232881, at \*10 (N.D. Iowa 2003).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] 360 F. Supp. 3d 817, 841-42 (S.D. Ind. 2018).

[8] *Id.* at 841 (emphasis added).

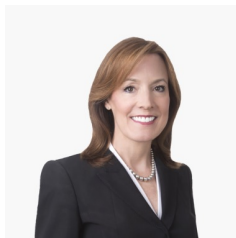
[9] See, e.g., *Am. Nat. Red Cross v. Vinton Roofing Co.*, 629 F. Supp. 2d 5, 9 (D.D.C. 2009) (“[a]n Act of God’ is the result of the direct, immediate and exclusive operation of the forces of nature, uncontrolled or uninfluenced by the power of man and without human intervention, and is of such character that it could not have been prevented or avoided by foresight or prudence”).

[10] See, e.g., *Harriscom Svenska, AB v. Harris Corp.*, 3 F.3d 576, 580 (2d Cir. 1993) (finding that government’s prohibition on sale of goods classified as military equipment to be “government interference” within the meaning *force majeure* clause).

[11] See, e.g., *Phibro Energy, Inc. v. Empresa De Polimeros De Sines Sarl*, 720 F. Supp. 312, 318 (S.D.N.Y. 1989) (citing *Kel Kim Corp. v. Central Markets, Inc.*, 524 N.Y.S.2d 384, 385 (1987)).

[12] <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---2-march-2020> (WHO Director-General’s Opening Remarks at Media Briefing on COFID-19, March 2, 2020)

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