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Construction ADVISORY ■

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Building a Case for Force Majeure in Construction Contracts

The coronavirus pandemic is disrupting our lives and our businesses. Contractual commitments entered in ordinary times are proving difficult or—in the short term—impossible to perform. This is particularly acute in the development and construction world where contractual obligations are being rendered difficult or seemingly impossible to perform. Against this backdrop, is the coronavirus an event that excuses contractual performance?

Coronavirus as a Force Majeure Event

Force majeure is a common-law doctrine or principle broadly applicable in the commercial context that excuses contractual performance when an extraordinary event or circumstance beyond the control of the parties intervenes to prevent performance. Force majeure excuses nonperformance for the duration of the force majeure event. It does not void or vitiate the contract.

In the construction context, the occurrence of a force majeure event does not automatically excuse performance or entitle one or both parties to additional time or money. This determination requires a multistep analysis, beginning with a determination of whether a force majeure event has occurred.

What constitutes force majeure?

There is no generally accepted definition of what constitutes "force majeure." Construction contracts typically define the term, and whether the coronavirus pandemic qualifies as a force majeure event will depend on how force majeure is defined in the contract at issue.

The American Institute of Architects (AIA) A-201 does not use the term force majeure per se, but traditional concepts of force majeure are reflected in Section 8.3.1:

> **§ 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.

The enumerated force majeure events are labor disputes, fire, unusual delay in deliveries, and unavoidable casualties, followed by the catch-all phrase "or other causes beyond the Contractor's control." The catch-all phrase is likely to cover nonperformance caused by the coronavirus pandemic because the outbreak and the government's responses to the outbreak are outside the control of the contracting parties.

If the force majeure clause in your contract does not contain a broad catch-all phrase tied to a lack of control, focus on the enumerated events of force majeure. Terms like "disease," "epidemic," "pandemic," "national emergency," or "quarantine" are all likely to capture the coronavirus pandemic.

Relief is also likely if the clause makes reference to an "act of government." Governors and government bodies are shutting down construction sites and issuing orders to shelter at home. These types of directives excuse nonperformance under a force majeure clause covering acts of government.

Other force majeure clauses make reference to "acts of God." The case law generally limits "acts of God" to natural disasters and weather events, so a force majeure clause containing an "act of God" provision may not be interpreted as covering the coronavirus pandemic, depending on your jurisdiction.

Timely notice

Force majeure clauses typically impose stringent notice requirements, and a failure to comply with the notice provision may well cause a waiver of the right to assert force majeure. If you are asserting a force majeure claim, or are the recipient of such a claim, be careful to confirm that any notice requirements in the contract have been satisfied.

Again, proper notice may be project-specific depending on the circumstances giving rise to the event. Likewise, when the event comes to an end and the project may resume is a project-specific inquiry.

Proving causation

In addition to timely notice, it is essential to be able to prove that there is a causal connection between the force majeure event and the failure to perform. Force majeure excuses nonperformance caused by the force majeure event, not by some other cause. It does not excuse nonperformance that predates the event, nor nonperformance that occurs after the event concludes. In this instance, the party claiming force majeure must be able to demonstrate that the coronavirus pandemic directly caused the failure to perform or the delay in performance.

In a construction context, and to prove causation, it is essential that the project schedule be current and up to date as of the occurrence of the force majeure event. Causation needs to be shown with a schedule that accurately reflects the as-built condition of the project as of the date the force majeure event occurred. Force majeure will excuse nonperformance for the duration of the force majeure event but will not excuse delays that were already in existence at the time the force majeure event arose or delays after the force majeure event concludes. Proper scheduling will also help clearly establish the overall impact of the force majeure event upon project restart.

The relief

Once the existence of a force majeure event has been confirmed, and a causal connection between the force majeure event and the failure to perform has been established, the next step in the analysis is to determine what relief the affected party is entitled to obtain under the contract. Under the common law, force majeure extended the duration for contract performance but did not entitle one or the other of the parties to monetary compensation. In the construction context, some construction contracts follow the common law and provide time relief only, while others provide that the contractor is entitled to payment by the owner of its extended general condition costs if a force majeure event exists for a specified period. Other contracts are less definitive and allow for "equitable" compensation or relief.

Impossibility or Impracticability of Performance

In commercial contracting, the doctrines of impossibility and impracticability of performance apply and may excuse contractual nonperformance. There is some question as to whether these doctrines apply in the construction context, where risk is heavily negotiated and extensively addressed in the contractual provisions. Unless your jurisdiction has definitively ruled on the application of the doctrines in the construction context, you need to know about these doctrines and their potential application to this situation.

In Georgia, for example, the doctrine of impossibility is limited to acts of God and is codified at O.C.G.A. § 13-4-21, which states: "If performance of the terms of a contract becomes impossible as a result of an act of God, such impossibility shall excuse nonperformance, except where, by proper prudence, such impossibility might have been avoided by the promisor."

California's doctrine is broader and is codified at Cal Civ Code § 1511. It provides: "The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: … When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary…."

If the doctrine in your jurisdiction is tied to an act of God, like in Georgia, the doctrine of impossibility will not be of much benefit unless the courts decide the coronavirus pandemic is an act of God. In a state like California, which has a broader definition, the potential for relief is greater. If your contract does not contain a force majeure provision, or if your force majeure provision is restrictive in scope, you may need to invoke or defend against a claim of impossibility of performance.

A related doctrine is commercial impracticability, which also excuses performance. Article 2 of the Uniform Commercial Code pertaining to the sale of goods states in Section 2-615(a):

> Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.

Since Article 2 of the UCC applies to the sale of goods, the doctrine of impracticability will apply to vendor contracts pertaining to the purchase or sale of materials and equipment. It probably will not apply to construction contracts since they are typically viewed as services contracts not sales contracts. However, some courts look to the UCC even when addressing non-sale transactions since the legal concepts embodied in the UCC are consistent with the common law. Check the law in your jurisdiction to see how the law of impracticability has developed, since there will undoubtedly be claims that the coronavirus pandemic is a contingency the nonoccurrence of which was a basic assumption on which the contract was made and excuses contractual nonperformance due to impracticability.

Suspension

Owners and contractors should also look closely at the suspension provisions in their construction contracts. Suspension clauses typically provide the owner the right to suspend the project for some time period before providing the contractor the right to terminate. This clause may also be a vehicle to control costs.

Next Steps

As the coronavirus works its way through our economy, we will be here for you and will work with you to evaluate your contractual obligations.

Alston & Bird has formed a multidisciplinary task force to advise clients on the business and legal implications of the coronavirus (COVID-19). You can view all our work on the coronavirus across industries and subscribe to our future webinars and advisories.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any member of our Construction Group.

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