
CONSTRUCTION CLAIMS
BUILDING BETTER OUTCOMES
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FOR CONSTRUCTION CONTRACTS, IS FORCE MAJEURE AN AVAILABLE EXCUSE OF PERFORMANCE?
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# COVID-19 HITS THE CONSTRUCTION INDUSTRY

## FOR CONSTRUCTION CONTRACTS, IS FORCE MAJEURE AN AVAILABLE EXCUSE OF PERFORMANCE?

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Much like the global impact from COVID-19, not all occurrences can be foreseen. This is why many contracts contain a provision known as a force majeure clause. Force majeure clauses are especially important in times like these—when businesses are shutting down, the government is ordering the labor force to stay home, and supply chains are interrupted or non-existent.

The question many in the construction industry and beyond are asking is whether the COVID-19 pandemic excuses performance under a contract. As usual when it comes to the law, it depends.

**Background of COVID-19 and the "Pandemic"**

For most people, COVID-19 causes mild to moderate respiratory illness, and they will recover without requiring special treatment. Older people and those with underlying medical problems like cardiovascular disease, diabetes, chronic respiratory disease, and cancer are more likely to develop serious illness.

On Jan. 30, 2020, the World Health Organization (WHO) designated the COVID-19 outbreak a Public Health Emergency of International Concern. Thereafter, due to the significant spread of COVID-19, the WHO designated it as a pandemic on March 11, 2020. On March 13, President Donald Trump declared a state of emergency. Many states had previously declared states of emergency, including California and New York, and subsequently, governors of other states have been issuing executive orders requiring citizens to stay at home, subject to certain limited exceptions for essential workers. Suffice to say that COVID-19 has had a significant and immeasurable impact on the global economy and the ability of parties to perform under contract.

### Force Majeure Clauses

Force majeure, commonly referred to as an "act of God," is a contract provision that excuses or delays performance when unforeseeable circumstances occur. An "act of God" is commonly defined as "[a]n overwhelming, unpreventable event caused exclusively by forces of nature," such as an earthquake, flood, or tornado. The definition has been statutorily broadened to include all natural phenomena that are, as defined by Black's Law Dictionary (11th ed. 2019), "exceptional, inevitable, and irresistible; the effects of which could not be prevented or avoided by the exercise of due care or foresight, as well as governmental action." The fact of the matter is that there is no one-size-fits-all definition of force majeure, and it depends on the specific language of the force majeure clause.

In practical terms, the qualifying event must be solely the result of a superhuman cause that was unforeseeable and could not have been prevented by the exercise of prudence, diligence, and care. When the event that triggers the force majeure clause does occur, timely and reasonable notice must be provided.

### Sample Provisions

Many construction contracts contain express force majeure clauses. However, other federal, state, and industry-created contracts (such as the AIA and ConsensusDocs) do not contain express force majeure provisions, but rather include provisions that excuse performance (e.g., delays and extensions of time) for qualifying events. It is standard and customary in the industry for the owner to grant the contractor an excusable delay for a force majeure event. A standard definition of force majeure is provided below (emphasis added):

> "Force Majeure Event means, and is restricted to, any the following: (1) Acts of God; (2) terrorism or other acts of public enemy; (3) acts or omissions of a Governmental Agency beyond the reasonable foreseeability and control of Contractor, including but not limited to, conduct, actions, omissions and delays by the authority having jurisdiction over the Project; (4) **epidemics or quarantine restrictions**; (5) strikes, other than those resulting from a violation by Contractor or any of its Agents of Laws or applicable collective bargaining agreements, resulting in the unavailability of workers or replacement workers; or (6) unusual shortages in materials."

For example, in federal government contracts, Federal Acquisition Regulation 52.212-4(f), defining excusable delays, provides (emphasis added):

> "Excusable delays. The Contractor shall be liable for default unless nonperformance is caused by an occurrence beyond the reasonable control of the Contractor and without its fault or negligence such as, acts of God or the public enemy, acts of the Government in either its sovereign or contractual capacity, fires, floods, **epidemics**, **quarantine restrictions**, strikes, unusually severe weather, and delays of common carriers. The Contractor shall notify the Contracting Officer in writing as soon as it is reasonably possible after the commencement of any excusable delay, setting forth the full particulars in connection therewith, shall remedy such occurrence with all reasonable dispatch, and shall promptly give written notice to the Contracting Officer of the cessation of such occurrence."

Similarly, the AIA A201 General Conditions at Section 8.3.1, states as follows:

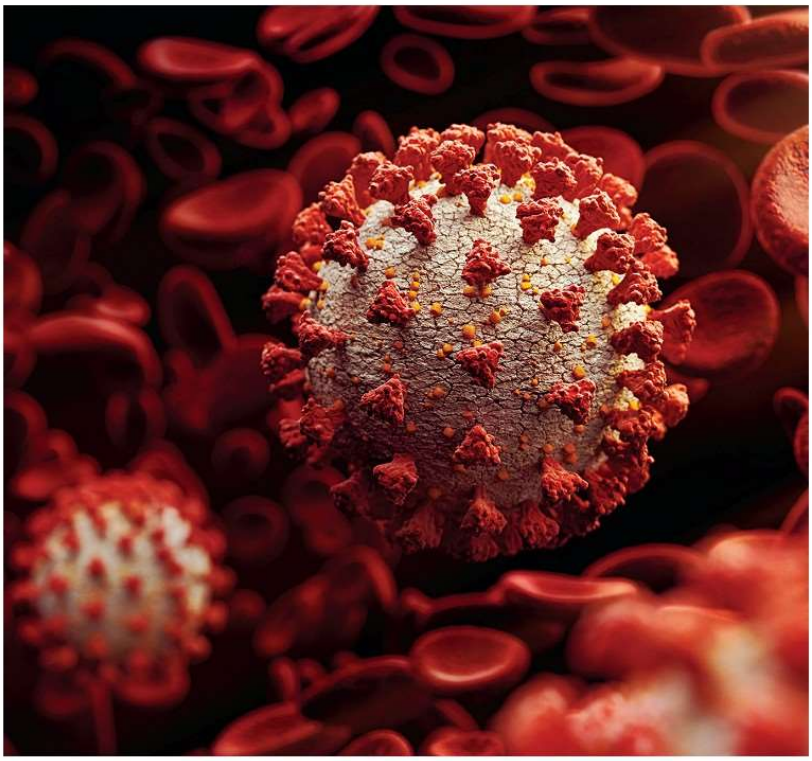
> "If the Contractor is delayed at any time in the commencement or progress of the Work by (1) an act or neglect of the Owner or Architect, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable 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."

As for the ConsensusDocs, Section 6.3.1 dealing with "Delays and Extensions of Time" specifically includes "epidemics" and "adverse governmental actions" as grounds for the contractor to receive an extension of the contract time.

### Is COVID-19 a Qualifying Force Majeure Event?

As outlined above, the WHO has identified COVID-19 as a pandemic, and the state and federal governments in the U.S. have declared states of emergency. Local cities and counties have issued orders for persons to shelter in place and to stay at home. Therefore, contract clauses that excuse performance due to a pandemic or an epidemic are likely triggered under the circumstances involving COVID-19. However, where the force majeure clause, or other excuse of performance clause, does not specifically identify a pandemic or an epidemic, the contractor would need to rely on other language in the clause that refers to government action or unforeseeable events beyond the control of the contractor.

If your operations have been interrupted or delayed by the government's actions in response to COVID-19, you may be fortunate enough to find that the phrase "government action" has been included in the force majeure clause. This type of "government action" is happening all over the world, with many governmental entities banning all non-essential operations and ordering citizens to stay at home. So long as these types of delays can be directly attributed to government actions, they may be considered as triggering events under force majeure clauses.



**A PARTY THAT DECLARES FORCE MAJEURE BUT DOES NOT ACTUALLY HAVE THE CONTRACTUAL RIGHT TO DO SO MAY FIND ITSELF IN BREACH OF CONTRACT.**

Notwithstanding the above, there is some gray area, and pushback can be anticipated in light of recent outbreaks involving SARS, Ebola, and H1N1. An argument could be made that these events are not truly "unforeseeable." We expect to see litigation on this subject stemming from the COVID-19 pandemic, with arguments over foreseeability and interpretations regarding what was made more difficult versus impossible.

Before declaring force majeure, it is imperative to understand all risks involved. A party that declares force majeure but does not actually have the contractual right to do so may find itself in breach of contract. An erroneous declaration of force majeure may be used against a party as evidence that it no longer intends to perform its contractual obligations and constitutes an anticipatory breach of the contract. This could potentially amount to a repudiation of the contract and gives the opposing party a right to recover damages. As a result, before sending the letter declaring a force majeure event has occurred, a detailed review of the contract is necessary and guidance from counsel is recommended.

### When No Force Majeure Clause Exists

If there is no force majeure clause, are there other contract arguments to be made? The short answer is yes. While reliance on a force majeure clause is preferred since it provides the most enforceable provision to relieve a party of its obligation to perform, other contract arguments do remain. These include the contract law principles of frustration of purpose, impossibility, or impracticability.

Under the doctrine of frustration of purpose, where a party's principal purpose for entering into the contract is substantially frustrated without his fault by the occurrence of an event—the non-occurrence of which was a basic assumption on which the contract was made—the party's duty to render performance is discharged, as outlined in Restatement (Second) of the Law of Contracts § 265 (1981). California Civil Code sections 3531 and 3526 state that "[t]he law never requires impossibilities" and that "[n] o man is responsible for that which no man can control."

As a result, where a party's performance is truly impossible, and not just more difficult or more expensive, performance is excused [noted in Williston on Contracts § 77:1 (4th ed.)]. Courts typically narrowly construe these provisions and the burden is on the party seeking to avoid the contractual obligation to establish a true frustration of the contract's purpose, or that performance is actually impossible or impracticable.

The specific terms of your contract will dictate whether COVID-19 qualifies as force majeure or other form of excuse of performance and should therefore be analyzed on a case-by-case basis. On a going-forward basis, specific care should be utilized in reviewing contracts to ensure that force majeure clauses are included and that the clause specifically covers events such as pandemics, epidemics, quarantines, emergency declarations, and government orders. Force majeure clauses should no longer be treated as throw-in provision at the end of the contract that only refer to "acts of God." ■

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