CARLTON FIELDS

Force Majeure and COVID-19 in the Construction Industry

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COVID-19 has disrupted many industries, and the construction industry is no exception. Besides the disruptions that have occurred because of supply chain delays and worker unavailability, some local jurisdictions are now ensuring that the disruptions directly affect the construction industry. Thus far, San Francisco and Boston are the first local jurisdictions to enact orders that will require suspension of construction projects, and only time will tell if other jurisdictions will follow suit. Currently, there are discussions in New York City to shut down construction sites, demonstrating that San Francisco and Boston may have started a trend in that direction and any jurisdiction could be next. Even so, nationally, the Centers for Disease Control and Prevention (CDC) suggested capping gatherings at 10 people, with local jurisdictions creating their own guidelines.

It is important to be prepared and proactive, and to act urgently — noting that although the COVID-19 pandemic is the textbook definition of *unforeseeable*, the construction contract still controls the fate of the parties. Particularly, the parties must consider whether a force majeure clause exists in their contract and how that clause may be used.

What Is a Force Majeure Clause?

Force majeure is the concept of excusing contractual performance as a result of unforeseen circumstances. Although force majeure clauses have traditionally encompassed extraordinary events identified as "acts of God," the actual application of the term may have a much wider or narrower scope. A force majeure cause in a contract serves two purposes: (1) it allocates risk and (2) it provides notice to the parties of events that may suspend or excuse performance. It can act as a safety net to modify a contract, suspend a party's obligation, or terminate the contract. Typically, if a contractor is able to invoke a force majeure clause, it will be entitled to an extension of time, but not additional compensation. However, the contract will control, and in some cases, the contractor will be entitled to some additional compensation.

Does My Contract Include a Force Majeure Clause?

The application of force majeure depends on the specific wording of the contract clause at issue. A force majeure clause may be unambiguous – listing specific events that will trigger it. A force majeure clause can also exist in your contract even if the specific term is not used; instead, you may find general language encompassing disruptions "beyond the control of the parties." This is true for the American Institute of Architects (AIA) documents, which do not use the term "force majeure" specifically, but instead include delay provisions that encompass this concept:

> § 8.3 Delays and Extension of Time
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> § 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.

Some contracts may not have any language forming a force majeure clause. Nevertheless, there are general principles of contract law that may be of assistance — arguments can be made under the doctrines of impossibility, frustration of purpose, or impracticability. Under these doctrines, the rights, obligations, and remedies may be less clear, but all doctrines should be examined to minimize the consequences of the disruption.

Is COVID-19 a Triggering Event Under My Force Majeure Clause?

After determining whether a force majeure clause exists in your contract, the next step is determining what events qualify as a force majeure event under your contract, and if the COVID-19 pandemic is a qualifying event.

A clause that includes specific triggering events often includes man-made disruptions such as acts of terrorism, riots, strikes and wars, and natural disasters such as floods, tornadoes, earthquakes, and hurricanes. Sometimes a contract may specify triggering events such as "disease," "epidemic," "pandemic," and/or "communicable disease." If it does, then you can ensure the COVID-19 pandemic qualifies as a triggering event under your force majeure clause. Accordingly, the contract clause will determine the rights, obligations, and remedies of the parties.

If your contract contains a list of triggering events but does not include the qualifying triggering events mentioned in the paragraph above, then examining the list for a different event that could arguably be applicable is the next step.

For example, a contract may include as a triggering event "government interference" or "state of emergency." Arguments can be made, if the specific circumstances exist, that the force majeure clause should apply to the COVID-19 pandemic under one of those triggering events. If a contractor was forced to suspend construction based on the CDC's recommendation that gatherings be capped at 10 people (or a local jurisdiction's cap on gatherings), then this could constitute government interference triggering the force majeure clause. Moreover, if any state, or any local jurisdiction, follows in the footsteps of San Francisco or Boston by suspending construction projects, then there is government interference in the construction project and the force majeure clause would be triggered. Finally, suspending a construction project could arguably be viewed as a reasonable step in the furtherance of public health, thus initiating the force majeure clause under the triggering event "state of emergency." While these do not unambiguously apply a force majeure clause to COVID-19, there are strong arguments for their application to COVID-19.

The possible risks in the performance of a contract are so numerous that parties often agree to a broad, general force majeure clause or language within the clause that acts as a catch-all. If this is the format of the force majeure clause, it is likely that this broad language will encompass the COVID-19 pandemic. Conversely, watch out for any limiting language such as "any events *similar to*" and any language that may render the clause too broad — courts will carefully scrutinize clauses that are general and ambiguous and narrowly construe the provisions. Nevertheless, arguing that the COVID-19 pandemic was unforeseeable and should thus fall under a general and ambiguous force majeure clause is a reasonable position to take.

What Are the Consequences of Applying the Force Majeure Clause?

Even though the construction contract provides that COVID-19 is a triggering event for the force majeure clause, it may not be the most logical option for the parties. It is important to examine on a case-by-case basis the rights, obligations, and remedies produced by the clause. The language agreed upon in the contract could provide for a disproportionate shift in rights, obligations, or remedies — excusing parties from providing consideration and/or terminating the contract in whole. Evaluating the expense, the ability to perform, and the consequences of nonperformance is important prior to taking action under the force majeure clause.

What Actions Should I Take to Implement the Force Majeure Clause?

Once you have determined that the construction contract has an applicable force majeure clause, the contract must be reviewed to determine what actions are necessary to excuse performance and preserve remedies. The provisions of the construction contract may provide that these requirements be followed if the force majeure clause is applied: (1) provide timely notice; (2) mitigate the damages; (3) resolve any disputes by engaging in mediation and/or arbitration; (4) ongoing reporting and due diligence; and (5) good faith negotiation of the contract. Be sure to document the

situation contemporaneously, as it will be useful if disputes arise in the future. A thorough review of the contract should be conducted to ensure compliance with all its terms. Use sound judgment to take steps, such as mitigation of damages, which may not be required by the contract but are required by the law of some jurisdictions.

What are the consequences of not acting in a timely manner?

If it is determined that there is an applicable force majeure clause in the construction contract, but no timely action is taken to excuse performance and preserve the remedies, then the right to apply the force majeure clause can be lost. The failure to provide timely notice to the other contracting parties can result in loss of reliance on the force majeure clause to excuse the nonperformance if a party files a breach claim. An alternative dispute resolution clause may provide that a party loses its rights by ignoring the agreed upon dispute resolution procedures; thus, it is imperative to follow the requirements set forth in any such clause. The bottom line is that the contract language must be reviewed thoroughly and followed precisely to avoid the risk of a determination that the right to apply the force majeure clause was lost by noncompliance with the construction contract terms.

Is COVID-19 a recordable illness for purposes of OSHA 300 logs?

There is no specific Occupational Safety and Health Administration (OSHA) standard covering COVID-19. OSHA record-keeping requirements mandate that covered employers record certain work-related injuries and illnesses on their OSHA 300 log. If an employee contracts COVID-19 while on the job, it is a recordable illness that must be documented by the employer. The illness is not recordable, however, if the worker was exposed to the virus while off duty.

An employer is responsible for recording cases of COVID-19 if all the following are met:

1. The case is a confirmed case of COVID-19;
2. The case is work-related, as defined by 29 C.F.R. 1904.5; and
3. The case involves one or more of the general recording criteria set forth in 29 C.F.R. 1904.7 (e.g., medical treatment beyond first aid or days away from work).

OSHA recently published additional guidance on this issue.

Conclusion

The construction industry is not immune to COVID-19. Below are the practical steps to take to ensure that you are in the best position to avail yourself to a force majeure clause:

- Begin documenting the situation contemporaneously so there is a thorough record.
- Review the construction contract for a force majeure clause or delay provision that references triggering events.
- Analyze the force majeure clause or delay provision to determine if COVID-19 can qualify as a triggering event.
- Consider the consequences of applying the force majeure clause to the current situation.
- Evaluate what steps are required by the construction contract to be taken in order to excuse performance and reserve remedies, keeping in mind commonly required actions include:
  - Timely notice
  - Mitigation of damages
  - Adherence to alternative dispute resolution provisions
  - Ongoing reporting and due diligence
  - Good faith negotiation of the contract

The failure to follow the terms of the construction contract may result in the waiver of the force majeure remedies and subject you to delay or liquidated damages.

Carlton Fields' Construction Practice is here to help clients during this uncertain time. We can answer your questions, assist you in overcoming the current obstacles, and help you mitigate the risk of future disputes because of COVID-19.

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