



Examining *Force Majeure* in Construction Contracts Amid the COVID-19 Pandemic

The COVID-19 pandemic has impacted the construction workforce significantly and has caused parties to construction contracts to review whether their obligations are excused or modified based on the unprecedented circumstances the construction industry is facing. Typically, the most relevant legal term that comes into play with respect to how contractual rights and obligations are altered by the onset of extraordinary, unforeseeable circumstances such as a pandemic is called *force majeure*.

What is *Force Majeure*?

Generally speaking, *force majeure* is the name for contractual provisions that relieve or modify a party's obligations under a contract due to extraordinary, unforeseeable circumstances outside the contracting parties' control. There is no *force majeure* doctrine under the common law, meaning that a court cannot apply it unless there is a written *force majeure* clause in the contract.

Are COVID-19 Impacts *Force Majeure* Events?

Whether a particular event triggers a *force majeure* clause is a matter of contractual interpretation that requires the court to examine the specific language of the clause to make a determination as to whether the event falls within the scope of the clause. Construction contracts often include provisions addressing impacts resulting from events and circumstances outside the control of the parties, which may or may not specifically use the terminology "*force majeure*." Therefore, the more relevant focal point for whether a particular event triggers a right to additional time, additional compensation, or relief from a contractual performance obligation is the language of the contract and not necessarily the specific terminology *force majeure*. The following table provides a comparison of the applicable provisions concerning extraordinary and unforeseeable events among popular forms used for construction contracts:

Organization	Contract Form	Relevant Provisions
American Institute of Architects (AIA)	AIA Document A201-2017, "General Conditions of	§8.3.1 If the Contractor is delayed at any time in the commencement or progress of the Work by ... (3) by labor disputes, fire, unusual delay in delivery,

	<p>the Contract for Construction”</p>	<p>unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, <u>or other causes beyond the Contractor’s control</u>;</p> <p>...</p> <p>or <u>(5) or 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.</u></p> <p>§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.</p> <p>§ 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.</p> <p>§ 15.1.6 Claims for Additional Time § 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor's Claim shall include an estimate of cost and of probable effect of delay on the progress of the Work. In the case of a continuing delay, only one Claim is necessary.</p> <p>§ 15.1 Claims § 15.1.1 Definition A claim is a demand or assertion by one of the parties seeking, as a matter of right, payment of money, a change in the Contract Time, or other relief with respect to the terms of the Contract. The term "Claim" also includes other disputes and matters in question between the Owner and Contractor arising out of or relating to the Contract. The responsibility to substantiate Claims shall rest with the party making the Claim. This Section 15.1.1 does not require the Owner to file a Claim in order to impose liquidated damages in accordance with the Contract Documents.</p>
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<p>ConsensusDocs</p>	<p>ConsensusDocs 200, "Standard Agreement and General Conditions between Owner and Contractor (Where the Contract Price is a Lump Sum)"</p>	<p>6.3 Delays and Extensions of Time</p> <p>6.3.1 <u>If the 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</u>, 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) <u>epidemics</u>; (k) <u>adverse governmental actions</u>; (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.</p> <p>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.</p>
<p>Design-Build Institute of America (DBIA)</p>	<p>DBIA Document 535, "Standard Form of General Conditions of Contract Between Owner and Design-Builder"</p>	<p>1.2.8 <i>Force Majeure Events</i> are those <u>events that are beyond the control of both Design-Builder and Owner</u>, including the events of war, floods, labor disputes, earthquakes, <u>epidemics</u>, adverse weather conditions not reasonably anticipated, and other acts of God.</p> <p>8.2 Delays to the Work.</p> <p>8.2.1 If Design-Builder is delayed in the performance of the Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom Design-Builder is responsible, the Control Time(s) for performance shall be reasonably extended by Change Order. By way of example, events</p>

		<p>that will entitle Design-Builder to an extension of the Contract Time(s) include acts or omissions of Owner or anyone under Owner's control (including separate contractors), changes in the Work, Differing Site Conditions, Hazardous Conditions, and Force Majeure Events.</p> <p>8.2.2 In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for Force Majeure Events unless otherwise provided in the Agreement.</p>
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As can be seen from the comparison of sample contract language in the table above, contracts provide varying rights to a Contractor for additional time and additional compensation based on the specific language agreed upon by the parties.

Am I Entitled to an Adjustment to the Contract Time or Contract Sum as a Result of COVID-19 Impacts?

Continuing to use the above series of forms as examples, AIA Document A201-2017 General Conditions do not expressly address "epidemics," "pandemics," or "adverse governmental actions" but include a "catch-all" provision for circumstances outside the Contractor's control that may justify an extension of time. With respect to additional compensation, AIA Document A201-2017 General Conditions do not expressly preclude an adjustment to the Contract Sum caused by extraordinary events resulting in delay and ultimately defer to the overall claims procedure and other portions of the Contract Documents to dictate whether such an adjustment is justified under the circumstances.

Comparatively, ConsensusDocs 200 expressly provides for additional compensation for a subset of *force majeure* impacts, but epidemics and adverse governmental actions do not fall within the category of delays for which a Contractor would be entitled to additional compensation.

Finally, DBIA Document 535 General Conditions include "epidemics" in the definition of *force majeure* events that may justify an extension of time, but expressly excludes a claim for additional compensation by the Contractor concerning such impacts.

Ultimately, the express language of the construction contract will determine the effects of any delay caused by COVID-19 or a government response to COVID-19. The provisions of AIA

Document A201, ConsensusDocs 200, and DBIA Document 535 relating to excusable delays and the corresponding contract price adjustments illustrate the need to perform a detailed review of a construction contract's *force majeure* clause to determine if a COVID-19 delay is excusable and whether the Contractor is entitled to an adjustment to the contract price.

Construction contracts may also contain other clauses, such as No-Damages-for-Delay, Liquidated Damages, or Waivers of Consequential Damages that affect the scope and effect of a *force majeure* clause. Conversely, construction contracts may not contain a *force majeure* clause at all.

For additional information about force majeure clauses and equitable remedies that may apply in the absence of a *force majeure* event, see our previous Client Alert "How Does COVID-19 Affect My Contracts?" available at <https://www.woodsoviattgilman.com/news-insights/2020/3-23-20-client-alert-how-does-covid-19-affect-my-contracts>.

What Should Parties to Construction Contracts do in the Near Term?

Find the clauses in the construction contract affected by COVID-19. These clauses may include delay, suspension, or termination clauses similar to those highlighted in this Alert, but the clauses will vary from contract to contract. While AIA Document A201, ConsensusDocs 200, and DBIA Document 535 are widely-used, they are rarely implemented in their unmodified forms. And construction contracts are often prepared in-house by the Owner or Contractor, without any reference to a standard industry form at all.

Provide written notice, if required. Pay special attention to the form, delivery and timing aspects of the notice clause in the construction contract, conformity with which are important to reserve rights. Also, provide prompt responses to any notices received in accordance with the construction contract (and under subcontracts and supply agreements too).

Continue to maintain project records. To the extent possible, refer specifically to delays and other effects of COVID-19 in project schedules and any daily/weekly reports.

Robert C. Carbone, Esq. is an Associate with the law firm Woods Oviatt Gilman LLP. As an experienced construction trial lawyer and former in-house counsel for one of the largest global architecture, engineering, and construction services firms, Mr. Carbone has extensive experience in all matters pertaining to contracts and disputes involving complex construction projects. Mr. Carbone's primary area of focus as an attorney is on representation of contractors, subcontractors, architects, and engineers in construction-related matters. If you have any questions or have an interest in discussing the subject of this article further, Mr. Carbone can be reached via e-mail at rcarbone@woodsoviatt.com or via telephone at (716) 248-3233.

