ZIBIRI MIRACLE

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CIVIL ENGINEERING

ENGINEERING LAW CLASS TEST

SHORT TEST

Describe two scenario where force majure clauses can be applicable to contract in your discipline

Answer.

**What is force majeure in the field of civil engineering?**

Force majeure is a contractual leverage - it does not exist at common law independently of being written into a contract. Courts are typically unwilling to imply a force on majeure provision into the contract where no express language exists.

This addresses potential contractual relief for construction projects impacted by COVID-19. Many projects are now suddenly stopped, or at least subject to slowdowns and delays caused by COVID-19. The impacts may arise from supply chain disruptions, state or local government stay-in-place orders, And workforce disruptions on every level — design, field construction, manufacturing, and inspection. Even without stay-in-place orders, personnel may be sick or stay home to avoid exposure. The cost to the construction industry and to your projects will likely be staggering.

Now is the time to pull out your contract (contractors and project owners alike) and consider how the contract’s delay, time extension, or force majeure clauses, as well as other contract clauses and legal theories, allocate this unusual risk between the parties. Are there possible liability clauses, issues, and defenses that you are overlooking? This Alert looks at how typical construction contracts allocate risk for COVID-19, as well as how US law treats relevant clauses, including potential relief outside the contract terms.

The term “force majeure” is French for “superior or irresistible force.” In US common and civil law, the term commonly refers to natural and unavoidable catastrophes that affect contract performance. Force majeure contract clauses allocate the risk of such events. Most standard US construction contracts do not specifically use the term “force majeure.” The same is true for federal government and most state and local public construction contracts. Instead, relief for force majeure events under most US construction contracts is addressed in delay and time extension remedial clauses. For convenience, we will use the term “force majeure” to cover all such remedial clauses.

As you view on, consider these critical questions in relation to your projects as you plan near-term actions and also ponder long-term strategy and potential consequences:

Is epidemic, pandemic, or illness specifically identified in your force majeure clause?

If not, does COVID-19 fall under some of the other events often referenced in force majeure clauses, such as an “act of God,” a “natural disaster,” or just something beyond the contractor’s control?

Does the COVID-19 disruption constitute a force majeure event under your contract?

Most force majeure clauses allow for schedule extensions without compensation. But does your force majeure clause support compensation as well as a time extension?

Allow one or both parties to terminate the contract?

Provide for some other form of contract relief or contract modification?

Does the law that controls your contract (federal, state, or international) reinforce or limit how force majeure clauses may be applied?

Does that controlling law suggest avenues of relief outside a force majeure clause, such as commercial impracticability?

What should you be doing now to reserve your rights and document your position?

What constitutes a force majeure event?

Generally speaking, a force majeure event may exist if the event is unforeseeable and outside the contractor’s control. COVID-19 certainly seems to be that. But whether a court or arbitration panel agrees with that general assessment will be revealed only as claims for relief are resolved or otherwise work their way through the courts and formal dispute procedures.

While uncertainty lies ahead, key factors in determining whether a force majeure clause offers relief for COVID-19 impacts will likely include whether the language in the force majeure clause specifically references the event as beyond the parties’ control; whether the force majeure event was foreseeable; and whether the force majeure event caused the party’s non performance.

At first glance, COVID-19 might check these boxes. But this is just the first step. It ultimately will depend on the trier-of-fact’s evaluation of the following:

The three factors listed above

Your contract language

The facts, the facts, the facts! (i.e., what actually transpired on the project)

The relation between COVID-19 and the specific relief sought

In considering the contract language, if your force majeure clause contains a very specific list of events (e.g., “epidemic,” “pandemic,” “outbreak of disease”) or other similar terms, then the COVID-19 pandemic would almost certainly fit within that clause. But note that “epidemic” and “pandemic” are not technically the same thing. And some courts will strictly construe the precise language of force majeure clauses to exclude events that are not specifically identified.

To that end, what if your contract limits force majeure events specifically to events involving nature (e.g., “severe floods” or “earthquakes”)? In that case, courts may be less likely to find that the parties intended that clause to cover the COVID-19 pandemic.

Other force majeure clauses may be a hybrid of the specific and broad forms and include a catchall provision meant to cover additional potential scenarios other than specific events. In these instances, some courts have held that common law notions of force majeure, such as unforeseeability, should be considered when a party has not protected itself by specifically listing an event in the force majeure clause. There, it may come down to a question of what the parties contemplated and if the parties voluntarily assumed the risk of COVID-19 (or, perhaps less specifically, a general pandemic).[2]

Your contract could also reference “acts of God” as an excusable delay. But the definition of “acts of God” varies from state to state. Some states have found that acts of God include wars, riots, hurricanes, floods, epidemics, and natural disasters. COVID-19 is more likely to be covered here. However, other states have more narrowly described an “act of God” as something caused by nature. Therefore, identifying the controlling law and how that particular state has used the term “act of God” is important.

Further, if you are looking to invoke a force majeure clause, it is critical to follow the contractual requirements for doing so. Note the form and substance of any required notice, as well as associated notice time limits. Many states demand strict compliance with such notice requirements, and a failure to adhere to even just one aspect can render a claim or extension request void.

But even if there is no timing requirement, it is better to communicate, sooner rather than later, even if on a preliminary basis and with caveats. You do not want to appear to be sandbagging on such a serious issue. Beyond technical notice requirements, such communications can help maintain good relations in difficult circumstances and keep everyone informed to help mitigate impacts and limit miscommunications.

When providing formal notice or otherwise articulating a basis for relief from COVID-19 impacts, contractors should attempt to cite to contract terms or legal theories, but also be wary of pigeonholing themselves too quickly and potentially cutting themselves off from relief under other clauses and theories. Owners must also exercise reciprocal caution and diligence in responding.

Most force majeure clauses allow only for an extension of time, and not a corresponding price adjustment. But COVID-19 will almost certainly cause the cost of performance to increase. A contractor reacting too quickly and categorically may unnecessarily limit itself to a time extension. Conversely, an owner that adamantly denies a time extension without compensation under a force majeure clause may find itself defending under another clause or legal theory that allows for contractor compensation.