

Government Contracts White Papers and Legal Insights, SQUIRE PATTON BOGGS INSIGHT: Coronavirus as Force Majeure?, (Mar. 5, 2020)

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The situation concerning the novel coronavirus (officially known as COVID-19) is rapidly evolving. The landscape of the virus' spread and its impacts continues to change dramatically, with hundreds, sometimes thousands, of new cases being confirmed every day and new countries—far from the likely origin of the virus in Wuhan, China—being added to the map of the virus' spread.

Concern, and some panic, is expanding and beginning to impact commerce across the globe. The Financial Times recently reported that China has issued a record number of force majeure certificates purporting to exempt exporters there, including steel, electronic and auto parts suppliers, from fulfilling supply contracts overseas.^[1] Fears surrounding the coronavirus' impact on global supply chains have been driving radical stock market fluctuations. On February 28, 2020, the Dow Jones Industrial Average ended its worst week since 2008 as U.S. investors became increasingly concerned about the virus' spread to other Asian and European countries.

COVID-19 is already affecting construction projects beyond the Far East, and COVID-19-related force majeure claims have begun to appear in projects in other regions. Expecting that as the impacts on manufacturing and supply chains continue to expand, so will the number of force majeure claims on construction projects.

While much attention has been paid to contractors' and suppliers' ability to declare force majeure and be excused from performance and liability as a result of supply risks arising from COVID-19, there has been less emphasis on the factors that construction project owners should be considering as they face the possibility of disruptions arising from COVID-19. This article endeavors to explore the prospect of force majeure from the owner's perspective and provoke thought on how best to plan for and handle declarations of force majeure related to COVID-19.

Parties' obligations with respect to force majeure will come from two main sources: the contract and the applicable law. Most construction contracts will address the concept of force majeure or unforeseen circumstances directly. Additionally, both common law and statutory provisions will often apply. The Uniform Commercial Code (UCC)^[2] and Federal Acquisition Regulations (FARs)^[3] both provide some relief for force majeure or exceptional events. Likewise, many domestic and international jurisdictions will address force majeure in some fashion. The common law doctrines of impossibility, frustration, and impracticability, though narrowly applied, may nevertheless provide relief. Finally, many jurisdictions will have statutory remedies for unforeseen and unavoidable circumstances.

While rarely seen without modification, most standard form construction contracts address the concept of force majeure (though many standard form contracts do not use that term).^[4] Whether a construction project is governed by an American Institute of Architects (AIA), ConsensusDocs, Engineers Joint Contract Documents Committee (EJCDC), International Federal of Consulting Engineers (FIDIC), or a bespoke contract, there will almost always be a clause addressing a force majeure event or an exceptional event or circumstance. Regardless of the source, four common elements emerge in most contracts, laws, and regulations. A force majeure event must be:

- unforeseeable;
- unavoidable;
- caused by an external force; and
- the event must actually prevent or seriously impact a party's ability to perform.

After describing the general circumstances required to invoke force majeure, construction contracts often specify qualifying events that would allow a party to invoke force majeure. Typical qualifying events in construction contracts include extreme weather events (e.g., hurricanes, earthquakes, typhoons, and floods), acts of war, terrorism, political unrest, governmental actions, and other types of events that might make the performance of a contract impossible or impracticable. Many domestic standard forms contracts or governing regulations including EJCDC, ConsensusDocs, and the FAR expressly refer to epidemics. Ironically, neither the leading domestic (AIA)^[5], nor international (FIDIC), standard form contracts expressly mention epidemics or pandemics as an example of force majeure.

In addition to contractual provisions concerning force majeure, local law—particularly, in civil law jurisdictions—may provide for relief from performance or liability or, in some cases, cancellation or revision of the contract. Common law jurisdictions will, though narrowly, consider frustration, impossibility, and impracticability. Civil law jurisdictions are often more generous. A typical civil law treatment of force majeure provides that if performance of an obligation becomes impossible due to a force beyond the control of the obligor, the obligation and any related and corresponding obligations are extinguished, and the contract will be deemed rescinded ipso facto. It also provides that where the impossibility is partial, the obligee can enforce those parts of the contract that can be performed or demand termination of the contract.^[6] Additionally, civil law codes commonly limit a party's liability for damages arising from a force majeure event.^[7]

While local law often permits parties to agree on the allocation of risk for force majeure or more specifically articulate the requirements for a force majeure declaration, other, mandatory provisions of local law may still apply. For example, Article 171(2) of the Qatar Civil Code provides that where, as a result of an exceptional and unforeseeable event, the fulfillment of a contractual obligation becomes excessively onerous—even if not impossible—in such a way to threaten the obligor with exorbitant loss, a court may reduce the obligation to a reasonable level.

Whether a disruption arising from COVID-19 qualifies as a force majeure event, and whether a contracting party may rightfully invoke it, will depend heavily on the circumstances of the claimed disruption, including the contract, local law, the nature and severity of the impact, efforts taken to mitigate effects, and adherence to procedural agreements regarding notice. An owner's response to declarations of force majeure should include obtaining accurate information about the alleged impacts arising from COVID-19, which may include some level of independent fact gathering and possibly even requiring the notifying party to provide certifications from third parties as to their inability to perform their obligations.

Owners will be well-served to take a holistic view as they plan for and respond to COVID-19. While there is always the potential for a party to be opportunistic about invoking force majeure, the rapid spread of COVID-19 beyond mainland China is already impacting construction projects around the world, and there will inevitably be claims that have merit. Owners should take steps to ensure they understand their rights and obligations when a counterparty claims a force majeure event.

The bottom line is that owners should be actively considering the risks arising out of COVID-19 on their particular project. Proactive owners will review their contracts, supply agreements, and insurance policies, and begin to address potential impacts on construction and supply so they are in a position to react quickly if and as COVID-19 related disruptions manifest on their projects. This may involve reviewing supply chains and investigating, or even pre-emptively approving, alternate sources and transportation plans for critical parts, equipment, and materials, and/or accelerating procurement to acquire necessary materials and avoid potential shipping delays. Prompt consideration and pre-emptive action will be the best way to reduce the risk of major costs, delays, and claims as the impacts of COVID-19 expand.

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Footnotes

- 1 See Sun Yu and Xinning Liu, *China issues record number of force majeure certificates*, Financial Times (Feb. 28, 2020), <https://www.ft.com/content/bca84ad8-5860-11ea-a528-dd0f971febbc>.
- 2 See U.C.C. § 2-615 (2020).
- 3 See 48 C.F.R. § 52.249-10(b)(1) (2020).
- 4 See, e.g., EJCDC C-700 § 12.03(A) (2007); ConsensusDocs Doc. 410, “Standard Design-Build Agreement and General Conditions Between Owner and Design-Builder,” at § 6.3.1; AIA A-201 at § 8.3.1 (2017); FIDIC Red Book (1999), Cl. 19.
- 5 See AIA, A201 § 8.3.1 (2017); FIDIC Red Book (1999), Cl. 19.
- 6 See Qatar Civil Code, Article 188; see also UAE Civil Code Article 273.
- 7 See, e.g., Qatar Civil Code, Article 204.