

COVID-19 and Force Majeure Provisions in EPC Contracts and Other Construction Contracts

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**SARAH BISER, NEALE JOHNSON, PHILIP LANGER, AND OLIVIA FAJEN
OF FOX ROTHSCHILD LLP WITH PRACTICAL LAW FINANCE**

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A discussion of the effects of COVID-19 on force majeure provisions under different standard industry construction contracts including AIA, ConsensusDocs, DBIA, FIDIC, and bespoke project finance engineering, procurement, and construction contracts.

The government and market response to the 2019 novel coronavirus disease (COVID-19) pandemic is presenting novel and difficult legal issues and challenges across all industries. In the case of construction, projects of all types and sizes are at risk and industry participants and project financiers must consider the effects that COVID-19 may have on a project. Unfortunately, COVID-19 has and continues to disrupt supply and distribution chains, prevent trades and materialmen from working, complicate inspections, and make credit less available to fund construction projects. These issues may disrupt and delay projects in the short and medium term and may affect projects for months and years to come.

States and local governments are taking a wide variety of actions to contain the spread of the virus. Many have issued orders shutting down non-essential businesses. Whether construction projects are considered essential varies depending on the issuing authority. For example, San Francisco's shelter-in-place order excludes "work to provide essential business and government services or perform essential public infrastructure construction, including housing." By contrast, Boston suspended all construction projects in the city for a specified period. On the other hand, as of the date of this Article, New York includes construction as an essential business. The parties bearing the risks posed by these shut-downs, disruptions, and delays depends primarily on the language and terms of the parties' construction contracts.

Most construction contracts have force majeure or acts of God provisions. Force majeure events are generally unforeseeable circumstances beyond a party's control that prevent a party from fulfilling or timely fulfilling a contract. These events include natural

disasters, but often go further to include any event that occurs beyond a party's control that could not be prevented by the exercise of prudence, diligence, and care. Acts of God definitions typically include natural events, such as storms, earthquakes, and floods.

Whether COVID-19 qualifies as a force majeure or an act of God under a construction contract depends on:

- The specific terms of the clause governing the project.
- The specific manner in which COVID-19 effected the project. For example, whether:
 - a government or administrative body issued an order halting the project;
 - necessary materials in the supply chain are delayed or unavailable; and
 - project personnel are unable or unavailable to work because of illness, quarantine restrictions, or a government issued "stay at home" order, including restrictions on the number of workers that are permitted on the site.

This Article:

- Examines how force majeure is defined in certain standard industry construction contracts and bespoke engineering, procurement and construction (EPC) contracts typically used in project finance transactions.
- Examines whether the terms of current construction contracts allow a party to make a claim for force majeure as a result of COVID-19.
- Considers what contractors can do to manage or mitigate the effects of the virus.
- Considers the long-term effects of COVID-19 on construction projects.

FORCE MAJEURE OR EXCUSABLE DELAYS UNDER STANDARD INDUSTRY CONSTRUCTION CONTRACTS

Many form contracts used in the construction industry do not have specific force majeure clauses, but they do include excusable delay clauses and compensation adjustment provisions in the face of certain force majeure events which may include the effects and consequences of COVID-19. For a discussion of different families of

form agreements, see Practice Note, Standard Construction Industry Documents: Overview ([9-560-0605](#)).

By contrast, project finance EPC contracts typically include force majeure provisions. These provisions may be drafted generically to refer to acts beyond a party's control or with specificity to include a list of the events or circumstances that may qualify as a force majeure event (see Practice Notes, EPC Contract Drafting Considerations: Force Majeure Provisions ([5-518-2224](#)) and Understanding Project Finance Construction Contracts ([1-422-1870](#))).

COVID-19 UNDER AIA FORMS

The American Institute of Architects (AIA) A201-2017 General Conditions of the Contract for Construction, a companion to most AIA forms, does not mention force majeure, epidemics or pandemics. Section 8.3.1 Delays and Extensions of Time, however, still excuses some force majeure events. It provides that:

"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."

Delays caused by COVID-19 may fall within several of these categories, including:

- Unusual delay in deliveries.
- Unavoidable casualties.
- Other causes beyond the contractor's control.
- Other causes the contractor asserts and the architect determines, justify delay.

There is no guarantee, however, that a court or arbitrator will agree that COVID-19 falls within one of these categories.

This provision does not excuse the contractor's performance; it only affords the contractor extensions of time. The amount of additional time that a contractor or subcontractor has to perform is not open-ended and requires consideration of:

- What constitutes a reasonable time for performance. Given that we are in what is being described as uncharted territory, it may be difficult to assess what a reasonable time means under these circumstances.
- The point at which it may be appropriate to terminate the agreement (see Practice Note, Terminations and Suspensions in Construction Contracts: Drafting Guidance ([0-593-2925](#))).

COVID-19 UNDER CONSENSUSDOCS

ConsensusDocs 200

The ConsensusDocs 200 Standard Agreement and General Conditions between Owner and Constructor states in Article 6.3 that:

"[i]f the Constructor is delayed at any time in the commencement or progress of the Work by a cause beyond the control of the Constructor, the Constructor shall be entitled to an equitable extension of the Contract Time."

It then lists several examples of causes beyond the contractor's control, including epidemics. The Centers for Disease Control (CDC) defines:

- An epidemic as "an increase, often sudden, in the number of cases of a disease, above what is normally expected in that population in that area."
- A pandemic as "an epidemic that has spread over several countries or continents, usually affecting a large number of people."

On March 11, 2020, the World Health Organization (WHO) characterized the current COVID-19 outbreak as a pandemic. While COVID-19 is considered to be a pandemic, it may also fall within the definition of an epidemic.

Other examples that may cover COVID-19 disruptions include:

- Transportation delays not reasonably foreseeable.
- Adverse governmental actions.
- Unavoidable circumstances.

In addition to providing the contractor with an extension of time, Article 6.3.2 of ConsensusDocs 200 also provides the contractor with an equitable adjustment of the contract price.

ConsensusDocs 410

Similarly, ConsensusDocs 410, the Standard Design-Build Agreement and General Conditions between Owner and Design Builder, provides in Section 6.3.1 that a design-builder is entitled to an equitable extension in time for certain "causes beyond the control of the Design-Builder" which specifically include "epidemics, adverse governmental actions, [and] unavoidable accidents or circumstances." It also provides for an equitable adjustment in the contract price related to the same events.

For more information on design-build and the rights and obligations of the parties, see Practice Notes, Selecting the Right Private Project Delivery System: Selecting Design-Build ([3-549-4368](#)) and Private Construction Project Delivery Systems: Overview: Design-Build ([5-546-2385](#)).

ConsensusDocs 831

ConsensusDocs 831, the Standard Owner and Construction Management Agreement, states at Section 8.5 that a:

"Construction Manager's compensation, including any limitation on the amount, shall be equitably adjusted in the event of changes that alter the cost of or time required for performance of Services such as changes to the Project, the Project Schedule, the Trade Contracts, the Owner-Design Professional Agreement or the Work, or any other event or circumstance beyond the reasonable control of Construction Manager, including but not limited to force majeure[.]"

Therefore, project impacts attributable to COVID-19 may also give rise to an equitable adjustment in a construction manager's compensation.

COVID-19 UNDER THE DESIGN BUILD INSTITUTE OF AMERICA FORMS

The Design-Build Institute of America (DBIA) Document No. 535 Standard Form of General Conditions Between Owner and Design-Builder defines Force Majeure Events in Article 1.2.8 as being beyond the control of both the Owner and Design-Builder and specifically includes epidemics and acts of God.

Article 8.2 provides for a “reasonable extension of the Contract Time” if the Design-Builder is delayed in the performance of its work due to circumstances or events beyond its control and for which it is not responsible. However, Article 8.2.2 expressly provides that “the Contract Price shall not be adjusted for Force Majeure Events unless otherwise provided in the Agreement.”

COVID-19 UNDER THE FEDERAL ACQUISITION REGULATION

Those using the Federal Acquisition Regulation (F.A.R.) form contracts are likely governed by 48 C.F.R. § 52.249-14, which addresses excusable delays. While not expressly referred to as a force majeure clause, this provision dictates that a contractor is not in default if the delay arises from causes “beyond the control and without the fault or negligence of the Contractor.”

The F.A.R. lists specific examples of these causes, many of which may apply to delays or defaults attributable to COVID-19, including:

- Acts of God or of the public enemy.
- Acts of the government in either its sovereign or contractual capacity.
- Epidemics.
- Quarantine restrictions.

(48 C.F.R. 52.249-10.)

The F.A.R.’s specific reference to epidemics or quarantine restrictions may apply to COVID-19 and its effects. However, this specific reference to epidemics or quarantine restrictions is not the norm, especially in general commercial contracts.

For more information on F.A.R., see Practice Note, Federal Acquisition Regulation: Overview ([W-021-9160](#)).

COVID-19 UNDER FIDIC (THE RED BOOK - FIRST EDITION, 1999)

The Fédération Internationale des Ingénieurs - Conseils or International Federation of Consulting Engineers (FIDIC)’s Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer provides that force majeure may include but is not limited to the exceptional events or circumstances listed below if all these conditions which are set out in Sections (a)-(d) of Article 19 are satisfied:

- The event is beyond the control of the party claiming force majeure.
- The party claiming force majeure could not reasonably have provided against the event before entering into the contract.
- Having arisen, the party claiming force majeure could not reasonably have avoided or overcome the event.
- The event is not substantially attributable to the other party under the agreement.

Exceptional Events or Circumstances

These events include:

- War, hostilities (whether war be declared or not), invasion, act of foreign enemies.
- Rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war.
- Riot, commotion, disorder, strike, or lockout by persons other than the contractor’s Personnel and other employees of the contractor and sub-contractors.
- Munitions of war, explosive materials, ionizing radiation or contamination by radioactivity, except as may be attributable to the contractor’s use of these munitions, explosives, radiation, or radioactivity.
- Natural catastrophes, such as earthquake, hurricane, typhoon, or volcanic activity.

Article 19 of the FIDIC Red Book does not refer to an epidemic or pandemic although it does provide an extensive listing of force majeure events. However, it is possible that a court or international tribunal would classify COVID-19 as a natural catastrophe.

PROJECT FINANCE EPC CONSTRUCTION CONTRACTS

These agreements, typically structured as lump sum EPC contracts, are bespoke agreements that reflect the nature of the project being built, the risk allocation between the contractor and the owner, and the concerns of the owner’s lenders. Force majeure events in EPC contracts are often defined as:

“Any event or circumstance (or series of connected events or circumstances) which is beyond the control of the Party affected, which prevents or impedes the due performance of that Party’s obligations under this Agreement but only if and to the extent that such circumstance, despite the exercise of reasonable diligence or adoption of reasonable precautions, acting as a reasonable and prudent contractor, cannot be prevented or overcome by such Party.”

Similar to standard construction industry forms, these events typically include:

- Acts of God, flood, earthquake, lightning, or other natural physical disaster.
- Acts of war (declared or not declared), invasion, act of foreign enemies, hostilities, civil war, insurrection of military or usurped power (whether war be declared or not), confiscation or expropriation on orders of any governmental authority.
- Acts of terrorism, riot, rebellion, revolution, sabotage or civil unrest.

EPC contract force majeure provisions often do not typically address diseases, plague, quarantine, epidemics, or pandemics. In the limited cases where these terms are used, they are often not defined. It is, therefore, unclear how these terms are to be understood in the context of COVID-19.

For more information on force majeure provisions in EPC contracts, see Practice Note, EPC Contract Drafting Considerations: Force Majeure Provisions ([5-518-2224](#)).

Despite the uncertainty, it may not be in the project owners' or the lenders' best interests to exercise any of the rights they have under the project documents, including seeking liquidated damages, terminating the contract, replacing the contractor, or invoking dispute resolution mechanisms. The widespread nature of COVID-19 and its impact on the construction industry as a whole means that project sponsors and their lenders have limited options. To manage the COVID-19 pandemic, project participants may need to be more flexible and willing to negotiate changes and share the risks to build their projects.

IMPLICATIONS FOR PROJECTS

Regardless of whether a contractor is able to claim a force majeure event under the EPC contract, COVID-19 has significant implications for the project. EPC contracts typically include a built-in cushion (or float) to allow the schedule to be maintained despite the occurrence of certain delays (for example, weather or minor construction delays). For more information on the float, see Practice Note, EPC Contract Drafting Considerations: Increased Costs and Extensions of Time ([0-560-5589](#)). The float does not, however, anticipate a delay of the kind or duration that COVID-19 presents.

Any delays in the construction and the completion of the project as a result of COVID-19 may result in:

- **Increased project costs.** Project owners, subject to the consent of the lenders, may need to approve changes to the budget, the incurrence of additional expenditures, and changes in suppliers, vendors, or subcontractors to complete construction of the project.
- **Defaults under other agreements.** For example, unless a waiver or amendment can be obtained:
 - failures to meet any construction milestones may result in a freezing of loan disbursements;
 - a delay to achieve substantial completion or final completion may entitle the project's lenders to declare an event of default; and
 - the project owner may be unable to begin performing its obligations under the offtake agreements. While there is a typically a delay between the date construction on the project must be completed and the project owner's obligations under the offtake agreement must begin, given the current projections for how long the COVID-19 pandemic is expected to last, this time is likely to be expended.
- **More exposure for project sponsors.** Project sponsors may need to inject more cash into the project.

Given these implications, project participants will need negotiate how best to mitigate and allocate the risks of COVID-19.

PRACTICAL TIPS FOR MANAGING THE EFFECTS OF COVID-19

Even in contracts containing a force majeure event or excusable delay provisions, construction contracts typically require:

- The contractor to mitigate damages, to the extent possible.
- The contractor to comply with relevant notice and claim provisions in the contract.
- The force majeure or act of God event to be the proximate cause of the delay. No other act may have caused the delay and no other act may have prevented it.

The interaction between COVID-19 and the rights and obligations of project parties ultimately depends on the specific terms of the construction contract and how COVID-19 affects the project. While there are many variables still at play and it remains unknown how long this pandemic will last or its ultimate effects, contractors, project owners, and sponsors should take care to comply with the terms of their agreements as much as possible.

Some practical tips for evaluating potential exposure to COVID-19 delays and disruptions include reviewing the construction contracts for:

- The relevant force majeure language. Contractors, project owners, and their counsel should also determine whether the contract includes a specific provision for epidemics or pandemics or whether they will rely on a generic provision in the contract. If relying on a generic provision, parties should be mindful that courts often construe force majeure narrowly. Where a contract contains a list of events but fails to specify epidemics or pandemics, the omission may be dispositive (see Practice Notes, Force Majeure Clauses: Key Issues ([5-524-2181](#)) and Force Majeure Clauses: Key Issues (NY) ([W-024-3891](#))).
- Any excusable delay provision, including:
 - the amount of additional time that a contractor may have to perform; and
 - whether any associated costs are compensable.
- Notice and claim requirements that may be triggered by the response to COVID-19. Construction contracts typically require the contractor to provide prompt notice of any force majeure event or cause for project delay, including the expected duration and probable impact on the contractor's performance of its obligations, schedule, and costs. It is difficult to tell how long the COVID-19 pandemic may last with announcements changing daily across different jurisdictions. A slowdown in the spread of the virus also does not mean it cannot come back, as recent news reports from China and Hong Kong suggest. Contractors must be vigilant and should furnish regular and updated reports to the project owner during the continuation of the event.
- Material price escalation provisions. Some construction contracts include provisions allowing a contractor to receive additional sums to compensate for the increased costs incurred as a result material shortages or price escalations associated with a force majeure event. Contractors must keep detailed records of these additional costs. For more information, see Practice Note, EPC Contract Drafting Considerations: Increased Costs and Extensions of Time ([0-560-5589](#)).

Additional considerations for contractors and subcontractors include:

- Notify the owner and architect in writing when delays occur, taking care to meet contract requirements. The notice should include the basis on which the force majeure event is being claimed and provide supporting documentation, to the extent applicable.
- Document every delay and how it was caused to later identify which delays were caused by COVID-19 or for another reason.
- Take steps to mitigate damages caused by COVID-19, including:
 - protecting project workforce from contracting COVID-19 (see Article, Expert Q&A: COVID-19 and Employment ([W-024-4643](#)) and Practice Note, Pandemic Flu Preparation and Response ([3-505-0385](#)));

- contacting suppliers to plan ahead;
- locating other suppliers to the extent possible;
- communicating with owners to develop contingency plans if suspensions are mandatory or prudent; and
- reviewing any insurance policies that may be in place to see if any of the contractor's losses are covered (see Insurance Coverage for Coronavirus Losses Checklist ([W-024-5319](#))).

Owners and project sponsors should:

- Document every delay and how it was caused to later identify which delays were caused by COVID-19 or for another reason.
- contact the project lenders, offtakers, and other counterparties to discuss options under their agreements, including waivers, amendments and terminations.
- Be consistent in the message and approach with all counterparties. A force majeure claim under the construction contract typically triggers a back-to back claim under the offtake agreement. Owners and sponsors should ensure there are no inconsistencies in how the force majeure claims are addressed (see Practice Note, Understanding Project Finance Construction Contracts: Coordination of the Construction Contract with Other Project Documents ([1-422-1870](#))).
- Contact the lenders to obtain any consents for changes to the budget or schedule.

LOOKING AHEAD

Regardless of the duration or severity of the COVID-19 pandemic, construction contracts are changed for good. Going forward, these agreements are likely to include epidemics, pandemics, outbreaks, and quarantines in their definition of force majeure. Many parties are likely to also seek to define these terms in their agreements. In arriving at these definitions, the parties will need consider:

- Whether the event must be declared as a pandemic or epidemic by WHO or any other international agency to qualify as a pandemic or epidemic.
- The role and effect of national, state, or local emergency declarations on the existence of a pandemic or epidemic.
- Whether national or international definitions of an epidemic or pandemic should be used.
- Whether excusable events or force majeure events should explicitly include the effects of one of these events including:
 - labor shortages;
 - disruptions in supplies; or
 - the inability of personnel to work on the project.
- Whether the extensions of time to perform are sufficient to address the effects of an epidemic or pandemic. If they are insufficient, at what point do other remedies come into play. Parties may consider revising their contracts to explicitly provide for additional compensation.

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