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CORONAVIRUS, PROJECT INTERRUPTION, AND CONTRACTUAL OBLIGATIONS

MARCH 2020

Yesterday Ohio Governor Mike DeWine announced that a Stay-at-Home Order executed by the Director of Ohio Department of Health Dr. Amy Acton shall become effective at 11:59 p.m. on March 23, 2020. Under the Order, all non-essential business and operations must cease all activities except for minimum basic operations. Essential businesses are encouraged to remain open, however, and professional services provided for construction, identified in the Order as essential to infrastructure, are permitted to continue.

As governments across the world impose increasingly restrictive measures to slow the spread of coronavirus, now is an important time for design professionals to review and reconsider contractual provisions accounting for unforeseeable circumstances and resulting project interruption. Expecting delays to project completion deadlines due to government orders or a shortage of manpower should be expected. But how does it affect contractual obligations where scheduling, delay, and time-is-of-the-essence provisions may be part of the contract documents?

Force majeure is a term from French law defining an event or effect that can neither be anticipated nor controlled. A force majeure clause in a contract defines the scope of events that may excuse performance by a party. It is a risk allocation mechanism to provide flexibility in a volatile economy. Events typically identified in a force majeure clause include weather, fire, war, insurrection, acts of terrorism, strike, riots, natural disasters, and "Acts of God."

In order to invoke a force majeure clause as an excuse for nonperformance, the nonperforming party bears the burden of proving that the event was beyond the party's control and without its fault or negligence. Mistaken assumptions about future events or worsening economic conditions do not qualify as a force majeure. As such, the scope and effect of a force majeure clause will always depend on the specific language used in the contract.

Courts generally construe force majeure clauses narrowly. Whether the coronavirus pandemic constitutes a force majeure event excusing performance of a party will depend on whether public health emergencies, disease, or pandemic, or acts of government, are identified in the clause itself. Assuming pandemic or the like is among those events listed in the clause, the party seeking to invoke force majeure must then show the causal connection between the event, here the outbreak of COVID-19, and the resulting impossibility of performing the contract. If the clause does not include pandemic or the like among the events excusing performance, but does include government action as an event, Ohio courts are unlikely to categorize the event as force majeure because construction activities and services are identified as essential to infrastructure and therefore an exception to the Stay-at-Home Order issued by Dr. Acton and the Ohio Department of Health.

For the time being, contracts for current projects must be reviewed to determine if a force majeure clause exists and to advise your client as to how the clause may impact project schedule, delay, and project delivery. To determine whether a force majeure clause applies, consider the following factors:

- **Express references to epidemics:** Force majeure clauses are not uniform and must be reviewed to evaluate if public health emergencies or the like are included as events qualifying as force majeure. Some clauses written after the SARS, MERS and Ebola outbreaks of recent years expressly cite pandemics as examples of force majeure. Earlier clauses may not do so.

- **Catchall provisions:** Even in the absence of express citation of pandemics, many contracts include "catchall" language with some enumerated qualifying examples. If the effects of the coronavirus pandemic are considered to be "unforeseeable," then they may fall within force majeure catchall parameters.

- **Notice requirements:** Many contracts require that any party seeking to assert force majeure as a basis for suspending performance promptly provide notice to the other party. Failure to do so may result in a waiver of the defense or other consequences. Other contracts state that the continuation of a force majeure event for a certain period of time (e.g., 90 to 180 days) may give rise to a right of termination. In other cases, force majeure may give rise only to a suspension of the required performance. Even without an express requirement, delay in providing notice could give rise to equitable principles such as laches or good faith and fair dealing claims in certain cases. The China Council for the Promotion of International Trade announced that it will offer force majeure certificates to help companies deal with overseas contractual requirements. The effectiveness of these certificates and notices will depend on the exact language of the contract's force majeure clause.

If your contract does not contain a force majeure clause, then a party may still be excused from its contractual obligations under the narrower doctrine of frustration of contractual purpose. To invoke this doctrine, the event affecting contract completion must not be reasonably foreseeable and must radically change the contract terms from what the parties agreed to in the first place. Merely escaping a bad bargain is not enough. It is a common law defense rarely accepted by courts where the parties' written contract omits a force majeure clause.

The attorneys at Weston Hurd LLP remain dedicated to providing its clients the advice and professional services needed during these uncertain times. The Stay-at-Home Order issued by Dr. Acton and the Ohio Department of Health has impacted your firm, practice, and employees in a myriad of ways. Do not hesitate to contact us with any questions or concerns you may have moving forward.

About the Author

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