



What the Covid Outbreak Can Teach Us About Force Majeure



Kyle Hermanson
Sameer Ghaznavi

What is Force Majeure?

- A force majeure clause is used by parties to a transaction to allocate the risk of certain unforeseeable events that may impact the ability of a party to perform its obligations under the contract if they occur.
- “Force majeure” is the term of art customarily applied to these unforeseeable events. A project contract will typically include a definition of “Force Majeure Event” that dictates which events qualify for relief.
- In addition to allocating the risk of force majeure events between the parties, a force majeure clause also typically mandates a procedure by which an impacted party must inform the other party of: (1) the occurrence of the force majeure event, (2) the impact of the event, (3) the steps the impacted party is taking to mitigate the force majeure event, and (4) a required timeline for submitting the notice.

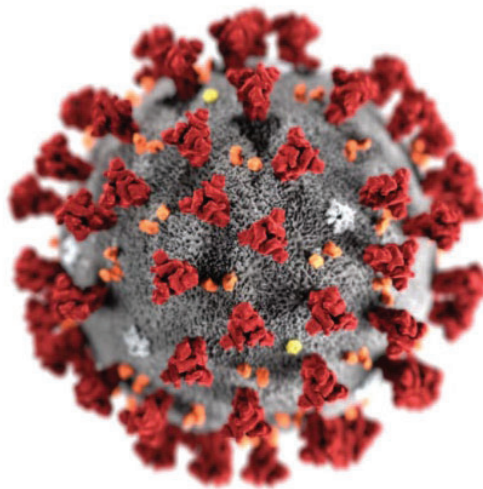
What is Force Majeure?

- We used to picture this:



What is Force Majeure?

- Now we picture this:



Components of a Force Majeure Provision

- Definition of “force majeure event”
 - Broad language (event outside of a party’s control) v. finite list of force majeure events
 - Examples v. inclusive list
- Exclusions (events within a party’s control)
 - Payments
 - Economic circumstance (inability to pay)
 - Labor issues specific to the contractor
- Language excusing one or both parties from performance if a force majeure event occurs
- Duty to mitigate
- Notice period
- Termination Rights

Owner v. Contractor

	Owner	Contractor
Trigger	<ul style="list-style-type: none"> -Narrow list of force majeure events -Must prove elements of force majeure have been met -Must demonstrate actual delay -Contractor must take efforts to mitigate 	<ul style="list-style-type: none"> -Open-ended or a broad list of force majeure events -Listed items are presumed to be force majeure event
Notice	Prompt notice upon occurrence of force majeure event	Reasonable time to notify Owner of force majeure
Rights	<ul style="list-style-type: none"> -Excused from performing -Day-for-day schedule relief -Termination right for extended force majeure -If terminated, Contractor assigns all subcontracts to Owner 	<ul style="list-style-type: none"> -Excused from performing -Equitable schedule relief (may be more than day-for-day) -Termination right for extended force majeure + costs to date

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