



When the Best Laid Plans are Thwarted: Force Majeure Provisions in Contracts
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Contracts are not written in anticipation of everything going as planned. Rather, contracts are intended to ensure the stakeholders' common understanding about a project's design, construction, consideration, and how disputes will be resolved. For those occasions when a project is derailed by forces beyond the stakeholders' control, contractual force majeure clauses define the parties' rights and obligations. Originating from the French phrase "superior force," a force majeure provision relieves the parties from their obligations when an event or force beyond the parties' control prevents them from performing their responsibilities under a contract.

What is a Force Majeure Provision?

A force majeure provision provides an avenue to parties of a contract to allocate risk by defining the circumstances a party may be excused from performance, such as riots, floods, fires, acts of government, pandemics and other, unenumerated "acts of God" which may include, for example, hurricanes, earthquakes and other natural disasters. Some force majeure provisions include catch-all language that follows a list of events or circumstances that contemplates other events beyond the reasonable control of the parties. Force majeure provisions may also detail notice requirements or what may happen after a force majeure event in order for the parties to assert their contractual rights under the force majeure provision which is intended to minimize delays, disputes between the parties and impacts to the project.

So, for example, force majeure provisions may absolve the parties of any delays for the unavailability of materials or excuse the parties from any further obligations to perform their contractual duties if the disruption to the project lasts for a stated period of time or results in the owner's forfeiture or loss of the property or project, such as through a government seizure by exercise of eminent domain or other legal process. Critical to a professional designer confronted with an act beyond their control which triggers the force majeure provision is knowing what their rights are, and what notice they must provide or other actions they must take to obtain the protections afforded by the contract. This consideration for forces beyond a design professional's control is contemplated in the AIA-B101 2017's § 3.1.3, which notes that time limits in a schedule for an Architect's services "shall not, except for reasonable cause, be exceeded by the Architect or Owner."

What Event or Circumstance is Contemplated in a Force Majeure Provision?

Notwithstanding the specifically identified acts, the design professional should keep in mind two considerations when seeking to be excused from performance under a contract:

1. In analyzing wording that is labeled as a "force majeure" provision or clause, Courts will still look to the language the parties specifically bargained for to determine the parties'



intent concerning whether the event complained of excuses the design professional's performance.

2. The frequency or likelihood of a circumstance is considered in determining whether the same is outside of the parties' control. For instance, extreme weather may not be considered to be as a qualified circumstance under a force majeure provision if the area where the Project is constructed is prone to extreme weather of the same type, or the contractor's critical path schedule includes float for extreme weather conditions such as predictable or anticipated periods of heavy rain or snow.

While the COVID-19 pandemic was likely an unforeseen condition that would be subject to a force majeure provision, the spread of new variants of COVID-19 may not be covered by a force majeure provision.

Conclusion

In negotiating contracts, it is critical for the design professional to be mindful of the language in the force majeure provisions to avoid one-sided wording that has the potential to place a design professional in a precarious position.

Jos. Scott Shannon and Annica Mae Mattus are Attorneys at Lee/Shoemaker PLLC, a law firm devoted to the representation of design professionals in DC, Maryland, and Virginia. The content of this article was prepared to educate related to potential risks, but is not intended to be a substitute for professional legal advice.