

An Assessment of the Current Impact of the COVID-19 Pandemic on Construction Claims

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The recent COVID-19 pandemic has brought forward a new set of rules for the construction industry to follow in order to keep everyone safe and protected. Some measures undertaken by contractors in order to meet these requirements have led to them experiencing increases in their total costs for contractual projects. With government shutdowns and stay-at-home orders in place around the entire country, more instances of labor inefficiency and material shortages are happening across the construction sector. Due to the huge financial impact of COVID-19 on businesses around the world, contractors are already becoming financially unstable. Above all else, significant delays in project completion may result in contractors being subjected to damages that they may not be able to cover in due time. Despite the unfortunate circumstances of today, contractors need to think about steps they can take in order to receive necessary relief from such a dire situation. In a world heavily impacted by the COVID-19 pandemic, construction contracts may need to be viewed in a different light by putting a greater emphasis on their inherent clauses that can be used to seek relief. This paper attempts to assess this data based on literature found through various firms and organizations, and what future implications it may hold for these types of claims.

Currently, one of the more commonly discussed clauses within the industry is the ‘force majeure’ contractual provision. The force majeure clause has been of relatively minimal use throughout time and has been quite overlooked up until now. The provision is used to excuse delays for events that are both out of the party’s control and unforeseen, and has mainly been used for instances such as natural disasters or other disruptions. Prior to today’s world, these events were less common and on a much smaller scale than the emergency currently being faced. With the spread and worldwide phenomenon of the ongoing COVID-19 pandemic, it is important for the force majeure provision to be further examined. As is stated in the article titled *COVID-19: The Current Impact on Construction and Engineering Projects* by the international law firm White & Case LLP, force majeure only grants the contractor an extension of time. This means that the clause does not compensate for any cost damages endured during the duration of the delay. Therefore, force majeure may not be the best solution for contractors to gain some relief when they seek compensation. Furthermore, according to the law firm Alston & Bird LLP in their article *COVID-19 Will Have Lasting Impact on Construction Contracts*, the interpretation of the contract language, especially regarding the aspect of force majeure, will be the main focus in contract and claim analyses. Meaning that although a contract may state that there is a force majeure clause included, its interpretation and implication may not be applicable to the situation at hand. Applying force majeure to one contract may not be in the same context as another. An additional point to consider is mentioned in the business construction magazine *Construction Executive* article titled *Risk Protection: Force Majeure Agreements Take on Renewed Relevance* in which they reiterate the aforementioned idea and add that since the global pandemic has already occurred in reality, the force majeure clause may not likely be utilized as unforeseeable for an event such as this one. This is again dependent on the language of the clause and which events fall under its criteria for applicability.

Force majeure is only one of the many alternatives that exist which allow contractors to seek relief. Referring back to White & Case LLP's article, it is mentioned that a change in law provision can actually result in the contractor being granted both an extension of time and compensation for incurred costs. This is a direct contrast to force majeure which only grants time extension. Another example is in the case of suspended work. The article *Dealing With the Construction Impacts of COVID-19* by the American Bar Association states that for the federal government, a suspension of work clause allows a contractor to be compensated for additional costs if the suspension of work continues for an unreasonable amount of time. This puts liability on the federal government itself, and not on the contractor. In the Construction Executive article mentioned before, they speak on the topic of sureties. Sureties can issue what is called a performance bond which assures that a contractor will carry out its full requirements of the construction contract. If the contractor for example, eventually finds itself out of business, it is the surety's responsibility to ensure the contract work continues and may even need to find a replacement contractor to guarantee this happens. Since the surety is now legally part of the contract agreement, these rules apply to them as well. In the unfortunate scenario where the obligee might impose the responsibility of the contractor to complete the work when they aren't able to, the contractor is protected and excused by several arguments including the impossibility, impracticability, and frustration of purpose provisions. These again are in favor of the contractor and may allow them to be compensated for additional expenses.

As multiple parties are involved in a contractual binding, it is now more important than ever for them to work together when resolving disputes. Mike Zisa, the Chair of the Surety and Construction Related Insurance Defense Practice Group at Peckar & Abramson, spoke in a podcast entitled *Let's Get Surety* about the different ways contractors can seek help under the pandemic. Apart from stating the different alternatives that exist for the force majeure provision, he also emphasized the importance of good communication, particularly between the contractor and the owner. In a worldwide emergency such as the one that is happening now, it is very important for people to communicate with and help each other, especially when everyone is being affected by the same event. Zisa suggests seeking direction from the project owners and to be as specific as possible in regard to what issues are being dealt with because of restrictions set out due to COVID-19. Communicating with subcontractors, owners, and even employees can make a difference and may even result in bigger and better opportunities. The best way to avoid discrepancies and disruptions in contract work is for the surety, principal, and obligee to work together towards a mutual goal and solution.

The COVID-19 pandemic has significantly slowed down ongoing construction projects around the globe. Currently, some governments have even ordered certain work to cease, however most of the projects within the construction sector are continuing for the following reasons: the ongoing status of these projects is highly important and progress needs to be made, and health and safety risks differ from one project to the next due to the type of work or the environment in which they are being performed. There are several different ways these problems are being handled today and they will continue to change with the times as more is learned. An article by Peckar & Abramson entitled *How Will Today's Pandemic Impact Tomorrow's Construction Contracts?*, addresses the most paramount sections of a construction contract in a world post COVID-19. New contracts to be proposed in this new age will need to have been carefully written with provisional items explicitly stated and explained, particularly those like force majeure or emergency clauses. It will also be especially important for these contractual provisions to provide entitlement for the

contractor to receive not only a time extension, but financial compensation as well. Again, these would need to be stated out in the written document. The idea of reasonable foreseeability will also play a huge role in future contracts, as contractors will need to know the difference between issues that would be considered unforeseeable in contrast with those matters that the contractor should have already known about. These matters may at first seem to fall under the former category, but there will need to be a clear distinction between the two. As time goes on, new strategies will formulate which will eventually become the new normal for contract analyses. Although contractors are facing a difficult scenario in the construction industry right now, proper preparation and research may surely pave the way for a better future ahead.