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BY: MATTHEW S.C. MOORE AND CORNELIUS F. "LEE" BANTA, JR.[1]

THE FORCE MAJEURE DOCTRINE AND STANDARD CONSTRUCTION FORM CONTRACT PROVISIONS: REVISITING AN OLD CONTRACT PROVISION DURING THESE NEW UNCERTAIN TIMES

I. INTRODUCTION

As we approach the first anniversary of the World Health Organization's declaration of COVID-19 as a global pandemic, its impact on local and global economies and our way of life cannot be ignored. The effects of COVID-19 to the construction industry are wide-reaching. Consequences on a project site include quarantines or other governmental restrictions resulting in impacts to the project workforce. Offsite impacts can cover a much broader scope of issues implicating the various links of the supply chain relied upon by the construction industry. For instance, labor shortages at manufacturing factories or fabrication facilities resulting in production delays or material price increases, transportation embargoes causing project supply issues, or governmental actions inhibit manufacturing and production by causing temporarily artificial inabilities to service existing demands. Due to these impacts, project participants are turning to the force majeure provision in their contract as a pathway for equitable relief.

This article will discuss the origins of the force majeure provision and relevant Texas case law. The article will conclude with an examination of key provisions found within certain standard form contracts published by The American Institute of Architects (AIA), AGC ConsensusDocs, Engineer Joint Contract Documents Committee (EJCDC), and Design-Build Institute of America (DBIA) through a COVID-19 lens and propose modifications to balance the risks and exposures caused by COVID-19 or other pandemics.

II. HISTORICAL BACKGROUND

The force majeure doctrine has its historical underpinnings in the British common law doctrine associated with frustration of purpose and impossibility of performance.[2] As one may recall from their 1L Contracts class, early British common law imposed absolute liability on parties that failed to satisfy unconditional contractual promises.[3] Unsurprisingly, parties sought to avoid the strict application of this rule, and courts over time softened the rule to allow a party to assert the defense of physical impossibility as an excuse to nonperformance.[4]

Such a narrow defense did not provide much comfort, prompting parties to include contractual provisions related to excusable nonperformance.[5] Borrowed from the Code Napoleon, the term "force majeure" came into use in British contracts to characterize these contractual carveouts.[6] This French civil law concept represented the codification of a legal doctrine harkening back to Roman law and the legal principle *impossibilium nulla obligatio est* ("there is no obligation to perform impossible things").[7]

1. Matt Moore is the Managing Partner in Peckar & Abramson's Houston office. Mr. Moore represents general contractors, construction managers, sureties, owners, developers, and subcontractors in all phases of construction and on a wide variety of construction-related issue. Matt also regularly reviews, drafts, and negotiates construction contracts. Mr. Moore has been selected each year beginning in 2012 to the *Texas Super Lawyers* and Rising Stars lists in the area of Construction Law. He is also among the first attorneys in Texas to become Board Certified in the area of Construction Law by the Texas Board of Legal Specialization.

   Lee Banta is a Senior Associate in Peckar & Abramson's Houston office. Lee has experience with lien and bond claim disputes, construction defect litigation, and general commercial matters. He has represented owners, contractors, subcontractors, and materialmen at all stages in the litigation process.
2. Sun Operating P'ship v. Holt, 984 S.W.2d 277, 282 (Tex. App.—Amarillo 1998, pet. denied).
3. Paradine v. Jane, 82 Eng. Rep. 897 (1647).
4. Hinde v. Whitehouse, 103 Eng. Rep. 216 (1806).
5. Fred R. Pletcher & Anthony A. Zoobkoff, *FORCE MAJEURE (AND OTHER USEFUL FRENCH PROFANITIES) IN RESOURCE AGREEMENTS*, 59 Rocky Mtn. Min. L. Inst ., 17-3 to 17-4 (2013).
6. Alphonse M. Squillante & Felice M. Congalton, *FORCE MAJEURE*, 80 Com. L.J. 4, 5 (1975) ("[t]here is no ground for damages and interest, when by consequence of a superior force or of a fortuitous occurrence, the debtor has been prevented from [performing]. . .") (quoting § 1148 of the French Civil Code from which the concept of force majeure is derived.).
7. Pletcher & Zoobkoff, *supra* note 5, at 17-3 to 17-4. For this reason, force majeure provisions are sometimes referred to by the Latin phrase "vis major".

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Commentators have observed that British lawyers likely relied on the civil law concept and the corresponding body of law as a way to include by contract what the common law failed to provide.[9] However, British courts were wary of relying on a singular term to incorporate by reference an entire civil law doctrine that had no equivalence in common law.[10] Thus, effo ts to contract around the harsh applications of the common law appeared to require parties to explicitly define the events that constituted force majeure.

Later, American courts largely followed the British common law's general principal of absolute liability for nonperformance along with the limited exception of "frustration." The latter doctrine is often referred to as "impossibility" in the U.S.[11] A "freedom of contract" state such as Texas has not departed from this legal tradition.[12]

For well over a century, Texas courts have recognized that force majeure is not so much a common law doctrine as it is a creature of contract.[13] Texas case law holds that supervening events preventing performance (*e.g.*, Acts of God) do not relieve a party from performance unless the express terms of the contract provide otherwise.[14] Courts are also not inclined to bail out a party by reading a force majeure provision into a poorly drafted contract, particularly when the more typical force majeure events affecting performance could be anticipated by the parties during contract negotiations.[15] Hence, Texas jurisprudence has not departed in any appreciable degree from the old British common law rule on contract performance.

Though excusable force majeure events are defined by contract, Texas does recognize the common law doctrine of impossibility.[16] The Texas Supreme Court adopted the Restatement (Second) of Contracts' formulation, which excuses a party's performance of a contractual obligation "made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made."[17] As the Eleventh Court of Appeals observed, impossibility of performance "read[s] into a contract an escape clause that does not otherwise exist."[18]

However, courts are cautious to apply this common law exception. For one, a party seeking to invoke the excuse of nonperformance due to legal prohibition must make reasonable effo ts to avoid the application of the regulation, including appealing a regulatory agency ruling even if the party believes it will be unsuccessful.[19] Additionally, courts often find that a temporary legal restriction against the purpose of the contract does not give rise to impossibility.[20] This is particularly true when the terms of the contract in question contemplate the possibility of delayed performance in connection with compliance with applicable legal requirements.[21] The efore, the doctrine of impossibility operates as an "escape clause" in only limited circumstances. The best line of defense remains a well-drafted force majeure provision.

8. Arthur L. Corbin, Corbin on Contracts § 1324 (One vol. ed. 1952).
9. Pletcher & Zoobkoff, *supra* note 5, at 17-2.
10. *See, e.g.,* Matsoukis v. Priestman & Co. [1915] 1 K.B. 681, 685 (noting that it was not clear whether a British court applying British law would be bound or entitled to give the words the full meaning as they have under French law); *see also* Thomas Bortwick (Glasgow) Ltd. v. Faure Fairclought Ltd. [1968] 1 Lloyd's Rep. 16, 28 (commenting that "the precise meaning of this term, if it has one, has eluded lawyers for years").
11. Pletcher & Zoobkoff, *supra* note 5, at 17-9.
12. *See, e.g.,* Koltermann, Inc. v. Underream Piling Co., 563 S.W.2d 950, 957 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.) ("Where the obligation to perform is absolute, impossibility of performance occurring after the contract was made is not an excuse for nonperformance if the impossibility might have reasonably been anticipated and guarded against in the contract.").
13. *See* Sun Operating P'ship v. Holt, 984 S.W.2d 277, 283 (Tex. App.—Amarillo 1998, pet. denied) ("Force majeure, is now little more than a descriptive phrase without much inherent substance. Indeed, its scope and application, for the most part, is utterly dependent upon the terms of the contract in which it appears."); *see also* N. Irr. Co. v. Dodd, 162 S.W. 946, 948–49 (Tex. Civ. App.—Austin 1913, writ ref'd) ("'[W]here the party of his own contract creates a duty or charge upon himself, he is bound to make good, notwithstanding any accident by inevitable necessity, because he ought to have provided against it by his contract.'")
14. *See* GT & MC, Inc. v. Texas City Ref., Inc., 822 S.W.2d 252, 258–59 (Tex. App.—Houston [1st Dist.] 1991, writ denied); *see also N. Irr. Co.*, 162 S.W. at 948–49 ("'It is a well-established rule of law that, where a person creates a charge or obligation upon himself by express contract, he will not be permitted to excuse himself therefrom by pleading an act of God rendering such performance impossible.'") (quoting 1 Am. & Eng. Ency. Law, p. 588).
15. Metrocon Const. Co., Inc. v. Gregory Const. Co., Inc., 663 S.W.2d 460, 462–63 (Tex. App.—Dallas 1983, writ ref'd n.r.e.) (defendant-builder assumed the risk of failure to timely construct a wall due to the occurrence of high winds).
16. *See N. Irr. Co.*, 162 S.W.at 948–49 (noting that the performance of a contract is prevented by law as an exception to the general rule that a promisor is not discharged where the performance becomes impossible subsequent to the making of the contract).
17. Centex Corp. v. Dalton, 840 S.W.2d 952, 954–55 (Tex. 1992) (quoting Rest atement (Sec ond) of Contra ct s § 261 (1981)).
18. Key Energy Servs., Inc. v. Eustace, 290 S.W.3d 332, 340 (Tex. App.—Eastland 2009, no pet.).
19. Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co., 118 S.W.3d 60, 69–70 (Tex. App.—Houston [14th Dist.] 2003) (disallowing impossibility defense where party to the contract dismissed legal challenge to agency decision because the party did not believe the case could be won in time to effectuate the contract).
20. Walden v. Affiliated Comput. Servs., Inc., 97 S.W.3d 303, 325 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).
21. *Id.*

III. SPECIFIC APPLICATIONS OF THE FORCE MAJEURE DOCTRINE

Due to the emphasis Texas courts place on the specific language in the force majeure provisions in determining whether a specific instance constitutes excusable nonperformance, it is worth considering some of the typical force majeure provisions and how they are interpreted by the courts.

Texas case law continues the theme developed by British common law that magic words alone (*e.g.*, "force majeure") will not excuse a party's failure to perform if there is no further effo t to clarify.

A. Acts of God

A common force majeure event that comes to mind is the familiar "Act of God." Courts have defined the phrase as being "an act occasioned exclusively by forces of nature" that "could not have been prevented or escaped by any amount or foresight or prudence, or by any reasonable degree of care or diligence, or by the aid of any appliances which the situation of the party might reasonably require him to use."[22] Courts have found that even natural disasters that occur infrequently can still be "reasonably anticipated" by the contracting parties.[23]

The case of *Metrocon Construction Company v. Gregory Construction Company* is instructive. The general contractor sued the masonry subcontractor for breach of contract and negligence seeking to recover additional sums spent to repair the masonry walls for a shopping center project that fell over during a high wind weather event.[24] The subcontractor argued the breach was excusable because it was caused by an Act of God.[25] The Fifth Court of Appeals disagreed, noting that the subcontract agreement did not contain a force majeure provision that excused performance due to an Act of God, and that high winds were the type of risk that could be anticipated when the subcontract was drafted.[26] The court further noted that the Act of God did not actually prevent performance of the subcontract, but merely made it more burdensome than originally anticipated, which is not a legally justifiable e cuse for failure to perform.[27]

Furthermore, a party should be wary about invoking an "Act of God" clause in a force majeure provision if the force of nature occurred after anticipated performance. Long ago, the Texas Supreme Court held that a force majeure event is not an excuse for nonperformance when a prior material breach has occurred.[28] Thus, in the construction industry context, a contractor seeking to claim a pandemic as an "Act of God" force majeure excuse for its failure to meet a specific turnover date would have to demonstrate that no concurrent delays existed.

B. "Catch-All" Language

One should also be cautious about relying on a "catch-all" clause in a force majeure provision. The following is example of such a clause: "[A]ny other cause not enumerated herein but which is beyond the reasonable control of the [p]arty whose performance is affected . . . ."[29] Typically preceding a laundry list of specifically identified events,[30] a contractor whose work was impacted by COVID-19 may be tempted to use this open-ended clause given that pandemics were not often one of the specifically enumerated force majeure events in contracts drafted prior to March 2020.

Faced with this creative contract interpretation argument, Texas courts would likely apply the familiar doctrine of *ejusdem generis* in order to determine if this unspecified event, which the party claims excused performance, is of the same kind as the events specifically listed in the force majeure provision. The specific list of events, and how a court characterizes them, will determine the outcome.

For instance, in *R & B Falcon Corp. v. American Exploration Company*, the United States District Court for the Southern District of Texas was asked to decide whether a seabed anomaly affecting the structural integrity of an under-construction offsho e oil rig fell within the "catch all" language of the force majeure provision in the parties' drilling contract.[31] The p ovision reads, in relevant part:

22. R & B Falcon Corp. v. Am. Expl. Co., 154 F.Supp.2d 969, 974 (S.D. Tex. 2001) (applying Texas law) (quoting BLACK'S LAW DICTIONARY 33 (6th ed.1990)); *accord N. Irr. Co.*, 162 S.W. at 948–49 (defining "Act of God" as being "the result of such natural causes as could not reasonably have been foreseen and provided against").
23. *N. Irr. Co.*, 162 S.W. at 948–49 (the lack of a severe drought for the ten years preceding the contract did not constitute an act of God excusing the defendant from failing to furnish water for irrigation). Of course, more leniency may be shown for a flu-like pandemic, which has not occurred on such a scale in over a century.
24. Metrocon Const. Co. v. Gregory Const. Co., 663 S.W.2d 460, 461 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).
25. *Id.* at 462–63.
26. *Id.*
27. *Id.*
28. Gulf, C. & S.F. Ry. Co. v. McCorquodale, 9 S.W. 80, 80–81 (Tex. 1888) (unprecedented flood that washed away a bridge an act of God but shipment of cattle would have passed the juncture prior to the casualty if the shipment left at its original departure time)
29. *See, e.g.,* TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).
30. *See id.* at 186. (specifically identifying "fire, flood, storm, act of God, governmental authority, labor disputes, [or] war . . . ." as force majeure events).

> [E]ach party to this Contract shall be excused from complying with the terms of this Contract . . . if and for so long as such compliance is hindered or prevented by riots, strikes, wars . . . , insurrection, rebellions, terrorist acts, civil disturbances, dispositions or order of governmental authority . . . , acts of God . . . , inability to obtain equipment, supplies or fuel, or by any act or cause (other than financial distress or inability to pay debts when due) which is reasonably beyond the control of such party . . . .[32]

Applying *ejusdem generis*, the district court interpreted the list as being essentially comprised of "governmental instability and supply-chain related events . . . ," which the court categorized as being "external to the actual performance of the contract."[33] The event in question (a seabed anomaly), though, related to the set-up and operation of the rig, which pertained to the core subject matter of the drilling contract. As such an event could be contemplated by the parties, it did not come within the scope of the force majeure provision.[34]

The Texas First Court of Appeals reached a similar conclusion for a less tangible event—changing market conditions. In *TEC Olmos, LLC v. ConocoPhillips Company*, a drilling company sought to invoke the force majeure provision in the parties' farmout agreement when a market downturn in oil and gas made it difficul to obtain the project financing necessary to test-drill land owned by the lessee.[35] The provision contained a list of events like those discussed in the *R & B Falcon* opinion,[36] which the Houston appellate court characterized as being natural or man-made disasters, governmental actions, or labor disputes.[37] Although foreseeable, the events were irregular, thus making it difficul for the parties to plan for and allocate the risk associated with such events.[38] On the other hand, changing commodity prices that made a mineral rights lease less profitable were more predictable and went to the heart of the farmout agreement.[39]

This pair of cases suggest that a pandemic may fall into a "catch-all" provision. Under the *R & B Falcon* court's characterization, a contagious disease such as COVID-19 can be viewed as a "supply-chain related event," external to the subject-matter construction contract. While the manpower shortages and material delays caused by the pandemic may facially be similar to the complained-of declining market conditions that were the focus in *TEC Olmos*, the root cause is distinguishable. The economic impacts of a pandemic—arguably a natural or man-made disaster—are irregular and distinct from the typical labor and material fluctuations complained of in the *TEC Olmos* opinion.

C. Specifically dentified Comme cial Events

Reliance on "Acts of God" or "catch all" clauses may be avoided if the force majeure provision identifies certain commercial events as excuses for non-performance.[40] As the construction industry has learned, a major ramification of the COVID-19 pandemic has been the disruption of labor markets and material supply chains. However, Texas courts are quick to scrutinize the specific language in assessing whether the event in question falls within the force majeure provision.

The case of *Sherwin Alumina L.P. v. AluChem, Inc.* provides a useful illustration. AluChem contracted with Sherwin Alumina to manufacture a ceramics chemical compound.[41] Sherwin Alumina began producing the compound on a specific kiln at its Texas plant, which was initially operated under a temporary Texas Commission on Environmental Quality (TCEQ) permit before a permanent permit could be obtained.[42] During production, Sherwin Alumina had to report several dust emissions events to the TCEQ. Though no formal actions were taken by the TCEQ, Sherwin Alumina eventually

31. R & B Falcon Corp. v. Am. Expl. Co., 154 F.Supp.2d 969, 974 (S.D. Tex. 2001).
32. *Id.*
33. *Id.*
34. *Id.* at 975.
35. TEC Olmos, LLC v. ConocoPhillips Co., 555 S.W.3d 176, 179 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).
36. *See id.* ("Should either Party be prevented or hindered from complying with any obligation created under this Agreement . . . by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected . . . ").
37. *Id.* at 186.
38. *Id.*
39. *Id.*
40. *See, e.g., Sherwin Alumina L.P. v. AluChem, Inc.*, 512 F.Supp.2d 957, 966 (S.D. Tex. 2007) (listing "unforeseen shortages or unavailability of fuel, power, transportation, raw materials or supplies, inability to obtain or delay in obtaining necessary equipment . . . " among the specifically enumerated force majeure events).
41. *Id.* at 960.
42. *Id.*

sent a letter to AluChem declaring a force majeure event due to environmental concerns, and simultaneously filed a declaratory judgment action seeking to adjudicate its contractual right to suspend performance.[43]

The federal district court subsequently granted AluChem's motion for summary judgment, finding that the economic impact of anticipated costs of environmental regulation compliance did not constitute a force majeure event under the parties' supply agreement.[44] Specificall , the court rejected Sherwin Alumina's argument that the extremely high cost of upgrading the kiln fell within the applicable force majeure provision, which read, in relevant part:

> Seller shall not be liable for failure or delay in performance under this Order due . . . to causes such as an act of God, strike, lockout . . . , [or] inability to obtain or delay in obtaining necessary equipment or governmental approvals, permits, licenses or allocations . . . .[45]

The court noted that a party could not avoid contract performance merely because the costs of regulatory compliance were higher than preferred or anticipated.[46] Sherwin Alumina was able to upgrade the kiln and continue performing under the contract, but instead sought to avoid the expense as it would make the contract unprofitable [47]

The *Sherwin Alumina* opinion cautions construction contract parties to determine if supply chain disruptions make performance impossible as opposed to simply expensive.

D. Government Regulations

A final clause often found in a parties' force majeure provision implicated by pandemics is nonperformance caused by government regulations. On this point, Texas case law mirrors that of the related common law doctrine of impossibility.[48] As a party must prove effo ts to avoid the effect of government regulations when declaring impossibility of performance, a party claiming force majeure must demonstrate that the governmental actions preventing performance were beyond the party's reasonable control.

For instance, in *Hydrocarbon Management., Inc. v. Tracker Exploration, Inc.*, the parties' mineral rights lease agreement excused nonproduction from a well due to government regulations.[49] The well operator sought to invoke the force majeure provision when the Railroad Commission shut in the well due to the operator exceeding the production quotas.[50] The Seventh Court of Appeals held that the force majeure provision did not apply because compliance with state-mandated production quotas was within the operator's reasonable control, and the shut in resulted from the operator's violation of an existing regulation.[51]

Additionally, the governmental action prohibiting performance under the contract must actually occur. Returning to the *Sherwin Alumina* opinion,[52] the federal district court noted that force majeure provisions do not typically provide for hypothetical or possible events that affect a party's future performance.[53] Thus, the potential or actual threat that the TCEQ may require a chemical manufacturer to suspend operations for multiple violations of emissions regulations was insufficien [54]

In the context of pandemic-related government regulations, the more stringent state or local government stay-at-home orders that did not exempt construction activities could arguably be the type of regulation constituting an excusable event under an applicable force majeure provision. On the other hand, rumors of a general lockdown, or the temporary closure of a project site for repeat violations of personal protective health regulations, would likely be inadequate.

The survey of Texas case law provides the reader with the current attitudes by the courts. However, seeing as how the analysis of force majeure provisions is a fact-specific inquiry based on the express language of the contract, it behooves the reader to scrutinize the typical force majeure provisions prevalent in construction form contracts.

43. *Id.* at 961–62.
44. *Id.*at 967–974.
45. *Id.* at 966.
46. *Id.* at 967.
47. *Id.*
48. *Compare* the cases discussed in section II above, with those in this section.
49. Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc., 861 S.W.2d 427, 435 (Tex. App.—Amarillo 1993, no writ).
50. *Id.*
51. *Id.* at 436.
52. *See Sherwin Alumina,* 512 F.Supp.2d at 960–69 (discussing opinion in the context of specifically identified commercial events).
53. *Id.* at 968.
54. *Id.* at 968–69.

IV. COMMON FORCE MAJEURE PROVISIONS IN CONSTRUCTION FORM CONTRACTS

This section of the article will evaluate the force majeure provisions found in common industry standard form contracts and will include some suggested modifications to ensure the force majeure provision includes impacts to the project caused by COVID-19, or future pandemics and government shutdowns.

AIA A201 – 2017

§ 8.3 Delays and Extensions of Time

§ 8.3.1 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, fi e, ***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. (emphasis added).

Commentary

The inclusion of "unusual delay in deliveries" and the catch all are strong points for a contractor whose work is delayed by COVID-19 to argue that such delays are excusable. However, in light of the current pandemic and the subsequent government shutdowns throughout the country, there is no good reason for not expressly including "epidemics" and "adverse governmental actions" in this provision. Contractors should also insist that the provision be further modified to state that "…such time extensions should be affo ded whether or not the events or conditions were reasonably anticipated at the time and should be equitable and not subject to the Architect's sole determination."

ConsensusDocs 200 (2011, revised 2017)

6.3 Delays and Extensions of Time

6.3.1 If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond the control of Constructor include, but are not limited to, the following: (a) acts or omissions of Owner, Design Professional, or Others; (b) changes in the Work or the sequencing of the Work ordered by Owner, or arising from decisions of Owner that impact the time of performance of the Work; (c) encountering Hazardous Materials, or concealed or unknown conditions; (d) delay authorized by Owner pending dispute resolution or suspension by Owner under §11.1; (e) transportation delays not reasonably foreseeable; (f) labor disputes not involving Constructor; (g) general labor disputes impacting the Project but not specifically related to the Worksite; (h) fi e; (i) Terrorism; (j) ***epidemics***; (k) ***adverse governmental actions***; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated. Constructor shall submit any requests for equitable extensions of Contract Time in accordance with ARTICLE 8. (emphasis added).

Commentary

Since 6.3.1 explicitly mentions "epidemics" and "adverse governmental actions", it would be difficul for an owner to successfully argue that delays to the work caused by COVID-19 are not excusable. To avoid all doubt on whether foreseeability is a determining factor as to whether delays caused by COVID-19 are excusable, this provision should be modified to state: "If Constructor is delayed at any time in the commencement or progress of the Work by any cause beyond the control of Constructor, Constructor shall be entitled to an equitable extension of the Contract Time, whether or not such event or condition is foreseeable unless otherwise stated herein."

EJCDC C-700 (2018)

4.05.C Delays in Contractor's Progress

If Contractor's performance or progress is delayed, disrupted, or interfered with by unanticipated causes not the fault of and beyond the control of Owner, Contractor, and those for which they are responsible, then Contractor shall be entitled to an equitable adjustment in Contract Times. Such an adjustment will be Contractor's sole and exclusive remedy for the delays, disruption, and interference described in this paragraph. Causes of delay, disruption, or interference that may give rise to an adjustment in Contract Times under this paragraph include but are not limited to the following:

1. Severe and unavoidable natural catastrophes such as fi es, floods, ***epidemics***, and earthquakes;
2. Abnormal weather conditions;
3. Acts or failures to act of third-party utility owners or other third-party entities (other than those third-party

utility owners or other third-party entities performing other work at or adjacent to the Site as arranged by or under contract with Owner, as contemplated in Article 8); and

4. Acts of war or terrorism.

(emphasis added).

Commentary

At first glance, this provision seems to adequately address impacts caused by pandemics such as COVID-19. However, the use of the word "severe" is problematic because it is subjective, and the word "unavoidable" is too strong and certain. Hopefully COVID-19 will be less severe towards the end of 2021, but the disease may still impact construction activities if it spreads onsite, thus requiring quarantine. As for "unavoidable," what does that really mean? If COVID-19 could have been avoided had our federal and state governments acted faster or taken more extreme measures to curb the spread, does that mean COVID-19 was avoidable and not subject to this provision? What if the workforce refuses to get vaccinated despite ease of access to vaccines? Does this mean COVID-19 is avoidable and not subject to this provision? The inclusion of those words creates confusion and uncertainty, so they should be struck.

The inclusion of "unanticipated causes" will also cause problems for contractors whose work may be impacted by COVID-19 if the contract was executed after March 11, 2020, the date the World Health Organization declared COVID-19 a global pandemic. It would be wise for contractors to strike "unanticipated causes" and replace it with "whether or not such event or condition is foreseeable unless otherwise stated herein."

DBIA Document No. 535 (2010)

1.2.8 *Force Majeure Events* are those events that are beyond the control of both Design-Builder and Owner, including the events of war, floods, labor disputes, earthquakes, ***epidemics***, adverse weather conditions not reasonably anticipated, and other acts of God. (emphasis added).

8.2 Delays to the Work

8.2.1 If Design-Builder is delayed in the performance of the Work due to acts, omissions, conditions, events, or circumstances beyond its control and due to no fault of its own or those for whom Design-Builder is responsible, the Contract Time(s) for performance shall be reasonably extended by Change Order. By way of example, events that will entitle Design-Builder to an extension of the Contract Time(s) include acts or omissions of Owner or anyone under Owner's control (including separate contractors), changes in the Work, Differing Site Conditions, Hazardous Conditions, and Force Majeure Events.

8.2.2 In addition to Design-Builder's right to a time extension for those events set forth in Section 8.2.1 above, Design-Builder shall also be entitled to an appropriate adjustment of the Contract Price provided, however, that the Contract Price shall not be adjusted for Force Majeure Events unless otherwise provided in the Agreement.

Commentary

Similar to ConsensusDocs and EJCDC, the inclusion of "epidemics" makes clear that COVID-19 would constitute a Force Majeure Event and that any delays caused by such an event would be excusable. Similar to the above provisions, to remove any doubt as to whether a foreseeable delay caused by COVID-19 constitutes a Force Majeure Event, contractors should make appropriate modifications, so they get the benefit of the force majeure relief.

V. CONCLUSION

During contract negotiations, careful consideration should be given to drafting the force majeure provision to provide entitlement to excused performance and equitable relief. A well-drafted force majeure provision will help ensure that project participants stand a better chance of mitigating their risks, and potentially reducing the likelihood of protracted litigation.