

## LEGAL PIPELINE

# A Current Look at Force Majeure

In this age of COVID-19, parties to construction contracts (and their legal counsel) need to be mindful of these provisions.



BY STEVEN NUDELMAN

The novel coronavirus (COVID-19) has thrown a wrench into the country's longest stretch of economic growth, threatening the performance and profitability of construction projects in states with restrictive governmental regulations. See, e.g., N.J. Exec. Order No. 122 (2020) (halting work on all "non-essential construction projects" in the State of New Jersey).

In these uncertain times, all parties involved in a construction project — owners, contractors, subcontractors and suppliers — and their respective counsel need to review their contracts carefully. Is there a contractual right to delay performance? Is the contractor entitled to an extension of time? Additional money? Both? What about liquidated damages?

The answers to these questions — in the first instance — lie in the express language of the contract. While many contract clauses may be implicated, the starting point for the inquiry should be the force majeure provision.

### Definition of force majeure

Force majeure, French for "superior force," may be defined as "[a]n event or effect that can be neither anticipated nor controlled; esp., an unexpected event that prevents someone from doing or completing something that he or she had agreed or officially planned to do. The term includes both acts of nature (e.g., floods and hurricanes) and acts of people (e.g., riots, strikes, and wars)."

A contractual force majeure provision might excuse performance due to "strikes, boycotts, war, Acts of God, labor troubles, riots and restraints of public authority, or any other reason." Team Mtkg. USA Corp. v. Power Pact, LLC, 839 N.Y.S.2d 242, 246 (3d Dep't 2007). The term "force majeure" may not appear in the contract, but parties often recognize the clause when they see a list of events that may excuse performance.

The standard ConsensusDocs 200 form includes a force majeure provision in Section 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 Date of Substantial Completion or the Date of Final Completion.

Disclaimer: This article is for informational purposes only and not to provide legal advice. Nothing in this article should be considered legal advice or an offer to perform services. The application and impact of laws may vary widely based on the specific facts involved. Do not act upon any information provided in this article, including choosing an attorney, without independent investigation or legal representation. The opinions expressed in this article are the opinions of the individual author and may not reflect the opinions of his firm.

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) fire; (i) Terrorism; (j) epidemics; (k) adverse governmental actions; (l) unavoidable accidents or circumstances; (m) adverse weather conditions not reasonably anticipated .... (Emphasis added.)"

This clause provides the contractor (or constructor) with an extension of time for "any cause beyond" the contractor's control. In addition, this clause makes specific reference to "epidemics," although some might question its application to COVID-19 because the term "pandemics" is not used. Contract interpretation is going to be based on the jurisdiction and applicable law involved. One recent example of a court interpreting a force majeure provision is the case of Roost Project, LLC v. Andersen Const. Co., No. 1:18-CV-00238-CWD, 2020 WL 560574 (D. Idaho Feb. 4, 2020).

### The Roost Case

In Roost, the parties contracted to build a residential apartment complex on Dec. 11, 2015. The contract called for substantial completion by June 2017, but the project was not completed until Feb. 21, 2018. Roost, the owner, sued Andersen, its contractor, for damages related to the delay, arguing that the contractor mismanaged the project, misrepresented the project's status in weekly reports and concealed information about the project.

Andersen argued, among other things, that it was delayed by allegedly unforeseeable events, namely adverse weather conditions and a labor shortage. Accordingly, Andersen believed the force majeure clause in the parties' contract applied.

The clause excused performance for several enumerated events, such as "fires, floods, epidemics, lightning, earthquakes, quarantine, blockade, governmental acts, orders or injunctions, war ..." and included a catchall phrase which included all events "beyond the reasonable control" of the contractor. The clause did not mention adverse weather conditions that fall short of natural disasters such as earthquakes or floods.

In interpreting the force majeure clause, the federal district court held that the touchstone of its meaning was foreseeability. In other words, the clause covered all unforeseeable events that prevented performance. See Roost Project, 2020 WL 560574, at \*8 ("When read in

its entirety, the Construction Agreement contemplates that force majeure qualifying events are unanticipated or unforeseeable, at least to some extent.”).

The court analyzed the clause using the principle of ejusdem generis. Ejusdem generis instructs that the meaning of a catchall phrase is limited by the class or nature of the enumerated examples that precede it. For example, “in the phrase horses, cattle, sheep, pigs, goats, or any other farm animals, the general language or any other farm animals — despite its seeming breadth — would probably be held to include only four-legged, hoofed mammals typically found on farms, and thus would exclude chickens.” Ejusdem Generis, Black’s Law Dictionary (10th ed. 2014).

The court in Roost analyzed the enumerated examples and concluded that they commonly involve unforeseeable events. That commonality established the outer limits of the catchall phrase’s meaning, so only unforeseeable events beyond Andersen’s “reasonable control” excused a delay in performance under the force majeure clause.

Accordingly, the court denied both parties’ motions for summary judgment, finding that a genuine issue of material fact existed whether the parties could have foreseen adverse weather and labor shortages “at the time of contracting.” Id. It is important to note that the operative time for the court’s analysis is when the parties sign the contract.

**Takeaways**

When parties stipulate to a force majeure clause, they

essentially allocate risk. The party for whom performance is owed stipulates that certain events, such as earthquakes or fires, excuse a delay in performance, and thus takes the risk that events will happen. If an event is not covered by the force majeure clause, then the party who owes performance takes the risk that it will not happen.

For example, if the parties specifically decide not to include “pandemics” in the force majeure clause, then the performing party takes the risk that a pandemic will not cause a delay to its performance. Since parties are responsible for negotiating their own contracts (and allocating their own risk) — and they may include whatever “laundry list” of events the parties agree on — courts tend to read catchall provisions in force majeure clauses narrowly, through principles such as ejusdem generis.

In this age of COVID-19, parties to construction contracts (and their legal counsel) need to be mindful of the force majeure provisions. In the past, these provisions took the form of boilerplate or were relegated to the middle of form general conditions. In the future, these clauses will take center stage as the parties negotiate specific force majeure events to consider as they allocate their respective risks regarding contract performance. ●

*Steven Nudelman is a partner at the law firm of Greenbaum, Rowe, Smith & Davis LLP. He may be reached at 732-476-2428 or snudelman@greenbaumlaw.com. Steve gratefully acknowledges his former intern, Daniel Lutfy, for his assistance in the preparation of this article.*



**“I KNEW THERE WAS MONEY IN DRAINS, BUT WE COULDN’T FIND IT!”**

“For years we’ve tried to get a drain cleaning department started on our own. We’d hire a tech, then he would quit, and we would be out of the drain business. Sound familiar? We decided to franchise with ZOOM DRAIN, and since then, we have made money every month in drain and sewer work.”

**Sam Marcisso Jr. & Sam Marcisso III**  
ZOOM DRAIN NEW ENGLAND & PINE STATE SERVICES



At ZOOM DRAIN we’ve solved the problems that hold you back—finding and developing great team members, and attracting the right number of calls. Our systems and support will help you grow your business. Franchises are available in select cities. **Interested? Let’s Talk!**



**ZOOM DRAIN**

Call Ellen Rohr at 877-629-7647 or visit [zoomdrain.com/franchising](http://zoomdrain.com/franchising)

This offering is made by prospectus only. ©ZOOM DRAIN