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FORCE MAJEURE IN THE WAKE OF COVID-19: *Legal and Contractual Considerations for Contractors*

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Introduction

This article concerns New York courts' treatment of force majeure clauses and provides examples of force majeure language that contractors should look out for in their construction contracts in order to protect their interests as a result of COVID-19's impacts on construction.

The COVID-19 pandemic has had, and will continue to have, significant impacts on New York's multi-billion-dollar construction industry. Specifically, as a result of Executive Order 202.6,¹ its amendments,² and recent guidance issued by the Empire State Development Corporation,³ New York has shut down all non-essential businesses, including construction projects that are not related to healthcare, infrastructure, housing, or emergency construction work. Notwithstanding the obvious impacts the above government closure may have on all non-essential construction projects, COVID-19 may result in additional day-to-day impacts for essential construction such as:

- Limited manufacturing and procurement of necessary materials and equipment, particularly where they come from states or countries with their own restrictions and closures in place;
- Temporary project shutdowns for cleaning or sanitation if a worker contracts COVID-19 or is otherwise exposed to an individual having a confirmed case; and,
- Project slowdowns as a result of a reduced or otherwise less efficient workforce.

Contractors⁴ must look to their contracts to determine their rights as a result of these types of impacts; specifically, contractors must review their contracts' "force majeure" or delay provisions.⁵

Generally, a contractual "force majeure" clause is one that excuses "nonperformance due to circumstances beyond the control of the parties."⁶ As set forth in greater detail below, New York courts interpret these clauses narrowly, and performance is only excused where "the force majeure clause specifically includes the event that actually prevents a party's performance."⁷

Construction contracts typically provide that time is of the essence and include liquidated damages provisions which expose the contractor to a fixed daily amount for each day that the project is delayed past the completion date. A force majeure clause provides for specific circumstances beyond the parties' control (*i.e.*, inclement

weather, strikes, or owner interference) and may, depending on the contract, excuse a contractor's delay or potentially entitle it to an adjustment of the contract price.

Some force majeure clauses are explicitly identified in the construction contract, while other contracts embed force majeure events into their delay, termination, extension of time, price adjustment, claim and/or other clauses. Therefore, it is critical that contractors look carefully at their contract to evaluate their rights in the event that a circumstance beyond their control, such as the COVID-19 pandemic, impacts completion efforts. The following is a non-exhaustive list of triggering events that may be identified in the applicable force majeure clause and may apply to COVID-19 construction impacts:

- Epidemics/Pandemic
- Quarantine
- Act or order of a governmental body
- Government shutdown
- Labor shortage
- Supply shortage
- National emergency
- Act of God

A force majeure clause may also include a "catch-all" provision. For example, these "catch-all" provisions may broadly include any event beyond the contractor's control as an excusable delay, or provide for other events that are of a similar nature to those explicitly listed in the force majeure clause. In addition, force majeure clauses will typically include certain notice provisions, requiring that the impacted party notify the owner of the triggering event within a certain period of time in order to obtain force majeure protection or additional compensation.

When faced with an unprecedented event such as COVID-19, a contractor must review the contract and determine answers to the following questions:

1. Does the force majeure clause explicitly include this event or otherwise contain a catch-all provision?
2. What is the contractual remedy (*i.e.*, an extension of time, price adjustment, etc.)?
3. Are there any applicable notice provisions?

Below, please find a general summary of the current state of construction in New York, as well as specific examples of force majeure clauses and New York courts' treatment of same.⁸

Current State of Construction in New York

Force majeure and delay provisions will undoubtedly be a hot issue in the coming months in New York, not only for contractors, but also for subcontractors, vendors and suppliers. New York's Executive Orders 202.6 through 202.14 currently mandate a 100% reduction in workforce for all for-profit and not-for-profit employers in New York State, unless such business is deemed an essential business or entity providing essential services.⁹ "Construction" was originally deemed to be an "essential service" under Executive Order 202.6.¹⁰ However, the scope of construction that may continue in New York was further limited per additional guidance issued by the Empire State Development Corporation on March 27, 2020:

All non-essential construction must shut down except emergency construction, (e.g. a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site). Essential construction may continue and includes roads, bridges, transit facilities, utilities, hospitals or health care facilities, affordable housing, and homeless shelters.¹¹

Given that construction in New York has now been limited to emergency and essential projects, per the above guidance, it logically follows that business operations of New York suppliers and vendors to the construction industry may likewise, at least in significant part, be limited to those which support emergency and essential construction projects, only.

General Statement of Law Regarding Force Majeure Clauses under New York Law

Generally, a force majeure event is an event beyond the parties' control that prevents performance under a contract and may, among other things, excuse nonperformance.¹² Under New York law, force majeure provisions are to be narrowly construed.¹³ Likewise, force majeure provisions are to be interpreted in accordance with their purpose, which, generally, is "to limit damages in a case where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties."¹⁴ Mere impracticality or unanticipated difficulty is not enough to excuse performance.¹⁵

When the parties themselves have defined the contours of force majeure in their agreement, "those contours dictate the application, effect, and scope of force majeure."¹⁶ To that end, "only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused."¹⁷

New York courts have found that an owner is under a good faith obligation to grant extensions of time where the contractor is faced with a force majeure event (as defined in the contract). In *Andron Construction Corp. v. Dormitory Authority of the State of New York*,¹⁸ the contract provided that the Dormitory Authority of the State of New York ("DASNY") was not permitted to impose liquidated damages where the contractor was

"without fault and . . . the delay in completion" was due to: (1) orders of the federal or state government; (2) unforeseeable causes beyond [the contractor's] control, as approved by DASNY; or (3) delays of subcontractors or suppliers occasioned by the foregoing factors.¹⁹

In partially denying DASNY's motion for summary judgment on the contractor's claim that "DASNY acted in a bad-faith and/or an un contemplated manner by refusing to grant, or to consider in good faith, requests for extensions of time"²⁰ for un contemplated delays, the court acknowledged that "a reasonable contractor . . . would be justified in interpreting [the force majeure clause] as a commitment by DASNY to exercise its discretionary power to grant extensions of time in good faith."²¹

As illustrated above and set forth more fully below, the applicable force majeure language will vary. While some contracts may have broad force majeure language, others provide more specific examples of what may constitute an excusable delay. It is therefore imperative that contractors look to their respective contracts and determine whether COVID-19 may constitute an excusable delay, as well as inform the owner of the potential impact to construction pursuant to any applicable notice provisions.

New York Construction Contracts and COVID-19: Additional Examples

The scope of a force majeure and delay clause will vary from contract to contract. By way of example, the most recent update of the AIA standard form contract includes explicit delay provisions. These delay provisions protect the contractor from liability for delay damages resulting from circumstances beyond its control, and provide for a remedy in the form of an extension of time. Specifically, AIA Form A201-2017 Section 8.3, titled "Delays and Extensions of Time," provides:

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, fire, 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).]

A201-2017's "Delays and Extensions of Time" provision does not expressly list epidemics, pandemics, or government shutdowns as excusable delays. As such, Contractors should thus be wary when relying on a catch-all provision, such as that stated in the above AIA contract. Indeed, under New York law, "[w]hen the event that prevents performance is not enumerated [in the force majeure clause], but the clause contains an expansive catchall phrase in addition to specific events . . . the 'words constituting general language of excuse are not to be given the most expansive meaning possible, but are held to apply only to the same general kind or class as those specifically mentioned.'"²² Notwithstanding the foregoing, a creative argument may be made to rely on the catch-all provision to provide for a wider range of unanticipated delays beyond the contractor's control.

In addition, the New York Department of Transportation ("NYDOT") Standard Specifications Volume I Section 108-03²³ provides in relevant part that in assessing liquidated damages and/or engineering charges for delays, NYDOT will "give due consideration to factors attributing to such delay due to extenuating circumstances beyond the control of the Contractor." Section 108-03 limits those circumstances to twelve factors, including, in relevant part:

- **The act**, or failure to act, **of any public or governmental body**, railroad, transportation or utility companies or corporations, including, but not limited to, approvals, permits, restrictions, regulations or ordinances not attributable to a Contractor's submission, action or inaction or Contractor's means and methods of construction.
- Restraining orders, injunctions, or judgments issued by a court not caused by a Contractor's submission, action or inaction or Contractor's means and methods of construction.
- Any industry-wide labor boycotts, strikes, picketing or similar situations, as differentiated from jurisdictional disputes or labor actions affecting a single or small group of contractors or suppliers.
- Any industry-wide shortages of supplies or materials required by the contract work, as differentiated from delays in delivery by a specific or small group of suppliers.
- Significant changes in contract quantities, major extra contract work, delays in the review or issuance of change orders or field change sheets, or delays beyond the established time periods for review and approval for shop drawings, which significantly affect the overall completion of the contract.
- Situations covered by §104-03 Differing Site Conditions, §104-04 Significant Changes in the Character of Work and §104-05 Suspensions of Work Directed by the Engineer.

[(Emphasis added).]

The NYDOT Standard Specifications do not list pandemics or epidemics as excusable force majeure events. However, contractors may argue that the wide-ranging government closures resulting from COVID-19 constitute an act of a public agency or government, preventing timely completion of the project.

Moreover, Article 13 of the New York City Standard Construction Contract²⁴ provides for an extension of time "for delay in completion of the Work caused solely":

13.3.1 By the acts or omissions of the City, its officials, agents or employees; or

13.3.2 By the act or omissions of Other Contractors on this Project; or

13.3.3 By supervening conditions entirely beyond the control of either party hereto (such as, but not limited to, acts of God or the public enemy, excessive inclement weather, war or **other national emergency making performance temporarily impossible or illegal**, or strikes or labor disputes not brought about by any act or omission of the Contractor).

13.3.4 The Contractor shall, however, be entitled to an extension of time for such causes only for the number of Days of delay which the ACCO or the Board may determine to be due solely to such causes, and then only if the Contractor shall have strictly complied with all of the requirements of Articles 9 and 10.

[(Emphasis added).]

Based on the above language, COVID-19 may be considered a “national emergency” that may provide a contractor relief. Therefore, depending on the express language of the construction contract, even where the particular contract does not expressly list epidemics or pandemics as excusable delays, contractors may point to the economic, governmental, and societal impact of COVID-19 to protect themselves.

Another example is Section 9.01 of the General Conditions of Construction²⁵ issued by DASNY, which provides:

The Contractor shall not be charged with liquidated damages or any excess cost if the Owner determines that the Contractor is without fault and that the delay in Substantial Completion of the Work is due:

...

2. To an unforeseeable cause beyond the control and without the fault of, or negligence of the Contractor, and approved by the Owner, including, but not limited to, acts of God or of public enemy, acts of the Owner, fires, **epidemics, quarantine**, restrictions, strikes, freight embargoes and unusually severe weather.

3. To any delays of Subcontractors or suppliers occasioned by any of the causes specified in Subsections 1 and 2 of this paragraph the Contractor shall, within ten (10) days from the beginning of any such delay, notify the Owner in writing of the causes of the delay.

[(Emphasis added).]

Given the specific mention of “epidemics” and “quarantine,” a contractor performing on a DASNY project under these General Conditions may point to these provisions in protecting its rights in connection with delays caused by the COVID-19 pandemic.

Conclusion

With non-essential New York construction projects at a halt, and the uncertainty of the long-term impacts to construction projects and their completion, contractors must pay careful attention to the terms of their contracts (and perhaps upstream contracts that may be incorporated in their contract). Contractors seeking to protect themselves should determine if their contract has a force majeure clause and, further, carefully evaluate whether COVID-19 falls within its ambit. If so, contractors must also adhere to any applicable notice provisions to ensure that they are protected as a result of any COVID-19-related delay.

¹<https://www.governor.ny.gov/news/no-2026-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

²Executive Order 202.6 has most recently been amended by Executive Order 202.14. An electronic depository of all New York Executive Orders may be found at <https://www.governor.ny.gov/executive-orders>.

³<https://esd.ny.gov/guidance-executive-order-2026>.

⁴ We note that, while this article generally focuses on the relationship between owner and general contractor, many of the principles discussed herein are applicable to subcontractors and other downstream entities. It is not uncommon for these downstream entities' agreements to incorporate the terms of upstream contracts, and, as such, even if the downstream contract does not contain force majeure and related provisions, the upstream agreements incorporated therein may contain such clauses.

⁵Additional contractual provisions that a contractor should review to determine its rights resulting from COVID-19 impacts may include those that address the contractor's right to suspend or terminate the work, extra work, claims for extra costs (including any notice of claim provisions), and delay damages. This article does not focus on those provisions. However, a contract's force majeure or delay clause may include terms that encompass those rights.

⁶*Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d 900, 902 (1987), *aff'd*, 70 N.Y.2d 900 (1987).

⁷ *Id.*

⁸This article's discussion of COVID-19 impacts is limited to contracts in existence prior to the COVID-19 pandemic. Contractors entering into new construction contracts during this time should be careful to ensure that the contract properly addresses the constantly-evolving COVID-19 situation, and their rights in the event that the situation worsens, resulting in further impacts.

⁹ <https://www.governor.ny.gov/news/no-20214-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹⁰ <https://www.governor.ny.gov/news/no-2026-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>.

¹¹ <https://esd.ny.gov/guidance-executive-order-2026>.

¹² *Beardslee v. Inflection Energy, LLC*, 25 N.Y.3d 150, 154 (2015).

¹³ *Reade v. Stoneybrook Realty, LLC*, 882 N.Y.S.2d 8, 9 (1st Dep't 2009).

¹⁴ *Constellation Energy Servs. of N.Y., Inc. v. New Water St. Corp.*, 46 N.Y.S.3d 25, 27 (1st Dep't 2017) (quoting *United Equities Co. v. First Natl. City Bank*, 383 N.Y.S.2d 6 (1st Dep't 1976), *aff'd*, 41 N.Y.2d 1032 (1977)); see also *Goldstein v. Orensanz Events LLC*, 44 N.Y.S.3d 437, 438 (1st Dep't 2017) (the purpose of force majeure clauses is "to limit damages . . . where the reasonable expectation of the parties and the performance of the contract have been frustrated by circumstances beyond the control of the parties").

¹⁵ *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199, 210 (N.D.N.Y. 2012).

¹⁶ *Constellation Energy Servs. of N.Y., Inc.*, 46 N.Y.S.3d at 27 (citing *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 931 N.Y.S.2d 436 (3d Dep't 2011)).

¹⁷ *Kel Kim Corp.*, 70 N.Y.2d at 902-03.

¹⁸ 51 Misc.3d 1217(A), at *2 (N.Y. Sup. Ct. Apr. 22, 2016).

¹⁹ *Id.* at *3.

²⁰ *Id.*

²¹ *Id.* at *4.

²² *Team Mktg. USA Corp. v. Power Pact, LLC*, 839 N.Y.S.2d 242, 246 (2007) (quoting *Kel Kim Corp.*, 131 A.D.2d at 950) (holding that the cancellation of a promotion schedule was insufficient to trigger the catchall provision of a force majeure clause in a staffing contract because none of the specifically enumerated events in the force majeure clause at issue, such as strikes, boycotts, war, Acts of God, labor troubles, riots, and restraints on public authority, were similar to the event preventing performance).

²³ Updated through January 1, 2020. https://www.dot.ny.gov/main/business-center/engineering/specifications/busi-e-standards-usc/usc-repository/2020_1_specs_usc_vol1.pdf.

²⁴ https://www1.nyc.gov/assets/doc/downloads/contracting/Updated_Construction_Contract_072201723CPD.pdf.

²⁵ <https://www.dasny.org/sites/default/files/rfp-documents/2019-01/4.%20General%20Conditions%20for%20Construction.pdf>

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