Force Majeure and COVID-19

Presented to:
Members of the General Contractors Association Of Hawaii

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WHAT IS FORCE MAJEURE?

Force majeure is a French term that literally means "greater force." It was originally related to the concept of an act of God, an event for which no party can be held accountable, such as a hurricane or a tornado.

It originated in French civil law and is an accepted standard in many jurisdictions that derive their legal systems from the Napoleonic Code.
WHAT IS FORCE MAJEURE?

In English common law systems such as ours, there is no such doctrine. Here, the term is used to refer to a Force Majeure Clause that is included in contracts to remove liability for events that are outside the control of the contracting parties.

Force majeure clauses are therefore contract provisions that excuse a party’s nonperformance when “acts of God” or other extraordinary events prevent a party from fulfilling its contractual obligations.
WHAT IS FORCE MAJEURE?

Force Majeure Clauses are an accepted part of contracts, but they have to be in the Contract, and you have to abide by the terms of the Contract. You should consider what is in your own contract terms, to see what is covered.

Some common law doctrines – commercial impracticability, frustration of purpose, impossibility – may afford opportunities for relief from contractual obligations. But it is always better to spell it out.

Most Force Majeure clauses list qualifying events. The better clauses will include a catch all phrase that includes “and other such causes outside the control of the contractor”.
Examples of Force Majeure events:

• Earthquakes
• Floods
• Fire
• Epidemic
• Acts of God/Hurricanes/Lightning
• Unusual Weather
• Terrorism
• Sabotage
• Riots or civil disturbances

• War, whether declared or not
• Strikes
• Change of law or regulation
• Nuclear or chemical contamination
• Loss or malfunction of utilities
• Loss of shipments at sea
Impacts from COVID-19

Construction has been declared an “essential service”, but COVID-19 can still impact the work:

• Delay in permitting due to government shutdown or slowdown

• Delay in inspections due lack of inspectors

• Lack of Labor due to workers being quarantined or unavailable including Mainland workers unwilling to travel

• Supply chain bottlenecks of equipment and materials — including structural steel and glass from Asia - 30% of building products in the U.S. are imported from China

• Job Site shut down due to COVID-19 cluster
Hawaii Administrative Rules

§3-125-18 Default, delay, and time extensions for construction contracts

(4) "Time extension. The contractor’s right to proceed shall not be so terminated nor shall the contractor be charged with resulting damage if:

(A) The delay in the completion of the work arises from causes such as: acts of God; acts of the public enemy; **acts of the State and any other governmental entity in either a sovereign or contractual capacity**; acts of another contractor in the performance of a contract with the State; fires; floods; **epidemics**; **quarantine restrictions**; strikes or other labor disputes; freight embargoes; unusually severe weather; delays of subcontractors due to causes similar to those set forth above; or shortage of materials; . . . ; and
(B) The contractor, within ten days from the beginning of the delay (unless the procurement officer grants a further period of time before the date of final payment under the contract), notifies the procurement officer in writing of the causes of delay. The procurement officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in the judgment of the procurement officer, the findings of fact justify such an extension.”
7.21.5 Delays Beyond Contractor’s Control

§3-125-18(4) -For delays affecting the critical path caused by acts of God, or the public enemy, fire, unusually severe weather, earthquakes, floods, epidemics, quarantine restrictions, labor disputes, freight embargoes and other reasons beyond the Contractor’s control, the Contractor may be granted an extension of time provided that:

7.21.5.1 The Contractor notifies the Engineer in writing within five (5) work days after the occurrence of the circumstances described above and states the possible effects on the completion date of the contract.

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7.21.5.3 The Contractor, if requested, submits to the Engineer within ten (10) work days after the request, a written statement describing the delay to the project. The extent of delay must be substantiated as follows:
(a) State specifically the reason or reasons for the delay and fully explain in a detailed chronology the effect of this delay to the work and/or the completion date.

(b) Submit copies of purchase order, delivery tag, and any other pertinent documentation to support the time extension request.

(c) Cite the period of delay and the time extension requested.

(d) A statement either that the above circumstances have been cleared and normal working conditions restored as of a certain day or that the above circumstances will continue to prevent completion of the project.

7.21.5.4 Time extensions shall be the exclusive relief granted and no additional compensation will be paid the Contractor for such delays.
8.5 Contract Time
(b) Modifications of Contract Time.

(3) Delays Beyond Contractor’s Control. For delays caused by acts of God, a public enemy, fire, inclement weather days or adverse conditions resulting therefrom, earthquakes, floods, epidemics, quarantine restrictions, labor disputes impacting the Contractor or the State, freight embargoes, and other reasons beyond the Contractor’s control, the Contractor may be granted an extension of time provided that:

(A) In the written notice of delay to the Engineer, the Contractor describes possible effects on the completion date of the contract. The description of delays shall:
(i) State specifically the reason or reasons for the delay and fully explain in a detailed chronology how the delay affects the critical path.

(ii) Include copies of pertinent documentation to support the time extension request.

(iii) Cite the anticipated period of delay and the time extension requested.

(iv) State either that the above circumstances have been cleared and normal working conditions restored as of a certain day or that the above circumstances will continue to prevent completion of the project.

(B) The Contractor shall notify the Engineer in writing when the delay ends. Time extensions will be the exclusive relief granted and no additional compensation will be paid the Contractor for such delays.
FAR 52.249-14 Excusable Delays

(a) Except for defaults of subcontractors at any tier, the Contractor shall not be in default because of any failure to perform this contract under its terms if the failure arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of these causes are (1) acts of God or of the public enemy, (2) acts of the Government in either its sovereign or contractual capacity, (3) fires, (4) floods, (5) epidemics, (6) quarantine restrictions, (7) strikes, (8) freight embargoes, and (9) unusually severe weather. In each instance, the failure to perform must be beyond the control and without the fault or negligence of the Contractor. Default includes failure to make progress in the work so as to endanger performance.
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) fire; (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.

6.3.2 In addition, if Constructor incurs additional costs as a result of a delay that is caused by items (a) through (d) immediately above, Constructor shall be entitled to an equitable adjustment in the Contract Price subject to §6.6.

6.4 NOTICE OF DELAY CLAIMS If Constructor requests an equitable extension of the Contract Time or an equitable adjustment in the Contract Price as a result of a delay described in §6.3, Constructor shall give Owner written notice of the claim in accordance with §8.4. . . .
8.4 CHANGES NOTICE

Except as provided in §6.3.2 and §6.4 for any claim for an increase in the Contract Price or the Contract Time, Constructor shall give Owner written notice of the claim within fourteen (14) Days after the occurrence giving rise to the claim or within fourteen (14) Days after Constructor first recognizes the condition giving rise to the claim, whichever is later. Except in an emergency, notice shall be given before proceeding with the Work. Thereafter, Constructor shall submit written documentation of its claim, including appropriate supporting documentation, within twenty-one (21) Days after giving notice, unless the Parties mutually agree upon a longer period of time. Owner shall respond in writing denying or approving Constructor's claim no later than fourteen (14) Days after receipt of Constructor's claim. . . .
§ 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, 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.
AIA A201-2017, § 14.1.1 – Allows the Contractor to terminate the Contract if the Work is stopped for 30 consecutive days, for any of four reasons, the relevant ones of which are:

1. Issuance of an order of a court or other public authority having jurisdiction that requires all Work to be stopped;

2. An act of government, such as a declaration of national emergency, that requires all Work to be stopped;

Similar provision exists at Section 11.5 of ConsensusDocs 200, where the conditions are that the Work has been stopped for 30 days for these reasons:

a) Under court order or order of other government authority having jurisdiction

b) As a result of a declaration of a national emergency or other governmental act during which, through no fault of Constructor, materials are not available.
§ 103D-307. Emergency procurements

(a) The head of a purchasing agency may obtain a good, service, or construction essential to meet an emergency by means other than specified in this chapter when the following conditions exist:

(1) A situation of an unusual or compelling urgency creates a threat to life, public health, welfare, or safety by reason of major natural disaster, epidemic, riot, fire, or such other reason as may be determined by the head of that purchasing agency;
Judicial Enforcement of Force Majeure

A contract means what the Courts say it means

• Courts look to several elements when considering the applicability of a force majeure clause:

• (1) whether the event qualifies as force majeure under the contract,

• (2) whether the risk of nonperformance was foreseeable and able to be mitigated and

• (3) whether performance is truly impossible
Judicial Enforcement

• Force majeure clauses are generally interpreted narrowly; therefore, for an event to qualify as force majeure it must be outlined in the clause at issue.

• Even when a potential force majeure event is encompassed by the relevant clause, however, a party is under an obligation to mitigate any foreseeable risk of nonperformance, and cannot invoke force majeure where the potential nonperformance was foreseeable and could have been prevented or otherwise mitigated.
Judicial Enforcement

• Depending on the relevant contractual language and governing law, a party generally will be required to establish that performance is **truly impossible** or **extremely onerous** rather than merely impracticable.

• In many force majeure cases, nonperformance will not be excused if it is merely financially or economically more difficult to satisfy contractual obligations.

• Again, contractors should look closely at the language of their force majeure clauses.
Hawaii Federal Court Construes Force Majeure Narrowly

There are no Hawaii State Court cases interpreting Force Majeure provisions


Lawsuit by Outrigger Wailea Resort against Clear Channel Communications and SFX Multimedia Group over an agreement to have Outrigger Wailea Resort host the Power Jam 2002, a music industry event/conference in February 2002
Hawaii Federal Court Construes Force Majeure Narrowly

Clause:

The parties' performance under this Agreement is subject to acts of God, war, government regulation, terrorism, disaster, strikes (except those involving the Hotel's employees or agents), civil disorder, curtailment of transportation facilities, or any other emergency beyond the parties' control, making it inadvisable, illegal, or impossible to perform their obligations under this Agreement. Either party may cancel this Agreement for any one or more of such reasons upon written notice to the other.
The clause was invoked on January 16, 2002:

The events of September 11th coupled with the fragile condition of the U.S. and international consumer economies resulted in the withdrawal of commitments to this event from many sponsors and participants.

SFX claimed that the September 11, 2001 terrorist acts "severely disrupted travel, decimated the tourism industry, and created a pervasive sense of fear that gripped the country." As a result, performance under the Agreement was "inadvisable" as referenced in the Force Majeure clause.
Outrigger claimed that the events of September 11, 2001, did not make it "inadvisable" to travel to or to hold events in Hawaii five months after the terrorist attacks, and that the actual reason that SFX cancelled the event was the economic downturn, which was too attenuated from the events of September 11 to excuse performance under the Agreement.

In interpreting “inadvisable” the Court looked at the legal dictionary definition of force majeure clause as a "contractual provision allocating the risk if performance becomes impossible or impracticable as a result of an event or effect that the parties could not have anticipated or controlled." Black's Law Dictionary 657 (7th ed. 1999).
The Court It said that the party who relies on a force majeure clause to excuse performance bears the burden of proving that the event was beyond the party's control and without its fault or negligence

“Impossible” speaks for itself.

Impracticable is when its performance becomes excessively and unreasonably difficult or expensive
The Court held that nonperformance dictated by economic hardship is not enough to fall within a force majeure provision.

They gave as examples cases where unseasonably hot temperatures resulting in record demand for power and unprecedented high hourly prices for electric power did not equate to force majeure; and where contract performance involved greater expense than anticipated, due to a steel strike.

In both cases, force majeure defenses were rejected because mere increase in expense does not excuse performance unless there exists extreme and unreasonable difficulty, expense, or injury.
COVID-19’s classification as a “pandemic” will trigger a force majeure clause that expressly accounts for epidemics.

Governmental restrictions on travel and movement may also be used to invoke force majeure provisions to if the clauses at issue enumerate governmental orders or regulations that make performance impossible.

Declaration of pandemic standing alone—without a reference to pandemics in a force majeure clause—will not automatically constitute a force majeure given the courts’ focus on whether the event is specified within the contractual language.
Clauses that are silent on pandemics, epidemics, or other viral outbreaks may be insufficient for a force majeure defense due to COVID-19, unless courts liberalize the force majeure analysis to account for market realities.

If a force majeure clause clearly covers COVID-19 as a qualifying event, parties seeking to invoke the provision will not need to establish the event was unforeseeable, but will still need to show: (1) that they took steps to mitigate the damage, and (2) that performance is truly impossible (or meets any other standard the clause requires).
Contractors planning to invoke the clause should consider:

Are labor or materials unavailable, or merely more expensive?

Can you demonstrate that you made a good faith effort to cover by looking for other supplies or sources of labor? Did you make efforts to secure alternate supply streams in the event a supplier’s operations are impacted?

Is the site completely shut down? For how long?

You also need to consider the language in your contracts, and whether you should bargain for escalator clauses to increase the contract amount due to circumstances beyond your control.
• The common law doctrines of impossibility or impracticability may apply:

✓ (1) an unexpected intervening event occurred;
✓ (2) the parties’ agreement assumed such an event would not occur; and
✓ (3) the unexpected event made contractual performance impossible or impracticable.

• A party’s nonperformance will not be excused if the event was expected or was a foreseeable risk at the time of the contract’s execution.
No Clause: Impossibility or Impracticality

• Even if the event was unforeseeable, courts still assess whether the “nonoccurrence” of the event at issue was a “basic assumption . . . on which the contract was made.” It is assumed that the subject of the contract will not be destroyed. It is not a “basic assumption” that existing market conditions will not change. Market shifts do not constitute unforeseen events the nonoccurrence of which was a “basic assumption” of the contract.

• A party assumes the risk of its own subjective incapacity to perform its contractual duties unless the contract envisions otherwise. As a result, courts apply an objective assessment of whether the performance sought to be excused is impossible or impractical—whether the performance is beyond a party’s subjectively-viewed capacity is irrelevant to this analysis.
The doctrine of “frustration of purpose” is similar to impracticability and impossibility, but focuses on whether an event at issue has obviated the purpose of the contract, rather than whether it has made a party’s contractual performance unviable. It applies if the central purpose of the contract has been frustrated by an event that the parties could not have reasonably anticipated at the time they entered into the contract:

- An event substantially frustrates a party’s principal purpose;
- The nonoccurrence of the event was a basic assumption of the contract; and
- The event was not the fault of the party asserting the defense.
The burden is to prove that the unforeseeable event has significantly altered the circumstances of an agreement such that performance would no longer fulfill any aspect of its original purpose. There are two primary obstacles to successfully invoking this defense.

- First, courts interpret a party’s “purpose” broadly, and the mere fact that an event has prevented a party from taking advantage of the agreement in an expected manner may be insufficient.

- Second, frustration must be near total—it is not enough that a transaction was previously expected to be profitable, but is now unprofitable.
When the contract was signed may play a crucial role in determining whether a potential or actual coronavirus pandemic constitutes a frustration of purpose or created an impracticable contract.

• Contracts before December of 2019 may be easier to avoid because they had no reason to anticipate the pandemic occurring just two-to-three months later.

• Contracts signed after the likelihood of a pandemic became apparent will be harder to challenge.

At what point did a pandemic become reasonably foreseeable? That question may become the subject of significant debate and case law in the near future.
If you have any questions or would like any further information, do not hesitate to contact me.

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