When disaster strikes:

How do AIA Contract Documents Address COVID 19 Issues?

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1.5 AIA HSW
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Force Majeure – what, and where, is it?

What is it?

Force Majeure is a French term, literally translating to “a superior force.”

It is, at its core, a risk allocation principle.

A clause doesn’t have to be titled “Force Majeure” to do the same thing as a “force majeure” clause.

In fact, there is case law from various jurisdictions that interprets force majeure clauses very narrowly, which can mean that unless a specific event or trigger is listed in the force majeure clause, it cannot be relied upon as a trigger for a delay claim.
Force Majeure – what, and where, is it?

What is it?

“...contractual force majeure clauses—or clauses excusing nonperformance due to circumstances beyond the control of the parties—under the common law provide a similarly narrow defense. Ordinarily, only if the force majeure clause specifically includes the event that actually prevents a party’s performance will that party be excused.” Kel Kim Corp. v. Cent. Markets, Inc., 70 N.Y.2d 900, 902–03, 519 N.E.2d 295, 296 (1987) (additional citations omitted).

Therefore, it can be in all parties’ interest to leave force majeure clauses broad, so any event – if it is substantial enough to cause delay – can trigger force majeure rights.
Force Majeure – what, and where, is it?

Where is it?

For most standard AIA contracts, you won’t find the term “force majeure” – but the concept is present in every agreement.

The AIA’s agreements do not provide an extensive laundry list of potential events that could trigger force majeure rights. Rather, as you’ll see, the concept is left to be broadly utilized in situations where the project is delayed for reasons outside the control of the parties.
Webinar overview

This webinar is intended to demonstrate how the AIA’s various agreements allocate these types of risks – even though those agreements may not use the term “force majeure.”

We’ll discuss:

- Owner/Contractor agreements;
- Contractor/Subcontractor agreements;
- Owner/Architect agreements; and
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Contractor delays
§ 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.

§ 8.3.2 Claims relating to time shall be made in accordance with applicable provisions of Article 15.

§ 8.3.3 This Section 8.3 does not preclude recovery of damages for delay by either party under other provisions of the Contract Documents.
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§ 15.1.6 Claims for Additional Time

§ 15.1.6.1 If the Contractor wishes to make a Claim for an increase in the Contract Time, notice as provided in Section 15.1.3 shall be given. The Contractor’s Claim shall include an estimate of cost and of probable effect of delay on progress of the Work. In the case of a continuing delay, only one Claim is necessary.
§ 15.1.3 Notice of Claims

§ 15.1.3.1 Claims by either the Owner or Contractor, where the condition giving rise to the Claim is first discovered prior to expiration of the period for correction of the Work set forth in Section 12.2.2, shall be initiated by notice to the other party and to the Initial Decision Maker with a copy sent to the Architect, if the Architect is not serving as the Initial Decision Maker. Claims by either party under this Section 15.1.3.1 shall be initiated within 21 days after occurrence of the event giving rise to such Claim or within 21 days after the claimant first recognizes the condition giving rise to the Claim, whichever is later.

§ 1.6.2 Notice of Claims as provided in Section 15.1.3 shall be provided in writing and shall be deemed to have been duly served only if delivered to the designated representative of the party to whom the notice is addressed by certified or registered mail, or by courier providing proof of delivery.
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Owner’s suspension or termination for convenience
Owner’s suspension for convenience

§ 14.3 Suspension by the Owner for Convenien
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§ 14.3.1 The Owner may, without cause, order the Contractor in writing to suspend, delay or interrupt the Work, in whole or in part for such period of time as the Owner may determine.

§ 14.3.2 The Contract Sum and Contract Time shall be adjusted for increases in the cost and time caused by suspension, delay, or interruption under Section 14.3.1. Adjustment of the Contract Sum shall include profit. No adjustment shall be made to the extent

.1 that performance is, was, or would have been, so suspended, delayed, or interrupted, by another cause for which the Contractor is responsible; or

.2 that an equitable adjustment is made or denied under another provision of the Contract.
Owner’s termination for convenience

§ 14.4 Termination by the Owner for Convenience

§ 14.4.1 The Owner may, at any time, terminate the Contract for the Owner’s convenience and without cause.

§ 14.4.2 Upon receipt of notice from the Owner of such termination for the Owner’s convenience, the Contractor shall

.1 cease operations as directed by the Owner in the notice;

.2 take actions necessary, or that the Owner may direct, for the protection and preservation of the Work; and

.3 except for Work directed to be performed prior to the effective date of termination stated in the notice, terminate all existing subcontracts and purchase orders and enter into no further subcontracts and purchase orders.
Owner’s termination for convenience

§ 14.4 Termination by the Owner for Convenience

§ 14.4.3 In case of such termination for the Owner’s convenience, the Owner shall pay the Contractor for Work properly executed; costs incurred by reason of the termination, including costs attributable to termination of Subcontracts; and the termination fee, if any, set forth in the Agreement.
§ 7.1.1 If the Contract is terminated for the Owner’s convenience in accordance with Article 14 of AIA Document A201–2017, then the Owner shall pay the Contractor a **termination fee** as follows:

(Insert the amount of, or method for determining, the fee, if any, payable to the Contractor following a termination for the Owner’s convenience.)
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Contractor’s termination rights
§ 14.1 Termination by the Contractor

§ 14.1.1 The Contractor may terminate the Contract if the Work is stopped for a period of 30 consecutive days through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, for any of the following reasons:

.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;
§ 14.1.2 The Contractor may terminate the Contract if, through no act or fault of the Contractor, a Subcontractor, a Sub-subcontractor, their agents or employees, or any other persons or entities performing portions of the Work, repeated suspensions, delays, or interruptions of the entire Work by the Owner as described in Section 14.3, constitute in the aggregate more than 100 percent of the total number of days scheduled for completion, or 120 days in any 365-day period, whichever is less.

§ 14.1.3 If one of the reasons described in Section 14.1.1 or 14.1.2 exists, the Contractor may, upon seven days’ notice to the Owner and Architect, terminate the Contract and recover from the Owner payment for Work executed, as well as reasonable overhead and profit on Work not executed, and costs incurred by reason of such termination.
ARTICLE 2 - MUTUAL RIGHTS AND RESPONSIBILITIES
The Contractor and Subcontractor shall be mutually bound by the terms of this Agreement and, to the extent that the provisions of AIA Document A201–2017 apply to this Agreement pursuant to Section 1.3 and provisions of the Prime Contract apply to the Work of the Subcontractor, the Contractor shall assume toward the Subcontractor all obligations and responsibilities that the Owner, under such documents, assumes toward the Contractor, and the Subcontractor shall assume toward the Contractor all obligations and responsibilities that the Contractor, under such documents, assumes toward the Owner and the Architect. The Contractor shall have the benefit of all rights, remedies, and redress against the Subcontractor that the Owner, under such documents, has against the Contractor, and the Subcontractor shall have the benefit of all rights, remedies, and redress against the Contractor that the Contractor, under such documents, has against the Owner, insofar as applicable to this Subcontract. Where a provision of such documents is inconsistent with a provision of this Agreement, this Agreement shall govern.
Dispute resolution
Claims and disputes

Notice of claims (see slide 17)
Continuing contract performance
Initial decision
Mediation
Binding dispute resolution
Section 15.1.4

Pending final resolution of claims... the Contractor shall proceed diligently with performance of the Contract and the Owner shall continue to make payments in accordance with the Contract Documents.

The Contract Sum and Contract Time shall be adjusted in accordance with the Initial Decision Maker’s decision, subject to the right of either party to proceed in accordance with this Article 15. The Architect will issue Certificates for Payment in accordance with the decision of the Initial Decision Maker.
Role of the IDM

Section 15.2.1

Unless Owner and Contractor agree otherwise, the Architect serves as IDM.

An initial decision by IDM is a condition precedent to mediation of disputes between Owner and Contractor.

1. The Owner or Contractor have a disagreement arising from or relating to the project.
2. Owner or Contractor file a claim with the IDM.
3. The IDM evaluates the facts of the claim and approves, rejects, or states inability to resolve the claim.
4. The IDM’s decision is binding but is subject to mediation and dispute resolution.
Role of the IDM

Architects can refer to the AIA’s recently published article on aia.org:

How to manage risk when acting as Initial Decision Maker

As a design professional, you’ve likely seen the term Initial Decision Maker (IDM) in one of the AIA Contract Documents. Perhaps you’ve even been involved in a project on which the architect was asked to render decisions as the IDM. The purpose of this article is to help you understand the role of the IDM, and how to manage risk when serving as the IDM.
Section 15.3

Either party may, within 30 days from the date of receipt of an initial decision, demand in writing that the other party file for mediation. If such a demand is made and the party receiving the demand fails to file for mediation within 30 days after receipt thereof, then both parties waive their rights to mediate or pursue binding dispute resolution proceedings with respect to the initial decision.
Alternative dispute resolution (ADR)

IDM’s decision may go to mediation as a condition precedent to binding dispute resolution.

Binding dispute resolution may include arbitration, litigation, or another form of binding dispute resolution as selected by the parties.

Both parties share the costs of mediation and arbitration equally.
§ 15.1.7 Waiver of Claims for Consequential Damages

The Contractor and Owner waive Claims against each other for consequential damages arising out of or relating to this Contract. This mutual waiver includes

.1 damages incurred by the Owner for rental expenses, for losses of use, income, profit, financing, business and reputation, and for loss of management or employee productivity or of the services of such persons; and

.2 damages incurred by the Contractor for principal office expenses including the compensation of personnel stationed there, for losses of financing, business and reputation, and for loss of profit, except anticipated profit arising directly from the Work.

This mutual waiver is applicable, without limitation, to all consequential damages due to either party’s termination in accordance with Article 14. Nothing contained in this Section 15.1.7 shall be deemed to preclude assessment of liquidated damages, when applicable, in accordance with the requirements of the Contract Documents.
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Architect issues
§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.
Schedule for performance of Architect’s services

§ 3.1.3 As soon as practicable after the date of this Agreement, the Architect shall submit for the Owner’s approval a schedule for the performance of the Architect’s services. The schedule initially shall include anticipated dates for the commencement of construction and for Substantial Completion of the Work as set forth in the Initial Information. The schedule shall include allowances for periods of time required for the Owner’s review, for the performance of the Owner’s consultants, and for approval of submissions by authorities having jurisdiction over the Project. Once approved by the Owner, time limits established by the schedule shall not, except for reasonable cause, be exceeded by the Architect or Owner. With the Owner’s approval, the Architect shall adjust the schedule, if necessary, as the Project proceeds until the commencement of construction.
Evaluations of work

§ 3.6.2 Evaluations of the Work

§ 3.6.2.1 The Architect shall visit the site at intervals appropriate to the stage of construction, or as otherwise required in Section 4.2.3, to become generally familiar with the progress and quality of the portion of the Work completed, and to determine, in general, if the Work observed is being performed in a manner indicating that the Work, when fully completed, will be in accordance with the Contract Documents. However, the Architect shall not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. On the basis of the site visits, the Architect shall keep the Owner reasonably informed about the progress and quality of the portion of the Work completed, and promptly report to the Owner (1) known deviations from the Contract Documents, (2) known deviations from the most recent construction schedule submitted by the Contractor, and (3) defects and deficiencies observed in the Work.
Evaluations of work

So, what can you do?

Communicate with the owner and contractor about the situation and problems presented.

Agree to a solution that works for your project – limited site visits, less personnel on each site visit, conduct site visits at non-working hours, conduct virtual site visits, etc.

Commit it to writing in a contract amendment, whatever solution you agree to.
Additional services

§ 4.2.1 Upon recognizing the need to perform the following Additional Services, the Architect shall notify the Owner with reasonable promptness and explain the facts and circumstances giving rise to the need. The Architect shall not proceed to provide the following Additional Services until the Architect receives the Owner’s written authorization:

.1 Services necessitated by a change in the Initial Information, previous instructions or approvals given by the Owner, or a material change in the Project including size, quality, complexity, the Owner’s schedule or budget for Cost of the Work, or procurement or delivery method;

.2 Services necessitated by the enactment or revision of codes, laws, or regulations, including changing or editing previously prepared Instruments of Service;
Owner suspension

§ 9.2 If the Owner suspends the Project, the Architect shall be compensated for services performed prior to notice of such suspension. When the Project is resumed, the Architect shall be compensated for expenses incurred in the interruption and resumption of the Architect’s services. The Architect’s fees for the remaining services and the time schedules shall be equitably adjusted.

§ 9.3 If the Owner suspends the Project for more than 90 cumulative days for reasons other than the fault of the Architect, the Architect may terminate this Agreement by giving not less than seven days’ written notice.
Owner termination for convenience

§ 9.5 The Owner may terminate this Agreement upon not less than seven days’ written notice to the Architect for the Owner’s convenience and without cause.

§ 9.6 If the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall compensate the Architect for services performed prior to termination, Reimbursable Expenses incurred, and costs attributable to termination, including the costs attributable to the Architect’s termination of consultant agreements.
Owner termination for convenience

§ 9.7 In addition to any amounts paid under Section 9.6, if the Owner terminates this Agreement for its convenience pursuant to Section 9.5, or the Architect terminates this Agreement pursuant to Section 9.3, the Owner shall pay to the Architect the following fees:

(Set forth below the amount of any termination or licensing fee, or the method for determining any termination or licensing fee.)

.1 Termination Fee:

.2 Licensing Fee if the Owner intends to continue using the Architect’s Instruments of Service:
§ 1.3 To the extent that the provisions of the Prime Agreement apply to This Portion of the Project, the Architect shall assume toward the Consultant all obligations and responsibilities that the Owner assumes toward the Architect, and the Consultant shall assume toward the Architect all obligations and responsibilities that the Architect assumes toward the Owner. Insofar as applicable to this Agreement, the Architect shall have the benefit of all rights, remedies and redress against the Consultant that the Owner, under the Prime Agreement, has against the Architect, and the Consultant shall have the benefit of all rights, remedies and redress against the Architect that the Architect, under the Prime Agreement, has against the Owner. Where a provision of the Prime Agreement is inconsistent with a provision of this Agreement, this Agreement shall govern.
Contract modifications
Insurance issues to consider

“Force Majeure” means something slightly different in the insurance context.

**In the property policy context**, no “property damage” for policy to respond to.

   Reasoning likely extends even to Business Interruption Insurance. Because it is a type of property policy, it usually requires damage to property.

Everything depends on policy wording.

Check with insurance counsel.
Questions?
Communication is key

The COVID-19 Pandemic will likely continue to impact the global construction industry in unpredictable ways.

The best thing all project participants can do is communicate to work toward efficient and equitable solutions; after all, your contract, and your project’s success, will both require it.
Contact and resources

Learn web page:

aiacontracts.org/learn

Questions about document content:

Email: docinfo@aiacontracts.org
Tel.: (202) 626-7526

Questions about the online service:

Email: techsupport@aiacontracts.org
Tel.: (800) 942-7732
Thank you!