

For more information
and to schedule an
interview, please contact:
Leo Levinson - 215-545-4600
leo@grouplevinson.com

FOR IMMEDIATE RELEASE:

FORCE MAJEURE: WHAT HAS THE CONSTRUCTION INDUSTRY LEARNED FROM THE PANDEMIC?

7 Issues That Need To Be Addressed In The Future

(Philadelphia, PA) Until Covid-19, the force majeure clause in construction contracts was largely perfunctory. The clause was designed to relieve the parties of some or all contractual obligations due to an unanticipated disruptive event that is out of the control of the parties, such as a war or natural disaster. Composed mostly of “boilerplate” wording, until recently, the clause attracted minimal scrutiny and virtually no negotiation.

Today, as we emerge post-pandemic, nearly everyone in construction has experienced disruption in the form of unanticipated delays or shutdowns of projects over the last 2-3 years. As a result, many have considered triggering force majeure to provide relief from losses caused by those delays or shutdowns by attempting to link them to the illness, because it was unforeseeable and beyond the control of either party. Many of those attempts failed because the boilerplate wording neglected to adequately define the force majeure, link it to the damages and specify what needs to happen once that force majeure is encountered.

Said James Gallagher, principal at Resolution Management Consultants, “It may come as a surprise to many who felt comfortably protected by their force majeure clause, however, just because a contract has a force majeure clause doesn’t necessarily mean that one can recover damages from the

unexpected. If Covid-19 itself didn't specifically cause your disruption, it is unlikely that you will be permitted relief from the contract and/or recover any damages. To succeed in an action, one must demonstrate that the contractual obligation can't in fact be performed and that the experience isn't just an inconvenience."

Gallagher believes that the pandemic has provided a teachable moment for the construction industry regarding the wording of force majeure clauses. Future contracts must make the clause more relevant to the disruption, adding in more effective wording for definitions, damages and timelines. He suggests 7 points for consideration:

- 1) What connotes a force majeure? Future contracts will need to broaden the definition of force majeure to include the recent unanticipated calamities, such as "epidemic" and "pandemic", as well as "government action" and "national emergency".
- 2) At the same time, one must be careful not to define force majeure too tightly or the courts might take your list to be all-inclusive and reject anything not specifically stated.
- 3) The wording should also take into account potential indirect causes for a delay or shutdown. For example, if a federal inspector is not permitted to visit a federal project, due to state health regulations, that may cause a delay or shutdown since without the inspector the job cannot continue to the next steps.
- 4) Define the potential damages more effectively. Until now, remedies in force majeure cases tended to focus on providing extra time to complete the

contract. If a delay or shutdown causes monetary losses, price increases, personnel issues or other damages, extra time may not be enough to remedy the damages.

5) Specify a window of time to provide notice of force majeure so that you preserve your rights under the contract. Most current force majeure clauses offer no timetable or allow too little time for determining a loss, notifying other parties and making a claim.

6) Take a global view. Since many materials come from around the world broaden your definition to include unexpected activities happening in other countries that affect your project by affecting other countries where raw materials, manufacturing, delivery and other goods and services originate.

7) Remember insurance. Make sure your insurance coverage is compatible with your force majeure definition.

Said Gallagher, "It's not as though these issues were not there prior to the pandemic. However, experiences over the last 2-3 years have put a spotlight on disruption and the weaknesses in many force majeure clauses that had rarely needed to be considered."

About Resolution Management Consultants, Inc.

Resolution Management Consultants, Inc. (RMC) is a nationally recognized consulting firm headquartered in Marlton, NJ. There are two sides to the business: the construction planning and management aspect – helping clients build more successful projects – and the litigation aspect – should matters go to court, providing analysis and testimony as expert witnesses. Founded in 1993 by veterans in the construction, contracting and engineering professions, RMC has assisted numerous private owners, public

agencies and contractors in either achieving project goals or resolving cost and time disputes between the contracting parties.

Website: resmgt.com

LinkedIn: [/company/ResolutionMgt](https://www.linkedin.com/company/ResolutionMgt)

Twitter: [@ResolutionMgt](https://twitter.com/ResolutionMgt)

Facebook: [@ResolutionMgt](https://www.facebook.com/ResolutionMgt)

#