

Force majeure claims in future waves of COVID-19: four key actions

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As countries emerge from lockdown, talk turns to the return of COVID-19. Here's how to succeed in future force majeure claims and stop your projects becoming what sounds like a second-rate horror movie:

Decide COVID-19's status as a force majeure event

Is a subsequent COVID-19 wave a new event or a continuation of the first?

The World Health Organization still says COVID-19 is a pandemic. This might mean it's a single continuing event. However, the project may be getting back to normal when it feels the impact. Read your contract and consider how the right to relief is defined. For example, the 2010 Fédération Internationale Des Ingénieurs – Conseils (FIDIC) Pink Book (but not the 1999 and 2017 Red, Yellow, and Silver Books, or the 2008 Gold Book) refers to performance of substantial obligations being prevented. This suggests a subsequent wave is likely to be a fresh event. Best practice is to send a new notice when you're aware of the further impact of a subsequent wave.

Identify the event actually affecting performance

Is a subsequent wave not the event disrupting performance at all?

If the pandemic is the cause, then its impact depends where the project, labor force, and supply chains are located. During the first wave, strategies differed across jurisdictions and there remains little consensus on the best approach. Some sites were allowed to continue to operate; others were closed and workers quarantined. Responses to subsequent waves are unlikely to be more coherent.

Alternatively, is the new event that is actually causing delay not the virus itself but the reintroduction of government restrictions (perhaps after a local outbreak in a workers' dormitory) which require physical distancing and self-isolation, workplace closures, or the suspension of transport links which usually provide free passage for people and materials?

Being clear which of these two broad categories of causal event you're relying on means you can establish:

- The performance of which contractual obligations are affected by the event and the extent they are being prevented, hindered, or delayed. Many contracts demand this level of substantiation. A byproduct is a more tailored set of detailed records, which you must maintain to prove causation.
- When the event starts and stops affecting performance. Note that the end of one event as restrictions are lifted may herald the beginning of another notifiable event (such as the imposition of safe working rules when activity resumes). In your notice of an event ending, reserve your rights should it reoccur following subsequent waves (for example, the reinstatement of previously-issued stringent measures).
- Whether you have a claim at all — the contract wording is critical here: remember that the event may have made the project slow down and cost more, but not necessarily impossible; some contracts and jurisdictions require that the event be the sole cause of delayed performance to allow relief.

Work together to introduce precautions now

Although COVID-19 and related causes should meet stipulations in signed contracts that the event was unforeseeable, claims in subsequent waves will have a better chance of success where project participants can show they have learned lessons from previous waves. Underprepared employers and contractors may be seen not to have reasonably mitigated the impact of measures likely to be re-imposed in the near future in light of the disease's ongoing presence. Many are encountering cross-border supply chain difficulties. Those higher up the chain may have little sympathy with contractors who have run into problems as a result of "just in time" arrangements.

Review working practices, which may involve thinking about dividing teams, providing personal protective equipment, and introducing hygiene products and sanitation facilities, temperature checking, control of access, and safe eating and sleeping accommodation. This exercise is fact sensitive and depends on the contract.

The gap between previous and subsequent waves is also significant. Employers can't expect contractors to have done as much to avoid the effects of a second wave if it occurs weeks rather than months after the first. For example, masks may currently be hard to secure at short notice for certain site locations.

Project participants must communicate openly now and raise issues early as they decide what precautions are needed. Can you keep projects on track by performing contractual obligations unaffected by the event? Engage with supply chains to understand their contingency planning. This requires many organizations to bolster crisis management procedures and teams perhaps on a scale never seen before so that all options and alternative claims (maybe for disruption or changes in law) can be considered properly.

Whether there is positive collaboration or not, every party must comprehensively document how they carefully contemplated each option (such as alternative supplies and work forces) and why one was implemented over others. For example, local materials could be ruled out if they don't comply with the contractually specified quality.

Realize solutions won't be straightforward

Timely and accurate notices, honest communication, and extensive records will improve your position, but parties will differ in how they view subsequent waves. Take whatever action you can now, but remember claims will play out against the backdrop of broader, unresolved factors like

the pandemic's course, the status of regulations and guidance, and policy decisions about the burden the private sector should bear.

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