



THE BUSINESS RESPONSE TO COVID-19

Force Majeure and Supply Chain Issues in the Era of COVID-19 and Tariffs

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Current Status Of Construction Nationwide

- Time of uncertainty
 - COVID-19 impact wide ranging
- How does COVID-19 impact construction?
 - Supply chain, labor, government shut-downs
- What is essential under various government orders?
 - State and local specific
 - New York, California, Pennsylvania, Ohio, etc.
 - Boston, San Francisco, Disney
 - Read your state or local order
 - Amendments

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Be Proactive

- Government Orders changing rapidly
- Do you have a plan if your jobs are shut down tomorrow?
 - How will site be secure?
 - Where will materials be stored?
 - How will you document the work in place?
 - Who will contact subs?
 - What insurance is relevant?



Force Majeure

- A contractual clause that operates to relieve one or more parties of a contractual obligation in the event an **unforeseeable** event beyond the **control** of the party delays or prevents performance under the contract.
- A/K/A "Acts of God"
 - Fire, riots, war, adverse weather, terrorism, etc.



What Is Control?

What is “control”?

- (1) party may not cause a force majeure event; and
- (2) a party may not rely on an event excusing performance if the party could have taken reasonable measures to prevent the event.

Think of concepts of legal control, actual physical control, fault, negligence, avoidance, and mitigation.



Courts Will Enforce Force Majeure As Written

- RTC (Read the Contract)
 - FM is a creature of contract and courts will generally defer to the wishes of the contracting parties
 - Courts will narrowly construe but parties can negotiate a broad clause
 - Actual words of the clause matter
 - What type of events are covered? How does it apply? What is the result?
 - Look to upstream contracts



Additional Force Majeure Considerations

- Economic hardship is not FM; more money doesn't necessary equate to force majeure
 - Need to take steps to mitigate your damages
- Viewed from an objective perspective
 - Would everyone in this possession be delayed?
 - Or are you the only one impacted?
- Connect delay to the claimed event



AIA A201-2017: General Conditions of the Contract

- §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
 - (3) by labor disputes, fire, *unusual delay in delivery, unavoidable casualties*, adverse weather conditions...or *other causes beyond the Contractor's control*;
 - (5) or by other causes that Contractor asserts, and the *Architect* determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.
- Excusable delays but not compensable; time but not money
- Don't forget NOTICE



AIA A201-2017: General Conditions of the Contract: "Unusual delay in deliveries"

- Industry wide shortage or one supplier shortage?
 - Increase in cost does not necessarily trigger force majeure
- Anticipate supply chain issues
 - Where are the materials from?
 - Can they be substituted?
 - Has the price been locked in?



AIA A201-2017: General Conditions of the Contract: "Other causes beyond Contractor's *control*"

- AIA fewer specific events so provides catchall
- Building permits
 - Inspections
- Pandemics
- Connect facts of project with specific provision



ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor

- § 6.3 Delays and Extensions of Time
 - 6.3.1 If Constructor is delayed at any time in the commencement of progress of the Work by any cause beyond the **control** of the Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond control of the Constructor include, but are not limited to, the following
 - (e) transportation delays not reasonably foreseeable;
 - (j) epidemics;
 - (k) adverse governmental actions;
 - (l) unavoidable accidents or circumstances.



ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor

- Notice
- Excusable delay but not compensable (unless caused by owner); time but not money



OFCC General Conditions

- **§ 8.6 Delay and Delay Damage Limitations; Derivative Claims**
 - **8.6.1** Subject to other provisions of the Contract, the CM will be entitled only to an extension of the Contract Times on account of delay in the commencement or progress of Work on the critical path of the Construction Progress Schedule caused by acts of Nature or the public enemy, acts of the government not arising from the CM's failure to comply with Applicable Law, fires, floods, epidemics, weather, and labor disputes beyond the CM's *control*.
 - Remember notice; time but not money



Claiming Force Majeure

- Whose burden to prove?
 - Party seeking to rely on clause must take the initial step in demonstrating how the specific event falls under the categories. It is an affirmative defense.
 - It must also connect the event to an actual delay to the work.
 - In the event of the Boston construction shut down, the cause of delay is pretty clear.
 - Existence of the coronavirus?
 - Likely not sufficient without an accompanying explanation of how it delayed the project.



Claiming Force Majeure

- Best practices require documentation of the impact. For example, if the coronavirus ravage a subcontractor's labor force or results in unanticipated obstacles for specified material, it must be documented. Be proactive and do not wait until the project nears completion to notify the owner of the impacts.



What should you do if impacted by Force Majeure?

- RTC
 - Is it an unforeseeable event beyond the contractor's control?
 - Comply with notice and claim provisions
 - Likely result is excusable but not compensable (more time to complete work but not more money)
- Are there other applicable contract provisions and what if your contract doesn't contain a Force Majeure?



All Is Not Lost— Opportunities to Recover Costs

- Suspensions
- Terminations
- Other Remedies



All Is Not Lost— Opportunities to Recover Costs

- Suspensions
 - By Owner
 - By Government
 - By Contractor / Subcontractor
- Terminations
 - By Owner
 - By Contractor / Subcontractor
- Other Remedies
 - Evidence of Owner's Financial Arrangements
 - Use of Contingency
 - Breach of Owner's Duty to Make Site Available
 - No Damages for Delay



Suspensions—By Owner

- Ideal!
- Extends time
- Usually allows recovery of cost

§ 14.3 Suspension by the Owner for Convenience

§ 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.



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- .2 that an equitable adjustment is made or denied under another provision of the Contract.



Suspensions—By Government

- Not ideal...
- Might fit into traditional force majeure provision (more time, no more money)
- Discuss with owner:
 - Scope of suspension
 - Agreement on effect of order?
 - Agree on compensation in exchange for remaining ready or performing non-field work?
- May provide opportunity for contractor to terminate (discussed later).



Suspensions—By Contractor / Subcontractor

- Not usually permitted.
- But... COVID-19 not like colds & flu; OSHA implicated

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§ 10.4 Emergencies

In an emergency affecting safety of persons or property, the Contractor shall act, at the Contractor's discretion, to prevent threatened damage, injury, or loss. Additional compensation or extension of time claimed by the Contractor on account of an emergency shall be determined as provided in Article 15 and Article 7.

- What about Subcontractors?

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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.

- Issue: does COVID-19 still qualify as an “emergency”?



Suspensions—In All Cases

- Confirm suspension in writing.
- Communicate understanding with higher-tier party.
- Reach agreement on time and cost, even if contract does not provide relief.
- Protect the Work.
- Secure the jobsite.
- Communicate to lower-tier parties.
- Suspend subcontracts and orders.
- Document everything.



Terminations—By Owner

- Unlikely once construction has started.
- Two grounds:
 - For Fault of Contractor
 - For Convenience
- COVID termination probably “for convenience.”
- Look at contract for remedy.

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§ 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.

....

§ 14.4.3 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.



Terminations—By Owner

- Contractor must terminate subcontract if owner terminates project.

A401-2017

§ 7.2.2 Termination for Convenience

§ 7.2.2.1 If the Owner terminates the Prime Contract for the Owner's convenience, the Contractor shall promptly deliver notice to the Subcontractor.

§ 7.2.2.2 In case of such termination for the Owner's convenience, the Subcontractor shall be entitled to receive payment for Work properly executed, costs incurred by reason of the termination, and reasonable overhead and profit on the Work not executed.

- Pays to read the contract!
 - Under AIA A401-2017, subcontractor may have greater rights to payment than contractor does.



Terminations—By Contractor / Subcontractor

- Impossibility / Impracticability
 - Applies when parties assume that something **essential to performance** will continue to exist, and if it ceases to exist, the contract is dissolved and the parties are excused....
 - And when performance has become “**so vitally different**” from what was anticipated that the contract cannot “reasonably be thought to govern.”
 - Applies when performance is literally **impossible**.
 - Also applies when “**commercially impractical**.”



Terminations—By Contractor / Subcontractor

- Commercial Impracticability
 - Contractor need not show literal and physical impossibility.
 - Instead, must show extreme and unreasonable difficulty, expense, injury, or loss.
 - But—an increase in expense alone is not sufficient.
 - Nor is mere prospect of hardship, inconvenience, or added expense.



Terminations—By Contractor / Subcontractor

- Commercial Impracticability
 - Factors that Contractor / Subcontractor must prove include:
 - All alternatives have been exhausted;
 - All means of performance are commercially senseless;
 - Performance objectively unreasonable;
 - No one else could perform;
 - Issue causing non-performance could not have been reasonably foreseen;
 - Not the fault of the Contractor / Subcontractor;
 - Contractor / Subcontractor did not agree to assume the risk (or guarantee performance).



Terminations—By Contractor / Subcontractor

- Commercial Impracticability
 - What does this defense provide?
 - Excused performance.
 - Possible ability to terminate.
 - May recover the costs of attempting to perform the contract.
 - Failure to perform will not be deemed a breach of contract.
 - Essentially, a way out of a delay with force majeure remedies plus possible additional remedies of ability to terminate and recover some costs.



Terminations—By Contractor / Subcontractor

- After Work Stoppage
 - Read the contract!

AIA A201-2017

§ 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;
- .3 Because the Architect has not issued a Certificate for Payment and has not notified the Contractor of the reason for withholding certification as provided in Section 9.4.1, or because the Owner has not made payment on a Certificate for Payment within the time stated in the Contract Documents;
- or
- .4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

...

§ 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.

- That's profit and overhead on unperformed work!
- But also **ConsensusDOCS 200, Section 11.5** (no profit + overhead on unperformed work).



Terminations—In All Cases

- Confirm termination in writing.
- Communicate understanding with higher-tier party.
- Reach agreement on time and cost, even if contract does not provide relief.
- Negotiate procedure to protect the Work.
- Negotiate procedure to secure the jobsite.
- Communicate to lower-tier parties.
- Terminate subcontracts and orders.
- Document everything.



Other Remedies

- Evidence of Owner's Financial Arrangements
- Use of Contingency
- Breach of Owner's Duty to Make Site Available
- No Damages for Delay
- Change in Law Provision



Other Remedies

- Evidence of Owner's Financial Arrangements

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§ 2.2 Evidence of the Owner's Financial Arrangements

§ 2.2.1 Prior to commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract. The Contractor shall have no obligation to commence the Work until the Owner provides such evidence. If commencement of the Work is delayed under this Section 2.2.1, the Contract Time shall be extended appropriately.

§ 2.2.2 Following commencement of the Work and upon written request by the Contractor, the Owner shall furnish to the Contractor reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract only if (1) the Owner fails to make payments to the Contractor as the Contract Documents require; (2) the Contractor identifies in writing a reasonable concern regarding the Owner's ability to make payment when due; or (3) a change in the Work materially changes the Contract Sum. If the Owner fails to provide such evidence, as required, within fourteen days of the Contractor's request, the Contractor may immediately stop the Work and, in that event, shall notify the Owner that the Work has stopped. However, if the request is made because a change in the Work materially changes the Contract Sum under (3) above, the Contractor may immediately stop only that portion of the Work affected by the change until reasonable evidence is provided. If the Work is stopped under this Section 2.2.2, the Contract Time shall be extended appropriately and the Contract Sum shall be increased by the amount of the Contractor's reasonable costs of shutdown, delay and start-up, plus interest as provided in the Contract Documents.

§ 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:

.4 The Owner has failed to furnish to the Contractor reasonable evidence as required by Section 2.2.

§ 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.

See also Consensus Docs 200, Section 11.5.2 (same remedy).



Other Remedies

- Evidence of Owner's Financial Arrangements
- Use of Contingency
 - Most likely available to contractor at contractor's discretion to pay for otherwise reimbursable costs.
- Breach of Owner's Duty to Make Site Available
 - If work authorized by government but owner is denying full access and refusing to cooperate.
- No Damages for Delay?
 - Read the contract—some allow partial recovery of delay costs, even for force majeure events (e.g., extended GCs)
- Change in Law Provision



Other Remedies

- Change in Law Provision

- ConsensusDOCS 200:

3.21.1. The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time needed resulting from any change in Law, including increased taxes, enacted after the date of this Agreement.

2.4.15. "Law" means federal, state, or local law, ordinance, code, rule, and regulations applicable to the Work with which Constructor must comply that are enacted as of the Agreement date.

- EJCDC has similar provision.
 - AIA does not.



Tariffs

- Similar problem?

- Unexpected disruption to expectations, leading to hire costs.
 - But was it unexpected?

- Possible remedies for changes caused by economic or political forces...

- Invoke Price Escalation clause in contract (if one exists!)
 - Usually available for extraordinary escalation only.
 - Contractor must not be at fault (e.g., did contractor timely buy-out?)
 - Sometimes such clauses are bilateral (i.e., credit due owner if prices fall).



Tariffs

- Possible remedies for changes caused by economic or political forces...
 - Invoke Price Escalation clause in contract (if one exists!)
 - Invoke Change in Law clause in contract (if one exists!)
 - ConsensusDOCS has.
 - EJCDC has but excludes tariffs.
 - AIA does not have.
 - Many customized contracts include.



Tariffs

- Possible remedies for changes caused by economic or political forces...
 - Invoke Price Escalation clause in contract (if one exists!)
 - Invoke Change in Law clause in contract (if one exists!)
 - Invoke Force Majeure clause in contract
 - Condition must be unforeseen, extraordinary, out of contractor's control.
 - Were President Trump's tariffs unforeseen?
 - Even if so, more time but probably no money.
 - Impracticability of Performance
 - Again, must be extraordinary and commercially senseless to perform.



When In Doubt...

- Read the contract.
- Communicate with higher-tier party.
- Consult your attorney.

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COVID-19

International Force Majeure Claims

Tom Crist, Benesch (USA)

Hanna Deir, Consultants House (UAE)



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COVID-19 International Force Task Force

- Tom Crist practices construction law globally as an advocate and arbitrator.
- Hanna Deir consults on projects globally.
- Benesch and Consultants House regularly collaborate on claims avoidance, risk management, claim preservation, and disputes.
 - We recognize similarities and differences in how various jurisdictions address force majeure.



COVID-19 International Force Majeure Claims

- Construction is dependent upon free movement of labor and materials.
- Progress tied heavily to both the supply chain and availability of labor.
- If either falters, time is lost and costs increase.
- When both are impacted, the result can be disastrous.
- Time is of the essence. Time is money.



CRISIS-DRIVEN IMPACTS

- Absent a crisis, claims for time and money occur on most projects.
- During a crisis, claims related and unrelated to the crisis may both occur.
- Contractor have to segregate the two categories of claims.
 - Don't forget about "routine claims" while coping with the crisis.
 - Don't blend the two types of claims and weaken both.
- Generally, impossibility of performance is a rare basis for a claim.
 - Money will clear most impediments.
 - No so with COVID-19.



A FORCE MAJEURE EVENT IS A CONTRACTOR'S SHIELD AGAINST OWNER CLAIMS FOR LATE PERFORMANCE

- Often, a contractor is entitled to a time extension, but no more money.
 - Prolongation costs are typically not recoverable.
- The claimant always has the burden of proof.
- The PRC and the China Counsel for the Promotion of International Trade have announced that the CCPIT will issue "force majeure certificates" as a result of COVID-19 for international contracts between PRC entities and foreign parties.
- That is a starting point for contractors and addresses only supply chain.



APPLICATION OF CIVIL CODES

- Civil codes generally describe “impossibility” of performance.
 - BE AWARE, more expensive, less convenient, or more difficult conditions for performance does not constitute impossibility.
- Need to resequence the work(s), modify the procurement program(me), often will not be enough.
 - Impossible and impractical are not the same thing.



CIVIL CODES: Middle East + PRC

- UAE Civil Code Article 273, Qatar Civil Code Article 188, Kuwait Civil Code Article 215 provide that the contract shall be automatically canceled if a force majeure event occurs.
- PRC Contract Law Article 94 provides: the parties to a contract may terminate the contract if the purpose of the contract is rendered impossible to achieve due to force majeure.
- BEWARE if you do NOT want the entire contract to be cancelled.



CIVIL CODES: Russia

- Russian Civil Code Article 401(3) provides that relief is limited to the precise obligation that is impacted by the force majeure event.
- If needed materials are caught up in the fractured supply chain, the constructor may be excused from delivering part(s) of the project later than planned.
- All other work(s) must proceed and unrelated lateness is not excused.
- This code basically protects a disruption claim, even if the completion date is not extended by the force majeure event.



UK Standard Contracts

- JCT (Joint Contracts Tribunal)
 - No reference to force majeure.
 - Either party may terminate if suspension exceeds two (2) months.
 - Time / no money.
- NEC (National Engineering and Construction Contract)
 - Reference to an “unforeseeable event” that stops work.
 - Terminate after 13 weeks of delay.
 - Time + money



FIDIC (Federation Internationale Des Ingenieurs- Conseils/International Federation of Consulting Engineers)

- Force majeure is where the "parties shall, having given notice, be excused from performance of such obligations for so long as such force majeure event prevents it from performing."
- Extensions of time for delay caused by "unforeseeable shortages in the availability of employer-supplied materials, if any, caused by epidemic..." or for delay caused by "unforeseeable shortages in the availability of personnel or goods caused by epidemic or government actions...."



FIDIC

- Delay or disruption under Clause 8.5 of the FIDIC Redbook 1999 where the "Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the country" for example by increasing health and safety testing and thus having suffered lost productivity.
 - Unavailable labor. Trade Stacking. Idle time.
 - FIDIC covers both supply chain and labor impacts.



CAUSATION IS KEY

- Entitlement is contingent upon proof that COVID-19 actually impacted design, fabrication, ordering, shipping, import, productivity of labor, or installation.
- The impact must be to the critical path.
- Review exclusions in the contract documents.
 - Economic downturn often excluded.
 - Don't get trapped by specifications prohibiting use of foreign materials.



CAUSATION IS KEY / SO IS MITIGATION

- The contractor claiming force majeure also must demonstrate mitigation efforts.
 - Contractor must seek opportunities to limit damages.
 - Force majeure is not a blank check.
- Owners defending a force majeure notice by a contractor will evaluate tender assumptions, ordering history, procurement logs, to establish whether materials were in fact ordered on time and impacted by COVID-19, not ordered later than they should have been, when timely ordering could have avoided impact.



IF YOU ASSERT A FORCE MAJEURE DEFENSE DUE TO SUPPLY CHAIN SHOCK....

- Ask manufacturers, suppliers, logistics providers to provide "force majeure letters."
- Owners will not necessarily believe that your order was impacted by COVID-19, even if they agree that COVID-19 is a forced majeure event.
- If you can establish that you ordered the goods on time per the owner's program(me) and procurement schedule, supported by force majeure letters of those downstream, that is the best INITIAL support for your claim.
 - Then, dig into the construction schedule to look for mitigation opportunities.



IF YOU ASSERT A FORCE MAJEURE DEFENSE....

- Monitor the direct and indirect impacts on your labor efficiency.
 - Lost time and inefficiencies driven by necessary new safety measures:
 - hand washing, PPE, social distancing
 - loss of lay-up areas that are now occupied by spread-out personnel (social distancing)
 - lift capacity, transportation (bus) limitations
 - local travel restrictions
 - changed inspection/approval activities, lack of inspectors/slow inspections
 - Labor turnover
- If your labor has left the site or country and cannot return, or returns but is quarantined, that will impact your productivity in a way that is outside of your control, driven by a force majeure event.



TAKE THE INITIATIVE WITH NOTICES: BE FIRST

- Do not wait for the owner or upstream party to ask you for evidence.
 - Gather and produce it, in writing. Log receipt of notices.
- Note that the nature of your notice is continuous.
- Increase detail as you proceed.
 - Reference prior notices.
- Provide references to local government orders and WHO advisories.
 - The date on which COVI-19 will cease to impact your project or the supply chain is not yet known.



SUMMARY

- Review your contracts up and down stream. Find the force majeure (or similar) clause.
 - What does it cover? Pandemic's? Suspension on work?
 - Exclusions? Assumption of the risk.
 - Does the contract automatically terminate, electively terminate or require continued performance.
- Gather evidence, facts, letters. Give notice. Keep giving notice.
- Assess the critical path. Track productivity.
- Send in tranches/batches.
 - Be first.
 - Share detailed evidence of mitigation.
- If events fall outside the scope of the force majeure clause.
 - Argue frustration / impossibility
- If the contract is terminated:
 - Preserve claims that preceded the force majeure event.

