



RLI DESIGN PROFESSIONALS
Design Professionals Learning Event

Time is of the Essence and Force Majeure Provisions

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DIFFERENT WORKS

Course Description

“
Creating beautiful things is difficult;
Creating them by committee is almost impossible;
Creating them by committee, on a deadline, and a budget,
is a task fit only for a deity.”

-Stimmel, Stimmel & Smith

This course will provide a greater understanding of “time is of the essence” and “force majeure” provisions in contracts, including their impact on design professionals and other parties to an agreement.

Learning Objectives

Participants in this session will:

1. Develop a greater understanding of the intent of “time is of the essence” provisions;
2. Learn the potential consequences to design professionals of failing to meet the obligations of a “time is of the essence” clause;
3. Study the components of a “force majeure” provision; and
4. Analyze some of the key issues to address with “force majeure” events.

Time is of the Essence

Sample Provision

“

Time is of the essence with respect to all provisions of this Agreement in which a definite time for performance is specified.

”



Implications

A “time is of the essence” provision:

- 1** Waives right to perform within a “reasonable amount of time”
- 2** Elevates *all* delays to a material breach of contract, giving Client cause to cancel the Contract
- 3** May create an uninsurable liability

Reasonable Delays

AIA B101-2017 § 3.1.3

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 submission 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.

Breach of Contract

2 types of breaches:

- 1** **Immaterial breach**
Remedies may include nominal damages or specific performance.
- 2** **Material breach**
Remedies may include nominal damages, specific performance, or termination of the Contract.

Material v. Immaterial Breach

Factors for consideration:

Factors a court considers to determine whether a breach is a material breach or an immaterial breach may vary by jurisdiction.



Extent and amount of benefit received by Client

Adequacy of remedy

Extent of your actual performance

Reason for your delayed performance

Moral blame – willful or negligent breach

Likelihood that you will perform remainder of contract

Mustang v. Driver

“Time is of the essence” clause

Mustang Pipeline
Company Inc.
Client



Driver Pipeline
Company Inc.
Contractor

Client validly terminated the contract for weather related delays where the contract contained a “time is of the essence” clause.

“

[A]ll time limits stated in the contract are of the essence to the Contract.

”

Lower Court Ruling

Liable for
\$2 million

Mustang Pipeline
Company Inc.
Client

Liable for
\$2.5 million

Driver Pipeline
Company Inc.
Contractor

Supreme Court of Texas Ruling



“

[I]f it is clear that the parties intended that time is of the essence to a contract, timely performance is essential to a party's right to require performance by the other party.

”

Supreme Court of Texas Ruling

Not a wrongful termination due to a valid “time is of the essence clause



NOT liable for
\$2.5 million

Mustang Pipeline
Company Inc.

Client

***Mustang would have been liable to Driver for \$2.5 million dollars *if* the termination had been wrongful. However, because Mustang’s termination of the Agreement was a valid exercise of their rights under the contract, the termination was not wrongful.

Policy Exclusions

Contractual Liability

This Policy does not apply to any Claim(s):

as a result of **liability assumed by the Insured under any contract or agreement**. This Exclusion does not apply to liability for Damages that the Insured would have had in the absence of the contract or agreement.

Policy Exclusions

Express Warranties or Guarantees

This Policy does not apply to any Claim(s):

Based upon or arising out of any express warranties or guarantees. However, this Exclusion does not apply to a warranty or guarantee by the Insured that the Insured's Professional Services are in conformity with the standard of care applicable to that Professional Service.

Liquidated Damages

Liquidated damages:

Predetermined amount of damages in the event of a breach of contract, used where actual damages are difficult or impossible to prove.



Managing Risk

What to do:

- 1** Eliminate “time is of the essence” clauses from your contracts, where possible.
- 2** Where striking the clause is not possible, limit “time is of the essence” obligation to the applicable standard of care.
- 3** As a last resort, draft clear “time is of the essence” agreements, tailored to your specific project. Protect yourself with suspension rights and force majeure clauses.

Subject to the Standard of Care

AIA B101-2017 § 2.2

The [Design Professional] shall perform its service consistent with the skill and care ordinarily provided by [Design Professionals] practicing in the same or similar locality under the same or similar circumstances. [Design Professional] shall perform its services as **expeditiously** as is consistent with such professional skill and care and the orderly progress of the Project.

Drafting Clear Provisions

Draft a clear “time is of the essence” provision

Crucial dates

Specify which obligations “time is of the essence” for.

Notice and cure periods

Will you be given notice and an opportunity to cure?

Consequences

What are the consequences? Termination? Do different deadlines carry different consequences?

Suspension Rights

Reasons to suspend your services:



Material breach

Nonpayment of fees

Dispute about additional services

Changes in parties

Substantially changed conditions

Suspension Clause

AIA B101-2017 § 9.1

...If [Design Professional] elects to suspend services, the [Design Professional] shall give seven days' written notice to the Owner before suspending services. In the event of a suspension of services, the [Design Professional] shall have no liability to the Owner for delays or damage caused the Owner because of such suspension of services. Before resuming services, the Owner shall pay all sums due prior to suspension and any expenses incurred in the interruption and resumption of the [Design Professional]'s services. The [Design Professional]'s fees for the remaining services and the time schedules shall be equitably adjusted.

Force Majeure (FM)



“
superior force
”

Relieves the parties from performing certain obligations when circumstances beyond the reasonable control of the parties' arises.

Key considerations when drafting a force majeure clause:

- 1** What constitutes a “force majeure” event?
- 2** How severe does the event need to be?
- 3** What are the rights and responsibilities of the parties?

What constitutes a “force majeure” event?

Some examples include:

Fire

War

Terrorism

Strikes/Riots

Natural disasters/“Acts of God”



Characteristics of FM Event

3 Common Traits:



External to the parties

Unforeseeable

Uncontrollable

Unforeseeable

What constitutes an “unforeseeable” event?

Impossible
or
Improbable?

Does it have to be impossible or can it be merely improbable?

Uncontrollable

An occurrence is “uncontrollable” if:

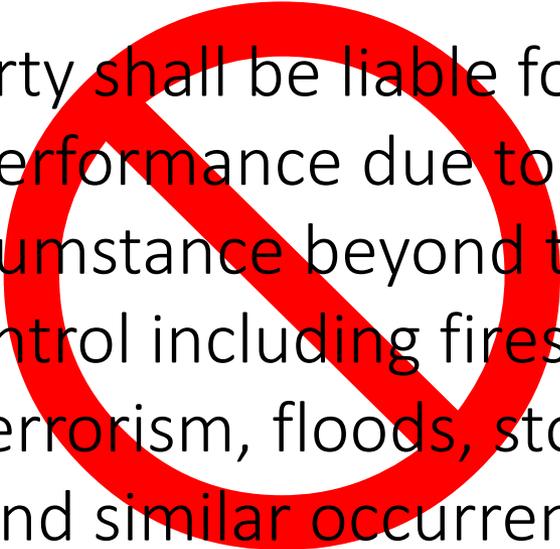
- 1** “Not caused by”
You can’t invoke a force majeure provision if you affirmatively cause the force majeure event.
- 2** Could not have been prevented by reasonable measures
You can’t invoke a force majeure provision if you could have taken reasonable measures to prevent the event.

Quiz

Neither party shall be liable for any delay or failure in performance due to any reason or unforeseen circumstance beyond the affected party's reasonable control including fires, riots, rebellions, wars, acts of terrorism, floods, storms, acts of God, and similar occurrences.

Fails to address key considerations

Neither party shall be liable for any delay or failure in performance due to any reason or unforeseen circumstance beyond the affected party's reasonable control including fires, riots, rebellions, wars, acts of terrorism, floods, storms, acts of God, and similar occurrences.



Red Flag Word

Avoid setting the standard at:

“Impossible”

Example:

“Neither party shall be liable for any delay or failure in performance making it impossible to complete performance...”

Words To Use

Instead use:

“inadvisable”

“commercially impracticable”

Example:

“Neither party shall be liable for any delay or failure in performance making it **commercially impracticable** to complete performance...”

Obligations of the Parties

What are the obligations of the parties when a force majeure event occurs?

Some things to consider:

Is notice required?

What is the permitted time extension?

Who pays for the additional costs of a delay?

Sample Language

Neither party shall be liable for any failure or delay in performing its obligations under this Agreement if and to the extent that such failure or delay is caused by a Force Majeure event. A Force Majeure event means, in relation to either party, any event or circumstance beyond the reasonable control of the party including act of God, fire, explosion, flood, epidemic, power failure, governmental action, war or threat of war, acts of terrorism, national emergency, riot, civil disturbance, sabotage, labor disputes and strikes (other than in respect of the workforce of the party affected). A party affected by the Force Majeure (the “Affected Party”) shall immediately notify the other party (“Non-Affected Party”) in writing of the event, giving sufficient details thereof and the likely duration of the delay. The Affected Party shall use all commercially reasonable efforts to recommence performance of its obligations under this Agreement as reasonably possible.

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Hartec v. GSE

Not entitled to extension in time under terms of Force Majeure clause



Appellate Ruling

Liquidated Damages

~\$500,000

Assessed at a rate of
\$500/day X 959 days

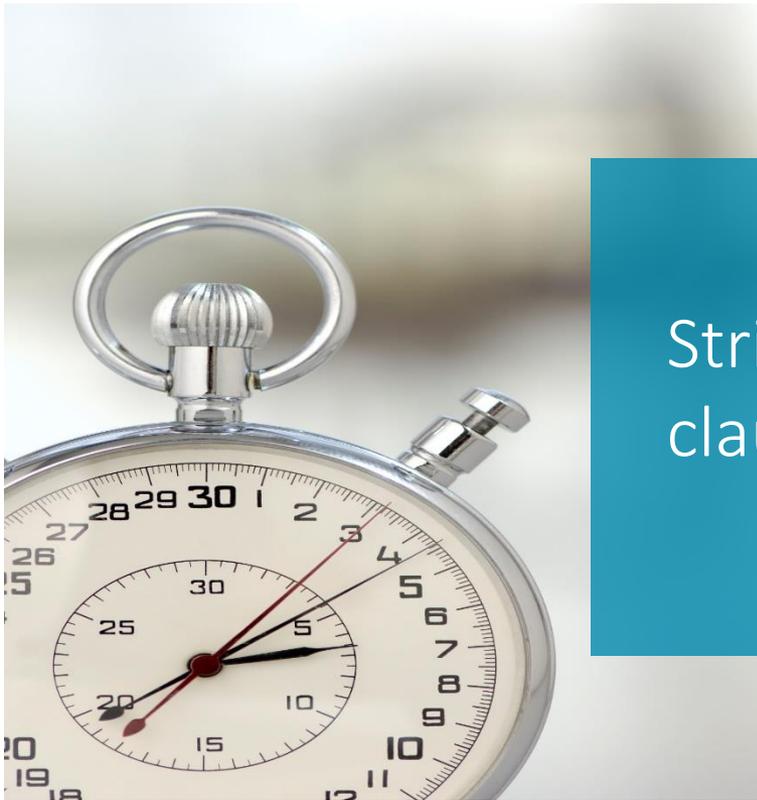
Force Majeure Provision

§12.2 of the contract

*The Contract Time will be extended in an amount equal to time lost due to delays beyond the control of Contractor **if a claim is made therefor** as provided in Paragraph 12.1. Such delays shall include, but not be limited to, acts or neglect by OWNER or others performing additional Work as contemplated by Article 7, or to ...abnormal weather conditions, or acts of God."*

Take Aways

Time is of the Essence



Strike “Time is of the Essence” clauses from your contracts.

More Take Aways

Force Majeure



Draft clear force majeure provisions addressing all of the key considerations found on slide 24.

Thank you for your time!

QUESTIONS?

This concludes The American Institute of Architects
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