

SURVEY RESULTS

ARE THE FORCE MAJEURE PROVISIONS IN YOUR CONTRACT FIT FOR PURPOSE?



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Introduction

These are unprecedented times and for the first time in many of our lifetimes, parties to construction contracts all over the world have been scouring their contracts to find recourse wherever possible for the award of additional time and cost due to the effects of a pandemic. Whilst many construction contracts deal with pandemics under a force majeure clause, there is a growing disquiet as to whether these clauses really anticipated such a situation arising and as a result deeper questions have been raised about force majeure in general, particularly the methods and processes of valuing entitlement.

To help address these important questions and stimulate debate, HKA issued a series of simple questions to parties on all sides of the contractual spectrum and this article summarises the findings of that survey.

Results

As can be expected, events that form the basis of many force majeure clauses listed an average approval rating of above 85%. These events included war, hostilities, rebellion, terrorism, revolution, insurrection, civil war, riot, and natural catastrophes. It is notable that there is also a consensus on the inclusion of pandemics in that standard list, with an average approval rating of 89%.

There is a divergence of opinion between contractors and employers in relation to exceptionally adverse weather, which is likely to be the most common of the force majeure claims made in the industry. There is little appetite from employers to entertain such claims, however, had the question on this subject been articulated differently, and particularly in around what constitutes exceptionally adverse weather, it is possible that result would be different.

It is noteworthy that there appears to be a clear divide between the usual parties to a contract (contractor and employer) and their legal advisors, i.e. lawyers. Generally, there appears to be a lack of consensus in the legal community as to what matters should be included in force majeure clauses, with civil unrest scoring particularly low at 70% compared to how it is scored by contractors and employers at circa 90%.

A change in law is not a popular inclusion as a force majeure event by any group, this is probably because most contracts deal with it separately. Mass hysteria was deliberately included as a possible event to provide some levity to the survey and, interestingly, a third of all contractors consider it to be worthy of inclusion as a force majeure event – an interesting follow-on would be to define what mass hysteria actually is! The table below sets out the summary of results:

Force Majeure Event	All	Employer	Contractor	Consultant	Lawyer	Other
Wars and other hostilities, such as terrorism	91%	86%	98%	100%	82%	75%
Epidemics or pandemics	89%	100%	95%	100%	79%	75%
Natural catastrophes, such as earthquakes, floods and volcanoes	88%	71%	98%	89%	79%	75%
Civil unrest, such as riots, revolution, strikes (other than by the contractor or subcontractors)	85%	86%	95%	100%	70%	50%
Exceptionally adverse weather	65%	29%	71%	67%	61%	75%
Fires	38%	14%	34%	44%	52%	25%
Unforeseen changes to legislation	36%	29%	34%	44%	36%	75%
Mass hysteria	23%	0%	31%	22%	15%	25%
Unexpected ground conditions	20%	29%	25%	11%	9%	25%
Change in Government	19%	0%	24%	44%	9%	0%

Table 1 – Events considered to be force majeure issues

HKA’s survey asked the respondents eight questions concerning the drafting of force majeure clauses in construction contracts and Table 2 summarises the responses given to those questions.

Question 1 simply asked whether the parties had carried out construction works where the force majeure provisions had been amended in a standard form of contract. Unsurprisingly, 63% of respondents confirmed that force majeure provisions had been amended.

Question 2 then asked whether the parties had encountered “ambiguous” amendments to the standard form force majeure clause and again the majority of parties confirmed that they had, with contractors being stronger in that view. Lawyers did not agree with the sentiment of employers, which begs the question whether they are listening to their advisors in drafting the contracts.

Question 3 then asked whether the parties should refrain from amending the force majeure provisions in standard form contracts. Predictably contractors supported refraining from doing so and ironically so did employers. The majority of lawyers preferred amendment, which leads one to potentially conclude that heavily amended standard form contracts arise out of pressure not from employers, but from their legal counsel.

Question 4 asked the respondents if they considered that force majeure events were “foreseeable”. The findings from the survey were mainly that the force majeure events were not foreseeable.

Questions 5 and 6 considered whether a contractor should be entitled to an extension of time for a force majeure event. All parties confirmed that it was equitable for the contractor to be awarded an extension of time for any delay, even where the contractor was already responsible for critical delay.

Question 7 asked whether the contractor should be entitled to compensation from the employer for financial losses arising from a force majeure event. The majority confirmed that compensation should not be made with only contractors suggesting that they should be compensated.

Question 8 then asked whether the parties to a contract should bear their own losses arising from a force majeure event and again the majority considered that they should, but with the majority of contractors who responded suggesting that they shouldn’t bear their own losses from a force majeure event.

		All		Employer		Contractor		Consultant		Lawyer		Other	
		Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
1	Have you worked on a standard form contract where the force majeure provision has been subject to an amendment?	62%	38%	57%	43%	63%	37%	33%	67%	73%	27%	50%	50%
2	Have you encountered an ambiguous amendment to a force majeure provision?	54%	46%	29%	71%	56%	44%	33%	67%	64%	36%	50%	50%
3	Do you think parties should refrain from amending standard force majeure provisions?	57%	43%	71%	29%	71%	29%	56%	44%	27%	73%	75%	25%
4	Do you consider that most, if not all, force majeure events are in fact foreseeable at some level?	35%	65%	14%	86%	24%	76%	11%	89%	61%	39%	75%	25%
5	Do you consider that a contractor should be entitled to extension of time for a force majeure event?	99%	1%	100%	0%	100%	0%	100%	0%	97%	3%	100%	0%
6	Do you consider that a contractor should be entitled to an extension of time when at the time of the occurrence of the force majeure event the contractor was already responsible for critical delay?	80%	20%	57%	43%	88%	12%	78%	22%	73%	27%	75%	25%
7	Do you consider that a contractor should be entitled to compensation from the employer for financial losses arising from a force majeure event?	39%	61%	58%	42%	21%	79%	33%	67%	0%	100%	0%	100%
8	Do you consider that the parties to a contract should bear their own losses arising from a force majeure event?	63%	37%	100%	0%	44%	56%	78%	22%	82%	18%	100%	0%

Table 2 - Questions on force majeure Provisions in Contracts

HKA's survey has given a unique insight into perspectives on force majeure by different parties to construction contracts. There is general consensus that matters deemed as force majeure have been correctly included in the standard form contracts and there is also consensus that a pandemic should be considered as a force majeure event. Opinions differ wildly on the inclusion of other events and the employer contractor divide follows a predictable pattern. Of some surprising note is the divergence between lawyers and employers on amending force majeure clauses.

Conclusion

The standard form contracts are creaking under the load of dealing with the unprecedented circumstances surrounding the global pandemic. Looking forward, contract drafters should address the "new norm" and add agility to outdated contracts. Such agility should also include a refocus on the standard clauses for suspension and termination for convenience – the subject of HKA's upcoming second survey in this series!

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