

K-Notes: Force Majeure in Construction Contracts

Corpus Christi Pipeline Project

Changing the definition of “foreseeable”

Covid has increased companies' awareness of and anxiety about force majeure clauses. In this example, the drafters included force majeure in the change order section of the agreement. This placement creates interesting outcomes for both sides of the contract in the event of catastrophic context changes.



“I would put language in that says ‘unforeseeable’ or ‘foreseeable.’ Now that we’re experiencing Covid... you can’t really say you can’t foresee another mutation.”

Gretchen Cothron

Litigation Attorney

KEY TAKEAWAYS

- **Embrace the Parade of Horribles**

Listing off every imaginable harm might create foreseeability risks in court, but it sets expectations for the contract.

- **Force Majeure is as plausible as a change order**

Every change order section deals with context changes that are different degrees of foreseeable. You might consider force majeure as part of that process.

- **Money may not be enough**

In the case of major force majeure events, paying on the contract may not address the market changes that have occurred. confusion. Use plain language.

- **Time may not be enough**

Giving the contractor more time might not address the force majeure-caused difficulty. Consider how additional time might change overall costs of fulfillment.

“A force majeure event can be an act of nature or it can also be an act of a governmental agency.”