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Shapiro Sher was founded in 1972 with the mission of providing outstanding legal counsel for businesses of all sizes. Based in Baltimore, the firm is nationally recognized for its practices in business, construction and real estate law, litigation, bankruptcy, and creditors' rights. For over four decades, the firm has provided invaluable representation to large corporations, emerging growth businesses, governments, non-profits, and individuals. Our construction and real estate attorneys are experienced in all aspects of project development, including the acquisition and disposition of real property interests, contract preparation, financing, and leasing.

David B. Applefeld heads Shapiro Sher's Construction and Real Estate Litigation Practice and represents developers, contractors, design professionals, and property owners throughout the Mid-Atlantic region and beyond. Mr. Applefeld has successfully litigated construction defect claims, landlord-tenant disputes, insurance coverage actions, mechanics' liens, and architectural and engineering professional negligence claims in all levels of state and federal courts, and before administrative agencies. Mr. Applefeld currently serves as Section Counsel to the Maryland State Bar Association's Construction Law Section, and has been nationally recognized by *The Best Lawyers in America*® in the area of construction litigation.

AIA CONTRACTS AND COVID-19: FORCE MAJEURE, SUSPENSION AND FINANCIAL ASSURANCE

By David B. Applefeld, Esquire

The disruption of business activity caused by the coronavirus pandemic presents a number of legal issues for the construction industry, several of which are addressed in the AIA form contract documents. Parties to these agreements should carefully review their contracts to determine how recent events impact their legal obligations. Taking appropriate steps **now** is critical to preserving your rights and mitigating your liabilities in the weeks ahead.

The term **force majeure** is derived from French law and translates to mean "superior force". It refers to a contractual risk allocation provision that excuses performance when circumstances beyond the contracting parties' control make performance commercially impracticable, illegal, or impossible. When in place, such clauses have been successfully invoked to excuse performance, obtain time extensions, and, in rare cases, delay or change a party's economic obligations following natural disasters, acts of terrorism, and changes to governmental regulations. Most construction contracts include a *force majeure* or "excused delay" clause in one form or another, although the term *force majeure* may not be expressly stated. The AIA form documents address this issue in **Section 8.3** of the **AIA A201-2017 General Conditions**. Section 8.3 provides that if the Contractor is delayed by "labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions . . . or other causes beyond the Contractor's control . . . then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine." Section 8.3 does not provide for an adjustment to the contract price, but specifies that either the Owner or the Contractor may pursue delay damages under other provisions of the Contract.

The AIA form documents also address **suspension of work and termination** resulting from causes "beyond the [the Owner and/or Contractor's] control." Pursuant to Sections 14.3 and 14.4 of A201-2017 General Conditions, the Project Owner may suspend or terminate the Contract without cause, "for convenience." When an Owner suspends the Contractor's work for convenience, **Section 14.3** requires the Owner to compensate the Contractor by adjusting both the Contract time and the Contract price for the period of delay. The AIA General Conditions permit the Owner to suspend the project for "such a period of time as the Owner may determine", so long as the Contractor is compensated for the

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delay. Notwithstanding this fact, a suspended Contractor may be entitled to terminate its Contract pursuant to **Section 14.1** if the suspension lasts for longer than 60 consecutive days, or is cumulatively for more than 120 days in any 365-day period (in the case of multiple suspensions), or if the Contract is suspended for a period of time that is longer than the total number of days scheduled for completion of the Project. Alternatively, under **Section 14.4**, when the Owner terminates the Contract for convenience, it is required to pay the Contractor for all work that has been properly executed, the Contractor's costs attributable to the termination, including costs related to the Contractor's termination of its subcontracts, and the termination fee, if called for in the Contract.

In light of the Covid-19 pandemic, Contractors may have questions concerning an Owner's ability to fulfill its **financial obligations** under the Contract. This is particularly true if the Owner is a single-purpose entity and the state of project financing is unclear to the Contractor. The AIA form documents address this issue in Section 2.2 of the A201-2017 General Conditions. **Section 2.2** establishes a mechanism whereby, in certain circumstances, the Contractor may request (and the Owner must provide) "reasonable evidence that the Owner has made financial arrangements to fulfill the Owner's obligations under the Contract". These circumstances include:

- The Owner's failure to make payment when due;
- A change in the Work that materially changes the Contract sum; or
- The ability of the Contractor to identify in writing a reasonable concern regarding the Owner's ability to make payment when due.

Following a Contractor's valid request for financial assurance, the Owner must provide such "reasonable evidence" within 14 days. If the Owner fails to do so, the Contractor has the right to stop work upon proper notice to the Owner.

When considering the best course of action, it is important to understand that the devil is in the details. Each contract is different and each project is unique. The critical part of this analysis is knowing your legal rights and liabilities under the Contract. It is also important to remember that the AIA documents stress the word "**reasonable**", but do not define the term. What is reasonable will vary from contract to contract and from one project to the next. We are in the midst of an unprecedented and fluid event. In the months ahead, courts and arbitrators interpreting these contracts will likely reward what they deem to be reasonable conduct, and take a much harsher approach with those who behave in an unreasonable manner.

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