About the Firm

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 and real estate law, construction 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 real estate and construction attorneys are experienced in all aspects of acquisitions and sales, development, leasing, and real estate finance. Headed by **David B. Applefeld**, Shapiro Sher's Construction and Real Estate Litigation Practice 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 matters, mechanics' lien actions, 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 Construction Law Section, and has been nationally recognized by *The Best Lawyers in America*® in the area of construction litigation.

FORCE MAJEURE, COVID-19, AND CONSTRUCTION CONTRACTS

By David B. Applefeld, Esquire

In light of the growing concern that the recent coronavirus outbreak will disrupt supply chains and business activity it is a good time, to understand whether your contracts include a ***force majure* clause**, and how this provision may affect your rights.

Taken from French law, the term ***force majeure* literally translates to mean "superior force".** It refers to a contractual risk allocation provision which excuses performance when circumstances beyond the contracting parties' control make performance commercially impracticable, illegal, or impossible. Such clauses have been successfully invoked to excuse performance, obtain time extensions, and justify changes to the contract price 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 A201-2017 General Conditions**, for example, provide 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." However, not every catastrophic happening or misfortune qualifies as a *force majeure*.

Regardless of the terminology which is used, by definition, a *force majeure* event must include three characteristics.

- **First**, the event must have been **unforeseeable** – i.e., an event that could not have been foreseen by the party seeking relief at the time the contract was entered.
- **Second**, the event must arise from an **external cause** – i.e., an event outside the control of the party seeking relief.
- **Third**, the event must be unavoidable – i.e., the party seeking relief could not have avoided the adverse effect on its contractual obligation by exercising due diligence.

Not all *force majeure* clauses are identical. Most require the party seeking relief to provide notice of the event and the effect on performance in a specific format, within a specific time. Many also require the submission of a mitigation plan. For these reasons it is important for owners, contractors and suppliers to understand exactly what your contract requires.

SHAPIRO SHER

Contact

David B. Applefeld
dba@shapirosher.com
410.385.4267

Baltimore Office
Shapiro Sher
250 West Pratt Street
Suite 2000
Baltimore, MD 21201

Phone: 410.385.0202
Fax: 410.539.7611