

ENFORCEABILITY OF CONTRACTS IN A PANDEMIC

By Douglas M. Kincaid



In mid-March, COVID-19 and government stay-at-home orders brought daily life and the economy to a screeching halt. Public power utilities are working hard to keep the lights on for their communities, but the pandemic has created uncertainty about many development and maintenance projects. Though the long-term effects of the pandemic are uncertain, there are growing concerns about delays and cancellations of contracts for these infrastructure projects.

What happens when COVID-19 affects an entity's ability to perform its obligation under a contract?

Contractual obligations may be discharged or delayed under force majeure clauses contained in many contracts. A force majeure clause operates to delay (and in some cases to discharge) contractual obligations in the event an obligation cannot be performed due to causes outside the control of the obligated party that could not be avoided by

exercise of due care. If a force majeure clause applies, then the party with the obligation to perform is not in breach of the contract and not liable for any damages caused by non-performance. While contract interpretation is largely a matter of state law, disputes over force majeure clauses begin with the specific language used in the contract. The clause may list specific events that constitute a force majeure event (such as acts of God, war, terrorism, fires, strikes, hurricanes, changes in law, etc.) or contain broad "catch-all" language such as "any cause beyond a party's reasonable control." Some clauses may explicitly mention pandemics, epidemics, or quarantine. Generally, a clause that lists specific events is of more limited applicability than a broad clause.

Even without specific language, COVID-19 is likely to be a qualifying event under many broad force majeure clauses. COVID-19 has been declared a pandemic by the World Health Organization and resulted in state-of-emergency declarations in all 50 states. The governors of both Oregon and Washington have issued stay-at-home orders requiring that only an "essential employee performing work for an essential business" and persons engaged in "essential activities" may leave their homes. These orders have the force and effect of law and violations are punishable as criminal offenses. Force majeure provisions mentioning pandemics, restrictive government orders, or "causes beyond the party's reasonable control" are likely to be applicable to delays caused by compliance with these orders.

Parties claiming force majeure must show that COVID-19, or virus-related government orders, caused the failure to perform and that, despite the party's diligence and good faith, performance became impossible or unreasonably expensive. Economic hardship alone, however, is not enough to excuse performance. Force majeure clauses do not generally insulate a party against recession or market changes resulting in financial loss unless specifically provided for in the contract language. A contractor that has been delayed due to implementation of required social distancing measures is more likely to obtain relief under a force majeure provision than a contractor who fails to perform because

an increase in the price of raw materials renders the work unprofitable. In order to invoke a force majeure defense, the party claiming the defense must strictly comply with the technical requirements of the contract. For example, failure to provide prompt notice of the force majeure event may render the defense unavailable.

If not already standard practice, utilities should consider listing “epidemics, pandemics, and quarantines” as force majeure events, as well as “changes in laws, regulations, and orders.” For contracts entered into during the current pandemic and in the near future, however, even explicit force majeure clauses may not be enough to insulate a party from liability. Impacts due to COVID-19 may be considered foreseeable and avoidable for contracts entered into before the end of the pandemic—even if such effects were the result of a second wave of the virus.

In the absence of a force majeure clause, a party may assert the common law doctrine of “impracticability” as a defense to a breach of contract caused by COVID-19. Most state courts, including those in Oregon and Washington, will not enforce a contract where performance becomes “impracticable” due to extreme and unreasonable difficulty, expense, injury, or loss to one of the parties due to an unforeseeable event outside of the parties’ control. Such events include “acts of God”—such as sudden severe storms—and the enactment of laws, regulations, or orders which prevent performance of the contract. A change in the degree of difficulty or expense, unless well beyond the normal range, does not amount to impracticability. A party is expected to take commercially reasonable efforts to overcome surmountable obstacles to contract performance. Although the extent to which a utility’s contract has been affected by COVID-19 is highly fact-dependent, this pandemic is precisely the type of sudden unforeseeable event which may render certain contract obligations objectively and legally impracticable to perform.

Courts have invoked the impracticability defense in analogous situations. In *Bush v. Protravel Int’l, Inc.*, a New York court applied the impracticability defense where the plaintiff missed a

contract deadline in the days following the 9/11 terrorist attacks, noting that the mayor had declared a state of emergency and the city was in a state of lockdown that prevented the transaction of most business. The Restatement (Second) of Contracts, an authoritative legal treatise, declares that the duty to deliver goods to a designated port is discharged where the port is “closed by quarantine regulations” for an entire month and that a significant increase in the risk of injury or death will generally excuse performance of a contract. In one Oregon case, *Goodyear v. Sch. Dist. No. 5*, the district closed schools due to a diphtheria outbreak. The court held that a provision allowing the district to “discontinue” a teacher’s employment contract suspended the contract during the epidemic, but the teacher had a right to resume employment under her contract when schools reopened. In another case, *Grover v. Zook*, a Washington court held that a contract was voidable where performance of the contract would thwart the purpose of laws enacted to stop the spread of tuberculosis. Although the current pandemic and its effects are unprecedented, courts have been sympathetic to parties directly affected by disease and national emergencies.

Every contract is unique, and whether COVID-19 and related governmental orders give rise to a defense under the principles of impracticability requires a thorough legal analysis. Utilities are likely to find themselves on both sides of these issues—as the party claiming the defense and the party seeking damages for delay. In either case, force majeure and impracticability should be the last lines of defense. Flexibility, implementation of change orders, and contract amendments are likely to be more cost effective in the long run than litigation. **NWPPA**

Douglas M. Kincaid is an associate at Cable Huston LLP. He assists the firm’s litigation, energy, public utility, and environmental practice groups. Kincaid can be contacted at dkincaid@cablehuston.com.



KVA

ELECTRIC, INC.

SUBSTATION & HIGH VOLTAGE SOLUTIONS

- Transformer & Substation Assembly
- Oil Degassing/Dehydration
- Testing & Repair Services
- Substation Maintenance
- Protective Relays & Breakers
- SCADA Integration

WE UNDERSTAND POWER SYSTEMS & UTILITIES

EXPERIENCED

Over 40 years of experience in the high voltage industry over a wide range of projects.

QUALIFIED

Highly trained and experienced High Voltage IBEW personnel.

PROPERLY EQUIPPED

Full line of digital electrical test equipment, automated oil processing system, and detailed reporting capability

RESPONSIVE

Personnel and equipment can rapidly respond to emergency situations

13933 Jim Creek Rd.
Arlington, WA 98223

P: 360-403-8301
F: 360-435-6145

info@kvaelectric.com
www.kvaelectric.com