



# The future of construction contracts

The contractual environment in the post-COVID-19 world has changed.

By Jason J. Annibale and Geza Banfai, McMillan LLP

**T**he global COVID-19 pandemic has made our world very different today than it was this time last year. There are few areas of the global business community that have not been impacted by the pandemic, and the construction industry is no exception.

Health and safety regulations have been adjusted to provide for personal protective equipment, social distancing requirements, and enhanced sanitation and cleaning protocols. Work has been reconfigured to reduce traffic on site and within offices. The movement and access to materials and construction personnel has been impaired. More construction projects are tangled in delay and additional cost disputes, and some construction companies face the threat of bankruptcy.

How extensively the pandemic will change the construction industry going forward is open to debate. What is clear, however, is that we are in a new contractual environment in this post-COVID-19 world. The following are

some of the key issues which owners and contractors should consider when writing future construction contracts.

## **Force majeure**

A *force majeure* event is an unforeseeable, intervening event, outside the control of the contracting parties and capable of delaying the performance of the work. The COVID-19 pandemic is a textbook illustration of this legal definition.

Until the pandemic, *force majeure* events were relatively uncommon. COVID-19 has awakened the need to consider *force majeure* provisions in all contracts. Typical *force majeure* clauses prescribe a list of qualifying events and some feature a basket clause that captures further unspecified events that fit within the legal definition. An example is GC 6.5.3 of the Canadian Construction Documents Committee 2 – 2008 (CCDC 2) stipulated price contract, which lists various delay events such as labour disputes, fire, unusual delay by common carriers, and abnormally

adverse weather conditions. It also covers “any cause beyond the contractor’s control.”

Unfortunately, some construction contracts fail to cover *any force majeure* events, thereby exposing the contractor to the entire risk of delay caused by such events. This could include liability for liquidated damages, owner losses that arise from late performance, as well as contract termination.

## **Monetary compensation for force majeure delay**

*Force majeure* risk is typically shared between owner and contractor. Affording contractors additional time but no money for *force majeure* events represents what most believed was an equitable sharing of the risk for delays that were the fault of neither party. However, COVID-19 has caused parties to reconsider the wisdom of this risk allocation. In many cases, the pandemic substantially increased the contractor’s costs of performance, including costs due to loss of productivity, disruptions in the supply chain, and indirect costs of schedule extension. While such costs may be absorbed over one or two contracts, they could

