

Suez Canal Blockage to Cause Lasting Construction Delays and Owner-Contractor Disputes

by Evan Livermore and Eric A.O. Ruzicka

The six-day saga of the *Ever Given* came to an end on the afternoon of Monday, March 29, when the 1,300-foot cargo ship was finally dislodged from the banks of the Suez Canal. However, with over 300 ships waiting for passage through the Canal, the impacts on international shipping are predicted to last months and the costs to global trade have been estimated at over \$50 billion.

The nautical jam has and will continue to delay all aspects of the construction supply chain from traditional construction materials, to heavy equipment and oil supplies. Substantial project delays will soon follow – especially on the largest of industrial projects. Contractors and project owners (and in turn, subcontractors and contractors) are likely headed toward disputes over these delays, and in those disputes it is likely contractors will turn to force majeure provisions in construction contracts.

Force majeure provisions in construction contracts relieve a party from liability resulting from “acts of God” and other circumstances beyond the party’s control. Force majeure clauses may explicitly include, or explicitly exclude, project delays and increased costs due to delays in shipping of materials. More likely, however, is that most clauses will be silent on the specific question of whether shipping delays are excusable force majeure events. In that case, the outcome will depend upon the language of the contract’s general provision regarding circumstances beyond the party’s control, as well as precedents in the relevant jurisdiction. Courts considering force majeure claims in similar contexts have generally held that extraordinary shipping delays beyond a contractor’s control may constitute force majeure—even where a result of human error and unrelated to weather events or other traditional “acts of God”—but have also emphasized that the claiming party bears the burden to take all reasonable steps available to mitigate the impact of the alleged force majeure. In this context, the required mitigation efforts could include sourcing delayed materials from another supplier, or even working with the shipping company on alternate arrangements (such as the choice some companies made to reroute around the Cape of Good Hope).

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