

8 KEY TAKEAWAYS

Hot Topics in Construction Contracting

[Kilpatrick Townsend](#) Partner [Brian Gaudet](#) recently presented on “Hot Topics in Construction Contracting” at the Association of Corporate Counsel Houston Chapter Meeting. With the continuing impact of Covid-19, the supply chain crunch, world events, and changes in the law, there are numerous issues to consider when entering into a construction contract and managing a construction project. Some of these concepts like force majeure and price escalations will apply to other types of commercial arrangements as well.

Key takeaways from Mr. Gaudet’s presentation, include:

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Traditional force majeure clauses, whether they include the word “epidemic” or not, are generally not written in a way suitable for an epidemic.

“Foreseeability” as an element of a force majeure clause dealing with an epidemic is ambiguous. Foreseeability of what? The epidemic or a jobsite impact?

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General requirements for “notice” of a force majeure event do not work with an epidemic. Notice of what? The epidemic or a jobsite impact?

Many price escalation clauses are tremendously ambiguous and will lead to legal disputes.

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Price escalation is a measurement. To measure, you need to start with a baseline and compare that to another data point. Are those clearly defined in your clause?

Price escalation clauses that reference national or regional indexes can be used (i.e. national average retail price of fuel on day 1 versus day 91).

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Price escalation clauses for other items may require detailed backup documentation and a line item analysis.

When considering the advanced purchase of materials and storage off the project site there are many issues to be addressed including, but not limited to, proper location, protection from creditors, insurance coverage, warranty period implications, etc.

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