

Current Status Of Construction Nationwide Time of uncertainty COVID-19 impact wide ranging How does COVID-19 impact construction? Supply chain, labor, government shut-downs What is essential under various government orders? State and local specific

- New York, California, Pennsylvania, Ohio, etc.
- Boston, San Francisco, Disney
- Read your state or local order
 - Amendments

Be Proactive

- · Government Orders changing rapidly
- Do you have a plan if your jobs are shut down tomorrow?
 - How will site be secure?
 - Where will materials be stored?
 - How will you document the work in place?
 - Who will contact subs?
 - What insurance is relevant?

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Force Majeure

- A contractual clause that operates to relieve one or more parties of a contractual obligation in the event an *unforeseeable* event beyond the *control* of the party delays or prevents performance under the contract.
- A/K/A "Acts of God"
 - Fire, riots, war, adverse weather, terrorism, etc.

What Is Control?

What is "control"?

(1) party may not cause a force majeure event; and

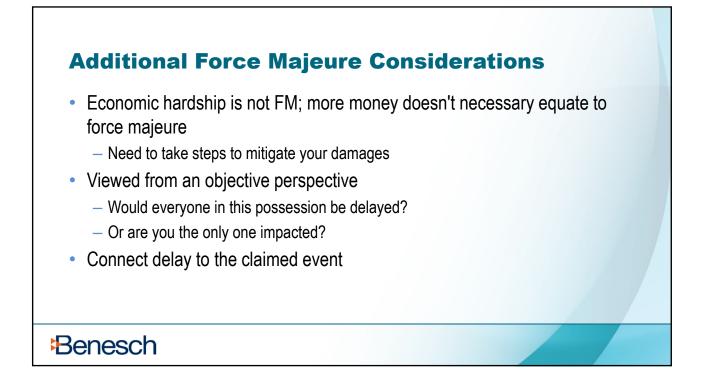
(2) a party may not rely on an event excusing performance if the party could have taken reasonable measures to prevent the event.

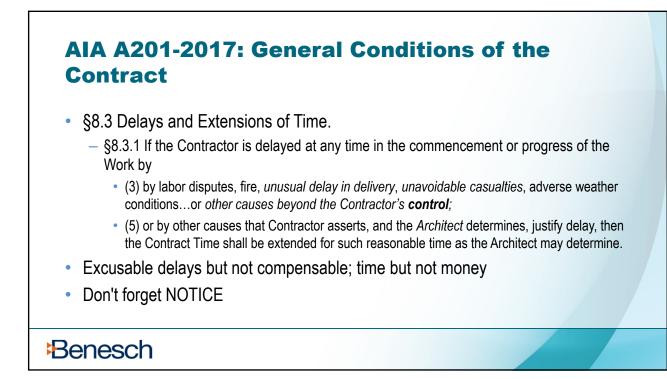
Think of concepts of legal control, actual physical control, fault, negligence, avoidance, and mitigation.

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Courts Will Enforce Force Majeure As Written

- RTC (Read the Contract)
 - FM is a creature of contract and courts will generally defer to the wishes of the contracting parties
 - Courts will narrowly construe but parties can negotiate a broad clause
 - Actual words of the clause matter
 - What type of events are covered? How does it apply? What is the result?
 - Look to upstream contracts





AIA A201-2017: General Conditions of the Contract: "Unusual delay in deliveries"

- Industry wide shortage or one supplier shortage?
 - Increase in cost does not necessarily trigger force majeure
- Anticipate supply chain issues
 - Where are the materials from?
 - Can they be substituted?
 - Has the price been locked in?

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AIA A201-2017: General Conditions of the Contract: "Other causes beyond Contractor's *control*"

- AIA fewer specific events so provides catchall
- Building permits
 - Inspections
- Pandemics
- Connect facts of project with specific provision

ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor

• § 6.3 Delays and Extensions of Time

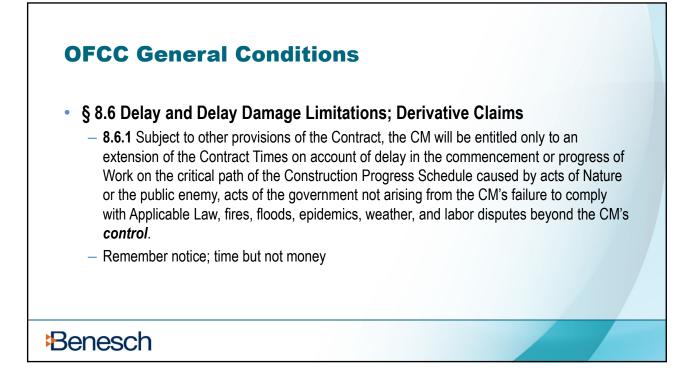
 6.3.1 If Constructor is delayed at any time in the commencement of progress of the Work by any cause beyond the *control* of the Constructor, Constructor shall be entitled to an equitable extension of the Contract Time. Examples of causes beyond control of the Constructor include, but are not limited to, the following

- (e) transportation delays not reasonably foreseeable;
- (j) epidemics;
- (k) adverse governmental actions;
- (I) unavoidable accidents or circumstances.

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ConsensusDocs 200 Standard Agreement and General Conditions Between Owner and Constructor

- Notice
- Excusable delay but not compensable (unless caused by owner); time but not money



Claiming Force Majeure

- Whose burden to prove?
 - Party seeking to rely on clause must take the initial step in demonstrating how the specific event falls under the categories. It is an affirmative defense.
 - It must also connect the event to an actual delay to the work.
 - In the event of the Boston construction shut down, the cause of delay is pretty clear.
 - Existence of the coronavirus?
 - Likely not sufficient without an accompanying explanation of how it delayed the project.

Claiming Force Majeure

• Best practices require documentation of the impact. For example, if the coronavirus ravage a subcontractor's labor force or results in unanticipated obstacles for specified material, it must be documented. Be proactive and do not wait until the project nears completion to notify the owner of the impacts.

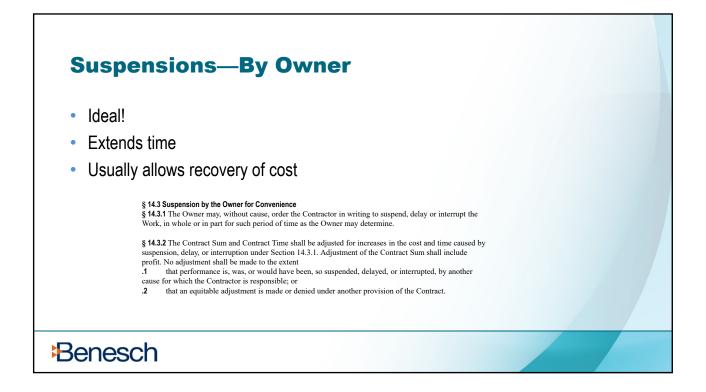
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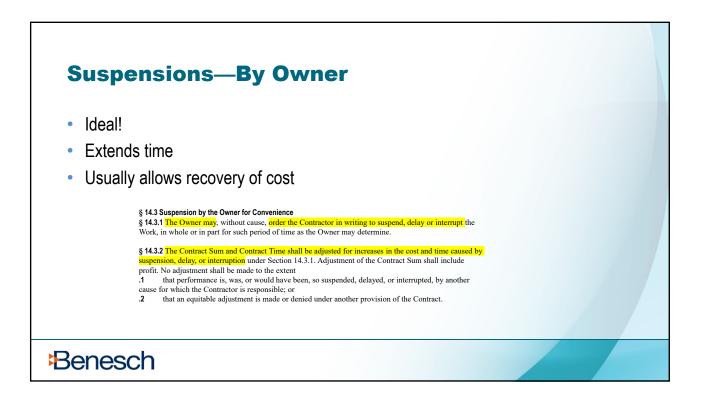
What should you do if impacted by Force Majeure?

- RTC
 - Is it an unforeseeable event beyond the contractor's control?
 - Comply with notice and claim provisions
 - Likely result is excusable but not compensable (more time to complete work but not more money)
- Are there other applicable contract provisions and what if your contract doesn't contain a Force Majeure?









Suspensions—By Government

- Not ideal...
- Might fit into traditional force majeure provision (more time, no more money)
- Discuss with owner:
 - Scope of suspension
 - Agreement on effect of order?
 - Agree on compensation in exchange for remaining ready or performing non-field work?
- May provide opportunity for contractor to terminate (discussed later).

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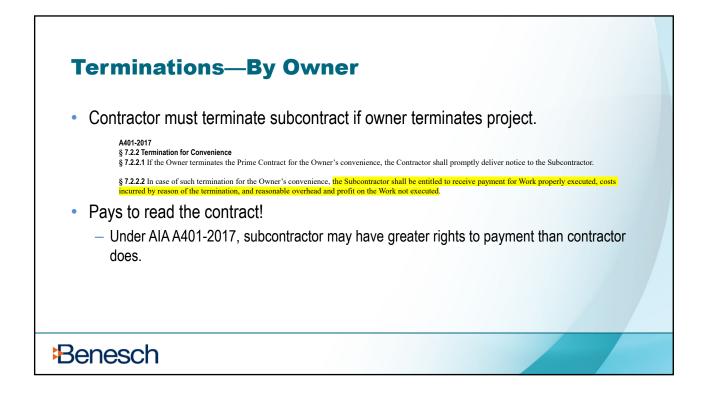
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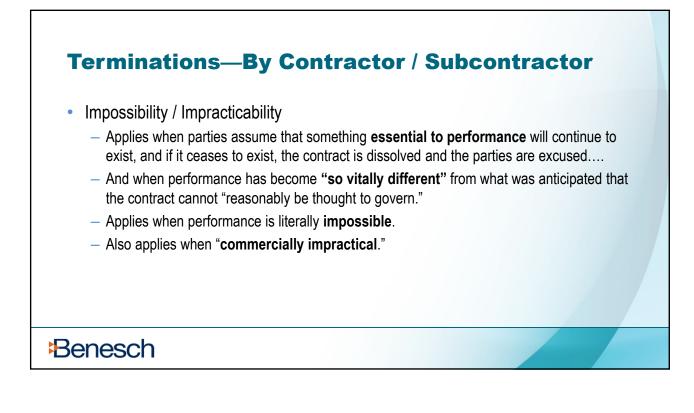
Suspensions—In All Cases

- Confirm suspension in writing.
- Communicate understanding with higher-tier party.
- Reach agreement on time and cost, even if contract does not provide relief.
- Protect the Work.
- Secure the jobsite.
- Communicate to lower-tier parties.
- Suspend subcontracts and orders.
- Document everything.

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Terminations—By Owner Unlikely once construction has started. Two grounds: For Fault of Contractor For Convenience COVID termination probably "for convenience." Look at contract for remedy. Yate Termination for the Owner for Convenience and without cause. The ase of such termination for the Owner's convenience and without cause. The Starter and the contract for the Owner's convenience and without cause.





Terminations—By Contractor / Subcontractor

- Commercial Impracticability
 - Contractor need not show literal and physical impossibility.
 - Instead, must show extreme and unreasonable difficulty, expense, injury, or loss.
 - · But-an increase in expense alone is not sufficient.
 - Nor is mere prospect of hardship, inconvenience, or added expense.

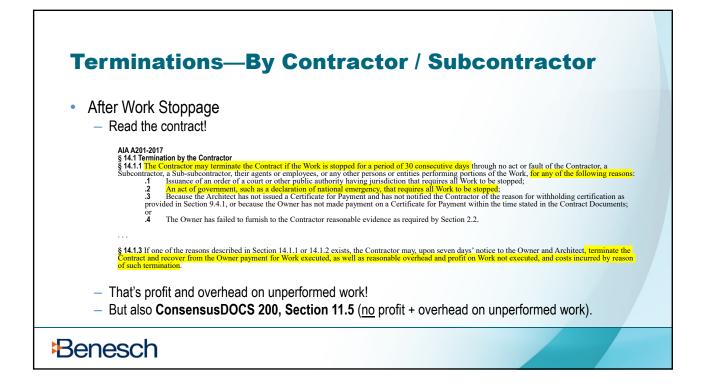
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Terminations—By Contractor / Subcontractor

- Commercial Impracticability
 - Factors that Contractor / Subcontractor must prove include:
 - All alternatives have been exhausted;
 - · All means of performance are commercially senseless;
 - · Performance objectively unreasonable;
 - No one else could perform;
 - · Issue causing non-performance could not have been reasonably foreseen;
 - Not the fault of the Contractor / Subcontractor;
 - Contractor / Subcontractor did not agree to assume the risk (or guarantee performance).

Terminations—By Contractor / Subcontractor

- Commercial Impracticability
 - What does this defense provide?
 - Excused performance.
 - · Possible ability to terminate.
 - · May recover the costs of attempting to perform the contract.
 - · Failure to perform will not be deemed a breach of contract.
 - Essentially, a way out of a delay with force majeure remedies <u>plus</u> possible additional remedies of ability to terminate and recover some costs.



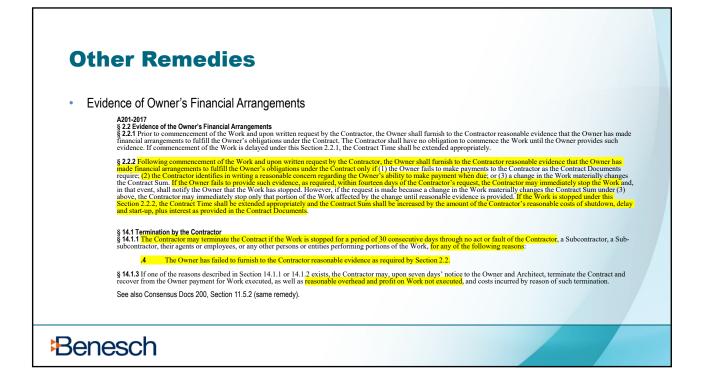
Terminations—In All Cases

- Confirm termination in writing.
- Communicate understanding with higher-tier party.
- Reach agreement on time and cost, even if contract does not provide relief.
- Negotiate procedure to protect the Work.
- Negotiate procedure to secure the jobsite.
- Communicate to lower-tier parties.
- Terminate subcontracts and orders.
- Document everything.

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Other Remedies

- Evidence of Owner's Financial Arrangements
- Use of Contingency
- Breach of Owner's Duty to Make Site Available
- No Damages for Delay
- Change in Law Provision





Other Remedies
Change in Law Provision
- ConsensusDOCS 200:
3.21.1. The Contract Price or Contract Time shall be equitably adjusted by Change Order for additional costs or time needed resulting from any change in Law, including increased taxes, enacted after the date of this Agreement.
2.4.15. "Law" means federal, state, or local law, ordinance, code, rule, and regulations applicable to the Work with which Constructor must comply that are enacted as of the Agreement date.
 EJCDC has similar provision.
 AIA does not.
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<section-header> Fariffs Similar problem? Unexpected disruption to expectations, leading to hire costs. But was it unexpected? Possible remedies for changes caused by economic or political forces... Invoke Price Escalation clause in contract (if one exists!) Usually available for extraordinary escalation only. Contractor must not be at fault (e.g., did contractor timely buy-out?) Sometimes such clauses are bilateral (i.e., credit due owner if prices fall).

Tariffs

- Possible remedies for changes caused by economic or political forces...
 - Invoke Price Escalation clause in contract (if one exists!)
 - Invoke Change in Law clause in contract (if one exists!)
 - ConsensusDOCS has.
 - EJCDC has but excludes tariffs.
 - AIA does not have.
 - Many customized contracts include.

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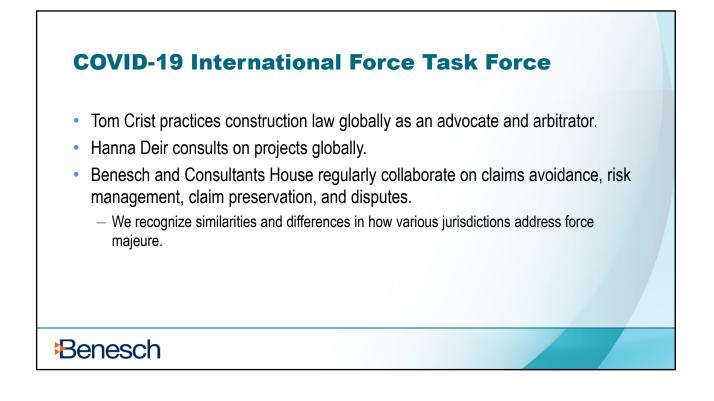
Tariffs

- Possible remedies for changes caused by economic or political forces...
 - Invoke Price Escalation clause in contract (if one exists!)
 - Invoke Change in Law clause in contract (if one exists!)
 - Invoke Force Majeure clause in contract
 - Condition must be unforeseen, extraordinary, out of contractor's control.
 - Were President Trump's tariffs unforeseen?
 - Even if so, more time but probably no money.
 - Impracticability of Performance
 - · Again, must be extraordinary and commercially senseless to perform.

When In Doubt...

- Read the contract.
- Communicate with higher-tier party.
- Consult your attorney.





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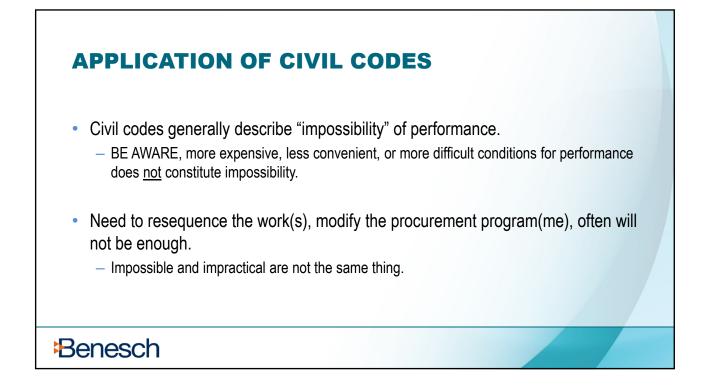
CRISIS-DRIVEN IMPACTS

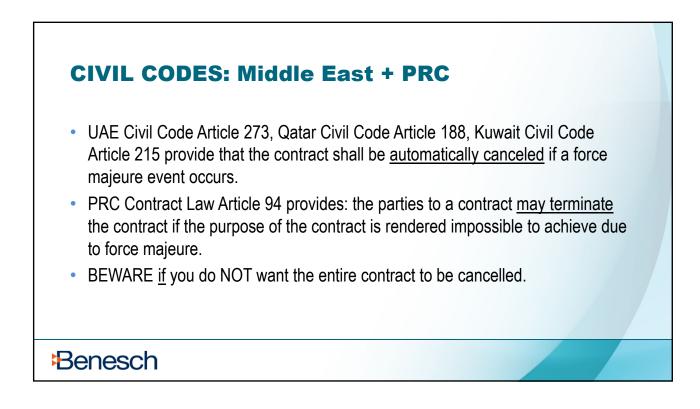
- Absent a crisis, claims for time and money occur on most projects.
- <u>During</u> a crisis, claims related and unrelated to the crisis may both occur.
- · Contractor have to segregate the two categories of claims.
 - Don't forget about "routine claims" while coping with the crisis.
 - Don't blend the two types of claims and weaken both.
- Generally, impossibility of performance is a rare basis for a claim.
 - Money will clear most impediments.
 - No so with COVID-19.

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A FORCE MAJEURE EVENT IS A CONTRACTOR'S <u>SHIELD</u> AGAINST OWNER CLAIMS FOR LATE PERFORMANCE

- Often, a contractor is entitled to a <u>time</u> extension, but no more <u>money</u>.
 Prolongation costs are typically not recoverable.
- The claimant always has the burden of proof.
- The PRC and the China Counsel for the Promotion of International Trade have announced that the CCPIT will issue "force majeure certificates" as a result of COVID-19 for international contracts between PRC entities and foreign parties.
- That is a <u>starting point</u> for contractors and addresses <u>only</u> supply chain.





CIVIL CODES: Russia

- Russian Civil Code Article 401(3) provides that relief is limited to the precise obligation that is impacted by the force majeure event.
- If needed materials are caught up in the fractured supply chain, the constructor may be excused from delivering part(s) of the project later than planned.
- All other work(s) must proceed and unrelated lateness is not excused.
- This code basically protects a <u>disruption</u> claim, even if the completion date is not extended by the force majeure event.

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UK Standard Contracts

- JCT (Joint Contracts Tribunal)
 - No reference to force majeure.
 - Either party may terminate if suspension exceeds two (2) months.
 - Time / no money.
- NEC (National Engineering and Construction Contract)
 - Reference to an "unforeseeable event" that stops work.
 - Terminate after 13 weeks of delay.
 - Time + money

FIDIC (Federation Internationale Des Ingenieurs-Conseils/International Federation of Consulting Engineers)

- Force majeure is where the "parties shall, having given notice, be excused from performance of such obligations for so long as such force majeure event prevents it from performing."
- Extensions of time for delay caused by "unforeseeable shortages in the availability of employer-supplied materials, if any, caused by epidemic..." or for delay caused by "unforeseeable shortages in the availability of personnel or goods caused by epidemic or government actions...."

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FIDIC

- <u>Delay or disruption</u> under Clause 8.5 of the FIDIC Redbook 1999 where the "Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the country" for example by increasing health and safety testing and thus having suffered lost productivity.
 - Unavailable labor. Trade Stacking. Idle time.
 - FIDIC covers <u>both</u> supply chain and labor impacts.

CAUSATION IS KEY Entitlement is contingent upon proof that COVID-19 actually impacted design, fabrication, ordering, shipping, import, productivity of labor, or installation. The impact must be to the <u>critical</u> path. Review <u>exclusions</u> in the contract documents. Economic downturn often excluded. Don't get trapped by specifications prohibiting use of foreign materials.

CAUSATION IS KEY / SO IS MITIGATION

- The contractor claiming force majeure also must demonstrate mitigation efforts.
 - Contractor must seek opportunities to limit damages.
 - Force majeure is not a blank check.
- Owners defending a force majeure notice by a contractor will evaluate tender assumptions, ordering history, procurement logs, to establish whether materials were in fact ordered on time and impacted by COVID-19, not ordered later than they should have been, when timely ordering could have avoided impact.

IF YOU ASSERT A FORCE MAJEURE DEFENSE DUE TO SUPPLY CHAIN SHOCK....

- Ask manufacturers, suppliers, logistics providers to provide "force majeure letters."
- Owners will not necessarily believe that your order was impacted by COVID-19, even if they agree that COVID-19 is a forced majeure event.
- If you can establish that you ordered the goods on time per the owner's program(me) and procurement schedule, supported by force majeure letters of those downstream, that is the best INITIAL support for your claim.

- Then, dig into the construction schedule to look for mitigation opportunities.

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TAKE THE INITIATIVE WITH NOTICES: <u>BE FIRST</u>

- Do not wait for the owner or upstream party to ask you for evidence.
 Gather and produce it, in writing. Log receipt of notices.
- Note that the nature of your notice is <u>continuous</u>.
- Increase detail as you proceed.
 - Reference prior notices.
- Provide references to local government orders and WHO advisories.
 - The date on which COVI-19 will cease to impact your project or the supply chain is not yet known.

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SUMMARY

- Review your contracts up and down stream. Find the force majeure (or similar) clause.
 - What does it cover? Pandemic's? Suspension on work?
 - Exclusions? Assumption of the risk.
 - Does the contract automatically terminate, electively terminate or require continued performance.
- Gather evidence, facts, letters. Give notice. Keep giving notice.
- Assess the critical path. Track productivity.
- Send in tranches/batches.
 - Be first.
 - Share detailed evidence of mitigation.
- If events fall outside the scope of the force majeure clause.
 - Argue frustration / impossibility
- If the contract is terminated:
 - Preserve claims that preceded the force majeure event.