ECA
Excellence in Electrotechnical & Engineering Services

GUIDANCE Note

COVID-19: Contracts: Force majeure
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COVID-19

This contractual guidance note covers time and the concept of force majeure in the context of construction and FM contracts.

1. Summary

The following is a list of considerations in the event that you are unable or impaired from proceeding with/completing works under a construction or FM contract (whether one-off or a framework basis).

Note: If you don't have a contract in place (oral or written) yet, the offer will most likely have been or will be cancelled/temporarily withdrawn until the outbreak is over.

If not, this may because clients are trying to lock desperate tenders into pre-COVID rates and productivity levels under terms & conditions which do not cater for pandemics. You should question your traditional tendering system as it is based on pre COVID-19 productivity rates and amend it according to new productivity rates under current safety measures for construction and FM.

The following considerations are only for when a contract has come into existence – which in the majority of cases in our sector is through behaviour rather than signed documents.

This guidance does not cover your ability to reach non-contractual agreements through collaborative commercial dialogue which should always be considered alongside your contractual position.

2. Force majeure

Force majeure is a contract right, i.e. it only exists if there is some kind of clause giving you the right to claim relief where you are precluded from carrying out your contractual obligations by some kind of 'act of god'.

"Force majeure", from the French "superior force" (read: 'Act of God') describes circumstances outside of the control of either party in a contract which prevents work from proceeding.

In English law, "force majeure" has no recognised meaning. A clause stating that the "parties agreed that if performance is disrupted or prevented by force majeure, the parties right and remedies shall be as follows…" will almost certainly be held void for uncertainty unless the term is defined elsewhere within the document.

The protection afforded by the clause will depend on the precise drafting. In the event of a dispute as to the scope of the clause, the English courts will apply the usual principles of contractual interpretation.

The following is a checklist of issues to take into account under a force majeure claim:

- Is there a clause?
- Does it cover epidemics/pandemics?

- What triggers it?
- What are the consequences for time, money (compensation/loss & expense/price), suspension and termination?
- What evidence is required
- Do you have parent or director guarantees and/or bonds in place which will still operate to cover your default in force majeure circumstances?

Affected parties should consider whether their contracts contain force majeure clauses and whether the outbreak falls within the protection offered by the relevant clause.

Force majeure is used to describe an event that occurs which is beyond the control of the parties, and which prevents them from fulfilling their contractual obligations. The courts have previously held that force majeure is an event which goes beyond what the courts understand by the terms 'act of God'.

There is, however, no precise legal definition of force majeure. Standard form building contracts deal with force majeure in different ways (see below).

Parties may, or may not, choose to incorporate a definition of what constitutes force majeure into their contract - the wording of any force majeure clause and the particular circumstances will have to be examined in every case.

It is very common to find a clause expressly dealing with force majeure events in a construction contract. In a construction contract a force majeure clause will usually relieve a party from the consequences of failing to perform its obligations when a force majeure event occurs - either by entitling that party to suspend performance, or allowing an extension of time for performance. It is for the party seeking to rely on the force majeure event to prove that such event applies.

An example clause is below:

> *Notwithstanding anything else contained in this Agreement neither party will be liable for any delay in performing its obligations herein, if such delay is caused by circumstances beyond its reasonable control (including without limitation any delay caused by an act or omission of the other party).*

In difficult cases, the client may try and argue the circumstances were not beyond the contractor's reasonable control as the consequences of COVID19 have been emerging over the past 8 weeks and allegedly could have been planned for. We would hope this argument would not be tolerated by a judge or adjudicator, but in spurious cases it might be used as a reason, in the interim, to delay payment.

The first death from unknown cause pneumonia was reported to the World Health Organisation in China on 31st December 2019. So, would a global response or shut down have been reasonably foreseeable after the media started reporting the incident around January 10th, 2020? Could the argument be put forward that you should have planned for the impact of the virus?

The words '*including without limitation…'* ensure that it is not just circumstances arising from an act or omission of the other party that allow the clause to be enacted.

> *Subject to the party so delaying promptly notifying the other party in writing of the reason for the delay and the likely duration of the delay, the performance of such party's obligations will be suspended during the period that the said circumstances persist, and such party will be granted an extension of the time period for performance of duties and obligations under this agreement equal to the period of the delay.*

Note this gives you time but not money. What if the extension, i.e. the consequential effect on the contractor's ability to deliver the contract is greater than the '*period that the said circumstances persist*'? Under this clause you will only be able to claim an equivalent period.

Either party may, if such delay continues for more than 5 weeks terminate this Agreement on giving notice in writing to the other in which event neither party will be liable to the other by reason of such termination.

Is 5 weeks an appropriate period? Whilst neither party will be liable, what can the contractor claim – works done to date (complete or not?) Loss of profit on the remaining works? Wasted expenditure to date? What is the process for wrapping up your account?

Are you relying on COVID19 or Governmental regulation/guidance following COVID19?

Is there a test 'prevention', 'hindering', 'unable to deliver' – this will dictate the level of proof required in order to present a robust claim with the required level of substantiation (record keeping will be paramount to proving your claim).

3. Frustration

Under English law, if a contract becomes impossible to perform as a consequence of the coronavirus, it may be open for a party to argue that it has been frustrated from completing its contractual obligations.

Frustration is a legal principle outside of the contract which allows you to walk away from further performance. It does **not** give you the right to compensation for the loss of the remaining contract and may still leave you liable for issues connected with your performance up until the date of 'frustration'.

- Do you want to be released from the contract?
- Is contractual performance impossible – not difficult/expensive?

Frustration is **only** available where contractual performance is **impossible**¸ not simply difficult or expensive.

However, this cannot be used as an argument where:

a) the parties have contractually agreed the consequences of the event (for example by the use of a force majeure clause),

b) an alternative method of performance is possible

c) just because performance has become more expensive or (d) because a party has been let down by one of its suppliers.

It must have become physically or commercially impossible to fulfil the contract which is incredibly difficult to prove.

The following factors will be relevant for a court in deciding if this argument works:

a) terms of the contract

b) the factual background

c) knowledge of risk at the time of entering the contract

d) ability to foresee and factor the risk of Coronavirus into project delivery.

If this argument fails, you will most likely be in breach of contract.

4. Force majeure events

Events that are typically thought of as force majeure events and could be held to constitute force majeure in a construction scenario, include: war or civil commotion, or natural disasters such as earthquakes. Other events may not so obviously fall under the ambit of force majeure and may instead need to be considered based on the individual circumstances surrounding the event and the contractual terms.

A downturn in economic conditions will not ordinarily constitute force majeure.

Strikes and labour disputes could qualify as force majeure events in construction with regards to supply of labour or materials. However, a strike may not be an event of force majeure if the party seeking to rely on the event has not used all reasonable endeavours to end the dispute. Note: to avoid this uncertainty JCT specifically itemises *strikes and lockouts…* as a separate ground for claiming an extension of time (c.2.19.14 JCT DBSub/C 2016 and loss and/or expense).

5. Causation

Does a party seeking to rely on a force majeure clause have to prove that it would have fulfilled its contractual obligations in any event, I.e. 'but for' the force majeure event? In other words, how forensic must the party relying on force majeure be in proving the clause is invoked because of the impact of COVID-19.

Ultimately, the answer would depend on the wording of the clause in question – where phrases like '*resulting from…'* are used in the clause they clearly indicate that the there is a requirement to prove that performance was impact because of COVID-19, i.e. evidence of the causal link between COVID-19 and the delay experienced must be adduced to support the claim.

Just because a force majeure clause may apply to the initial adverse impact on contractual performance, may not mean that it will continue to apply to impaired performance. Once it can be determined that the impact of COVID-19 is no longer an unforeseen event, many force majeure clauses may no longer apply as the parties will then be expected to have factored in the impact which becomes reasonably foreseeable and, at least in theory, quantifiable.

6. Defining force majeure

As there is no general definition of force majeure in English law, and some standard form construction contracts do not contain an express definition (e.g. JCT), it is quite common for parties to include a list within the construction contract of the events that would constitute force majeure, to try to combat the uncertainty surrounding what will constitute force majeure.

It is also common, however, to state that the list is not exhaustive (i.e. indicative only), to enable other events that the parties had not contemplated to be caught within the definition of force majeure.

The phrase 'the usual force majeure events' is lazy and is likely to be held to be void for uncertainty – after all how can a clause operate if it is vague and ambiguous in that it does not outline the basic concept on which it relies.

7. Force majeure: consumer contracts

If the contract is a B2C (business to consumer) contract based on one of the party's written standard terms of business, a force majeure clause will be likely to fall within the meaning of s.3 of the Unfair Contract Terms Act 1977, as the clause is effectively entitling one party to escape performance of its obligations or deliver performance of its obligations in a substantially different way from that which was initially agreed. UCTA therefore requires that such a clause is reasonable under the test outlined in that Act.

8. JCT: Force majeure

Under c.2.19.17 JCT DBSub/C 2016 force majeure is one of the Relevant Events available to the contractor which may entitle it to an extension of time to complete its obligations under the contract.

As no definition of force majeure is provided, the meaning would need to be determined by the court in each individual case. Therefore, whether or not a specific event constitutes an event of force majeure may be difficult and expensive to determine through litigation or predict and it is better to be clear and give a non-exhaustive list of examples.

Under c.2.18.6 JCT DBSub/C 2016, the sub-contractor is required to use its '*best endeavours'* to prevent delays, and this would include any delay caused by an event of force majeure. If the sub-contractor has not done so, it will not be entitled to an extension of time even if the event is held to qualify as force majeure under the contract. The term '*best'* as opposed to '*reasonable'* endeavours, is thought to include a duty to do everything, not simply that which any other professional sub-contractor might objectively be expected to do, in order to prevent delay from COVID19.

The initial challenge is for the sub-contractor to show prove that it discharged this duty and that not just the COVID-19 pandemic in itself, but impact on the contractual performance of the sub-contractor was beyond its control and that it could not have done anything further to mitigate or avoid the adverse consequences of COVID-19 on delivery of the project.

Note: Force majeure is not a 'Relevant Matter', so the occurrence of a force majeure event may entitle the sub-contractor to an extension of time, but not to loss and expense.

Under JCT, if the sub-contract works are not reasonably progressed due to the contractor before practical completion unreasonably, then the sub-contractor can give notice to the contractor that unless progress is resumed within ten days then it will terminate the contract. If the breach is not remedied within the 10-day period, the sub-contractor may serve a further notice terminating the contract (see c.7.8 JCT DBSub/C 2016). However, that interrupted progress must not have been reasonable and COVID-19 was in all reality not predictable and therefore can be construed as a reasonable interruption to progress removing the sub-contractor's right to terminate.

Without a definition of force majeure within JCT contract the initial hurdle is to prove that COVID-19 in the context of delivery of the works constitutes force majeure – which as described above will most likely involve proof of causally linking the delay and disruption incurred directly to events arising from COVID-19. It is vital to establish a solid basis for invoking these clauses as the consequence for getting it wrong is that the party suspending without preparing solid grounds (including evidence) for its position could find itself in breach of contract for having wrongfully suspended.

If COVID-19 is construed as a force majeure event, it may entitle either of the parties to terminate the contract.

9. NEC: Force majeure

The NEC contracts do not use the term 'force majeure'.

However, NEC3 and NEC4 c.60.1(19) and 91.7 refer to a test which equates for force majeure.

NEC4 c.60.1 lists the compensation events which may entitle the contractor to an extension of time (in a similar way to 'Relevant Events' in the JCT contracts) and/or to additional cost, and this includes an event which stops the contractor from completing the whole of the works, or prevents it from doing so by the date for planned completion shown on the Accepted Programme. This is almost identical to the provisions in clause 60.1 NEC3. In both contracts, the event must be one which:

a) neither party could prevent

b) an experienced contractor would have judged at the contract date to have such a small chance of occurring that it would have been unreasonable for the contractor to have allowed for it

c) is not one of the other compensation events stated in the contract

The employer can also terminate the contractor's employment if such an event occurs which is one that stops the contractor completing the whole of the works, or prevents it from doing so by the date on the current programme, and is predicted to delay completion by at least 13 weeks (c.91.7 NEC4 – c.91.7 NEC3 is almost identical).

The NEC approach, unlike that of the JCT (which only give rise to an entitlement to time, but not money) allows a contractor successfully passing the above elements of the test contained in the clause is entitled to both an extension to the time to complete the works, *and* additional payment.

It is common for Z clauses (which amend the standard NEC provisions) to include for an amendment to curtail this right to time **only** where is remains at all after bespoke amendments are added.

Summary – a sub-contractor will most likely want to establish a contractual ground – e.g. lack of site safety in line with government and industry guidance equating to a client prevention or impediment, as although the standard form contracts include for force majeure, it requires a heavy and therefore costly evidential and legal battle. In reality there may be more solid grounds upon which to find a claim and force majeure can be left to a secondary argument.

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