



GILES DIXON
SOLICITORS

Coronavirus, Force Majeure and Contracts in the Public as well as Private Sectors

Introduction

What are the contractual implications if your business is affected by the coronavirus pandemic? The great majority of contracts do not contain clear terms to deal with a situation such as this. But sometimes the contract will contain a force majeure clause – i.e. a clause that gives one or both of the parties relief from obligations under the contract in the event of circumstances that are beyond that party's control.

Force Majeure

When there is a clear definition of what is meant by force majeure, you need to check this to see that it does cover the current crisis and, in this connection, the fact that Covid-19 has been designated as a pandemic by the World Health Organisation is useful. Nonetheless, some force majeure clauses are quite narrowly drafted and could exclude or ignore epidemics or pandemics.

When reviewing a force majeure clause, you need to check:

- What specific events are stated to be events of force majeure?
Even if there is no reference to epidemics, the fact that the Government has introduced legislation which can result in a business having to cease trade is likely to be covered by a force majeure clause. (If the phrase 'force majeure' is used on its own, without any definition, that is potentially helpful as the dictionary definition can be used, which in the Shorter Oxford Dictionary is 'an unforeseeable course of events excusing fulfilment of a contract'.)
- Has one of those events prevented a party from performing its obligations under the contract?
The fact that a supplier's employees are off sick as a result of the epidemic may not be enough to trigger a force majeure clause. But a government directive requiring all workers to remain at home could.
- What happens if the force majeure clause applies?
The clause may grant limited relief – for example, an extension of time to complete certain obligations but not the costs involved in the delay. Alternatively, there may be a provision for either party to terminate the contract if force majeure continues for a specified period.

Given the draconian nature of the Coronavirus Act 2020, recently passed by Parliament, both parties to a contract are likely to be severely affected, at least in the short term, and it is in their interests, regardless of what the contract terms actually say, to get together – by email, phone or video link – to discuss and agree what action each of them should take to maintain their relationship in the

longer term, while finding a mutually acceptable solution in the short term. A pragmatic approach, as set out in Government guidance for public sector contracts (see below), is a potentially useful model for private sector companies to consider.

Frustration

In some cases, the impact of coronavirus and the accompanying legislation can mean that it is no longer possible for the supplier or contractor to perform their obligations. In that situation, in the absence of a reasonably minded employer, the doctrine of frustration may apply, in which case the contract will be terminated and neither party has any obligation to continue to perform it.

Other forms of Relief

If there is no force majeure clause in a contract, there may be other provisions which can be used by the employer or the contractor to obtain some relief. Most contracts have scope not only for variations but also to allow a contractor an extension of time and/or extra costs in certain defined situations. But if none of those clauses seem, on the face of it, to be applicable, there may be other terms that can be used to justify some relief. For example, some large project contracts, in particular those awarded by Government Departments, contain detailed requirements for the contractor to comply with all relevant health and safety laws and regulations. As the restrictions on movement have the force of law, and compliance with those restrictions on a building site could mean a delay in completion of the work as well as additional cost for the contractor, this could provide grounds for a claim to deal with the situation.

Public Sector contracts

If you are a supplier or contractor to the public sector, you should be getting good treatment from your client/customer. The Cabinet Office has issued a [Policy Note PPN02/20](#) with helpful guidance on maintaining business continuity during the coronavirus crisis. The guidance includes:

- Assist suppliers “at risk” in maintaining cash flow and this can include overriding provisions in contracts that allow for reduced payments in the event of poor performance or force majeure etc.
- As a quid pro quo, suppliers in receipt of public funds are expected to operate on an “open book” basis. This may include providing evidence that cash received is flowing through to the supply chain
- Adopt a pragmatic approach and work with suppliers to vary contracts rather than allowing suspension of performance, and cooperate in varying terms e.g. with regards to frequency and timing of delivery, performance indicators etc.
- Relief may include extensions of time or a waiver of a claim for liquidated damages
- Where a contract does contain a force majeure clause, the authority should not be bound to accept a supplier’s claim for force majeure but, rather, should try to seek an appropriate solution to allow business to continue
- Where a contract contains provisions for relief from contractual obligations in certain circumstances, contracting authorities should maximise any commercial flexibilities within the contract rather than take a narrow approach
- Suppliers should be paid as quickly as possible to maintain cash flow and protect jobs. This can include resolving disputed invoices on an urgent basis and/or encouraging suppliers to invoice on a more regular basis – e.g. weekly rather than monthly

On 6th April the Cabinet Office issued further Guidance on this topic dealing specifically with construction contracts, and that Guidance includes Model deeds of Variation for JCT and NEC contracts

So, whether your business has a contract with a public body or a sub contract, you be able to benefit from this relaxed and sensible approach. For more details, see the [Procurement Policy Note PPN 02/20](#) online

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Below are some notes on relevant clauses in some standard forms of construction contract

NEC 4. Clause 19.1, Prevention, provides for the Project Manager to give an instruction to the Contractor if an event stops the contractor from completing the whole of the works by the completion date and it is an event that neither party could prevent and an experienced contractor would not have foreseen at the Contract Date. While Covid-19 in itself would not necessarily be such an event, the legislation and regulations issued as a result most probably would.

Clause 60.1(19) has similar language so that an event described above would constitute a compensation event, thus allowing for the possibility of extra time and/or money.

It is more likely that the project manager will issue an instruction, probably to suspend the work, in which case the need for 60.1 (19) might not arise. Alternatively, the employer might want to exercise the right to terminate the contract under clause 91.7, which also deals with such an event.

Also, there is, of course, an early warning provision in clause 15, which either party might use when affected by the lockdown or some other impact of Covid 19.

JCT Design and Build 2016. Delay is dealt with in clauses 2.23 to 2.26, and extra time will be given to the contractor if there is a “Relevant Event” and these are listed in 2.26. They include in 2.26.12 the exercise by the UK government or any local or public authority of any statutory power which directly affects the execution of the works and in 2.26.14 force majeure. The Coronavirus Act 2020 contains the sort of powers that are covered by the wording of 2.26.12 and while force majeure in 2.26.14 is not defined, it would certainly include a pandemic of the type we are currently experiencing.

Loss and expense can be recovered under clause 4.19 if possession of the site is deferred or regular progress of the works is materially affected by a Relevant Matter. The definition of Relevant Matters is quite narrow and does not include an event that is unforeseen and beyond the control of one of the parties. However, if the employer restricts access to the site, that constitutes a change under clause 5.2 which could entitle the contractor to claim for loss and expense.

ICC- Infrastructure Conditions of Contract. Although there is no general force majeure clause, there are a number of ways in which the impact of a pandemic can be dealt with. Clause 44 entitles the Contractor to request an extension of time for a number of causes including ‘other special circumstances of any kind whatsoever that may occur’. Clause 63 deals with Frustration: if there are any circumstances that are outside the control of both parties that make it impossible or illegal for either party to fulfil their obligations, either party can give notice that the Works shall be deemed to be abandoned. The clause then sets out the payment and other procedures to be followed. The last subclause 64(6) says, somewhat curiously, that ‘Save as aforesaid the Contract shall continue to have full force and effect’.

FIDIC. As a contract designed for international use, FIDIC contract forms have a comprehensive clause of two pages dealing with force majeure. Although epidemic is not mentioned as one of the 'exceptional events' listed as examples of force majeure, the pandemic or its impact would qualify, given the broad definition of force majeure in clause 19.1. However, while clause 19.4 allows an extension of time for force majeure, clause 19.4(b) appears to limit cost recovery to four specified events which would not include a pandemic. However, clause 19.7 entitles the parties to be released from performance of the contract altogether if an event or circumstance outside their control makes it impossible or unlawful for either or both parties to fulfil their obligations.

The **FIDIC Model Services Agreement** for use with Consultants does not have the same force majeure clause but it does have a Changed Circumstances clause (cl.26) that provides for the Consultant to give notice of circumstances that would make it "irresponsible or impossible" to perform the services in whole or in part. This can then result in suspension of services and an extension of time.

The **RIBA Standard Professional Services Contract** 2018 in clause 9 allows the Architect to suspend or terminate their services and other obligations in the event of force majeure (9.2.5) or 'any other reasonable grounds for suspension or termination' (9.2.6).

Giles Dixon, Solicitor

giles@gilesdixon.com

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