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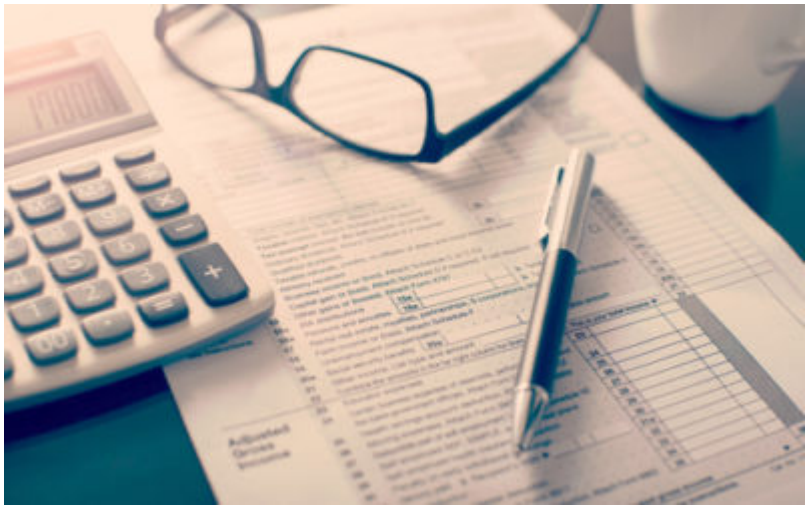

# FORCE MAJEURE | Coronavirus COVID-19: Construction, frustration, force majeure – What does contract law say?

Contract obligations must be performed, with the sanction of a potentially painful trip to the courts, arbitration or adjudication standing behind them for failure to perform. No ifs, no buts. Unless, that is, something out of the ordinary happens. And now, many are asking, is that something coronavirus?

**What are the legal possibilities?**

Under English law there are two obvious mechanisms to be considered. The first, established by case law, is frustration. The second is *force majeure*, which depends for its existence, and effects, on the contract itself. *Force majeure* is a legal concept in civil law countries, created by a provision in their civil codes which set out the law, for instance in France. In England, however, where there is no civil code, provisions to deal with *force majeure* should be set out in the contract.

**What is frustration of a contract?**

This occurs when, after the contract is made, an event occurs (without either party's fault and for which the contract makes no sufficient provision) which so significantly changes the nature of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time it was made, that it would be unjust, in the new circumstances, to hold them to its literal wording. More expensive or more difficult is not enough.

*What is its effect?*

Under English law both parties are automatically discharged from further performance. Legislation deals with the recovery of monies paid and compensation for any valuable benefit provided.

*Does it happen often?*

There are very few cases where a contracting party has successfully claimed that a contract has been

frustrated.

### What is *force majeure*?

This can be similar to frustration but, as it is not an English law concept, it is open to the parties to define, via the contract, exactly what circumstances are agreed to constitute *force majeure*.

*What is its effect?*

For the same reason, the contract also needs to set out the consequences of any event of *force majeure*, for instance suspension of performance until the *force majeure* event ceases.

### Could coronavirus be a legally frustrating event or *force majeure*?

Coronavirus has the potential to affect different contracts in different ways. If, for instance, a country imposes a legal quarantine ban on movement out of an area, so that a materials supplier cannot fulfil its supply obligation to a subcontractor, that might be a frustrating or *force majeure* event under the supply contract, but whether that is also the case under the subcontract with a main contractor may be a different story.

As we have seen, another key question is whether that subcontractor assumed responsibility to the main contractor for carrying out the subcontract works and, consequently, took the risk of an inability to source the necessary materials when required. If it did (and this will be a matter of legal interpretation of the contract), then there will be no frustration and, depending on the contract wording, there may be no *force majeure*.

Whether frustration or *force majeure* applies will depend on the individual circumstances of each case. How seriously did coronavirus affect performance? Did it become illegal or impossible or radically different and how, if at all, does the contract in question deal with this situation? Is an epidemic, for instance, defined by the contract as an event of *force majeure*?

It is reported that in February the Chinese government issued over three thousand certificates stating that *force majeure* has occurred, but does that mean that it has? Unless the contract provides that such a certificate is conclusive as to the existence of *force majeure*, it is likely to be for the court (or arbitrator or adjudicator) to decide if the event in question does constitute *force majeure* under the contract provisions, although such a certificate may carry more weight in a Chinese court.

### How do standard form contracts deal with *force majeure*?

*JCT 2016*

Under, for instance, the JCT 2016 Design and Build and Standard Building Contracts '*force majeure*' is a *'Relevant Event*' which may entitle the contractor to an extension of time. The contractor must, however, constantly use their '*best endeavours*' to prevent delay '*however caused'*.

And if '*force majeure*' causes the whole, or substantially the whole, of the works to be suspended for a specified period, there is a procedure for either party to terminate the contract and provisions dealing with the consequences. The relevant subcontracts have similar provisions in respect of extensions of time but no equivalent provision as to suspension.

Curiously, however, *force majeure* is not defined. Article 1218 of the 2016 French Civil Code may, however, be useful in indicating the essence of *force majeure* under civil law. It says that:

"*In contractual matters, there is force majeure where an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of the conclusion of the contract and whose effects could not be avoided by appropriate measures, prevents performance of his obligation by the debtor.*"

The JCT 2016 contracts do, however, offer an alternative possibility. If, for instance, the government issued an order shutting construction sites in a particular area, this could entitle the relevant contractors to time under a separate statutory power Relevant Event clause and could also entitle either party to terminate after suspension of the works for a specified period.

*NEC3/4 – force majeure by any other name?*
NEC3 and NEC4 make an event that looks like *force majeure* a compensation event. They do not use those words but Clause 60.1(19) says that an event which:

- stops the contractor completing the works, or completing them by the Accepted Programme date;
- neither party could prevent;
- an experienced contractor would have judged at the contract date to have had such a small chance of occurring that it would have been unreasonable for them to have allowed for it; and
- is not one of the other compensation events,

is a compensation event.

Early warning is likely to be required, followed by a risk reduction meeting, and the Project Manager then instructs the contractor as to how to deal with the event. The contract procedures and time limits for notifying, and dealing with, the event need to be carefully followed.

The event also entitles the Employer/Client to terminate if the event stops completion or is forecast to delay completion by more than 13 weeks.

The standard NEC3 and NEC4 subcontracts are in similar terms, amended as necessary.

*FIDIC*
The 1999 edition FIDIC contracts, for instance the Silver Book, contain provisions defining *force majeure* as an exceptional event or circumstance beyond a party's control which:

- they could not reasonably have provided against before entering into the contract;
- could not reasonably have avoided or overcome once it had arisen; and
- which was not substantially attributable to the other party.

It gives examples, and it provides for:

- suspension of performance, on notice, in respect of any obligation prevented by *force majeure*;
- extensions of time and payment of costs; and
- the potential for termination.

The 2017 editions of the Red, Yellow and Silver Books abandon the term '*force majeure*', substituting *'Exceptional Event'*; but with similar, though not identical, provisions.

*PPC 2000*
*Force majeure* is not mentioned, but there is provision for suspending and/or abandoning the project (and the consequences) in certain specified events, such as insured risks, government (of the project country) acts or omissions and hostilities.

There is also provision for extensions of time in the event of changes of law or regulation, or of the exercise of a statutory power affecting the works.

**Legal versus commercial?**
While there is likely to be plenty of scope for legal debate concerning cases about frustration and about interpretation of *force majeure* clauses, commercial considerations may take precedence. If suppliers, subcontractors and contractors want to continue working together in the future, in circumstances where no party is at fault, understanding on both sides will be required. If the shared objective is the resumption of performance as soon as possible, collaboration (underpinned by a sound understanding of the contractual position), rather than confrontational legal battles, may be the way forward.

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