

Force majeure in an ongoing COVID-19 environment from a construction perspective

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In parts of the world, cases of COVID-19 are declining, whilst others are seeing their first spikes. Commonly, a number are experiencing a resurgence or second wave. Seven months after it was first announced as a pandemic, the WHO Emergency Committee *"unanimously agreed that the outbreak still constitutes a public health emergency of international concern"* and that *"any countries that believed they were past the worst are now grappling with new outbreaks"*⁽¹⁾

According to John Hopkins University⁽²⁾, when predicting the future of the COVID-19 pandemic, experts look to other pandemics and the behavior of other viruses. Examples include the 1918 flu pandemic and the 2009 H1N1 flu epidemic. Both of these events began with a mild wave of infections, followed by a resurgence of cases.

As a result, and given the duration of the pandemic and the pattern which has emerged, the resurgence of COVID-19 can no longer be regarded as an unforeseeable event. Certainly it will not have been foreseeable prior to the conclusion of a contract, but there is scope to argue that it has now become foreseeable and is capable of being managed and factored into performance obligations. Certainly from the perspective of parties to a fresh contract, the foreseeability of COVID-19 causing disruption is beyond question and parties should be careful of addressing this issue clearly in their agreement terms.

Initially, and broadly speaking, the approach to dealing with the impact of COVID-19 has been dealt with as a *'force majeure'* event on the basis that it is an event beyond the contractor's control (lack of control element) and was also unforeseen/unforeseeable (unforeseeability element). Accordingly, the contractor on invoking same would become entitled to an extension of time and/or additional payment, depending on the applicable conditions of contract, and the amendments.

For parties who concluded construction contracts prior to the occurrence of COVID-19, and depending on the specific terms and conditions as contained in those contracts, there is certainly a likelihood that the cover afforded by force majeure would be limited if a resurgence or second wave were to occur. It is not suggested that a contractor will not have recourse by relying on other relevant provisions of a contract or to base its claims on other events arising from COVID-19 such as change in law consequences or instructions to suspend (for example), however parties should not be too confident that they will in all cases be able to avoid their obligations entirely. There would be an expectation on parties in any event, and given that the foreseeability position has changed in relation to COVID-19 that at the very least, parties should endeavour to mitigate the losses occasioned by COVID-19, instead of adopting an entirely supine stance. Each case would of course also have to be considered on its own merits, but whereas successive floods, hurricanes or earthquakes would still retain a degree of unpredictability (lightening purportedly does not strike twice in the same place), the pandemic is with us for some time to come and is no longer "unpredictable" and unforeseeable.

The Conditions of Contract for Building and Engineering Works designed by the Employer (*"FIDIC"*), NEC3 Engineering and Construction Contract (*"NEC3"*), Joint Building Contracts Committee (*"JBCC"*) and General Conditions of Contract (*"GCC"*) are slightly different from one another but contemplate an event to be *'force majeure'* in a similar manner.

Bespoke and other contracts will in most instances also follow an approach which is consistent and broadly requires both ingredients – lack of control **and** unforeseeability.

Contracting parties must consider the provisions governing *'force majeure'*, their definitions and application carefully.

The question of when foreseeability is to be assessed is one which also bears scrutiny. Would the assessment of foreseeability be one undertaken prior to the conclusion of the contract or is foreseeability assessed and measured on an ongoing basis?

Certain standard contracts specify the point at which an event was unforeseeable. Clause 19 of the NEC3 refers to '*contract date*' which is the date when the contract came into existence. Similarly, clause 19 of FIDIC refers to '*before entering the contract*'. These clauses provide wiggle-room for contractors to rely on the event remaining a force majeure, if a resurgence were to occur. This is not the case with all contracts. For contractors concluding new contracts, the wiggle-room may be lost.

As such, and in order to avoid disputes arising, contractors should approach their employers/clients to propose innovative ways to deal with COVID-19, in circumstances where the normal '*force majeure*' provisions, may no longer provide respite. An amendment of the contract to provide for shared responsibility in the costs, and agreement on extensions of time, if a delay is experienced, is an option. Incorporation of the costs associated with COVID-19 and its impact into the contract as a uncertain undefined sum to be determined at a later stage, similar to the approach adopted in respect of provisional sums, may be another option.

Contractors shall also need to anticipate amendments to contracts by clients, excluding a right to claim due to such an event or circumstance, as they are foreseeable and possibly now in the contractor's control. As an example, South African National Roads Agency Limited recently amended the '*force majeure*' provision in its contracts relating to strikes, unrest and riots and the rights and obligations arising therefrom. The amendments effectively raise the bar of what constitutes a '*force majeure*' when dealing with such events, which include construction-mafia type disruptions. The occurrence of such events is no longer sufficient ground to simply claim a '*force majeure*', as was normally the case. There are additional requirements a contractor is now required to satisfy for it to be entitled to claim that the event is a '*force majeure*'. The decision to introduce the amendments could be based on a number of reasons. However, it can also be argued that the regular occurrence (resurgence) of such events renders them foreseeable. As things stand and based on information currently available, it is no different when it comes to a COVID-19 or its resurgence in future.

COVID-19 is no longer novel. Contractors and clients have been forced to find innovative and safe ways to accommodate continued execution of the works under the now not so new normal. A second wave or resurgence is unquestionably foreseeable. Wholehearted reliance on force-majeure on the basis of this pandemic, will become increasingly difficult to sustain.

At general, parties need to be proactive and consider mutually beneficial ways in which to mitigate the risk and effects of COVID-19.

[1] <https://www.who.int/news-room/detail/01-08-2020-covid-19-emergency-committee-highlights-need-for-response-efforts-over-long-term>

[2] <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/first-and-second-waves-of-coronavirus>



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