

Coronavirus and Construction Contracts

by Jon Miller

Introduction

1. The key points to bear in mind re coronavirus and construction contracts are:
 - 1.1 force majeure clauses (unsurprisingly they turn on the wording of the clause);
 - 1.2 notices, and when to give them;
 - 1.3 record keeping/evidence;
 - 1.4 other coronavirus related Relevant Events/Relevant Matters which could give rise to time and money;
 - 1.5 frustration – a common law remedy that can be very difficult to establish;
 - 1.6 what to do with contracts that are about to be signed.

Force Majeure

The Contract wording is crucial

2. There is no established meaning in English Law of “*force majeure*” and every *force majeure* clause turns on the words used. In broad terms most *force majeure* clauses:
 - 2.1 suspend the obligation to perform the Contract when a *force majeure* event has occurred (contrast this with Frustration which discharges the Contract completely);¹ and
 - 2.2 the event must be beyond the control of the party relying on the clause.
3. *Force majeure* will only apply if there is a *force majeure* clause in the Contract – without a *force majeure* clause a party may have to fall back on Frustration. *Force majeure* excuses what would probably otherwise be a breach and effectively suspends temporarily an obligation to perform the Works, but it may not give rise to any compensation/loss and expense (e.g. a JCT Contract) unless the Contract provides otherwise (e.g. NEC3/4).
4. *Force majeure* clauses tend to be interpreted literally – they have been described as, “An exemption clause that must be construed strictly”.²

1. But some Force Majeure Clauses can give rise to a termination – see below.

2. SHV Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Inc [2006] 1 Lloyd’s Rep 163.

“Beyond the Contractor’s Control”

5. Unsurprisingly authors of contracts find it difficult to list every event which may have an impact on the Contract, and Force Majeure clauses normally contain a list of events, with a sweep up phrase such as “... *and any other clause beyond the Contractor’s reasonable control*”. Some commentators state it is not clear whether the *ejusdem generis* rule, whereby general words are interpreted by reference to the surrounding words, applies to Force Majeure clauses. I believe it does not.
6. In a case where a clause which exonerated a party to a contract “*In the case of strikes, lockouts, civil commotions, or any other causes or accidents beyond the control of the consignee*”, it was held that “... *strikes, lockouts*”³ still had to be “*beyond the control of the consignee*”.⁴
7. However, the *ejusdem generis* rule does not automatically apply to all commercial contracts; Courts will look at the parties’ intentions and give general words a wider meaning not restricted to the proceeding words, if this is what the parties intended.⁵ In a case where the purchase of an aircraft did not have to proceed under a list of Force Majeure events which included “... *any other cause beyond the Seller’s reasonable control*”, the Judge did not apply the *ejusdem generis* rule (but still felt it was telling that nothing in the earlier list of examples had anything to do with the economic downturn, and therefore the collapse of the financial markets did not trigger the Force Majeure Clause⁶).
8. There are a number of cases that suggest general words in commercial contracts are prima facie to be construed as having their natural meaning and are not limited by the *ejusdem generis* rule.⁷ In a Singapore case which exonerated one of the parties due to:

3. Emphasis added.

4. Frontier International Shipping Corp v Swiss Marine Corp Inc [2005] 1 Lloyd’s Rep 390.

5. Chandris v Isbrandtsen-Moller Co Inc [1951] 1KB 240, Henry Boot v Central Lancashire New Town DC 1980 15 BLR and Dunavant Enterprises Incorporated v Olympia Spinning & Weaving Mills Limited [2011] EWHC 2028.

6. Tandrin Aviation Holdings Limited v Aero Toy Store LLC [2010] EWHC 40.

7. E.g. Sonat Offshore SA v Amerada Development Limited [1988] 1 Lloyd’s Rep 145, 149, 158 & 163.

8. Emphasis added.

“(iv) *Accident at the mines, railway or port; ...*

(viii) *Partial or Total interruptions on railways or port; ...*

(x) *Any cause of whatsoever kind or nature, beyond the control of the Seller,*”⁸

it was held that each of the reasons given were standalone events which could amount to Force Majeure, and there was no need to qualify any of the earlier sub-clauses by the need for the events being “*beyond the control of the Seller*”.

9. Whether or not the *ejusdem generis* applies to Force Majeure clauses may be significant to the Force Majeure provisions within a JCT Contract – see below.

Impossible

10. In a contract which provided for its cancellation where delivery of goods was “*impossible*”, the fact that new government regulations prevented exports of the goods halfway during a delivery window did not amount to Force Majeure. The Court held that under the Contract delivery could have taken place prior to the prohibition of products by the Italian Government earlier in the delivery period. In keeping with the principle that the words of any Force Majeure clause need to be looked at closely, a requirement rendering performance to be “*impossible*” before it did not have to be performed imposed a very high hurdle which the party relying on the clause could not overcome; they could have delivered the goods prior to the prohibition coming into force.

Prevent/Hinder

11. Another example of the importance of the words used is a clause where delivery was suspended for reasons beyond the buyer's or the seller's control, which ultimately resulted in "preventing or hindering" delivery. The Court gave an indication that "prevention" is a more stringent test to overcome in that:

"Prevention' in such a clause must refer to physical or legal prevention and not an economical profitableness and that 'hindering' must refer to an interference with the manufacture or delivery from the same cause as 'preventing', but interference of a less degree".⁹

In this case the outbreak of war did not "prevent" or "hinder" the delivery of the goods in question at all as they could be obtained from alternative suppliers, albeit at higher prices.¹⁰

More expensive/Price rises

12. The mere fact that performance of a contract may become more expensive, e.g. via the use of alternative agency labour or suppliers, does not amount to Force Majeure:

"By 'hindering' delivery is meant interposing obstacles which it would be really difficult to overcome. I do not consider that even a great rise of price hinders delivery".¹¹

"... the fact that a contract has become more expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration."¹²

13. I suspect that the nature of the obligation in the underlying construction contract is relevant as to whether Force Majeure will come into play. For example, if a contractor can purchase sanitaryware from anywhere, and has decided to purchase this sanitaryware from China as it is cheaper, Force Majeure may not apply if there is the same but more expensive sanitaryware available in the UK. Contrast this with a scenario whereby a contractor has to purchase Italian marble from a particular seller within Northern Italy, and there is no alternative supplier.

Foreseeability

14. There is no common law rule that a Force Majeure event should be foreseeable, or in existence at the time the contract was entered into.¹³
15. However, in the absence of a general common law rule that foreseeability is a key element of Force Majeure, many Force Majeure clauses go on to state that they may only be relied upon for (say) "unforeseeable" events. In one notable example a Force Majeure clause referred to an "... unforeseeable act or event which was beyond the reasonable control of either party". The Court of Appeal held that the word "unforeseeable" did not add anything – if an act was not within a party's control, it was very likely that it was also not foreseeable.¹⁴
16. Significantly, the Force Majeure Clause within the JCT D&B 2016 makes no mention of foreseeability but the NEC3/4 does – see below.

Epidemic/Pandemic

17. In the current climate it may be useful to rely upon a quote from *Lebeaupin v Crispin and Company*¹⁵ where the Court referred to a quote from a French textbook which stated, "...war, inundations, and epidemics, are cases of force

9. Emphasis added.
 10. *Tennants (Lancashire) Limited v CS Wilson & Co* (1917) UKHL 523.
 11. *Tennants (Lancashire) v CS Wilson & Co* [1917] AC 495.
 12. *Thames Valley Power Limited v Total Gas & Power Limited* [2006] 1 Lloyd's Rep 668.
 13. *Navron v Callitis Ship Management SA* [1988] 2 Lloyd's Rep 416 and *SVH Gas Supply & Trading SAS v Naftomar Shipping & Trading Co Inc* [2005] EWHC 2528.
 14. *Great Elephant Corp v Trafigura Beheer BV* [2013] EWHCA Civ 905.
 15. [1920] 2 KB 714.

majeure...", with the Court adding, "This is a wide definition, but I think that it usefully though loosely suggests not only the meaning of the phrase [force majeure] as used on the Continent, but also the meaning of the phrase is often employed in English Contracts".

(N.B. The World Health Organisation has just declared a "pandemic" which apparently is different from an "epidemic". An "epidemic" is more local – it can occur in a community, geographical area etc. A "pandemic" is a disease that affects an entire country or the whole world.)

18. The *Lebeaupin* case was concerned with a clause containing a list of events which included "...any cause not under the control" of the party, but emphasised that the meaning of each cause turned upon the words used:

"A force majeure clause should be construed in each case with a close attention to the words which proceed or follow it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each instrument."

Notices

19. Unsurprisingly, one party will normally have to serve notice of Force Majeure on the other to benefit from a clause – in *GPP Big Field LLP v Solar EPC Solutions*¹⁶ one of the reasons the contractor's claims failed was that he did not give valid notice of Force Majeure under the contract.

Causation

20. As a general rule Force Majeure must be the sole cause of the delay. In the recent case of *Seadrill Garner Operations Limited v Tullow Garner Limited*¹⁷ drilling operations were delayed by:

20.1 a drilling moratorium imposed by the Government of Ghana (a Force Majeure Event); and

20.2 Tullow's failure to progress a drill plan in areas unaffected by the moratorium (not a Force Majeure Event).

The Court held that the Force Majeure Event must be the sole cause of the default.

21. However, the rule that a Force Majeure Event has to be the sole cause of delay may not apply to a JCT Contract – see below. Also bear in mind that the Contractor is still to use their best endeavours to prevent any delay.¹⁸
22. The burden of proof is on the party relying on the Force Majeure clause. A claim for (say) an extension of time would require the usual evidence, for example:

22.1 records – evidence of staff being unable to attend site due to coronavirus. This may be in the form of doctor's certificates, or if there are issues of confidentiality, witness statements confirming sickness or self-isolation. If sites are closed, evidence to confirm why they were closed and by whom. For late delivery/inactivity by a supplier, some form of contemporaneous confirmation from the supplier as to the effect of coronavirus on deliveries. It may be that the contractor's own head office staff are not available; again evidence will be required as to their lack of availability being due to coronavirus and some form of confirmation that there were no substitute employees who could have taken up the slack/taken their place;

16. [2018] EWHC 2866.

17. [2018] EWHC 1640.

18. Clause 2.25.6.1.

22.2 evidence that (say) the contractor has sought alternative staff from an agency, but has been unable to find any suitable replacements. If (say) the contractor's regular supplier of sanitaryware in China was unable to deliver, some form of evidence that the contractor sought alternative UK sources but still could not find a supplier who could deliver on time will prove to be useful;

22.3 as always, some form of programming evidence showing that the Force Majeure Event did indeed cause delay is crucial.

23. Interestingly, the Chinese Government has issued around 3,000 certificates confirming that Force Majeure has indeed taken place with the coronavirus outbreak, but these are at best of limited or of no real evidential value.

JCT Contracts¹⁹

Introduction

24. Force Majeure is a Relevant Event but not a Relevant Matter. Accordingly with existing JCT Contracts delay caused by coronavirus can give rise to an extension of time, but will not result in loss and expense as it is not a Relevant Matter²⁰.

No definition

25. The real issue with a JCT Contract is that, whilst the interpretation of a Force Majeure clause depends on the words used, surprisingly a JCT Contract makes no attempt to define Force Majeure. In a case concerning a clause which stated "*the usual force majeure conditions shall apply*", it was decided that this was too uncertain as Force Majeure clauses come in too many different varieties.²¹ There is no reported case as to what Force Majeure means under a JCT Contract.

Possible interpretation(s) of Force Majeure under JCT

26. As mentioned, there is some debate at least as to whether the *ejusdem generis* rule applies to Force Majeure clauses – one way of interpreting Force Majeure under a JCT Contract would be to look at the preceding Relevant Events. However, I do not believe *ejusdem generis* applies to Force Majeure at all, and also find it difficult to extract any common themes or limitations from the various Relevant Events, save that they all have potential to delay the works and ultimately the Completion Date.

Impossibility/Prevention/Hindrance

27. In my view this does not apply to Force Majeure under a JCT Contract. The trigger for extension of time is "*the progress of the Works ... is being or is likely to be delayed...*",²² which in turn causes a delay to the Completion Date.²³ This should probably in practice make it easier than a clause requiring performance to be "*impossible*" etc. as we merely need to establish that the Works are "*or likely to be delayed*". This is an issue we may ultimately have to emphasise to adjudicators when looking at the authorities on Force Majeure, which turn on their own specific wording.

Notices – JCT

28. As a Relevant Event, notice needs to be given of Force Majeure when it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed. This is then followed, as soon as possible thereafter, with particulars of the expected effect, including an estimate of the delay to the Completion Date.²⁴

19. The commentary here is largely based upon a JCT 2016 D&B.

20. Clause 2.26.14.

21. British Electrical and Associated Industries (Cardiff) Limited v Patley Pressings Limited [1953] 1 WLF 280.

22. Clause 2.24.1.

23. Clause 2.25.1.2.

24. Clauses 2.24.1 and 2.24.2.

29. I am still to look at the timing of notices under a JCT Contract in detail but suggest that a notice is given early and even now, as the impact and expected effects of coronavirus are changing daily, and we may approach a point of time soon where a project is "likely to be delayed".
30. The JCT Contract requires the Contractor to use his best endeavours to prevent any delay. Indeed, this may be no more than a reflection of the established principle of interpretation of Force Majeure causes – namely the cause can only be relied upon by a person who has taken reasonable steps to mitigate or overcome the event.²⁵

JCT Contract – Causation

31. As mentioned above, normally it is essential that it can be shown that the Force Majeure Event was the sole cause of one party's failure to comply with its contractual obligations.²⁶ However, I doubt, as a matter of interpretation, that this principle would apply to a JCT Contract.
32. In broad terms, where two or more Relevant Events give rise to a delay to the Completion Date, or even when a Relevant Event and an event which the Contractor is responsible for, both concurrently delay the Completion Date, then under an unamended JCT Contract this can still give rise to an extension of time.
33. I have real doubts whether it needs to be established under a JCT Contract that the Force Majeure event was the sole reason for the delay despite the earlier authorities being quite clear on this point where Force Majeure events come into play. This is reinforced in JCT Contracts such as a JCT D&B 2016 which makes it clear an extension of time can be attributed to more than one Relevant Event.²⁷

Termination – JCT

34. Under a JCT D&B 2016 Force Majeure may ultimately give rise to termination of the Contractor's employment,²⁸ if the suspension is due to Force Majeure and continues for a continuous length of time as stated in the Contract Particulars.²⁹

NEC 3/4

Clause 60.1.9

35. The NEC 3/4 contains a clause which is often described as Force Majeure in everything but name:

"(19) An event which

- Stops the Contractor completing the works or
- Stops the Contractor completing the works by the date shown on the Accepted Programme,

and which

- neither Party could prevent,
- 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 him to have allowed for it and
- is not one of the other compensation events stated in this contract."³⁰

25. See for example Hoecheong Products Co Limited v Cargill Hong Kong Limited [1995] 1 WLR 404.

26. See earlier reference to the Tullow case.

27. Clause 2.25.3.1.

28. Clause 8.11.1.1.

29. If none is stated, the period is 2 months.

30. Clause 60.1.9 – see also Clause 19.1.

36. As a Compensation Event a claim under this clause should give rise to not only an extension of time, but additional monies as well.

NEC Clause 60.1.9 – Key Issues

37. There are a few points to be borne in mind which are peculiar to the NEC:

37.1 the NEC introduces a degree of foreseeability in that at the “Contract Date” there must have been such a “*small chance of occurring...*” etc;

37.2 the “Contract Date” is a defined term within the NEC – “*the date when this contract came into existence*”.³¹ This term is sometimes amended to a later date when the last party signs the contract;

37.3 the Force Majeure Event must stop completion of the Works, or completion of the Works by the dates shown on the Accepted Programme. The NEC contains comprehensive provisions as to what the Accepted Programme should contain,³² which frequently the Parties do not comply with. If there is no Accepted Programme then Clause 60.1.9 may not (or at least may have some difficulty in) applying.

NEC – Notices

38. Under the NEC an Early Warning Notice can be given as soon as either the Contractor or the Project Manager “*becomes aware*” of any matter which could increase the Prices, delay Completion etc.³³ More significantly, however, notices are to be given of a Compensation Event which has happened, “*or which [a contractor] expects to happen as compensation event within 8 weeks of the contract or ... becoming aware of the event*”.³⁴
39. This clause is often amended with the 8-week deadline shortened. It does, however, leave open the question as to when the Contractor became aware of the “event”, or indeed what the “event” is. Unlike the JCT D&B 2016 the trigger for giving a Notice is not that the Works are likely to or are affected by coronavirus but under any circumstances once the Contractor becomes aware of the “event” Notice needs to be given.
40. I am still looking into the timing of notices but in the interim advising clients to give Notice on a compensation event now. There are some inherent difficulties with this approach in that, if a Project Manager accepts that a Compensation Event has occurred, then this is followed by a quotation containing not only the additional costs which the Contractor will incur, but also the delay to the Key Dates and the Completion Date – this may be impossible to do in current circumstances but in view of the potential Compensation Event Notice is given late, I think the advice should be to give Notice as soon as possible.

Termination – NEC

41. A Force Majeure event can give rise to termination under an NEC – Clause 91.7 allows the employer to terminate a Force Majeure event if the anticipated Completion is more than 13 weeks after the date shown on the Accepted Programme.

Frustration

Introduction

42. Frustration is a common law remedy but is rarely used successfully. Unlike Force Majeure which merely suspends performance of the contractual obligation, Frustration will bring the Contract to an end.

31. Clause 11.2.4.

32. Clause 31.2.

33. Clause 16.1.

34. Clause 61.3.

43. Frustration normally occurs after the Contract is entered into and renders it physically or commercially impossible to fulfil, or to transform the contractual obligations into something radically different (which is difficult to prove), and is not the fault of either party – not surprisingly this could be very difficult to apply in practice. Cases where Frustration has been successfully argued are rare and I suspect it will be more difficult to prove than Force Majeure.
44. Arguably, where a Force Majeure clause covers a Frustration event the same event cannot amount to Frustration.³⁵ The rationale behind this appears to be that one of the elements of Frustration is that the event in question was not foreseeable.³⁶ If the event came within the ambit of a Force Majeure clause, then arguably it was foreseeable at the date the Contract was entered into.

Examples of Frustration

45. They include:

45.1 destruction of the subject matter of the contract – e.g. the destruction of a venue by fire where an event was to take place;³⁷

45.2 non-availability of the subject matter of the contract due to no fault of the parties – e.g. the requisitioning of a ship;³⁸

45.3 a subsequent change in the law which made performance illegal – e.g. prohibition on exports due to the declaration of war;³⁹

45.4 an unexpected change in circumstances which falls completely outside what the parties would have contemplated at the time of contracting – e.g. when a number of voyages a ship was to undertake were drastically reduced and changed due to strikes;⁴⁰

45.5 contractual performance radically different from that contemplated at the time of contracting.

Often attempts at establishing Frustration fail

46. It is easier to find examples of when Frustration has not been upheld by the Courts:

46.1 An alternative method of performance should not be possible/the Contract should not be merely more expensive to perform. Cases involving shipping routes through the Suez Canal being blocked whilst it was closed did not amount to Frustration – the ships in question could have taken a longer and more expensive route to reach their destination.⁴¹

46.2 When a seller is let down by a supplier.⁴²

46.3 The frustrating event was apparent when the contract was made and gets no worse during the contract term. A case where a theatre promoter in Greece argued that the contract had been frustrated due to civil unrest and disturbance failed, as there was civil unrest and disturbance when the contract was entered into and it was found that it did not get any worse.⁴³

47. Accordingly, any case based on frustration due to coronavirus will have to be shown that the situation has deteriorated somewhat since the Contract was entered into. Foreseeability (or lack of it) appears to be an element of Frustration. No doubt with some sections of the media painting what could be a worst case

35. Jackson v Union Marine Insurance Company Ltd [1874] LR 10 CP 125.

36. Armchair Answercall Ltd v People in Mind [2016] EWCA 1039.

37. Taylor v Caldwell (1863) 3 B&S 826.

38. Bank Line Limited v Arthur Capel [1919] AC 435.

39. Denny Mott and Dickinson Limited v James B Frasa & Co Ltd [1944] AC 265.

40. Pioneer Shipping Ltd v BTP Tioxide Limited [1982] AC 724.

41. Tsakiroglou v Noble Thorl [1962] AC 93.

42. CTI Group v Transclear [2008] EWCA 856.

43. Flying Music Company Ltd v Theatre Entertainment SA [2017] EWHC 3192.

scenario due to the coronavirus outbreak, a claim for Frustration based upon the outbreak might be defended on the basis that the impacts of the coronavirus outbreak are foreseeable.

Law Reform (Frustrated Contracts) Act 1943

48. Frustration will not only discharge the contract to an end but the Act, which applies to the majority of commercial contracts which have been frustrated, can make it difficult to recover the innocent party's costs as:

48.1 money due and money paid before the frustrating event can be recovered/is no longer payable;

48.2 parties can retain an amount up to the value of the expenses from payments received, or recover a sum not exceeding the expenses if this exceeds the sums paid;

48.3 a party who gains a valuable benefit before the frustrating event occurred is entitled to adjust payment.

Obviously, trying to establish these sums can be extremely difficult.

Frustration – Risk

49. Not only is Frustration more difficult to prove, it can be a very risky approach to take. If a contract is frustrated, it is discharged – the parties no longer need to perform their contractual obligations. Should a contractor believe the contract has been frustrated and stop work, then unless this is justified under the rules of Frustration, this will no doubt amount to a repudiatory breach.

Other Routes for Recovery under the Contract

50. Bearing in mind that there may be other Relevant Events/Relevant Matters/ Compensation Events which could be a consequence of the coronavirus outbreak, they may be far easier to prove, such as:

50.1 changes in the Law;⁴⁴

50.2 the exercise of statutory powers by central and local government;⁴⁵

50.3 an impediment/breach etc. by the Employer – e.g. failure to give instructions on time due to lack of staff;

50.4 delays by Statutory Undertakers.

Generally speaking, nearly all of these claims will be easy to prove in Force Majeure, and certainly frustration.

New Contracts

44. E.g. NEC Optional Clause X2.

45. E.g. JCT D&B 2016 Clause 2.26.12 – NB. For this clause the exercise must be after the "base date".

51. Foreseeability probably has no role to play when considering Force Majeure under a JCT Contract. There is no mention of foreseeability and "Force Majeure" is just referred to as a Relevant Event, without any further explanation. Force Majeure will not give rise to any loss and expense.

52. Foreseeability has a role to play under the NEC where an event must be one which an experienced contractor will have judged at the Contract Date to have such a

small chance of occurring, it would have been unreasonable for the contractor to allow for it etc.

53. The safest way is to include coronavirus/COVID-19 as a Relevant Event/Relevant Matter/Compensation Event in new contracts and I have recently included a clause as a Compensation Event within an NEC Contract.

"Any matter directly or indirectly arising out of or in connection with Coronavirus and/or COVID-19/CONVID 19".⁴⁶

Not surprisingly, the Employer has strongly resisted this clause. A similar but possibly more elaborate clause could be included as a Relevant Event/Relevant Matter within a JCT Contract.

46. Alternatively, coronavirus could be included as an Employer's Risk in the Contract Data = see Clause 60.1.14.