

CONSTRUCTION AND ENGINEERING

COVID-19: Practical Considerations: Managing your Construction Contract

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As the impact of COVID-19 unfolds, in Ireland there has been widespread support for Government measures taken to slow the spread of the virus, including enactment of emergency powers.¹

It is clear that the construction sector is affected in a number of ways and, in these circumstances, companies operating in Ireland are considering management of their contracts. Where inability to carry on with business as normal impacts a party's ability to perform its obligations, companies need to examine the terms of their contracts to determine their rights and responsibilities and to prevent disputes further down the line.

This briefing summarises principles underlying some of the types of clause you may encounter, and provides practical points which may assist when considering them. In each case, determining the position requires review of the specific terms of your individual contract.

FORCE MAJEURE

Force majeure clauses are now in sharp focus. The general principle behind this type of clause is that, when entering into a contract, parties may include a mechanic to deal with events whose probability or impact could not have been contemplated at the time the contract was agreed, and which neither party will have caused or been able to control, but which, if they occur, will impede one or more of the parties in carrying out their obligations. These events are often known as 'force majeure' events but may be labelled

differently in your contract.

Mechanics providing for force majeure may, for example:

- define what constitutes a Force Majeure event,
- specify the parties' obligations once a Force Majeure event occurs. For instance, the party who is unable to perform its obligations may be required to give notice of the occurrence and anticipated impact of a force majeure event; to keep records as the situation unfolds; and to use reasonable or best endeavours to mitigate loss, and
- set out the reliefs or entitlements that flow from the occurrence of a Force Majeure event. As fault for the event will not have been attributable to either party, the objective is to provide options to reasonably vary expectations and manage the contract, without penalising a party for its failure arising from the Force Majeure event. Examples include entitlements to:
 - more time to perform a party's obligations,
 - possibly, though this may be less likely, adjustments to price for the obligations to be performed under the contract,
 - be excused from liability for breach of contract arising from delay or non-performance,

- trigger suspension of certain obligations under the contract for a specified period of time, or
- (possibly following a period of suspension) terminate the contract without either party being liable for damages in respect of the termination. A termination clause may provide for some form of restitution to leave the parties in a neutral position (for example, paying a counterparty for work done or goods delivered).

Force majeure clauses can be an effective mechanic in avoiding contract frustration. Frustration occurs when there is an event (after parties have entered into the contract) that is not the fault of the parties and which makes it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform the contract into a radically different obligation from that which was agreed. If this occurs, a contract is automatically discharged and parties are excused from their future obligations. In these circumstances, neither party can claim damages for non-performance and payments already made may not be recoverable.

CHANGE IN LAW

Contracts may also provide a mechanic for dealing with the impact of changes

¹ The [Health \(Preservation and Protection and Emergency Measures in the Public Interest\) Bill 2020](#) has been passed in the Oireachtas and was signed into law on 20 March 2020

in law. Changes in law will likely include new legislation but may also include directives or codes issued by public bodies or regulatory authorities. They may be limited to changes that could not reasonably have been foreseen by the parties.

If restriction on movement is imposed pursuant to emergency legislation, this may lead to sites temporarily shutting down, short-term labour shortages, and disruption to supply chains. If this impacts a party's ability to perform its obligations for the price, time, or

specification it agreed, then it may be able to apply under a Change in Law provision for adjustment to those terms. It is less likely that these types of provision will cover recommendations, for example in relation to staff pay and sick pay, which are not made mandatory pursuant to legislation. Again, what will determine this is the specific drafting of your contract.

STANDARD FORM CONSTRUCTION CONTRACTS - A SNAPSHOT OVERVIEW

Some of the key trigger events under

standard form contracts are identified below. Careful scrutiny of these clauses (including the amendments in your contract) are required to determine whether an entitlement to relief arises. Pay careful attention, also, to any pre-conditions and obligations relating to these clauses (such as notice requirements and obligations to mitigate loss or minimise delay).

<p>FIDIC (Yellow Book)</p>	<p>Clause 18 provides for Exceptional Events, defined as an event or circumstance which (a) is beyond a party's control, (b) could not have been reasonably provided against before entering the contract, (c) having arisen could not reasonably have been avoided or overcome, and (d) is not substantially attributable to the other party. Exceptional Events <i>may</i> comprise a number of occurrences which are expressly mentioned. These include "strike or lockout", but not pandemics.</p> <p><i>Entitlement:</i> extension of time; payment of costs for some of the occurrences expressly mentioned; optional termination if the Exceptional Event continues for 84 continuous days or 140 cumulative days (unless parties are able to agree on an amendment that would permit continued performance).</p>
<p>JCT</p>	<p>Clause 2.29 defines Relevant Event to include:</p> <ul style="list-style-type: none"> • force majeure (which is not a defined term), and • the exercise after the Base Date by the Government or any Local or Public Authority of any statutory power that is not occasioned by the fault of the Contractor but which directly affects the execution of the Works. <p><i>Entitlement:</i> extension of time; suspension and then termination if Works are prevented for a period of time.</p>
<p>NEC</p>	<p>Clauses 19.1 (Prevention), 60.1(9) (Compensation Events) and 91.7 (Reasons for Termination) provide for an event which (a) stops the Contractor completing the whole of the works or from completing them by the date for planned Completion, and (b) neither party could prevent, and an experienced Contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to allow for it.</p> <p><i>Entitlement:</i> extension of time; adjustment to Prices; termination by the Employer if the event stops the Contractor from completing the Works or from completing them by planned Completion and they are forecast to be delayed by more than 13 weeks.</p>
<p>PW-CF1</p>	<p>The Schedule to CF-1 provides for Delay Events.</p> <ul style="list-style-type: none"> • Force majeure is not included. • Delay to the Works caused by the order or other act of a court or other public authority exercising authority under Law, that did not arise as a result of an act, omission or breach of the Contractor, is included. <p><i>Entitlement:</i> extension of time.</p>
<p>RIAI</p>	<p>Clause 30 provides that, if, in the opinion of the Architect, the Works will be delayed by force majeure, then the Architect shall as soon as possible make a fair and reasonable extension of time for completion of the Works. Force majeure is not defined.</p> <p><i>Entitlement:</i> time.</p> <p>Clause 4 provides for variations arising from legislative enactments. Where the cost of performance of the contract changes as the result of any legislative enactment, rule or order or the exercise by the Government of powers vested in it, whether by way of affecting the cost of labour or otherwise, the amount shall change as certified by the Architect.</p> <p><i>Entitlement:</i> cost adjustment.</p>

PRACTICAL POINTS

- The provisions of your contract are paramount. Check what your contract says about force majeure and change in law (including any amendments to standard form contracts). Be aware that relevant provisions may be described using different terminology, specific to your contracts.
- Your contract may not provide for force majeure, or it may provide for force majeure in a manner that does not include pandemics. Again, check the other provisions. Your contract may include another mechanic designed to allow for variation of terms in specific circumstances, which may or may not be applicable.
- Your contract may provide for force majeure but not necessarily define force majeure. If that is the case, as a starting point, check the dictionary definition of force majeure. Judicial comment on the meaning of force majeure will also be relevant, although this will need to be interpreted in the context of the particular judgment in which it is made, and the sector in which the case arose. One often cited comment is that the term is “used with reference to all circumstances independent of the will of man, and which it is not in his power to control... war, inundations and epidemics are cases of force majeure...”²
- Once you have identified applicable clauses, check the obligations that arise. Are ‘early warning’ and ‘delay’ notices required to be given, and what triggers the requirement? What information must the party seeking relief provide to the other party, and when and how must this be done? If an application for extension of time has to be made, what is the process that must be followed? It is vital to be aware of these obligations: failure to comply with them could undermine an entitlement to relief.
- Relief may also be subject to a requirement to mitigate loss by, for example, checking if there are alternative ways to perform obligations or using reasonable or best endeavours to minimise delay or other impacts. Bear in mind, also, the general principle that an injured party may not recover damages for loss to the extent they could have mitigated that loss; this may become relevant if a dispute arises in relation to the contract.
- Keep a good record of events, your communications with counterparties, and actions you take. This may become useful for a number of reasons:
 - causation: questions may arise

as to whether there were other issues, and not solely COVID-19, that impeded the performance of obligations. In addition, causation may impact entitlement to relief. Site shutdown could be a force majeure event; it could also be a change in law event if done to comply with the exercise of emergency powers.

- seeking costs, mitigating loss and avoiding / managing disputes: a good record may also assist if a party is required to demonstrate mitigation measures or additional work (such as deep cleaning of premises or providing safety materials), or if disputes arise.
- Look at your contract in its entirety. There may be other provisions that interact with the relevant provisions, breaches of which may undermine your entitlement to relief. Examples are requirements to comply with Good Industry Practice; to have and comply with a Business Continuity Plan; and obligations to maintain insurance coverage.
- Who determines whether a force majeure event has occurred? This may be specified in your contract, but it is likely that the contract administrator makes the determination. Be aware of the dispute resolution clauses in your contract, which may become relevant in the event that the parties disagree about whether a force majeure event has occurred.
- What if you are a public sector organisation? If you are managing a contract that has been awarded under EU public procurement rules, it is worth being aware that contracts may be modified without a new public procurement procedure where: (i) the need for modification has been brought about by circumstances which a diligent contracting authority could not have foreseen, and (ii) the modification does not alter the overall nature of the contract.³ As with any changes made to public contracts, the awarding authority should decide on a carefully reasoned course of action, taking into account the relevant regulations and case law. Notice of such contract modification must be published in the Official Journal.
- Finally, are there other connected agreements that need to be considered? If, for example, a party is given an extension of time to complete its obligations, what impact will that have on third parties such as funders or future purchasers /

tenants? It is likely that you will have obligations under any agreements with third parties to provide notice and to seek commensurate extensions of time. You should be familiar with any restrictions those agreements impose on you when considering how to deal with applications for relief under the building contract. Examples of such agreements are Development Agreements, Facility Agreements, Forward Funding Agreements, Forward Purchase Agreements, and Agreements for Lease.

COLLABORATE AND COOPERATE

Pandemics are not the fault of either party. Whether or not they are caught by the mechanics of a contract, parties should engage and cooperate with each other as the situation develops, particularly since health and financial risks have to be managed on a day-to-day basis.

If you are currently negotiating a contract, bear in mind that COVID-19 is now well and truly with us; it is no longer an unanticipated or unexpected event of the type that the mechanics discussed in this briefing are likely to cover. At the same time, given the difficulty in predicting events over the coming months, it may be challenging to develop a highly defined allocation of risk for any contract you are about to enter. In any case, parties negotiating contracts should carefully explore the ways in which COVID-19 are likely to impact them, agree to the level of detail possible how they will manage those impacts, and ensure that this is clearly and expressly reflected in their contract.

FAILURE MAY NOT BE AN OPTION

Contracts end in a variety of ways and, as referenced above, these include frustration and termination. In normal circumstances, the key advantage of getting out of a contract is that you are free to engage a new party who you consider to be more capable to provide the goods or services you require. Given, however, that any impact of COVID-19 will be felt across the economy, walking away from a contract may not assist you in the way that it might when an individual project or transaction goes wrong. COVID-19 introduces a scenario in which the best course of action is constructive engagement, cooperation and preservation of your existing commercial relationships.

² Lebeaupin v Crispin [1920] 2 KB 714

³ Provided pursuant to Regulation 72(1)(c) of the [European Union \(Award of Public Contracts\) Regulations 2016](#).

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