# COVID –19: Managing the Impact on Construction Contracts

**Hon. Peter Vickery QC[1]**

*Abstract*

*COVID-19 is an acronym for Corona Virus Disease of 2019 (also known as SARS-CoV-2). It originated in Wuhan China to become a global pandemic with far reaching and devastating consequences that are unparalleled in the modern era.*

*In response, in attempting to manage and contain the outbreak, governments world-wide have been compelled to introduce laws which constrain personal freedoms and impact deeply and adversely on their own economies. Billions of people are in lock-down and economies are shutting-down.*

*No area of human activity is left untouched. All construction projects are potentially affected.*

*A highly fluid situation has developed as the course of the virus unfolds, in some countries rapidly escalating, in others steadily abating, with the prospect of resurgence ever present. To compound the malady, there remains the spectre of an entirely new pandemic virus emerging in the future. Uncertainty is a hallmark of the crisis.*

*A new context for the construction industry and for construction contracts has emerged.*

*This paper focuses of the impacts of COVID-19 on the construction industry in Australia and elsewhere in the common law world, and in particular on construction contracts in those jurisdictions. Two legal remedies are examined which may be deployed to manage the disease and its impacts:*

- *The common law doctrine of Frustration; and*
- *The contractual remedy of Force Majeure.*

## Introduction to Frustration

If a contract becomes physically or commercially impossible to perform, the common law doctrine of frustration may apply to automatically discharge the parties from their obligations.

However, the threshold for frustration at common law will ordinarily be significantly higher than the threshold for force majeure under a construction contract. The courts have given the scope of the doctrine of frustration a limited application.

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In practice, the doctrine of frustration is likely to only be invoked in the most obvious circumstances.

**Historical Background to the Doctrine of Frustration**

Permit me to step back in time and shortly trace the development of the doctrine of Frustration.

*Paradine v Jane*

The early position adopted by the common law in England reflected strict liability for contractual obligations. This was exemplified in *Paradine v Jane* of 1647.[2]

This was a case which arose out of the English Civil War (1642–1651). It was on 19 July 1643 that the British Royalist forces (the Cavaliers), led by Prince Rupert, took possession of land owned by the Plaintiff, Paradine. The land was leased to the Defendant, Jane.

The Royalists held the land for three years. This denied capacity of the hapless Jane to earn profits from the land and pay the rent, and he fell into arrears.

The Justices of the Kings Bench who heard the case held that even though in previous cases they would not allow a lessor to proceed against a lessee in time of war, Jane was still liable for the rent, even though he had been denied the capacity by acts of war to pay it.

The case entrenched the doctrine of strict liability in English common law for contractual debts.

*Taylor v Caldwell*

Then followed some 200 years later the decision of Justice Blackburn in *Taylor v Caldwell* of 1863. [3] This was a landmark English contract law case which established a basis for the modern doctrine of common law frustration.

The facts were colourful. In 1861 the Defendant (Caldwell) owned Surrey Gardens & Music Hall, and agreed to rent it out to the Plaintiffs (Taylor & Lewis) for £100 a day for a series of four concerts and an extravagant array of variety entertainments. All manner of things were to be enjoyed: jugglers, fireworks, fortune tellers, acrobats, singers and musical performances

Then, as fate would have it, on 11 June 1861, a week before the first concert was to be given, the music hall burned to the ground. The plaintiffs sued the music hall owners for breach of contract for failing to provide the music hall to them.

There was no clause within the contract itself which allocated any risk in relation to the facility.

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[2] [1647] EWHC KB J5.
[3] [1863] EWHC QB J1.

Could the Plaintiffs succeed? Not on the common law of the UK as it stood before 1863, following the principles applied in *Paradine v Jane* .

Blackburn J however reasoned that the continued existence of the Music Hall in Surrey Gardens was an implied condition essential for the fulfillment of the contract.

The destruction of the music hall was the fault of neither party, and rendered the performance of the contract by either party impossible.

Blackburn J cited the civil code of France and Roman law. He took an implied term approach to the problem, saying in a key passage: "*The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.*"

In so doing, Blackburn J set the groundwork for development of the modern law of frustration.

*The Modern Law of Frustration - Davis Contractors v Fareham Council*

From the springboard of Blackburn J's analysis in *Taylor v Caldwell* the English House of Lords 93 years later went on to establish the classic test for the modern common law of frustration in the case of *Davis Contractors Limited v Fareham Urban District Council* of 1956. [4]

Davis Contractors agreed with Fareham Council to build 78 houses over eight months for £92,425. It ended up taking 22 months and cost £115,223, because Davis fell short of labour and materials.

Davis, however, did not succeed. The House of Lords held that although the performance of the contract had become more onerous and difficult to perform, it was not frustrated.

Nevertheless, Lord Radcliffe summed up his reasoning in the following seminal statement:

"……..*frustration occurs whenever the law recognises that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract*." [Emphasis added]

And so it was that the concept of 'radical difference' was introduced into the law of frustration where it lives today as a major limiting factor in application of the doctrine.

*The Law in Australia - Codelfa Construction Pty Ltd v State Rail Authority of NSW*

In Australia, Lord Radcliffe's test was approved by the High Court of Australia in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [5]. This case is best known for its analysis of the principle of implied terns in a contract. However, the case also provided a vehicle for the majority to find that the contract in question was frustrated.

[4] [1956] AC 969.
[5] (1982) 149 CLR 337.

The basic facts which arose in *Codelfa* were these: The State Rail Authority engaged Codelfa Construction to excavate tunnels for the development of a railway line in a built up area. Under the contract Codelfa was bound to complete all works within 130 weeks. Codelfa commenced the work. However, the noise generated by underground drilling led local residents to obtain an injunction granted by the Supreme Court of NSW. This significantly restricted the hours of work.

The majority found for frustration, concluding that the situation resulting from the grant of an injunction rendered the project "radically different" from that which was contemplated at the time of contractual formation. On this point, Justice Mason stated [para 55]:

*"….the performance of the contract in the events which have occurred is radically different from performance of the contract in circumstances which it, construed in the light of the surrounding circumstances, contemplated."*

**Doctrine of Frustration Defined**

*Principles*

As it has evolved, the common law doctrine of frustration is of limited application for 3 basic reasons.

1. The first centres on the requirement that to establish frustration, the change in circumstances must be truly radical.

An obvious example is the fire at the Surrey Gardens & Music Hall (1861) in *Taylor v Caldwell* where the subject matter of a contract (to hire an event venue) was prevented from performance. Another is the delay caused in *Codelfa* where completing the tunnelling works as originally contemplated became illegal by reason of the Supreme Court injunction.

2. A second major limiting factor in application of the doctrine is that frustration must be the product of events which the parties did not contemplate when they entered into the contract.

Thus, if the facts are notorious, as with the current presence of COVID-19 at the time when the contract was entered into, there will be considerable forensic difficulty in establishing to the satisfaction of a court that the events flowing from the pandemic were not were expressly contemplated.

3. A third limiting factor is that the doctrine will not apply if the events of frustration relied upon are the fault of one of the parties.

*Summary of Frustration Elements*

By way of summary, the doctrine of common law frustration as it has developed in Australia, applies only in a limited range of circumstances – that is, where the following 5 elements are established:

1. the frustration event occurs subsequent to contract formation;

2. was not in contemplation of the parties at the time of contracting;

3. was without the fault of either party;

4. the contract is incapable of being performed due to an unforeseen event (or events);

5. resulting in the obligations under the contract being radically different from those originally contemplated by the parties.

Further, if established, and frustration of the contract is proven, at common law the contract is terminated as and from the point of frustration and the parties will be discharged in the future from performing any further obligations pursuant to it.

*Limitations*

Frustration principles will not apply in numbers of circumstances, illustrating that frustration is a doctrine of limited application.

In sum, the courts will not apply frustration where:

- the event could have been anticipated and therefore provided for by the parties in their contract;

- where mere hardship or disruption in the performance of a contract arises, or becomes more expensive to perform, except where completion of the contract has become commercially impossible;

- where certain risks are regarded as inherent in the contact such as delay in a construction contract which the parties could have foreseen at the outset of the contact (see for example *Davis Contractors Limited v Fareham Urban District Council*[6]);

- where one of the parties is at fault because the alleged frustrating event was self-induced (see for example the Privy Council in *Maritime National Fish Ltd v Ocean Trawlers Ltd* [7]); and

- a final limitation is this - upon the frustrating event occurring, the contract is not void *ab initio* (that is, from the beginning). The parties continue to be obliged to perform those parts of the contract which fell due for performance before the frustrating event, and they will also be obliged to perform any

[6] *Ibid* [1956] AC 969.
[7] [1935] UKPC 1.

obligations which are intended survive termination (for example, submission of a dispute to arbitration).

*Two Additional Factors Apply to Frustration*

1. *Loss Lies Where it Falls*

At common law, where frustration is established the contract is terminated automatically and the loss resulting from the termination lies where it falls (although there are limited exceptions to this rule).

2. *Relief by Statutory Modification*

Statutory modifications have been introduced with a view to mitigating the harshness that might result from strict application of the common law rule.

The modifications vary in their effect. See for example

the *Fair Trading Act 1999* (Vic) Part 2C;

the *Frustrated Contracts Act 1978* (NSW) and the

*Law Reform (Frustrated Contracts) Act 1943* (UK)).

**Enter the World COVID-19 Pandemic – 2020**

On 11 March 2020 the Director-General of the World Health Organisation (WHO) declared COVID-19 to be a pandemic. In a chilling public media release, the Director-General Dr Tedros Ghebreyesus, described the dangerous and rapid growth of the disease:

"*In the past two weeks, the number of cases of COVID-19 outside China has increased 13-fold, and the number of affected countries has tripled. There are now more than 118,000 cases in 114 countries, and 4,291 people have lost their lives. Thousands more are fighting for their lives in hospitals. In the days and weeks ahead, we expect to see the number of cases, the number of deaths, and the number of affected countries climb even higher. WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity, and by the alarming levels of inaction. We have therefore made the assessment that COVID-19 can be characterized as a pandemic*."

It might be mentioned that prior to this time, WHO had taken significant action to control the outbreak. On 11-12 February, WHO organised over 400 participants from across the world who came together at a Global Research and Innovation Forum, including scientists, Member States' representatives, public health professionals, funders and private sector representatives, to accelerate the development of innovations to control the epidemic. On 12 March 2020, WHO released the product of

the meeting – the Research and Development BluePrint called "*A Coordinated Global Research Roadmap: 2019 Novel Coronavirus*" to activate and accelerate the development of diagnostics, treatments and vaccines to address COVID-19.[8] The document also looks preventative action in avoiding and managing potential future pandemics, the likes of coronavirus. The WHO R&D BluePrint is a shared enterprise designed to work as a collaborative exercise. It is a thorough and comprehensive plan which covers the field, both in the short term and long term. May its work continue.

*The New Context of COVID-19 for the Construction Industry*

COVID -19 is setting a new context for the construction industry.

1. The first point to note is that COVID-19 is an entirely new challenge for humanity. We are compelled to deal with many 'known unknowns' and no doubt some 'unknown unknowns'.

   A 'known known' is that the current outbreak of COVID-19 is unprecedented and will have a significant impact on construction businesses of all sizes. However, we cannot know the extent of the impact. Many suppliers will struggle to meet their contractual commitments and this in turn will impact on supply chains further up the ladder. Specialist labour may also be in short supply.

   An 'unknown unknown' is that the virus is unpredictable in its manifestation, severity, duration and its economic effects generally and on the construction industry. The manifestations of the disease in different States of Australia, and in nations of the world, will vary widely. Underlying reasons attributed to the variations also vary widely among experts. They include a wide range of as yet undetermined factors such as demography, social norms, acceptance of government regulation, variations in levels of governmental and social control, early preparedness for pandemic events and effective communication of preventative measures.

   An example of the uncertainty occurred recently in Singapore. Just when it was thought that the disease was under control, a fresh outbreak occurred in the living quarters of construction workers in the city.

   With constant changes in conditions as the passage of the disease unfolds, government responses and restrictions will also change. Things are changing constantly with obligations on government authorities to keep the public informed, and for the public to adjust behaviours to accommodate the advice.

   Finally, we have the unknown of the timing of the end of the pandemic, likely to coincide with the development t of effective treatments and vaccines which is presently underway in some 40 countries of the world.

[8] https://www.who.int/blueprint/priority-diseases/key-action/Coronavirus_Roadmap_V9.pdf?ua=1

2. A second and counterbalancing point is the 'known known' of the importance of the construction industry to the economy. In Australia, it supports about 1.1 million jobs nationally (about 3 million jobs in the UK), and accounts for a large percentage of GDP [9]. A shut down of building sites could trigger a surge of costly claims and counterclaims between parties to construction contracts and their suppliers.

3. A third and related point is that some parts of the construction sector will need to keep functioning as 'essential services' – supporting critical infrastructure; and constructing new health facilities.

For example, in Moscow a short time ago, Russian authorities were pressing to build a hospital for coronavirus patients, similar to the medical facilities that were rapidly constructed in China. The new hospital and its 500 beds was said to be ready in the "near future", according to a statement by Moscow's deputy mayor Anastasia Rakova on the city's health department website.[10]

For these reasons, governments are presently constrained to shut down building sites. This is reflected in the New South Wales COVID -19 Stage 2 restrictions which exempt construction activities. The Victorian Stage 3 restrictions take a similar approach, and the Australian Prime Minister's Statement of Measures of 20 March 2020 also exempted construction works. But there is no guarantee that the present immunity for construction in Australia will not change.

4. The fourth point is that government is the only body in a position to deal with the problem. Both State and Commonwealth governments on Australia have developed an unprecedented expansion of emergency government controls, not experienced since WW2.

An example is the Declaration of Emergency under the *Biosecurity Act 2015* (C'w) implemented on 18 March 2020.

This Act was developed over 7 years of extensive consultation. It aims to manage biosecurity risks of all kinds including providing protection from public health risks and meeting Australia's international obligations.

On 18 March 2020 in response to the COVID-19 outbreak in Australia, under section 475 of the Act the Governor-General declared that a human biosecurity

[9] About 8% in Australia and about 7% in the UK.

[10] Daniel Brightmore, Global Construction news, 16 March 2020, https://www.constructionglobal.com/infrastructure/russia-builds-coronavirus-hospital-moscow-cases-rise [Last observed 4 April 2020]

emergency exists. The declaration gives the Minister for Health expansive powers to issue directions and set requirements in order to combat the outbreak. This is the first time these powers under the *Biosecurity Act* have been used.

The use of such powers will increase and abate in response to the disease – itself an unpredictable and unruly factor.

The only certainty is that controls and restrictions likely to be imposed by government on different sectors of the economy, including the construction industry, will evolve and change rapidly.

5. The fifth point in the present context is the question of what practical precautions are possible on construction sites to contain the risk of infection to an acceptable level.

   In answering this question, the precise nature of these precautions will need to be carefully considered, given the unique variety of construction projects which involve the assembly of manpower concentrated at different levels, at vastly different sites, undertaking different works and working to different patterns of work.

   For example, it is not likely to be practical on work sites in all circumstances to enforce the present social distancing rules which apply to the community at large. [11] This is especially a problem where workers are often compelled to work collaboratively in close quarters, for example in high-rise multi-level construction or roofing works.

   And in tunnelling works, how does one practically enforce disinfection of vulnerable components in the confinement of these severely time constrained projects while construction is underway?

   All of these factors will need to be carefully considered before controls on building sites are imposed to manage COVID -19 and like panfemics.

6. However, the risk of closure of building sites cannot be excluded in the present context. Building sites are not immune from COVID 19 outbreaks or government directives to closely manage them, or even close them down entirely.

   *Melbourne Building Site Outbreak*

   Last month, a construction worker on the Melbourne University building site has tested positive to COVID-19 after returning from overseas.

[11] Usually mandating a social distance of at least between 1.5 – 4.5 metres.

The worker on the $190 million New Student Precinct project in the heart of Melbourne University's Parkville campus is the first known case of COVID-19 on a building site in Australia.

Thankfully, the incident caused minor disruption. The employer undertook a sterile clean of the areas he had worked in, the workforce returned to work within a few days and the unions were comfortable the safety measures taken and adopted for the future.

*Boston Building Site Closures*

However, in the United States, Boston, Massachusetts, was the first city in the United States to issue a targeted cessation of construction work. Boston Mayor Martin Walsh directed that construction in the City of Boston was suspended starting 17 March 2020. Projects were given until Monday, 23 March 2020 to secure sites. After March 23, only skeleton crews needed for safety are permitted for the remainder of the suspension. The suspension applied to all non-essential construction until further notice. Exceptions for essential/emergency construction work were provided for.

*New York State Building Site Closures*

A short time later, in New York State most construction projects have now been shut down as COVID-19 cases in the city soar.

New guidelines were issued on 27 March 2020 following issue of a revised Executive Order from Governor Andrew Cuomo. Under the Executive Order, the definition of permissible "essential" construction has been severely narrowed to "a project necessary to protect health and safety of the occupants, or to continue a project if it would be unsafe to allow to remain undone until it is safe to shut the site." A $10,000 fine may be imposed for transgressions.

The practical effect has been the closing most construction projects in the State except for emergency construction. The shutdown was to be in effect Statewide until 21 April 2020.

*How Then in this Context to Manage the Risk?*

The present context calls for the need for collaboration to minimise the risk of building site closure. Government needs to be proportionate in its responses. By the same token, the construction industry needs to respond with creativity, flexibility and with a public-spirited approach.

Collaboration will be the key to achieving these objectives.

**Force Majeure Clauses**

*Introduction*

Given the limited role of the doctrine of frustration, preventative action in the form of a force majeure clause looks to be the best form of protection for construction contracts to guard against the pandemic.

But beware – all is not plain sailing – a force majeure clause will need to be clearly defined to address the necessary issues.

The term "Force Majeure" originates from the French Code Napoleon (now the Code Civil) which states "There is no place for any damages when, as a result of Force Majeure… the debtor has been prevented from... doing that to which he was obliged."

However, unlike the French civil law, Anglo/Australian law gives no definition to the concept of Force Majeure.

In Australian common law, the sole source of the rights and obligations which arise from a Force Majeure clause, when applied to the facts of each case, is the contract itself.

This creates the imperative of precision in the drafting of Force Majeure clauses in contract to make them effective.

It also gives rise to there being considerable variation in the drafting of Force Majeure clauses in construction contracts. Many are standard form contract clauses, and some are bespoke clauses. The drafting is not consistent.

The example of Clause 19 of the FIDIC 1999 Red Book standard form contact produced by the International Federation of Consulting Engineers will be examined. The FIDIC standard form of contract is an internationally recognized and commonly utilized form of contract.

An important implication for contractors is that before entering a construction contract, a party needs to be satisfied that the Force Majeure clause and the relief it grants the will address the likely adverse events that the project will encounter. In the

present context, this will also include coverage of the risk of COVID-19 and like epidemics and pandemics.

Failure to do so may result in a party adversely affected by an unforeseen event being forced to rely upon the limited relief available under the doctrine of frustration, or worse, being left with no remedy at all.

*What is a Force Majeure Clause?*

A working definition of a force majeure clause is this:

> A clause in a contract which adjusts the responsibilities of the parties for any failure to perform obligations under the contract if a party is prevented from, or delayed in, performing those obligations by an event of force majeure.
>
> An event of force majeure is an event or circumstance which is beyond the control and without the fault or negligence of the party affected and which, by the exercise of reasonable diligence, the party affected was unable to prevent.
>
> Provided that event or circumstance is limited to the events described in the contract.

*Anatomy of a Force Majeure Clause*

A force majeure cause in a contract serves two basic purposes:

(1) it allocates risk and

(2) it provides notice to the parties of events that may suspend or excuse performance.

In general terms, force majeure clauses have two components –the definitional part and the operative part. These will be examined in a little detail.

*Force Majeure – Definitional Part*

Given the application of force majeure depends on the specific wording of the relevant contract, the list of events to be included in the definition is a matter for negotiation between the parties.

A number of approaches bay be adopted in the drafting of a force majeure clause. General language may be used which broadly encompasses the anticipated possible disruptions defined in the widest possible terms. An example can be found in the standard form contract of the American Institute of Architects (AIA) which describes force majeure as arising from events "beyond the control of the parties."

However, a more common technique is to list specific categories of events which trigger a force majeure event. Given the common law meaning of the term force majeure is not certain and is open to interpretation of the courts in the event of a dispute, it may be considered to be in the best interests of the parties to ensure that the term force majeure is unambiguous and is as clearly defined as possible.

Adopting an exhaustive definition is one accepted way of achieving clarity. This may be supplemented by including a general 'çatch-all' force majeure term as a precaution.

A commonly used force majeure clause is Clause 19 of the FIDIC Red Book (1999 ed.). This too is widely drawn.

Sub-clause 19.1 defines Force Majeure as an exceptional event,

(a) which is beyond a party's control;

(b) which such party could not reasonably have provided against before entering into the contract;

(c) which, having arisen, such Party could not reasonably have avoided or overcome;

(d) which, is not substantially attributable to the other party.

Thereafter follows a non-exhaustive list of five categories of events that could fall within the definition of an exceptional event, which may include, but is not limited to, the kind listed below, so long as conditions (a) to (d) above are satisfied:

- war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
- riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-contractors,
- munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and
- natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

It will be observed that, although the definition of Force Majeure in Clause 19 of the FIDIC Red Book (1999 ed.) is widely drawn, there is no specific reference to any 'pandemic' or 'disease' or 'epidemic' and / or 'communicable disease' included in the example list of triggering events.

Still less is there any reference to any "government interference" or "declared state of emergency" or "government health directive" of the kind found, for example, in the *Biodiversity Act 2015* (C'w).

The absence of these references may well give rise to argument as to whether COVID -19 and like epidemics and pandemics are included in the Clause 19 force majeure clause, even though these events may well fall within the parameters of Sub-clause 19.1.

The following factors would suggest a narrow construction of Clause 19, in effect excluding the issues which may typically arise from COVID – 19:

- common law courts have typically interpreted force majeure clauses strictly;[12]
- the fact that the Clause 19 definition is drawn widely but does not include issues which typically may arise from COVID – 19; and
- perhaps most critically, the fact that issues which typically may arise from COVID – 19, and which typically are likely to impact directly on the construction industry in the course of a project, are specifically dealt with elsewhere in the FIDIC Red Book (1999 ed.). In particular, Clause 8.4(d) gives potential relief to contractors by way of extension of time in the event of 'shortages in the availability of personnel or goods caused by an epidemic or governmental actions'.

It would therefore be advisable to include in the definition of force majeure a specific reference to COVID – 19 and like epidemics and pandemics in future contracts.

*Force Majeure – Operational Part – Causation*

The causal element is important. Before engaging the relief provided in the operative part of a force majeure clause, it will be necessary to establish causation.

The claiming Party needs to be in a position to prove that it was indeed prevented by the event of force majeure from completing its contractual obligations and could not have reasonably avoided or overcome its effect.

[12] See for example the recent case of *2 Entertain v Sony* [2020] EWHC 972 (TCC).

To invoke the relief provided by a force majeure clause, the prevention must be a physical or a legal prevention. Simply economic unprofitability (eg. where the cost of performance increases above what was originally anticipated) will not suffice. [13]

Further, to qualify for a Force Majeure the event cannot be one that is caused or "substantially" attributable to the claiming Party or the other Party. It must be an event caused by the force majeure.[14]

Proof of the facts to establish causation may be a relatively straightforward exercise, as for example where there is a case of an outbreak of sickness on site with resultant loss of irreplaceable manpower. More difficult and therefore forensically more risky, will be a case built upon the unavailability of essential construction materials due to economic downturn caused by progress of the disease.

There are two factors which may work to negative the causal element in the operation of a force majeure clause and deny relief. They are:

(a) whether mitigation taken; and
(b) whether the event relied upon was attributable to one or other of the parties.

It will need to be established that the injured party has been prevented, hindered or delayed from performing its contractual obligations directly due to a defined force majeure event, such as coronavirus outbreak.

In practical terms, the party seeking to invoke 'force majeure' needs to be in a position to prove that:

(a) it had no alternative means or method for performing its contractual obligation; and

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[13] *Tennants (Lancashire) Ltd v G.S. Wilson & Co Ltd* [1917] A.C. 495 6; *Fairclough Dodd & Jones Ltd v J.H. Vantol Ltd* [1956] 3 All E.R. 921.

[14] See for example the recent case of *2 Entertain v Sony* [2020] EWHC 972 (TCC). The High Court held that liability for losses stemming from a warehouse fire during the 2011 London Riots could not be excluded by a force majeure clause because: i) Sony failed to carry out adequate security risk assessments and take reasonable security measures at the warehouse; ii) Sony failed to carry out adequate fire risk assessments and take reasonable fire precautions at the warehouse; and iii) The fire, loss of the stock and loss of the Logistics Services were caused by Sony's said failures and did not amount to force majeure.

(b) that it had taken all reasonable efforts to avoid or mitigate the force majeure event and its effects.

A clause to this effect may be provided in the contract, such as under the FIDIC 1999 contract where each Party is at all times obliged to use "*all reasonable endeavours to minimise any delay in the performance of the Contract*".

What mitigation is possible will depend on the factual circumstances. For example, where supply is interrupted, alternative suppliers for goods equipment and materials may be sought out. If delay occurs, program adjustments may be introduced if permitted by the contract.

*Force Majeure – Operational Part – Remedies*

In the event of a force majeure occurring which gives rise to an entitlement to relief, that party will be entitled to the relief provided for in the contract.

Relief may take a number of forms, which will vary according to the contractual terms. The relief available may be defined by reference to such factors as:

- a defined category of force majeure; or by
- the time period during which the force majeure event persists; or by
- the length of delay caused by the force majeure; or by
- the character of the effects of the force majeure (eg. arising from a shortage of Materials); or even by
- the physical location or country of the works.

The Contractor may be entitled to a variety of relief provided for in the contract – for example:

- an extension of time for delays arising from being "prevented" from performing the contract;
- recovery of the cost or additional cost it incurred resulting from the force majeure (not profit);
- recovery of the lost profit it incurred resulting from the force majeure); or

- in the most extreme case, to termination of the contract.[15]

  Upon termination, the Contractor may be paid out according to the contract, which may provide for it to be paid for all work it has done and all costs arising directly from the termination, or repatriation of the Contractor's staff and labour.

  In the usual case on termination, the Contractor will not recover profit on the balance of incomplete work, and the Employer will not recover the cost of procuring a replacement contractor to undertake the balance of the work.

Common additional features of the operative part may also include:

- providing early notice with particulars of the force majeure event;
- an obligation to use reasonable efforts to mitigate the effect of the event of force majeure on performance
- upon the passing of the force majeure, if the contract is still on foot, an obligation as soon as reasonably practicable, to recommence performance of contractual obligations and if necessary, provision of a revised programme rescheduling the works to minimise the effects of the prevention or delay caused by the force majeure;
- a provision that the force majeure does not relieve a party from liability for an obligation which arose before the occurrence of that event, nor does that event affect the obligation to pay money in a timely manner which matured prior to the occurrence of that event;
- further, it is common in a force majeure clause for a Contractor to be entitled to an extension of time if a force majeure event impacts on its ability to achieve timely completion of the works;
- and for an obligation to be imposed on the Contractor for care of the works during an event of force majeure, coupled with an obligation to reinstate any damage to the works arising therefrom prior to completion.

**Force Majeure Clause – 9 Practical Take-away Points**

Finally, there are nine practical steps which may be taken to ameliorate potentially damaging effects of COVID – 19 and like epidemics or pandemics in the administration of *force majeure* clauses in construction contacts:

*Textual Review at the Outset*

1. Recognising that the text is critical and that this is a matter for negotiation between the parties it will be important to undertake a thorough review of the provisions of the proposed contract in relation to force majeure prior to execution of the contract to ensure that

[15] Under the FIDIC contracts, either Party may terminate the contract "[i]*f the execution of substantially all the Works in progress is prevented*" due to the Force Majeure event for a continuous period of 84 days or for multiple periods that total more than 140 days.

(a) that COVID-19 or like epidemic of pandemic is defined clearly as a triggering event; and
(b) the risk is allocated appropriately in accordance with the negotiated intentions of the parties;

*Consider Contract Governing Law*

2. It is also important at the outset to consider the governing law of the contract to ensure that there is no provision which regulates the force majeure clause. This may assume particular importance in contracts with an international dimension where the governing law of a foreign jurisdiction may contain an unexpected provision which operates to impact on, modify or declare illegal a force majeure clause;

*Familiarity with Contract Prior to Project Commencement*

3. Prior to project commencement, project managers should attain familiarity with the force majeure terms. This will be important to ensure compliance, including with any procedural requirements under the force majeure clause, such as the giving of timely notice, to preserve the operation of the remedies provided and avoid the risk of losing force majeure rights;

*Ensure Procedural Compliance During Contract Performance*

4. If an event of force majeure arises during the contact, ensure that relevant provisions of the contract, are adhered to, including for example: mitigating loss and damage; and resolving any disputes by engaging in mediation and/or arbitration; and the like;

*Keep Accurate Records*

5. Accurate record keeping of an event which may trigger a force majeure clause, the consequences as they occur, together with records of all attempts to mitigate the impact, is essential for future reference;

*Maintain Flexibility*

6. If an event of Force Majeure occurs, it is always open to the parties to respond by negotiating an amendment to the contract;

*Observe Occupational Health and Safety (OHS)*

7. Compliance with applicable occupational health and safety standards and government directives relating to COVID-19 management and control will need to be observed. Recording the response measures taken will also be important.

*Review Existing Contracts*

8. In the face of the present pandemic, as with any contract, it is always open to the parties to review the force majeure clauses in existing contracts with a view to re-negotiating agreements to accommodate force majeure to cover COVID-19 and its impacts, if it is not already covered. Given good will, an appropriate outcome may well be possible.

9. *By Way of Conclusion – The Need to Maintain communication and collaboration*

   A hallmark of the COVID-19 pandemic for the construction industry is uncertainty. This will bedevil all parties to the construction contract together with all sub-contractors and suppliers.

   Both the duration, and extent and nature of the impacts are in the realm of the 'known unknown'.

   To this may be added the changing nature and extent of laws imposed by government to deal with the pandemic. These too are constantly evolving and changing.

   In the end, the antidote for the construction industry in this time of great uncertainty is a very human one. A heightened level of collaboration and good communication is demanded, as never before.

   I venture to say that this will be key to managing the impacts of COVID – 19 and like epidemics and pandemics of the future, and steering construction projects to successful outcomes through the challenges ahead.