



Welcome to the November edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

This issue examines what force majeure is, considers the approach of the domestic standard forms to situations such as the Ebola pandemic and the ISIS threat and provides practical tips for those who might be affected by force majeure on how to mitigate the risks that might arise.

Whilst it is unlikely in the most part that the threats posed by ISIS and Ebola will ever materialise, the existence of these threats has certainly caught the attention of the business community. Ebola has caused significant trading delays and disruption in West Africa: the export of commodities is being affected (as a result of which commodity prices have increased); a number of airlines have cancelled flights; there are areas where travel is either restricted or difficult; and some contractors have declared force majeure. The ISIS threat has caused similar problems in western Iraq and north of Baghdad, where trade sanctions and embargoes have also been imposed.

What is force majeure?

In general terms, force majeure is an event that relieves the parties from performing their obligations under the contract. Such events are usually exceptional events that are deemed to be beyond the control of the parties, and which make performance of the contract physically or legally impossible, as opposed to more difficult, time-consuming or expensive. Examples may include natural disasters such as hurricanes, floods, earthquakes and other "acts of god", as well as man-made disasters including war, terrorism, civil disorder, supply shortages and labour strikes.

The doctrine of force majeure is not one that is recognised by English law; instead parties have to rely on the common law concept of frustration. Frustration occurs when a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing that is radically different from that which was contemplated by the contract. It is a difficult test to fulfil, as what is essentially required is a radical turn of events which completely changes the nature of the contractual obligations, such as a change in the law which makes performance of the contract impossible. Due to the inherent difficulties that the concept of frustration presents, contracting parties often define the circumstances under which force majeure will apply themselves, by listing possible force majeure events in their contracts. Sometimes, force majeure

is not defined at all which can be very problematic, as the declaration of an event that transpires not to be a true force majeure event carries considerable risks, as will be seen below.

Force majeure under the standard forms

JCT Standard Building Contract 2011

The JCT suite makes an express reference to the concept of force majeure at clauses 2.29.14 and 8.11, but notably, it does not define force majeure, nor does it provide any examples as to what might constitute a force majeure event.

Force majeure is, however, listed as a "Relevant Event" under clause 2.29.14. Other Relevant Events include civil commotion, or the use or threat of terrorism and/or the actions of the relevant authorities in dealing with such an event or threat. Civil commotion, or the use or threat of terrorism, would probably cover any ISIS-related performance failures, but any performance failures arising out of the Ebola pandemic would probably fall under the force majeure heading as epidemics are not independently listed as being Relevant Events.

A force majeure event must be formally notified by the service of a notice under clause 2.27 which deals with Relevant Events that cause a delay, following which the architect or contract administrator must give an extension of time. Whilst an extension of time is available, there would be no corresponding claim for loss and expense as force majeure and civil commotion are not listed as "Relevant Matters" under clause 4.24.

In practical terms, it would probably be difficult to obtain an extension of time based on force majeure as a Relevant Event alone, not least because it might well initiate a debate (which may become contentious) as to whether the event was a true force majeure event, or not.

On a worst case scenario basis, Clause 8.11 provides for termination by either party by reason of force majeure (again, force majeure is not defined) in circumstances where the carrying out of the whole or substantially the whole of the works is

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Ebola & Isis: force majeure under the standard forms

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suspended for the relevant continuous period of the length stated in the contract particulars. At the expiry of the relevant period of suspension, either party may give notice to the other that, unless the suspension ceases within seven days of receipt of the notice, the contractor's employment may be terminated on the service of a second notice which is given upon the expiry of the first notice.

Termination for reason of force majeure carries considerable risks if the force majeure event is not a true force majeure event, which at the worst might include a claim for repudiatory breach of contract and consequential losses.

NEC3

The force majeure provision under NEC3 is at clause 19.1. Clause 19.1 deals with prevention arising from 'force majeure' and includes (i) any matters that are beyond the control of the parties and (ii) events that stop the contractor completing the works at all, or by the date shown on the accepted programme.

In order for a force majeure event to fall within clause 19.1, three tests have to be satisfied. First, there must be no reasonable way of completing the works on time (it is not sufficient to show that the contractor has been delayed and that it will be expensive to make good that delay). Secondly, the force majeure event must be an event that neither party could prevent with the use of reasonable measures. The third and final part of the test emphasises the unexpected nature of force majeure in that it must have been unreasonable for an experienced contractor to have allowed for the event.

It is conceivable in principle that both ISIS and Ebola may constitute force majeure events, but it is very likely that there would be reasonable measures that could be taken to mitigate the effects of ISIS or Ebola as far as they might affect the domestic construction market, for example by re-routing the supply chain of

any affected materials.

There is no need to provide specific notification of force majeure under NEC3, as force majeure is notified under Clause 16 which deals with early warning. This is an important point because it might be that an event becomes a force majeure event over the course of the contract.

If a force majeure event occurs, the project manager is to give an instruction to the contractor stating how he is to deal with the event. There are various options open to the project manager. He may decide to abandon the works on the basis that the project is no longer viable; he may change the works information with a view to circumventing the force majeure event; or he may permit progress to be delayed until the force majeure event is overcome (in which case completion will be delayed).

The management of a true force majeure event under NEC3 therefore sits with the project manager/employer, and true force majeure events carry far less risk for contractors than under the JCT form as the contractor does not bear the burden of proving the event was a true force majeure event. It is also incumbent upon the project manager to manage any time consequences of the force majeure event.

In practice, if the force majeure event stops the contractor completing the works by the date shown on the accepted programme, and it is forecast to delay completion by more than 13 weeks, the employer can elect to terminate the contract provided (i) that the event qualifies as a true force majeure event and (ii) the three force majeure tests mentioned above are satisfied. There is no equivalent provision under NEC3 for the contractor to terminate by reason of force majeure, and contractors are therefore in employers' hands as far as force majeure is concerned.

Provided that no other compensation event provides for the force majeure event, unlike JCT, the occurrence of a force majeure event is a compensation event under clause 60.1(19). This means that the contractor can recover cost. There is also scope for a further compensation event if the project manager makes a change to

the works information as a result of any instruction he might issue in connection with the force majeure event.

FIDIC

FIDIC is traditionally regarded as being an international standard form but it has started to be used in the domestic context¹, and it therefore warrants a mention.

Force majeure is dealt with at clause 19 of the FIDIC 1999 Red Book. It is defined as being an event which is beyond a party's control, against which that party could not reasonably have provided before entering into the contract, which could not reasonably have been avoided or overcome, and which is not substantially attributable to the other party.

Clause 19 includes a very wide and non-exhaustive list of force majeure events which includes natural catastrophes (which might cover the Ebola epidemic), rebellion, terrorism, revolution, insurrection and military or usurped power (which would probably cover ISIS).

Notices must be given within 14 days of a party *being* aware of the force majeure event or circumstances, or when the party *should* have been aware of it, and the test under FIDIC is therefore objective.

If a party is prevented from performing any of its obligations under the contract by reason of force majeure, provided the requisite notice has been given, it is entitled to an extension of time for any delay, and sometimes its costs. The point to note about FIDIC is that claims for additional costs related to rebellion, terrorism, revolution, insurrection and military or usurped power must relate to the country where the site is located, and so sites that are located near borders with countries that are affected by ISIS would be excluded. Further, there is no entitlement to additional cost for natural catastrophes (which force majeure category the Ebola pandemic is most likely to fall into), which may make it more difficult to claim for additional cost arising out of the Ebola pandemic, unless the Ebola pandemic was accepted as being a force majeure event only, and not a natural catastrophe.



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Finally, if the force majeure event continues for 84 days, or for multiple periods of more than 140 days, either party can terminate the contract on the provision of 7 days' notice. The engineer then determines the contractor's entitlement to payment for completed work and any consequential costs such as demobilisation and repatriation of staff. The approach to termination is thus much more flexible than the approach that is taken under NEC3.

Practical tips when dealing with a potential or actual force majeure event

- Review your contract and ask yourself whether the impact of Ebola and/or ISIS fits with any definition of force majeure that might appear in your contract, having regard to the ordinary and natural meaning of the force majeure definition. If there is any ambiguity as to whether the event is a true force majeure event, it will be construed against you.
- If your force majeure event does not transpire to be a true force majeure event, then any failures in your performance (i.e. by suspending the works) may render you vulnerable to a claim for breach of contract. The safest route is to proceed with caution and not to assert force majeure until you are sure you are dealing with a true force majeure event.
- As a belt and braces measure, check whether the definition of and procedures for claiming a force majeure under your contract have been amended. Standard form contracts are frequently amended and you do not want to be caught out.
- If the event is a force majeure event, assess as a matter of fact whether there is, or there is the potential for there to be, an impact on (i) the works; (ii) the programme; (iii) the completion date; (iv) the cost; (v) your performance of the contract; or (vi) the performance of the other party to the contract.

- Next, consider carefully whether there are any reasonable steps that you could take to avoid or mitigate the force majeure event, or its consequences. Could you, for example, speak to your supply chain to see if you can re-route to avoid areas that are affected by Ebola, or put contingency plans in place to protect against the worst case scenario? Focus on what you can do, as opposed to what you can't do, and if you can, agree the actions you propose to take with the other party.
- If you are confident that the event is a force majeure event, check your contract to see if any notices are required in order to declare force majeure, and follow the appropriate contractual mechanism as to the service of those notices to the letter. If you fail to do so, your claim for force majeure may be barred and/or you may lose your entitlement to additional cost or time.
- Ensure you have the necessary documentary evidence available to prove that the event was a true force majeure event, and make sure you can substantiate your claim for additional time and/or cost in case it is challenged further down the line.
- If all else fails, take the low risk approach and endeavour to agree an orderly termination of the contract on mutually acceptable terms.

Conclusion

The treatment of force majeure in the JCT form reflects the traditional approach to the allocation of risk whereby the majority of risk is placed in the hands of the contractor and there is an entitlement to additional time but not cost. NEC3 is much more contractor friendly in that the management of true force majeure events rests with the project manager, and both time and cost are afforded to contractors who are adversely affected by the project manager's management of the force majeure event. FIDIC, on the other hand, reflects the more extensive nature of the risks that are undertaken by contractors who work in the international market, often contracting outside their own jurisdictions. It has an

extensive list of force majeure events and provides contractors with an entitlement to additional time and cost, provided that the force majeure event is not a natural catastrophe (which may exclude the Ebola pandemic).

The approach of the standard forms to force majeure is variable. However, this is probably less problematic in the domestic context, where any force majeure event relating to Ebola or ISIS would most likely relate to supply issues regarding materials, which could probably be mitigated by the use of reasonable measures in the form of alternative suppliers or the use of comparable materials.

Ultimately, if parties wish to make more precise provision for force majeure relating to threats arising from insurgent groups and pandemics than is currently provided by the standard forms, it is open to them to make the appropriate amendments.

[The Construction and Development Partnership ("CODEP") is a construction industry led development charity that operates in London and Sierra Leone. It is currently focusing on providing relief to the quarantined, in particular the Ebola orphans, and running education forums to help spread the word about the best ways to try and prevent the spread of the Ebola virus. For further information, or to donate to the CODEP Ebola Emergency Appeal, please go to <https://www.justgiving.com/codep-ebola/>]

Footnotes

¹ It was used in both *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC) and the Forth Replacement Bridge in its amended form.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.

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