We Are All in It Together—But for How Long?

The spread of the COVID-19 virus since it was first identified in China in late 2019 has been rapid and unrelenting. In just a few weeks, the imposition of social-distancing measures and a lockdown by the UK Government has led to mass job losses, furloughing of employees and a catastrophic drop in economic activity.

The construction industry, which accounts for 6 percent of the UK economy and employs approximately 2.4 million people, has been impacted greatly, in common with many industry sectors. While the Government has introduced schemes to support businesses, these will only provide comfort to directors in the short term and do little to assuage their fears about the longer-term viability of their firms. The industry operates with low margins, so most firms will not have a war chest into which they can delve. It is also unknown whether it will be possible to generate positive cash flow at a sufficient margin to fund additional financing costs once the pandemic has passed, because of the possible looming recession.

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As English law places a heavy onus on a party to deliver what it has promised, one issue taxing many is how parties will deal with the delays and associated costs that are being incurred. Will participants adopt the philosophy that we are all in it together and try and work through the issues in a proactive manner; or merely demand performance and prosecute the failure to perform to the agreed bargain as set out in the contract? Should participants decide to prosecute, legal commentators have described two doctrines that might excuse contractors from not performing to the agreed timetable, namely frustration and force majeure.

The origins of these are separate. Frustration is a common-law principle and occurs where contracts are set aside due to an unforeseen event which renders the contractual obligations impossible or fundamentally changes the parties' purpose for entering into the contract. The parties' obligations end after the frustration event. This led to inequitable situations where parties held onto moneys and saw the introduction of the Law Reform (Frustrated Contracts) Act 1943, which permitted the courts to allow payments in full or part to be recovered in a manner they deem equitable. It should be noted that courts will not allow a party to escape a bad bargain, so its use may be of limited effect.

INTELLIGENCE THAT WORKS

Force majeure in English law is a creature of the contract. It is not a term of art. Its meaning shifts from contract to contract. For example, the two leading contracts in use in the UK have two different approaches. The JCT (Joint Contracts Tribunal) contract does not define what constitutes force majeure, and there is little case law to assist in its interpretation; should an event be deemed to fall under it, it is only a "Relevant Event" and therefore relieves the contractor only for the critical delay caused by it and not the recovery for costs associated with the delay.

The New Engineering Contract (NEC) Third and Fourth Editions do not refer expressly to force majeure, but clause 60.1(19) is in essence a force majeure clause and describes it as an event which: (a) stops the Contractor completing the works at all or by the date shown on the Accepted Programme; (b) neither Party could prevent; (c) 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 (d) is not one of the other compensation events stated in the contract. Should an event pass these criteria, it would be classed as a "Compensation Event", thereby entitling the Contractor to claim not only the time but also additional moneys.

A party could claim for the effects (either time or money or both) suffered from COVID-19 under a contract. These means may include the general items below but will vary by contract—the key is to review the contract:

1. The employer restricting access to the site or specific parts of the site.
2. The employer issuing an instruction to postpone any of the works to be done under the contract.
3. Deferment of the giving of the possession of the site.
4. Exercise after the contract has been entered by the United Kingdom of any statutory power which directly affects the execution of the project.
5. Delay in receipt of necessary permission or approval of any statutory body which the contractor has taken all practicable steps to avoid.

The contractual mechanisms concerning the timing and giving of notices need to be observed to ensure that a party's claim does not become time barred. Parties also need to ensure they are mitigating losses they are suffering and keep detailed and clear records which show a causal link to COVID-19. The current pandemic will not be a panacea for existing poorly performing contracts.

Society is suffering an extraordinary change and has been united in fighting the spread of COVID-19. It is unclear as to whether this approach will survive after COVID-19 has been brought under control and parties engage in meaningful negotiations, cognisant that the virus was not the cause of any of the parties, or whether they engage in prosecuting the contract come what may. Many mature, solvent organisations may take the negotiation route, but others will not, and COVID-19 will be a rich vein of work for dispute practitioners for many years.

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