

COVID-19: GOVERNANCE: MOVING PROJECTS FORWARD IN THIS TIME OF UNCERTAINTY (GLOBAL)

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Legal Briefings - By **Dan Zador, Laura Bowlt and Rickelle Kenny**

Over the course of the last 4 to 6 weeks businesses have been incredibly busy dealing with an array of claims from contractors arising out of the COVID-19 pandemic, and the various governmental protection measures put in place to control the virus. For some, the process of reviewing existing contracts and responding to contractor claims has been all consuming, taking up all available time and internal resources. Thankfully, many are nearing the end of this extreme busyness and are beginning to report a return to 'normal' (all things considered).

With a return to 'normal' comes a returned focus to business as usual; instead of reacting to contractor claims and fighting fires, principals are now finding the bandwidth to recommence stalled negotiations and enter into new contracts. A common question we are being asked as clients return to entering into new contracts is what, if anything, should these new contracts say about the current COVID-19 pandemic? Does the current force majeure provision adequately deal with the pandemic or is something more required?

To assist you to answer these questions, and move forward with confidence in this time of great uncertainty, this article briefly:

- considers the application of typical force majeure drafting to the current COVID-19 pandemic; and

- explores the need for drafting a standalone provision to deal with the COVID-19 pandemic.

TYPICAL FORCE MAJEURE PROVISIONS

A typical force majeure provision generally only applies to excuse performance for events that are unforeseen at the time of entering the contract. As such, they are unlikely, without further amendment, to apply in the current circumstances given the presence of COVID-19 is known.

The absence of a specific provision dealing with COVID-19 leads to uncertainty when the relevant event does arise, forcing reliance on more extreme contractual mechanisms (such as termination for convenience) or less certain common law remedies – such as frustration. This is obviously not ideal and may be problematic for both principals and contractors.

A bespoke clause dealing with COVID-19 allows the parties to identify issues and allocate risk appropriately. It can provide flexibility and increase certainty, both of which are paramount in these turbulent times.

DRAFTING FOR COVID-19

In preparing a bespoke clause which deals with COVID-19, and the consequences if performance of the contract is impeded because of the pandemic, the following issues should be dealt with:

- **COVID-19 - more than a virus:** one must consider what is the event or circumstance that is being dealt with – i.e. what is a COVID-19 event? The subject matter of such a definition must be carefully considered and should be defined more broadly than just the pandemic itself. Drafting should also capture any government orders having force of law which have been introduced to address the pandemic, as well as applicable recommendations and guidance. Such orders can, both directly and indirectly, have a much broader impact on a party's ability to conduct its business as usual.
- **Acknowledgement of the event:** Similar to a force majeure provision, a COVID-19 provision will likely recognise that a party may be prevented or delayed in the performance of all or part of its contractual obligations due to a pandemic, and that the impact of the pandemic may change rapidly during the term of a contract.
- **Notice:** By including a requirement to provide notice of any adverse impacts of a pandemic, the other party is given early notice of an issue and its potential consequences. Such notice can also include a requirement to specify any actions which the affected party proposes to take to mitigate the effect of the pandemic, and an

estimate of the likely duration of such affects.

- **Relief:** A dedicated clause should set out the relief each party will be entitled to if they are affected by a COVID-19 event. Such relief may include suspension of contractual duties (in part or whole) and adjustment of pricing.

If pricing adjustments are to be provided for, it is important to be clear that any price adjustments should be for tangible costs actually incurred by a party, how the risk of such costs is to be allocated and, where appropriate, should require principal pre-approval of such additional costs. Including an 'agreement to agree' on additional costs at a later date may be unenforceable and could expose the parties to lengthy negotiations resulting in unnecessary delay and interruptions to the services or works. Depending on the nature of the transaction, specific costs could include transport increases due to a shortage of commercial flights, limited supply in materials or changes to employee wages due to travel restrictions and a reduced workforce.

- **Mitigating the impacts of COVID-19:** There should be a positive obligation upon an affected party to mitigate impacts, including costs of COVID-19, and provide evidence of such mitigation action to the other party.

Depending on the parties' commercial position, bargaining power and pricing incentives, a principal may also wish to consider whether it can secure priority of supply to mitigate the impact of the pandemic. For example, if a contractor is working at a reduced production rate, it may be beneficial for a principal to have priority over the contractor's other customers.

A principal engaging a contractor may also want to include an exception to any exclusive supply obligations imposed by the contract during the COVID-19 event. For example, if:

- the contractor is unable to provide the required goods or services; or
- the principal considers the increased costs are higher than market price,

then the principal may require the option to acquire the relevant goods or services from a third party during the pandemic.

- **Termination:** If the effects of the pandemic continue for a prolonged period, it may lead to changed market conditions or have unforeseen impacts on a project. A principal may therefore wish to include a right to terminate the contract if the pandemic continues for a specified period of time.
- **When will the pandemic end?:** One difficulty that we are all facing is when will the pandemic end? This is a subjective question which will likely differ depending on jurisdiction and industry.

A principal may adopt a two limb approach with the intent of reducing subjectivity when drafting for the cessation of COVID-19 impacts. For example, the earlier of:

- the parties' agreement that the COVID-19 event has ended; or
- where the impacted party is able to perform its normal contractual obligations for a specified period of time (for example, two consecutive weeks).

Although the second limb still bears a subjective element, its' risk is mitigated by the fact that, when appropriately drafted, the parties will have a financial interest in being able to perform their normal contractual obligations.

MOVING FORWARD IN THIS TIME OF UNCERTAINTY

The above is a snapshot of some of the matters that a principal may wish to address in a bespoke COVID-19 provision. However, the exact requirements of such a provision will be dependent on the identities of the parties and their unique circumstances.

Specific COVID-19 drafting encourages companies to continue to stimulate the economy by progressing new projects whilst still offering protection in these challenging times.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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