



Navigating the Disruption of the Coronavirus

Thursday 9 April

Adrian Elliott
Andrew Shelling



Pinsent Masons

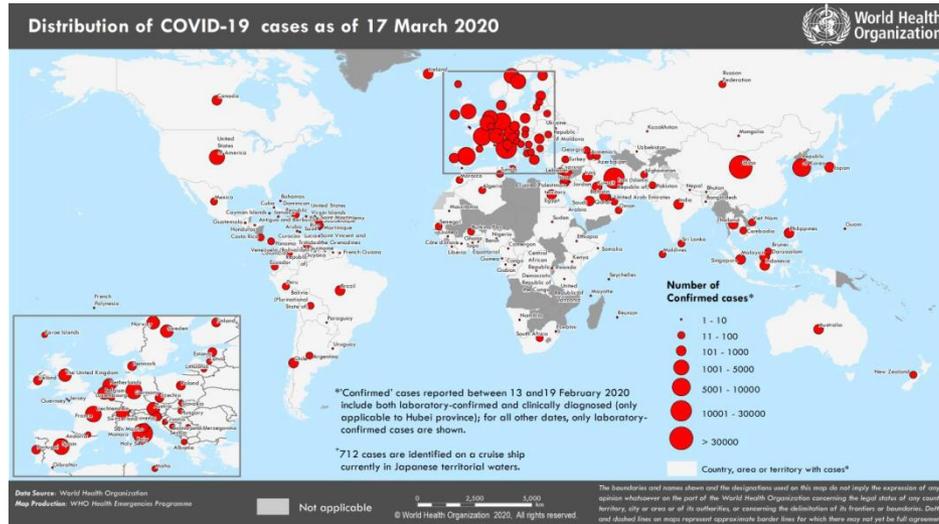
Agenda for Today

- The outbreak and its disruptive effects
- Legal remedies
- Examples from Standard form contracts
- Conclusion
- Q&A



The outbreak

- What has happened?



- By 30 January 2020, all provinces of mainland China had declared a Level-One Emergency Responses to a Public Health Emergency Event.
- On 30 January 2020, WHO declared the outbreak a Public Health Emergency of International Concern (“PHEIC”).
- On 11 March 2020, WHO declared the Coronavirus outbreak to be a global **pandemic**.

The disruptive effects

- What are the consequences
 - Movement of people and goods within very many jurisdictions are now severely restricted
 - Production has been severely affected
 - Shipments of materials and equipment delayed or cancelled;
 - Travel and visa restrictions imposed and widespread suspension of flight services
- Effect on global supply chains:
 - Exports delayed or cancelled
 - Imports affected by:
 - Reduced demand for products; and
 - Physical restrictions



What should Contractors Do?

- Protect their contractual position with their customers.
- Protect their commercial position through claims and entitlements, or through other actions in difficult and changed economic conditions.
- Be ready to change and adapt their contract and commercial strategy as the reactions of Employers and governments change and adapt to the impact of COVID-19.



Legal remedies

- The legal devices available to businesses:
 - Doctrine of frustration;
 - Force Majeure;
 - Extension of Time;
 - Claim for the cost of overcoming the disruption.
 - Others
- Availability will depend on:
 - The terms of each individual contract, esp. the governing law;
 - The jurisdiction in which you are operating;
 - The circumstances of the delay or disruption to the supply chain;
 - Whether the delay or disruption can be avoided, overcome, mitigated.



Frustration

- Discharges parties from further performance; automatically by operation of law.
- Rarely applicable – drastic outcome of automatic termination, without party choice or control.
- 4 elements to be satisfied :
 - Supervening event;
 - Without default of either party;
 - Changing nature of contractual rights and obligations from that reasonably contemplated at time of contract;
 - So radically it would be unfair to continue holding parties to the contract.



Frustration – application

- Metropolitan v Dick Kerr (1918, HL) – Works prohibited upon onset of war.
- Wong Lai Ying v Chinachem (1979, PC): Landslip obliterating the works and killing 67.
- Cf. Davis Contractors v Fareham (1956, HL): labour & material shortages.
- Foreseeability challenge for COVID-19.
- Frustration will not arise where the event is contractually provided for



Force majeure

- Literally, a ‘superior force’
- Different concepts under Common law and Civil Law.
- Both excuse non-performance of contractual obligations prevented or hindered by extraneous events
- Legal basis is different.



Force majeure in Civil Law

- Statutory provision re:
 - Definition
 - Contractual impact
- E.g. Art 1218 of French Civil Code:
 - Events **beyond control** of party; **not reasonably foreseeable** at time of contract; **effects not avoidable**; and **prevents performance** of contract obligation.
 - Suspension for temporary prevention.
 - Termination for permanent prevention.
- Foreseeability challenge for COVID-19?
- Still usual to have a specific FM clause.



Force majeure at Common Law

- At common Law → not term of art → no specific meaning → a creature of contract.

“[T]he precise meaning of this term, if it has one, has eluded lawyers for years”

– Donaldson J, *Thomas Borthwich v Faure* (1968, EWHC)

- FM clause will generally deal with:
 - Definition
 - Procedure
 - Impact
 - Remedies



Anatomy of a Force Majeure Clause

- Definition of FM:
 - Broad criteria: “beyond the Party’s control”; could not have been provided against; could not be avoided or overcome.
 - List: a specific list of events that will be FM.
 - War, terrorism, earthquakes, hurricanes, plague, epidemic
 - Combination of the two – general criteria followed by a list.
- Procedure for claiming / establishing FM:
 - Notice requirements
 - Timescales
 - Particulars
 - Record keeping
- The remedies which follow



Force Majeure – Impact

- Requires a party to demonstrate impact
- “Prevent”, “hinder”, “delay”.
 - Impacts on:
 - Whether or not the definition is fulfilled; and
 - the subject matter of the notice and the impact to be proven.
 - The difference can be important:
 - *Tennants (Lancashire) Ltd v Wilson & Co (1917, HL): ‘Preventing’ delivery means...rendering delivery impossible; and ‘hindering’ delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible.*
 - *Triple Point Technology Inc v PTT Public Company Ltd (2017, TCC): There is no dispute that such civil unrest [in Thailand 2013-14] would constitute force majeure as defined under the Contract. What is in issue is whether this had any impact on the project at all.*

Force Majeure –Mitigation

- FM clause re events beyond the parties' control, cannot be relied on if party fails to take reasonable steps to avoid the event
 - Channel Island Ferries v Sealink (1988, EWCA)
- May also be an express obligation to mitigate the impact of the event
- Burden is on the party claiming FM
 - Seadrill v Tullow (2018, EWHC)
 - "*use reasonable endeavours to mitigate, avoid, circumvent or overcome the circumstances of Force Majeure*"
- Important to keep a documentary record of mitigation efforts.

Position under standard forms - FIDIC

- Examples:
 - FIDIC Yellow Book 1999 – clause 19.1:

Force Majeure means an exceptional event or circumstance

 - *which is beyond a Party's control;*
 - *which such Party could not have provided against before entering into the Contract;*
 - *which, having arisen, such Party could not reasonably have avoided or overcome; and*
 - *which is not substantially attributable to the other Party.*
 - Non-exhaustive list: includes war, rebellion, terrorism, earthquakes, hurricane, typhoon and volcanic activity. Does not include “epidemic”.
 - Clause 19.2 (notice clause): *"If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure..."*



Position under standard forms

What relief is available?

- Examples:
 - FIDIC Yellow Book 1999 – cont'd
 - What does the Contractor get?
 1. *“The Party shall, having given notice, be excused from performance of such obligations for so long as such Force Majeure prevents it from performing them.”*(clause 19.2)
 2. Extension of time, subject to serving notice under clause 20.1.
 3. Cost, but only where the event is war, hostilities, invasion, rebellion, terrorism, earthquakes, hurricane, typhoon and volcanic activity etc. (and, save for war, hostilities, invasion, in the country where the Site is).



Position under standard forms - NEC

- Compare with NEC4 cl 19.1 and 60.1(19):
 - Compensation event: time and cost compensation
 - Key elements:
 - “*stop*” Contractor completing “*the whole of*” of the Works, either at all or within the contractually required time; and
 - “*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 have allowed for it*”; and
 - Not another compensation event
 - Contractor should:
 - Give an Early Warning notice; and
 - Notify the Employer within within eight weeks of becoming aware
 - **BUT** - commonly amended by employers!



Position under standard forms

- Contrast with IChemE contracts:
 - Broad criteria:
 - **any** circumstance
 - beyond the reasonable control of either party
 - which prevents **or impedes** the due performance of the Contract
 - Non-exhaustive list in clause 14.6 includes “*epidemic*”
 - Time not cost



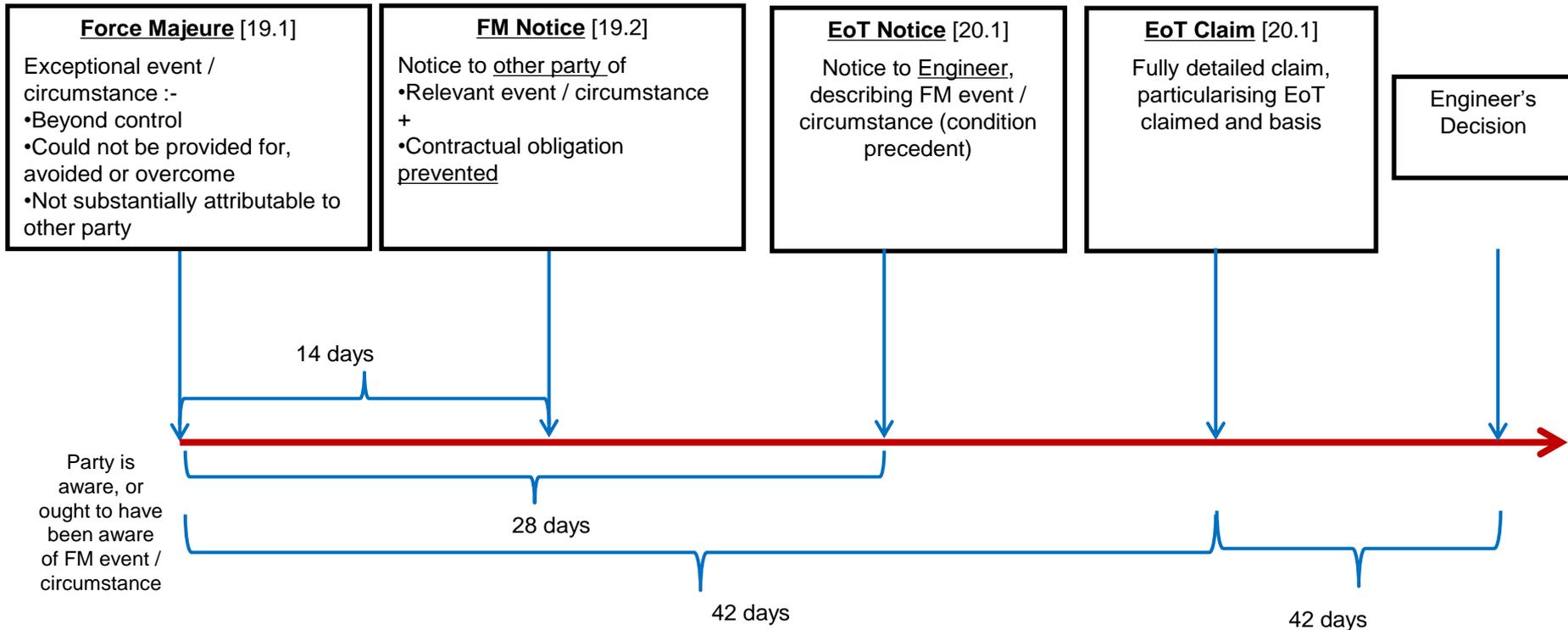
Position under standard forms

Mitigation requirements?

- FIDIC Yellow Book 1999:
 - Clause 19.1: FM event must be beyond control of party + cannot reasonably be avoided or overcome.
 - Clause 19.3: use reasonable endeavours to minimise delay
- NEC4:
 - “*neither party could prevent*”
 - Assessment based on Contractor reacting competently and promptly and costs reasonably incurred
- IChemE:
 - event must be “*beyond the reasonable control of the parties*”
 - Must “*use all reasonable endeavours to minimise any delay in the performance of their obligations under the Contract,*”

Position under standard forms

Notice requirements



Employer's Suspension

- Some contracts will give the Employer the right to suspend.
 - Example, 1999 FIDIC Yellow Book:
 - Clause 8.8: *“The Engineer may at any time instruct the Contractor to suspend progress of any part or all of the Works.”*
 - Clause 8.9: If the Contractor suffers delay or incurs Cost as a consequence of complying with the instruction to suspend and/or from resuming work at the end of the suspension – provided he gives notice under clause 20 – he will get an extension of time **and** he will recover the Costs.
 - Reminder: “Cost means all expenditure reasonably incurred (or to be incurred) by the Contract, whether on or off the Site, including overhead and similar charges, but does not include profit.”
 - **Thus, from a Contractor's perspective it is a better basis for claim than force majeure – you get to recover “Cost”.**
 - **Causation?**



Government actions and “Change in Law”

- When the government issues a lockdown – could this be the basis?

Examples:

- Again, FIDIC Yellow Book 1999 – clause 13.7: “Adjustment for Changes in Legislation”
 - Where there is a change in Laws that increases the Contractor's Costs, then:
 - Adjustment to the Contract Price (like a Variation); and
 - Extension of time.

Note: “Laws” defined broadly – “all national or state legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted authorities.”
 - An order by government to lockdown and to shut down construction sites would be a change in Laws.
 - This is what has now happened in France and other western countries. In other countries the position is more complicated, e.g. the UK.



Termination

- Right to terminate
 - Prolonged impact of force majeure;
 - Prolonged suspension;
 - Non-payment;
 - Unable to demonstrate ability to pay.
- In a global economic downturn, this might be the best solution.



Conclusion.1

- Terms of the contract are paramount:
 - Understand what can qualify as force majeure under your contract.
 - Look at what you need to prove – prevent, hinder, delay.
 - Serve the required Notice – use the language of the clause.
 - Be aware of any further notices (e.g., EoT) or information to be served.
 - Ensure that you take positive steps to mitigate the impact, and record them...even if they cost more...
 - Communicate with / manage your supply chain:
 - A combination of legal and commercial
 - Can they continue to perform?
 - Protect your legal position under sub-contracts
 - Are they mitigating their position? Or using FM to hide their own delays...
 - Are they providing the records which you'll need to protect your position up the line?



Conclusion.2

Don't forget about.....

JV agreements and how they might be impacted – look up down and sideways.

Have a clear Contract strategy with Clients Subcontractors and JV members, but be flexible as circumstances change.

- FM notice might be the best protections early on.
- Later might there be an opportunity for a claim for both time and money?



QUESTIONS?





Andrew Shelling

Senior Associate
Risk Advisory Services

T: +44 20 7418 7066

M: +44 7786 526 485

E: andrew.shelling@pinsentmasons.com



Adrian Elliott

Partner
Risk Advisory Services

T: +44 20 7490 6403

M: +44 7748 112 001

E: adrian.elliott@pinsentmasons.com

Pinsent Masons LLP is a limited liability partnership, registered in England and Wales (registered number: OC333653) authorised and regulated by the Solicitors Regulation Authority and the appropriate jurisdictions in which it operates. Reference to "Pinsent Masons" is to Pinsent Masons LLP and/or one or more of the affiliated entities that practise under the name "Pinsent Masons" as the context requires. The word "partner", used in relation to the LLP, refers to a member or an employee or consultant of the LLP or any affiliated firm, with equivalent standing. A list of members of Pinsent Masons, those non-members who are designated as partners, and non-member partners in affiliated entities, is available for inspection at our offices or at www.pinsentmasons.com. © Pinsent Masons.

For a full list of the jurisdictions where we operate, see www.pinsentmasons.com