

Force Majeure During COVID-19

ECRI Webinar on 31 July 2020

Presented by Hogan Lovells

Roberta Downey

Roberta.downey@hoganlovells.com

Angus Rankin

Angus.rankin@hoganlovells.com

Rupert Sydenham

Rupert.sydenham@hoganlovells.com



ECRI welcomed lawyers from Hogan Lovells (HL) who provided valuable guidance to ECRI's Sponsor Representatives on the practicalities and handling of Force Majeure-type situations and provisions during the effects of COVID-19. The following is a summary of some of the topics covered but does not purport to fully cover or describe the contents of the Webinar. *Certain graphics are replicated for reference.* A copy of the slide deck presented is available on ECRI's website: www.ecrionline.org (login required).

The Impact: The effects of COVID-19 on the E&C industry are unique, universal, and on a portfolio scale.

The Good News: Because of E&C's experience and expertise in risk management we are well-positioned to handle the impact. In fact, our reputations in the future may be shaped by our response to and management of COVID-19 issues, both for ourselves and for our clients. This can be the making or breaking of how we are perceived and it affords us opportunities. Lessons can be learned from the continuing effects felt by the financial industry brought on by the financial crisis and its response.

The Road from Triage to Discharge

HL offered a comprehensive checklist of steps to consider as the E&C industry moves from its current state of health to its recovery:

- Triage** - the industry continues to assess and adjust to the daily changing landscape and prepare for second and third waves and lock-downs. Prepare by: (1) checking governing law provisions; (2) determining contractual and legal rights and remedies (force majeure, change in law, frustration, suspension, and/or termination); (3) analyzing the scope of available remedy; and (4) being prepared to follow notice provisions correctly and for the consequences and next steps of issuing notice. Remember to pick battles wisely (don't sweat the small stuff) and that communication with clients remains a key factor for success in the E&C industry and in managing contractual relationships.
- Treatment** - be prepared to: (1) establish the link between the impact of COVID-19 and its consequences for E&C performance of contractual obligations; (2) manage cash flow, including paying attention to the changing financial positions of suppliers, subcontractors, and customers; and (3) update and keep notices current.
- Recovery** - (1) exercise concern for all project participants and health and safety; (2) collaborate with participants (including clients, supply chain and government) early and openly; and (3) understand differences across contracts and assess the opportunities to negotiate to keep projects moving.
- Discharge** - make a plan for the transition back to remobilization of workforces, acquisition of materials, changes to notices (when no longer a "pandemic"), and using feedback from different regions.

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What if we have to make a claim?

A strong claim is supported by (1) documentation that (2) shows causation by COVID-19 that (3) resulted in delay or disruption that (4) had a real impact on business/critical path (5) despite reasonable efforts to mitigate the negative consequences.

Build your case from documentation up. Remember to: maintain professionalism, focus on facts, adhere to contract mechanics, and to include commercially reasonable steps to provide mitigation in communications internally and with clients and stakeholders.



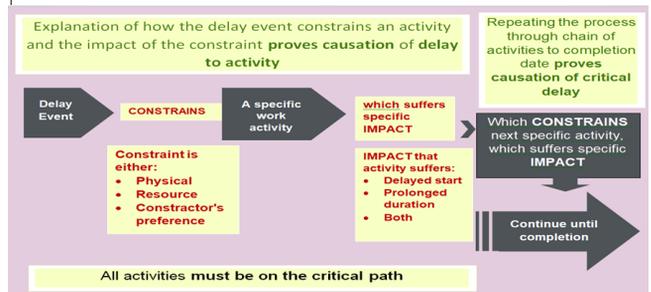
Consider...

Delay
prolongation costs, cost of being on site longer

Disruption
loss and expense above the costs that would have been incurred without the event

How to prove actual delay:

**Note: Do not confuse lateness with delay. Contractors are typically not entitled to relief for lateness; a critical path delay must be demonstrated.*



How to prove disruption:

- Identify what costs would have been incurred but for the disruption.
- Demonstrate how the activity was impacted: with as little globality as possible.
- Watch out for alternative causes....

Issue Spotting

Of instructional interest are certain themes HL is seeing that are raising issues for E&C and clients as follows:

- What is adequate substantiation?
- Demonstrating causal links
- Internal cost savings efforts being sought/appropriated by client
- Second waves and local lockdowns
- Mitigation: robbing Peter to pay Paul
- Preferential payments (robbing Peter again to pay Paul)
- Adjudication
- Self Help
- Can I (should I?) terminate?

Additional Resources

HL Construction Forum Clinics: email constructionforum@hoganlovells.com to be included.
HL Force Majeure Checklist: <https://www.hoganlovells.com/en/publications/coronavirus-as-a-contractual-force-majeure-event-a-simple-checklist>