



CHARLES WILSONCROFT
EXECUTIVE DIRECTOR
HKA

COVID-19: GUIDANCE ADVICE AND A USEFUL TEN-POINT CHECKLIST FOR EUROPEAN INTERNATIONAL CONTRACTORS

With the outbreak of COVID-19, contractors are experiencing severe disruption across many of their projects, with construction and engineering works facing significant delays, site closures and members of the project team being asked to work from home or forced to self-isolate.

There will be a heavy burden on contractors' in-house legal teams with the need to quickly serve many notices and ensure that contractual risk is minimised right across the contractual chain, from contractors' client relationships through to the subcontractors and suppliers.

Whilst contractors may not currently be able to identify specific impacts, by issuing a notification they will be able to protect their contractual position. It is important to carefully read the contract requirements in terms of both notifications and requirements for further additional particularisation.

If the contract is in a common law jurisdiction, it is likely to include a force majeure clause on which contractors could seek to rely. The force majeure clause will likely entitle contractors to additional time, and in some cases cost, should a delay occur. It may also provide relief against financial consequences. Alternatively, there may be opportunities to claim for financial relief should the contract be 'frustrated' or there are changes in law.

If the contract is in a civil code jurisdiction, it most likely will not include an express force majeure clause as the concept of force majeure (or similar) should be recognised in the civil code. The concept of force majeure will likely entitle contractors to additional time should a delay occur. There may be opportunities to additionally claim for financial relief should the contract include a hardship clause, or due to changes in law. Alternatively, contractors may have to apply to the courts and make a case for 'exceptional circumstances' if there is no express hardship clause in the contract.

A point to remember is that force majeure only applies where the contract is executed before occurrence of the force majeure event, so contractors need to ensure that upcoming contracts provide expressly for this pandemic situation.

In addition to the above advisory guidance, below is a **ten-point checklist**:

- Record decisions that you make or propose to make in response to the pandemic (slowing down/closing the site/specific discrete measures or actions, etc.) and communicate these to the relevant contracting parties.
- Put in place systems for recording delay and additional cost due to COVID-19 and keep the other contracting party regularly informed/updated.
- Check what risks are covered by insurance; cover for pandemics may by the terms of the policy only be offered for an additional premium. Whether or not there is cover may turn on a careful consideration of the policy terms. If covered, notify your insurer; if in doubt, notify anyway.
- Prior to progressing a claim, the claim strategy should be checked carefully in respect of the entire contract, particularly given any limitations that the force majeure provision may impose on either party.
- Review clauses and the allocation of risk in contracts, particularly related to the consequences of pandemics.
- Check existing contractual provisions to identify entitlements arising from extensions of time, additional cost and suspension of works.
- Gather evidence proving the event and the causation between the event and failure to perform.
- Ensure that necessary contractual notices are provided on time including any required particularisation.
- Take stock of current progress so that, where necessary and appropriate, an opportunity for the effects of the uncertainty can be separated from effects of earlier delaying events and, again where necessary and appropriate, provide a platform for agreeing compensation at a later date by reference to these several factors.
- For contracts that are about to be agreed, ensure there is sufficient provision for dealing with the impact are included.

If you require any further information or wish to have an e-chat with our claims specialist, Charles Wilsoncroft, please contact him at charleswilsoncroft@hka.com.