THE CORONAVIRUS AND ITS EFFECTS ON CONSTRUCTION AGREEMENTS

IS IT A *FORCE MAJEURE* EVENT?

The rapid spread of the coronavirus concerns everyone in every sector. The recent financial crisis is testament to the concern and soon the effect will be realized in the construction and engineering sector. We have already seen delays in cross-border procurement and labour resources and the financial consequences are alarming. Are contractors and suppliers liable for the delays and costs associated with the delay and disruption caused by the virus? The answer can be found in some standard contracts (and hopefully yours) in the form a *force majeure* provision.

What is Force Majeure?

A *force majeure* event – literally translated as "superior force" – is the occurrence of an event which could not be foreseen and is out of the control of all parties to a contract. Typical examples are an extreme weather or seismic event or an Act of God. Another example could be mass industrial or union action by employees on a site. Ordinarily, the written provisions in a contract will specify whether an event which occurs can be classified as a *force majeure* event and what consequences flow from that event. In most cases, contractors are afforded an extension of time to complete the works but rarely any money. The reasoning behind such an approach is that the employer cannot be held liable to financially compensate a contractor where the cause is outside the parties' control.

A Look at the FIDIC Red Book

In the 1999 edition of the FIDIC Red Book (properly known as the FIDIC Conditions of Contract for Construction), a *force majeure* event is described in clause 19.1 as:

"*…an exceptional event or circumstance: (a) which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party.*"

The Red Book provides a list of possible events or circumstances which would qualify as a *force majeure* event. However, the list does not make specific provision for situations such as an outbreak of a potentially deadly disease such as the coronavirus, but it may qualify as such an event as long as the conditions under clause 19 are satisfied.

How to Proceed under FIDIC

Notice must be given to the other party in line with clause 19.2 and clause 20.1 – the notice must set out exactly which contractual obligations have been affected by the *force majeure* event and must be given within a set period after the delayed party became aware (or should have reasonably become aware) of the event. The notice, properly drafted and submitted, then serves as a safety net:

"*The Party shall… be excused performance of such obligations for so long as such Force Majeure prevents it from performing them.*"

Clause 19.3 obligates the delayed party to minimise any delay in its performance of the contract due to the *force majeure* event, while clause 19.4 sets out the consequences of the event which, if the completion of the works will be delayed, is usually an extension of time. It is unlikely that the current event will attract compensation for contractors under most standard construction and engineering contracts.

The difficulty with the coronavirus for the sector is the quantification of time and the unknown duration. Using FIDIC again, clause 19.7 provides that if the *force majeure* event makes it impossible for either party to fulfil their contractual obligations, a termination of the contract can follow. This is obviously dependent on the provisions regulating termination, but one must consider the long-term possibilities as it will affect cashflow and further investments.

Other Considerations

If the contract only provides for an extension of time to be granted in the circumstances, what then of the financial implications? If no remedies to cater for additional costs occasioned by *force majeure* events are available, the parties will find themselves at a distinct disadvantage in trying to move forward without incurring significant financial losses. It is highly advisable that provision is made for potential variations to a contract price given that COVID-19 may force a contractor to utilise a different but more expensive supplier or subcontractor to obtain the same materials or execute certain works. It is important to seek legal advice in such circumstances as it affects the risk, responsibility and performance of the parties to an agreement in any case, whether it is deemed to be *force majeure* or not.

Don't Be Caught Out

Force majeure is not an automatic entitlement. It depends squarely on the terms contained in the contract. If your contract is silent on the issue of *force majeure*, the risk in some instances, will fall on the contractor. Likewise, any contract entered into with the knowledge of COVID-19 will not provide the relief discussed above as the event is now known.

It is vital that parties adequately provide in future construction agreements for COVID-19 and similar events, as it is now reasonably foreseeable that the virus could impact performance under the contract. Special attention must be given to any additional costs that could result from the virus's influence not only over the site itself, but also the contractor's ability to procure goods and services. The key is, similar to the approach taken in the health sector, not to be complacent about how it could affect you and your business. Be cautious of the time-barring provisions in your contract!

If contracts already in place do not provide for diseases such as COVID-19 – or the impact thereof – to be classified as a *force majeure* event, the parties must consider the practical steps they will take if COVID-19 does affect their ability to fulfil their contractual obligation.

BY BEYERS BARNARD

CONTACT DETAILS

CAPE TOWN

Email: capetown@constructionlaw.co.za Tel: +27 (0)21 065 0183

SANDTON

Email: info@constructionlaw.co.za Tel: +27 (0)11 807 0834