



association of
consulting and
engineering



COVID-19

dealing with the
unforeseeable in
contracts

The purpose of this Advisory is to provide some general guidance to Consultants on the legal regime concerning contracts when unforeseeable events, such as the Covid-19 virus and the Government's Alert Level 4 lockdown ("the Lockdown"), prevent or disrupt their services. It also provides some practical suggestions on steps to take when this situation occurs.

Contractual relief may be available through a force majeure provision if present in a contract. If not present, there is the possibility of the general law principle of frustration applying in a particular case. However, it appears very unlikely that frustration will be generally available as a remedial route for consultants unless the current Lockdown is extended for a prolonged period causing substantial delays/obstruction to the performance of services.

The recommended way forward for consultants, including those with contractual relief provisions, is to communicate proactively with clients and seek a mutually acceptable negotiated solution via a contract variation. If that can't be achieved directly, consultants are recommended to seek legal advice on their contractual position.

force majeure

Under New Zealand contract law, there is no general law principle of "force majeure" in contrast to there being a principle of frustration. A force majeure provision can only be created by a contract. Such a provision is common in long-form services contracts for larger projects and master agreement situations in order to overcome the limited application of the principle of frustration. In broad terms, the provision operates to exclude liability where a party's failure to perform (in whole or part) is caused by forces beyond its control. Because it is a contractual provision, parties are able to define what amounts to a force majeure and set parameters on its consequences.

Generally, there are three elements to a force majeure situation:

It occurs due to natural or human forces.

Its cause was completely beyond the control of the party whose performance has been affected.

The effect on performance could not have been prevented by that party.

Whether (and if so, how) a force majeure clause responds is a matter of contract interpretation and then applying the clause to the factual situation. There are three key aspects to consider:

1. What particular event(s) comprise the force majeure? Are the events specifically described and therefore limited, or has a wider "catch-all" provision been used, or a hybrid?
2. What are the consequences if a force majeure event occurs? Does it suspend obligations until the event subsides, does it also give a right to terminate after a period of time if the event is prolonged, or does it entirely excuse performance and give a right to terminate immediately?
3. What is needed to establish the link between the force majeure event and the impact on a party's ability to perform? Must the party seeking to rely on the force majeure provision show the event was the sole cause of its performance failure or is it sufficient if it is the predominant cause?

A client does not have to accept a consultant's claim for force majeure and can dispute it. Consultants are therefore advised to seek legal advice before invoking a force majeure clause unless they fully understand all aspects of the clause and the validity of the claim is clear.



frustration

Under the general law principle of frustration, a contract is mutually discharged when an event for which neither party is at fault and for which the contract makes no provision causes the performance of the contract to become impossible or the performance to become radically different to what had been originally intended

If a contract has been frustrated, it terminates automatically, and the parties are excused from their future performance obligations, although there may be terms unrelated to future performance which survive termination such as confidentiality, intellectual property and dispute resolution provisions.

At common law, any contractual obligations incurred before the time of frustration remain enforceable, and losses lie where they fall. There are legislative remedial provisions to reduce this harshness and provide fairer outcomes.¹

The threshold for a contract being declared “frustrated” is high. If the event has caused the performance of obligations to be more difficult or expensive, or to take longer, or to be undertaken in a different way, the threshold will only be met if these consequences (individually or jointly) have meant the contract becoming radically different to what had been originally intended. In reaching its decision, the Court adopts a multi-factorial approach taking into account: the terms of the contract, its context, the parties’ mutual knowledge and expectations particularly as to risk, the nature of the supervening event, the parties’ reasonable and objectively ascertainable calculations regarding the possibilities of future performance in the new circumstances, and the overall interests of justice.

As regards the impact of the Covid-19 virus including related Government restrictions, the delay or obstruction caused to performance would, therefore, need to be sufficiently long or substantial that future performance would be impossible or result in a radically different contract. This is objectively assessed at the time when the event occurs, or its impact becomes reasonably apparent. The answer will often turn on the probable duration of the delay/obstruction.

At the date of this Advisory, it appears unlikely that the impact of the Covid-19 virus will be sufficiently long or substantial to frustrate most services contracts, particularly given the ability to use telecom technology to perform work remotely. However, that may change if the current Lockdown for four weeks or so does not sufficiently contain the virus but remains in place for an extended period including in specific regions.

On the other hand, there may be some contracts which because of their particular nature have already become frustrated. For example, the Lockdown may have prevented further performance of a contract involving inspection services which had a tight programme because of its specific purpose.

Contracts, therefore, need to be assessed on a case by case basis as to whether their performance has been frustrated. Consultants are advised to seek legal advice if they have concerns about their position and need to consider frustration because of the absence of a force majeure clause.

¹ Frustrated Contracts Act 1944, now Subpart 4 of the Contract and Commercial Law Act 2017.



CCCS contract²

The CCCS contract contains a force majeure clause in the following terms:

12.5 Events beyond Control

Should any event occur which:

- is beyond the control of either party; and*
- is neither directly nor indirectly caused by either party; and*
- prevents the performance of the Services (in whole or in part) required under this Agreement,*

then those Services will be suspended until such time that it becomes practicable to recommence the Services. This does not include events personal to either party, such as ill-health or lack of funding or resources.

In the event that there is a reasonable likelihood that the Services are not able to be recommenced, then this Agreement may be terminated by the Client.

In circumstances where the Services or part of the Services have to be suspended or delayed, the Consultant will be allowed extra time to complete the Services and such extra time should be reasonable in the circumstances.

In the event that the suspension continues for greater than 6 months, then this Agreement may be terminated by the Consultant.

The following observations are made about the clause:

It is a "catch-all" provision not limited to specifically described events.

To trigger the clause, all three bullet point elements of the event need to be satisfied.

Only the services unable to be performed are suspended, which may not be all the services.

While ill-health is included as an example of excluded personal events, it is doubtful that ill-health due to a national virus epidemic would be sufficiently personal.

While the Client can terminate the contract if there is a reasonable likelihood that the services are not able to be resumed, the Client can also terminate at any time under clause 11.1 in any event.

On resumption of the suspended services, the Consultant is allowed reasonable additional time to complete the services.

If the suspension continues for more than six months, the Consultant may terminate the contract.

² ACE New Zealand/Engineering New Zealand-endorsed Conditions of Contract for Consultancy Services & Form of Agreement, December 2017.

Clause 12.5 should not be considered in isolation from other relevant clauses in the lead up to or when dealing with a force majeure event:

- Clause 2.13 “Consultant to give Early Warning” requires the Consultant to notify the Client in writing as soon as the Consultant becomes aware (or should reasonably have become aware) of any circumstance which could impact the provision of services, and notify whether or not the Consultant considers the circumstance to be a Variation. Within 15 working days of notifying, the Consultant needs to provide details of the likely or estimated impact on the cost, programme and completion of the services and make recommendations on how to proceed.

In the lead up to or early stages of a force majeure situation, the details should be provided to the fullest extent reasonably possible even though they may be limited and/or estimated details. The Client should then be updated as firmer details become available.

- Clause 12.8 “Notices” contains the notification process requirements which need to be followed. Delivery by hand would need to be by a courier during the Lockdown. Care should be taken if notifying by email to obtain a “Read Receipt” message or a reply indicating receipt (and the intended recipient otherwise chased up by telephone to acknowledge receipt).

Where the Lockdown has prevented or disrupted all or part of the Consultant’s services, the Consultant should notify the Client of this circumstance under clause 2.13. Construction Monitoring and other inspection services have needed to stop during the Lockdown but other services, while not prevented, may have been adversely affected, causing foreseeable delays. As a Variation is defined in the CCCS Contract as “a change in the provision of the Services, including scope, time of supply or scale”, the circumstance should be notified as a Variation together with the details required by clause 2.13 to the fullest extent reasonably possible including that the Lockdown is for four weeks from 25 March 2020 to 23 April 2020 inclusive but could be extended.

Where the Lockdown has prevented the performance of services, the Consultant should also invoke force majeure clause 12.5. This could be done in the same communication provided there was a separate section referring to the Lockdown as being an event beyond the Consultant’s control in terms of clause 12.5, and providing details of the services prevented by the Lockdown and accordingly currently suspended.

Consultants are advised to seek legal advice if they are unsure about the wording of a notification.



Short Form Agreement for Consultant Engagement³

There is no force majeure clause in the Short Form Agreement.

It does, however, contain an early warning and variation notification clause. Clause 12 of the Model Conditions states:

As soon as either party becomes aware of anything that will materially affect the scope or timing of the Services, the party must notify the other party in writing and where the Consultant considers a direction from the Client or any other circumstance is a variation the Consultant shall notify the Client accordingly.

Similar comments to those above concerning CCCS clause 2.13 apply to this clause where the Lockdown has prevented or disrupted all or part of the Consultant's services.

Steps to take when unforeseeable events prevent or disrupt services

1. Review the terms of the relevant contract:

Check whether the contract has a force majeure clause. A client-modified Short Form Agreement could have a force majeure clause added.

If there is a clause, read it carefully. Client-developed contracts take varied approaches to a force majeure event. The CCCS Contract clause is also sometimes modified by clients.

Check whether any other clause could be relevant such as an early warning/variation notification clause, and also read carefully the wording of a variation clause.

There will usually be specific processes to be followed under the contract when dealing with an event which prevents or disrupts services, including relating to the requirements for notices. They need to be followed precisely to pursue a variation claim or maintain protection.

Termination rights in a force majeure clause may be triggered if the event persists, but the length of time for triggering varies.

There may be a prescribed contractual duty to mitigate loss in addition to the duty at common law. The contractual duty is often higher, such as to use "best endeavours", compared to the common law duty to use "reasonable endeavours".

³ ACE New Zealand/Engineering New Zealand-endorsed Short Form Agreement for Consultant Engagement, February 2019.

2. Communicate proactively with clients and seek a mutually acceptable negotiated solution via a contract variation:

This is the recommended way forward, including when the contract has a force majeure clause. The clause may not provide the most appropriate response to the event, whereas finding a mutually acceptable solution is likely to do so and also enhance the client/consultant relationship and project prospects. A negotiated solution would also be consistent with both parties' duties to mitigate. If it can't be achieved directly, consultants are recommended to seek legal advice on their contractual position.

Keep a record of the communications, and confirm the outcome of telephone discussions by email. In any subsequent dispute with the Client, it may well assist the Consultant to have evidence that it took a proactive and reasonable approach in trying to reach a negotiated solution.

3. Keep detailed records to assist in substantiating any variation claim for additional time and/or fees. Include all additional costs incurred in relation to the particular contract due to the services being prevented or disrupted because of the Lockdown and/or the services or method of work needing to be changed. An assessment can be made later as to what costs are claimable.

4. For engagements occurring during the Lockdown, it is recommended that consultants advise clients in advance of any known or foreseeable limitations or uncertainties affecting fees and/or timing of services. This should be recorded in the contract. If the Short Form Agreement is being used, it could be confirmed in the scope of services/fees letter. For example, there could be an additional paragraph along the following lines:

Timing of services – Covid-19

Normally it would take approximately [4-6 weeks] to complete this work. However, because part of the work involves [a site inspection], we will not be able to do that while the Government's Covid-19 Alert Level 4 lockdown remains in force either nationally or in the [Wellington] area. As a result, we are presently unable to say when we will be able to complete our work, but we will keep you advised.



5. For engagements occurring during the Lockdown and subsequently, it is also recommended that Consultants ensure the proposed contract has an appropriate force majeure clause. Legal advice should be sought on its wording. If the Short Form Agreement is being used, a clause along the following lines may be appropriate:

If the performance of the Services (all or part) is prevented by an event or circumstance ("circumstance") beyond either party's control and not directly or indirectly caused by either party, the Services will be suspended to the extent to which they are affected by the relevant circumstance for so long as it continues. Both Parties will take all reasonable steps to minimise the effects of the circumstance. Where the suspension results in a delay in the Consultant's performance of the Services, the Consultant will be entitled to a variation for additional reasonable time to complete the Services and for any additional reasonable costs incurred as a result of the suspension.

29 March 2020

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