

Uwe Putlitz was born in Johannesburg, qualified as an Architect at the University of the Witwatersrand and subsequently awarded the first M.Sc Building. He practiced as an Architect and/or as a Project Manager for various firms and as managing member of Building Strategy Network until 2000 when he was appointed as CEO of the Joint Building Contracts Committee until his retirement in 2019. Uwe is a visiting lecturer at the University of the Witwatersrand, and the RICS, regularly contributing articles to various industry journals about 'dispute avoidance' when using Standard-form Contracts as well as involved with the review of applications for registration by the Council for Project and Construction Management Professions.

Uwe may be contacted at uwe@buildstrat.co.za

BUILDING CONTRACTS AND THE COVID 19 GLOBAL PANDEMIC

The building and construction industry in Southern Africa generally use one of the four Standard-Form Contracts (SfC) (FIDIC, GCC, JBCC and NEC) accepted by the Construction Industry Development Board (CIDB) for use by State owned Companies and, off course, by all private sector employers.

What is a SfC?

Either party may draft its own form of contract to limit some common law obligations but the choice of wording, content, risk allocation and application are unknown to the industry resulting in higher prices to cost uncertainty. All SfC have been developed in cooperation with industry representative bodies to spread risks equitably. When competently used SfC provide a checklist to guide the execution of a project.. To quote Lord Diplock from '1974 Modern Engineering v Gilbert-Ash' a SfC "is an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work done. Decisions have to be made from time to time about such essential matters as the making of variation orders, the expenditure of provisional and prime cost sums and extension of time for the carrying out of the work under the contract".

All SfC have similar headings in much the same order:

1. Definition and Interpretation
2. The parties
3. Design criteria
4. Risk allocation
5. Works description
6. Specialist contractors
7. Completion and adjustments
8. Payments and adjustments
9. Suspension
10. Dispute resolution
11. Agreement ... where the parties sign the agreement

What is 'force majeure'?

Some SfC refer to an 'exceptional event', others to 'force majeure' (as do some insurance policies) as an event that neither party could have reasonably foreseen, avoided or overcome that is beyond its control. Some definitions include events such as 'natural catastrophes, civil commotion or war, civil commotion, etc' often followed by wording 'but not limited to' ... The rapid spread globally of the Covid 19 Pandemic and consequent local restrictions to economic and other activities in terms of 'regulations published under the Disaster Management Act, 2002 and the State of Emergency Act, 1997' would fall into this category.¹ The contractor must be excused for such delay from performing his contractual obligations or, in an extreme scenario, may be completely excused from performance.

The determination of additional time to complete a project is relatively straight forward in this scenario. The difficulty arises to allocate costs incurred as a result of such delay. Generally, where the employer is at fault, the contractor must be compensated. In the Covid 19 scenario neither party is to blame ... should the additional costs be shared equally by the parties?

Role of the Contract administrator

All SfC require the appointment of a neutral 'contract administrator' (CA). (FIDIC – the engineer, GCC – the employer's representative, JBCC - the principal agent, NEC – the project manager) The CA must, within the period stipulated, adjudicate a claim fairly based on the available information – following the SfC procedures dealing with the revision of the date for practical completion, adjustment of the contract value, and/or the clause dealing with expense and loss.

Role of the Contractor

All contractor, and each subcontractor, must, within the period stipulated, submit a claim with as much information as possible – following the SfC procedures dealing with the revision of the date for practical completion, adjustment of the contract value, and/or the clause dealing with expense and loss.

Role of the Employer

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- "The present lockdown will probably amount to *casus fortuitus*, which is an incidence of *vis major*, and which is defined as an exceptional or extraordinary occurrence which was not reasonably foreseeable¹. It has been held² that plague is an incidence of *casus fortuitus*. In our view, the present COVID-19 outbreak is analogous, and the resultant government bans constitute *vis major*." ¹ See *Spolander v Ward* 1940 CPD 24
 - ² *Stockham & De Jong v Kaplansky & Co* (1901) 18 SC 156 and also *Joe v Mahomet* (1901) 11 CTR 816
 - Quoted from 'GVS - for commercial legal solutions' opinion for SAPOA 2020-03 24

in terms of the SfC the employer is not directly involved but should continuously be kept informed by the CA of the implications of all claims, progress etc

The 'claim'

The Covid 19 scenario differs from all other delay and cost claims. The typical time bars in all SfC to give notice *or loose the opportunity to claim* should not necessarily apply strictly for this event – but by the prompt provision of all relevant information by all involved to the CA and the employer to resolve the Covid 19 claim any potential disputes about nor following the process may be avoided.

Further implications

- The Covid 19 scenario differs from all other delay and cost claims as it includes a legally enforced (lock down, social distance, etc) closure of sites, workshops and factories to prevent person to person transmission of the virus;
- Owners, managers and staff may be effected by the virus and their ability to work may be reduced when the state of emergency is lifted;
- Owners, managers and staff may suffer serious financial hardship during the legally enforced lock down, if salaries cannot be paid regularly as no money is earned. Certain government sponsored grants may be claimed – but payment may take some time and the quantum is unlikely to be 'generous';

Registration is open, on www.smmesa.gov.za, for small and medium-sized businesses that require help during the coronavirus crisis.

- The global pandemic will disrupt international and local supply chain delivery of materials and goods;
- The likely scenario is that subcontractors will be affected more than principal contractors as, on expiry of the lockdown period, materials and goods will not necessarily be available for some time.

Conclusion

- Resorting to the dispute resolution clauses to determine the allocation of costs incurred is unlikely to result in a fair settlement if the parties cannot agree in the 1st instance;
- Covid 19 is an extreme contract frustration event with no winners and only a limited number of survivors who may have to restart their businesses, probably in a new format;
- Whatever is agreed – the parties must record such agreement and their respective obligations and sign such document as an addendum to the contract.

Note: The opinions expressed are those of the author who assumes no responsibility arising from any actions implemented by readers

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