

## COVID-19: Contractual dispute

Regarding the impact of **COVID-19** on construction dispute, there are many questions arising but no clear-cut right answers to all. Due to unprecedented COVID-19 situation, many *ad hoc* laws are coming but *firm laws* will pan out with passing of time.

**The typical questions evolving due to impact of COVID-19 on contractual issues are -**

- Is COVID-19 a Force Majeure?
- Can it be the reason for “Frustration of Contract”?
- Are you absolved from all your contractual obligation due to COVID-19 outbreak?
- What are good practices to safeguard the claim due to Lockdown etc?

We are sharing few illustrative pointers as below that may address couple of your queries.

1. First of all, the Force Majeure in general and COVID-19 particular cannot be the excuse of getting rid of all your contractual obligation.
2. The frustration shall be applied in the impossibility of doing the work. If the alternative means are available to mitigate then it must be attempted by the party even though the onerous lies with him.
3. If the “Force Majeure Clause” is absent in the contract, the affected party must refer to the EOT, Variation and other contract clauses that may provide relief on occurrence of such kind of event.
4. If the pandemic word is categorically mentioned in the Force Majeure clause then the COVID-19 would be treated as Force Majeure.
5. If the “Pandemic” word is missing in the Force Majeure Clause then the governing law allows the claim of the Pandemic as Force Majeure and how the local authorities intend to deal with the Pandemic needs to be explored.
6. In absence of any other relevant contract clause that entitles the affected party to claim time and cost, the affected party must refer to the Governing Law of the contract.
7. From a contractual perspective, a force majeure clause provides temporary reprieve to a party from performing its obligations under a contract upon occurrence of a force majeure event. Frustration of Contract can not be the on the basis of temporariness.

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8. Some contracts also contain a provision that if such force majeure event continues for a prolonged period, the parties may be permitted to terminate the contract.
9. In the Force Majeure event continues to substantially prevent execution of works for a continuous period of 84 days from the date of Notice or for multiple periods which total more than 140 days due to the same Force Majeure, the FIDIC contract provides an option for either party to terminate the contract. However, it can be governed the special condition of contract or by local laws
10. Once the contract clause and the claims have been identified, it is imperative for the affected party to Notify the Engineer/Employer. The key notices timelines are (as per FIDIC contract terms):
  - Notice for a Force Majeure should be made after 14 days from the start of the event
  - Notice of Claim to be made 28 days after the affected party became aware of the event
11. In all circumstances, a failure to notify in a timely manner would result in loss of entitlement to relief for the Contractor. It is also important to note that email notifications are not considered as “Notices” in many cases.

### **Way Forward:**

In nutshell to manage claims effectively during this current pandemic of COVID-19 or lockdown, the Contractor must undertake a phased approach to identify, evaluate, timely notify and substantiate their claims to avoid any major penalties or losses. And the contractor must prove that they have attempted/taken all measures to mitigate the losses. Lockdown can't be the reason of wriggle out for all other kind of disruption. The best way of settlement of losses is through reconciliation and mediation.

**Note:** *Aforementioned views/suggestions are based on our experience and research. However, expert legal advice can be sought on case to case basis.*