

Managing the Supply Chain Crisis - Contract Issues under Irish and English Law

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Today's Speaker



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Existing construction /mechanical /plant/engineering contracts

Common law

**Contract
provisions**

**How to
recover
additional
cost and time**

Legal framework

Principle of freedom to contract

- Agree contracts without unnecessary interference by the legislature or government
- B2B – no statutory restriction on “unfair” terms
- Parties agree risk allocation



Engineering Contracts – General Principles

- No special rules of contract apply
- Normal rules of interpretation
- Give effect to the intention of the parties as expressed in the ordinary meaning of the words used in the contract
 - all of the terms
 - contract is read as a whole
 - Ambiguity – contra proferentum



Force Majeure

- No legal meaning
- Needs to be interpreted by the contract provisions
- Will be interpreted strictly
- Excuses party from performance
- **Depends on specific wording of the clause**
 - May allow temporary delay
 - May give rise to termination
 - May affect liquidated damages



Force Majeure

- **Qualifying force majeure events**
 - Acts of god
 - Pandemic
 - War
 - Government action
- **Causation**
 - Did the event “prevent, hinder or delay” performance
 - Must be the sole cause
- **Foreseeability**
 - Was the event foreseeable?
- **Duty to mitigate**
 - Mitigate the effects of the event on contractual performance
- **Notice requirements**

Frustration

- Unexpected event - contractual obligation incapable of being performed - impossible
- Not due to the fault of either party
- Parties released from contract – terminated
- Neither party may claim damages
- Not hardship or inconvenience
- very high threshold
 - Canary Wharf v European Medicines 2019 Agency
 - partial frustration not recognised by courts



Implied terms

- Courts reluctant to interpret a contract or imply a term to assist a party who is adversely affected by supply chain disruption
- Where it is necessary to make the contract work (but the court does not improve contracts)
- Court must find that the parties intended that term to form part of the contract
- It must be reasonable and equitable
- Must be necessary to give business efficacy
- No duty of good faith

Possible solutions

- Look for flexibility in the mechanisms that allow additional time or money
- Is the liquidated damages clause enforceable?
- Identify weaknesses in the contract documents
- Consider if there is anything that could be construed as a variation
- Value engineering
- Renegotiate?



Solution outside the contract...

Inflation/Supply Chain Delay Co-operation Framework Agreement

- recognizes burden placed on contractors by supply chain disruption and price inflation
- encourages “pragmatic and proportionate approach” to mitigate impacts
- operates without prejudice to each party’s rights
- cost burden share:
 - ex gratia contribution
 - waives application of liquidated damages

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**Thank you for your time.
Any questions?**

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