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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

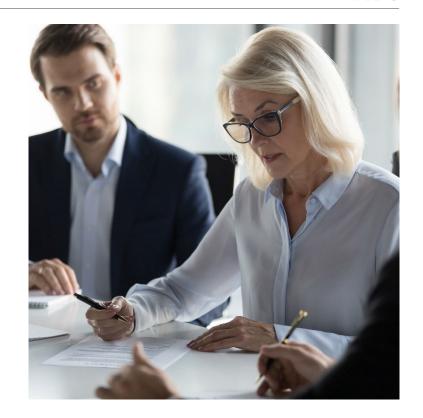
Contract provisions

How to recover additional cost and time

Legal framework

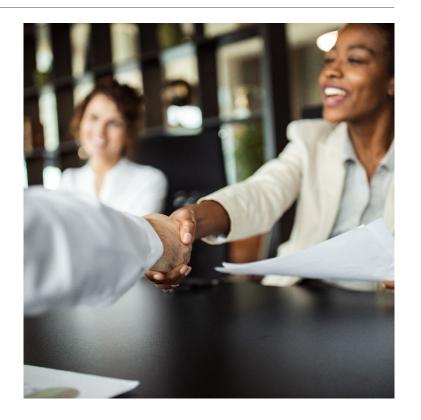
Principle of freedom to contract

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



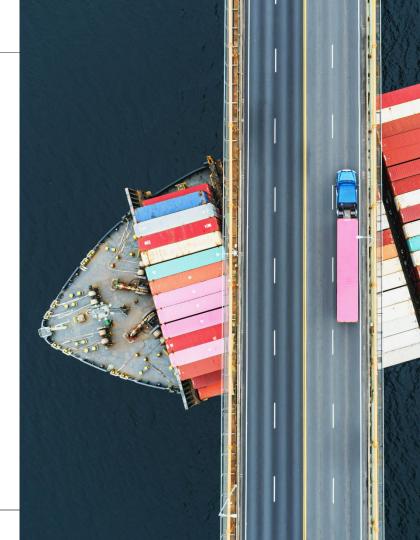
Engineering Contracts – General Principles

- 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 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

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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?