

# Construction disputes:

Why it pays to put the project first.



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## Gleeds Supervisory Board member, Chris Soffe, and construction and engineering Partner at Freeths LLP, Alex Johnson, take a closer look at construction contract disputes in the wake of the pandemic.

Perhaps unsurprisingly, 2020 was a bumper year for construction disputes. According to a leading report, the global average value of disputes increased from \$30.7 million in 2019 to \$54.26 million in 2020. [1]

We could look to COVID-19 as a likely source for increased disagreement between parties – the pandemic had a major impact on construction projects around the world. [1] According to Research and Markets, the global construction market size declined from \$11.2 billion in 2019 to \$10.7 billion in 2020, or around 9.5 percent. [2]

Contractor teams may have been subject to stay-at-home orders by national or state governments. Operatives may have got sick or otherwise chosen to remain off-site. Even if sites remained active, global supply chains for building materials and products were impacted with severe ripple effects for building and infrastructure schedules.

When the pandemic hit and schedules started to slip, contracts were brought out of filing cabinets and construction teams looked through them to find what, if any, protection would be afforded by the agreement they had signed up to.

Construction lawyers received a lot of requests asking what teams should do and what the impact on the project would be. Most standard form contracts, such as those produced by the International Federation of Consulting Engineers, the American Institute of Architects and The Joint Contracts Tribunal, were silent on the matter of pandemics.

Given there has not been a global pandemic within the last 100 years, few standard form or bespoke contracts contain any specific provision for what should happen in the event of one. Instead, many parties were left looking to force majeure clauses.

These relieve parties from their obligations to perform the contract on the occurrence of an event which was beyond their control. Whether the pandemic was a force majeure event or not depended on the wording of the clause and the specific facts.

Some clients, with good intentions, closed their sites in response to the pandemic. However, under standard form contracts this constituted a breach of contract and an act of prevention, potentially exposing the client to a claim.

## The drawbacks of force majeure clauses



**Force majeure lacks a specific definition in English law but it translates literally as ‘superior force’. These clauses usually set out a list of example extreme events, such as natural disasters and acts of terrorism – events beyond the control of the parties.**

If pandemics were not specifically included in this list, parties needed to assess whether the wording was such that it would include pandemics as an event that was unforeseeable at the time the parties entered into the contract.

Even if the pandemic was covered by this clause, parties still had to establish that non-performance or late performance resulted from the pandemic (as opposed to another cause), was beyond their control.

While force majeure clauses typically allow the contractor an extension of time, they do not generally allow the contractor financial compensation. The extra expenses associated with the pandemic could easily eat into often-slim profit margins.

As the contract did not fairly allocate the novel risks that had arisen, parties decided to put aside contracts altogether to agree alternative measures to see them through the difficulty caused by the pandemic.

Parties agreed extensions of time and, in some cases, compensation via side agreements or contractual amendments. In the UK, many large contractors signed up to a conflict avoidance pledge that meant disputes would not be entered into as a result of the pandemic.

This appears to have been successful — construction lawyers have seen relatively few, if any, claims relating to the pandemic.

## Contracts deal with unexpected events in an unsatisfactory way



**The response of parties to the pandemic reflects the unsatisfactory way that contracts deal with unexpected events. The majority of standard form contracts did not address pandemics, much less in terms of risk allocation and available remedies.**

While force majeure clauses (if they applied) relieved the contractor from delivery, they were silent on financial compensation.

Force majeure clauses are typically drafted in a narrow way. Before the pandemic, they were rarely scrutinised and the courts consider them on a case-by-case basis. This issue may reflect the adversarial nature of contracts. Little thought often goes into the why of contracts.

Many owners and contractors tend to have ‘favourite’ contracts that are not properly tested until something goes wrong. The pandemic exposed the limitations of contracts, and the often zero-sum game played when parties compete to load risk on to each other.



# Time for a rethink in a changing world



**We cannot legislate for the unforeseeable, but the pandemic provides an opportunity to take a long look at construction contracts and the spirit in which they are produced. Instead of treating the construction contract as territory in a battle between the client and contractor, would it not be better if the parties put the project, rather than their own interests, first?**

The world needs new or upgraded infrastructure, and faces problems in how it will be delivered. The time is right to build contractual relationships that are more collaborative and put the needs of the project first. We believe project teams are missing the opportunity to draft contracts that deal more effectively with the increasing type and frequency of events that occurs in today's world — which may lead to a rise in construction disputes.

Why rely on force majeure clauses when certain types of extreme events are now more commonplace, and we can prescribe what happens if they occur? Contracts need to be relevant and specific to the issues we face and how those issues apply to the specific project.

Even before the pandemic, the world was less stable than five years earlier. Climate change has contributed to severe flooding in parts of Europe this year and extreme heat and wildfires occur regularly in Australia and North America. How will the contract deal with one of these events if they happen and impact the project? If they are identified as a potential risk, contracts can include provisions to deal with that risk.

Standard risks will always be addressed in traditional contracts, but COVID-19 should force a rethink on whether that is sufficient given the issues the world faces and will face in future. In the UK, the value of contract disputes rose 117 percent in 2020 from the year before.

Meanwhile, more than 75 percent of survey respondents said projects had been impacted by the pandemic.

[1] In a Gleeds survey of industry professionals in April, 54 percent of respondents expected an increase in contractual disputes. [3]

# How to approach contracts differently



**We suggest the first step is to consider the people involved in a project — the culture, behaviour and environment of the team. Why? Because people cause disputes, not contracts. Instead of the typical adversarial approach (for which contracts and the law share much of the blame), try to create mutual understanding across project teams and put egos to one side.**

If all parties focus on working together, communicate their expectations, and the culture of behaviour is good, then the ingredients are in place for a successful project with minimal risk of disputes arising. That is why, in our experience, the most successful schemes tend to be created by teams who have worked together before.

Parties should not focus on their own bottom line, but see the project as an asset in which they all invest, with the expectation of a positive return if the outcome is successful. Invest in the outcome. Care should be taken in choosing the contract negotiation and bid teams, and their strategy. Avoid the traps that bake disputes into the project to begin with, such as lowballing to win the work, failing to bring up potential site issues, undercooking the tender designs and hiding extra costs in the contract.

Instead, carry out a systematic joint risk review that looks at all potential issues. Consider an autopsy approach, starting at an imaginary end-catastrophe and working back to identify the triggers that caused the project to fail and how they could have been prevented. This will allow parties to make provision for the specific risks that could impact the project rather than leaving it to force majeure or other clauses.

## Start with what you agree on



**In an ideal world, risks on a project would be split down the middle. But generally, one party puts forward a contract draft that suits them, and the other marks it up to suit them. Both parties then work on what they can accept.**

Instead, parties should start in the middle, with what they agree on, and work outwards, rather than take an extreme position and work inwards to find a compromise. Contracts reflect the behaviour of people.

If teams were more collaborative, the contract could be similarly drafted in the spirit of partnership.

The type of project delivery chosen can help your lawyers select the correct contract for different circumstances and how it should be tailored for the project. Assess the owner's needs to begin with. Do they want single point responsibility? Speed? Or is flexibility more important? We have learned that problems often start when the delivery method does not suit the project.

## Bringing change to construction project delivery



**There is no magic in putting projects first – it is a change in mindset. Projects still need to be completed on time, on budget, and to the best quality standards without disputes. There is a different way to achieve that, however.**

Without change, the number of disputes will continue to rise, much-needed infrastructure may not be built or become compromised, and construction expertise will be diminished.

To help bring about this change, Gleeds and Freeths, a full-service law firm, have joined forces on the Construction Disputes A to Z Initiative, which was launched in 2020.

This initiative means we can meet all your technical, contractual and legal needs with a coordinated resource. We encourage parties to get in touch to find out how we can help support the successful completion of your project.

### References:

1. Arcadis, 2021 Global Construction Disputes Report, The road to early resolution.
2. Research and Markets, Global Impact of COVID-19 on Construction Industry Market by Type (Residential, Non-Residential, and Heavy & Civil Engineering) and Region (North America, Europe, Asia Pacific, Middle East & Africa, South America) - Forecast to 2024.
3. Construction Manager, Contracts should address pandemics fairly, p40-41, June 2021.





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