



CONSTRUCTION  
LAW  
INSTITUTE

# THE EFFECT OF FORCE MAJEURE ON CONSTRUCTION CONTRACTS.

By:  
David Kaggwa, FCI Arb, FICCP  
*LLM (Construction Law & Arbitration) RGU Arberdeen*

At the ICAMEK Webinar on 24th APRIL 2020



# Profile

**David Kaggwa, FCIArb, FICCP**

LLM (Construction Law & Arbitration) RGU Arberdeen



## Current Positions:

- Chairman, Chartered Institute of Arbitrators – Uganda Chapter.
- Director, Chartered Institute of Arbitrators – Kenya Branch.
- Executive Director, Construction Law Institute.
- Senior Partner, Kaggwa & Kaggwa Advocates.

## Memberships:

- Fellow: Chartered Institute of Arbitrators (FCIArb)
- Fellow: Institute of Construction Claims Practitioners (FICCP)
- Member: Society of Construction Law (UK)
- Member: London Court of International Arbitration (LCIA)
- Member: International Center for Mediation & Arbitration in Kampala (ICAMEK)
- Member: Center for Arbitration & Dispute Resolution
- Member: International Bar Association.
- Member: Uganda Law Society and East Africa Law Society



CONSTRUCTION  
LAW  
INSTITUTE

I will discuss the post Covid19 effects on Construction contracts and the likely disputes that may arise. My focus will be on FIDIC contracts which are the most widely used construction contracts in the World.

FIDIC contracts are published by the International Federation of Consulting Engineers and are often used by the World Bank, UNRA, KCCA and most complex infrastructure projects such as roads (Kampala Flyover, Kampala Entebbe Express way, Busega-Mpigi Express Highway, warehouses like the new National Medical Stores Warehouse in Kajjansi, bridges like the Jinja bridge and buildings worth more than **US \$ 10M.**



# What is Force Majeure?

**Force majeure or an act of God** is an event that relieves the affected party from performing their contractual obligations when circumstances beyond their control arise that make performance of the contract impossible. Such events include a pandemic like Covid or Ebola West Africa, ISIS in Iraq, earthquakes, floods, war and government orders or directives.

Government orders, directives or even the Statutory Instruments issued by the Minister of Health of Uganda under the Public Health Act, amount to a change of law under the FIDIC Conditions of Contract.



# Force Majeure

- Any change in law affecting the progress of works would lead to an entitlement by a contractor to more time and money. It is these claims and more which are likely to lead to disputes which if not amicably resolved would lead to adjudication and eventually arbitration.
- A person must show that a force majeure clause was included in the contract before relying on it. In the absence of a force majeure clause, a person may rely on the common law principle of frustration, which has its distinct ingredients that must be proven.



# Force Majeure

- A party to a contract who wishes to rely on a force majeure must send out a written notice within 28 days from when he knew of the event to the other party indicating the event or circumstance under which it has been given. It is only a party who is likely to be prevented from performing the contract who qualifies to give the notice.





**What are the likely  
Consequences of  
Force Majeure?**

# Likely consequences of Force Majeure



**Projects will be delayed.** Because a Contractor is entitled to claim for extension of time for completion of the contract and costs, most construction projects are likely to be delayed. In cases where the Employer like Government which borrowed from the EU or World Bank it may lead to disputes at an International level for delayed projects and or repayment.

---

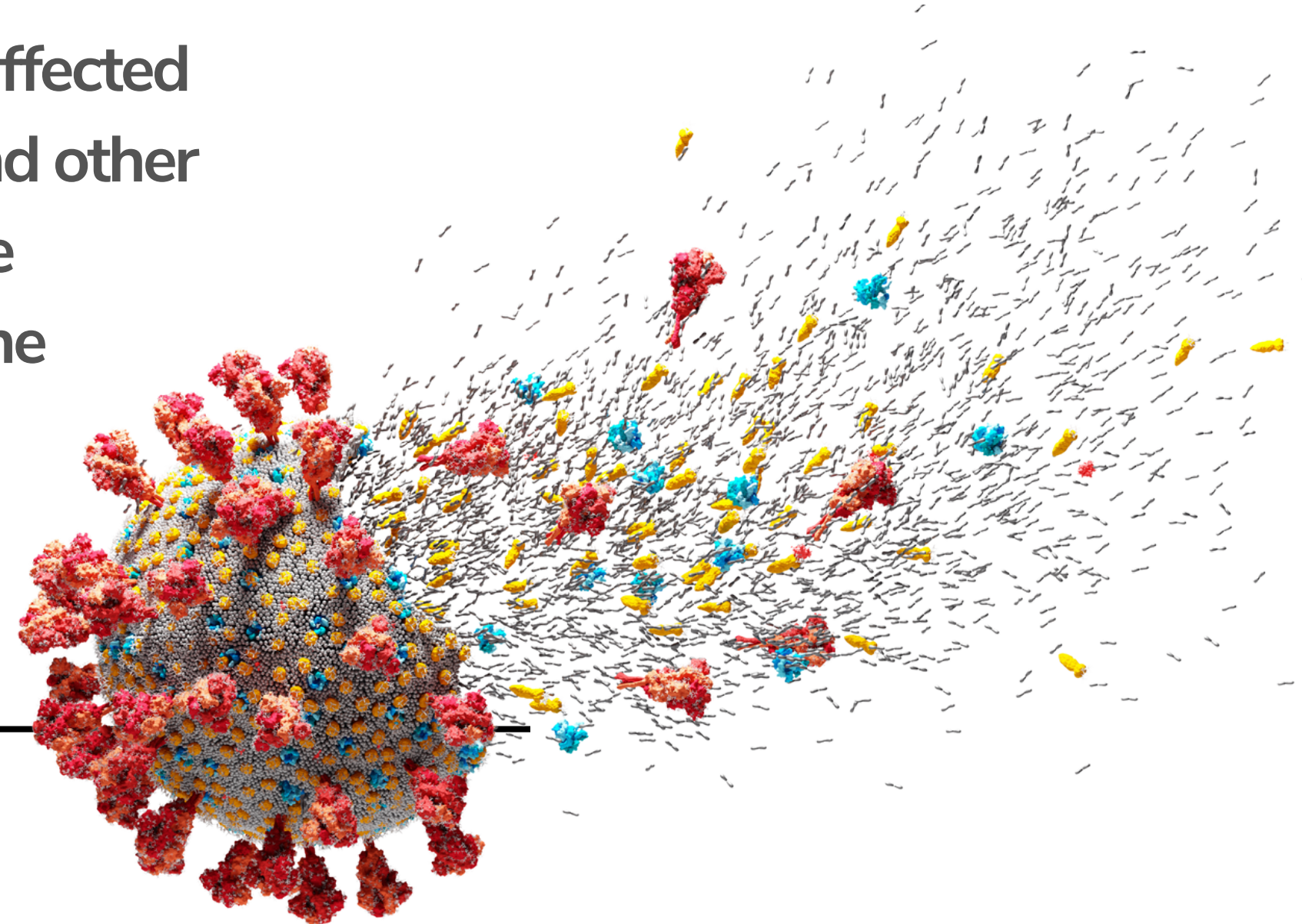
**Delayed certification and payments.** Since cashflow is the blood life of construction projects, Most contractors borrow from the banks to finance their projects, the delay in performance of their contracts may lead to delayed certification and payments, they may default on the bank loans and this will lead to chain of disputes.



# Likely consequences of Force Majeure

Even after COVID 19, provided the contract has not been terminated, the Contractor has an obligation to resume works and perform his obligations. However, after effects of Covid 19 will be felt, such as; laid off workers, demobilized equipment, restricted travel of expatriates from other affected countries, disrupted supplies e.g bitumen, steel, tiles and other equipment are imported from China and Europe. These delays will lead to disputes and the Arbitration being the preferred mode of dispute resolution in those supply contracts, is likely to be the preferred mode of dispute resolution.

---



# Likely consequences of Force Majeure

The Employer may terminate the contract because of force majeure, and they would not be liable for breach of contract. The issue is whether the employer will have the funds to compensate the contractor without delay. If not, this is likely to cause a dispute.



# CONCLUSION

- The result of termination under force majeure is that upon fulfillment of all the conditions precedent, both the employer and the contractor are released from further performance of their obligations under the contract.
- In some cases, the force majeure event might only affect a part of the contractual obligations, without impacting the rest and force majeure may in that case, apply partially leaving the remaining obligations intact.
- In case of termination? So what? Who will complete the rest of the works? This is a practical question to employers. Isn't the contractor on site best placed to remobilize and complete the works? Therefore, while there may be enough grounds for taking the legal route, commercial considerations may take precedence and are the better choice.

# CONCLUSION

- Termination of the contract, most often than not, does not make business sense since it sometimes affects third parties and the general population.
- At the time of signing the contract, some Employers amend the contract and delete the entitlement to costs in case of force majeure, therefore contractors need to read and internalize their contracts. In case such a clause was deleted, no claim for costs can arise safe for Extension of Time.
- Mediation is likely to be the best option for both parties to engage in negotiations towards resuming the performance of the contract as soon as possible and in case of any monetary compensation it can agreed amicably.



**Thank You!**



**CONSTRUCTION  
LAW  
INSTITUTE**



**Contact us:**

 +256 789 519 111

 [info@constructionlawinstitute.com](mailto:info@constructionlawinstitute.com)

 Plot 28 Golf Course Road, Kololo, Kampala.

 [www.constructionlawinstitute.com](http://www.constructionlawinstitute.com)



**SCAN  
ME** 