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Discussion: How one shall interpret 'spirit of mutual trust and co-operation' in NEC contracts

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Contribution by Joe Colgan

The answer to the question posed in the *Management, Procurement and Law* paper 'How one shall interpret the "spirit of mutual trust and co-operation" …' clause (Leung and Kwok, 2020) is however one wishes to construe it.

The existence of the clause within the contract conditions renders it being as enforceable (or not) as any other clause.

The main difference lies in the fact that there is little case law to support any claim, but this is far from an insurmountable hurdle, and it seems to the contributor that the analysis is predicated on a leap to conclusion without considering the process that precedes it.

There are extant examples. Repudiation of a contract is a well-recognised legal position, and it can be and often is claimed by parties to be the facts of the circumstances. It is, though, just a presumption until it is proven in a dispute forum to be a fact. Time at large is similarly often a circumstance claimed and one with ample case law to support its contention but again, until determined by a disputes tribunal, is simply a subjective assessment of circumstances.

For example, when does an inaccurate variation claim become a fraudulent misrepresentation? When a judge says it does.

The contributor sees this as no different from the 'spirit of mutual trust and co-operation' (Somtac) clause.

If it is felt that the clause has been breached, then this can be alleged as a dispute and/or cited as a compensation event (arguably a negative one if it is the contractor who has failed to comply with the obligation).

It is for the tribunal to weigh and measure the respective merits of the claim and defence proffered and to make a determination based on an interpretation of the parties' intentions at the time that the contract was formulated, as is the case with all formal dispute resolution. It is no more problematic than that.

The contributor accepts that it could, without some relevant precedents, lead to numerous (perhaps spurious) claims and there is a danger that reciprocal claims under the same banner could be spawned – that is, the act of seeking to prosecute a breach of the Somtac clause is itself, if considered meritless, a breach that may be claimed, and the initial assessment of that is simply subjective opinion.

It would also, the contributor thinks, be relatively easy to put some basic structure around what that obligation equates to in terms of behaviour at a general level.

Contracts do not cater for every possible circumstance. If they did, there would be no need for a civil judiciary, and seeking to prescribe a remedy for every conceivable combination of conditions is a task that can never be completed.

That does not detract, though, from the effort to promote a collaborative, working arrangement by virtue of a contractual clause that has at least some sanction if it is ignored.

Authors' reply

The authors agree with the observation that there is a limited amount of case law supplementing the interpretation of the clause. Yet based on this understanding, it seems that the parties will be bound by this clause without fully understanding its implication and impact, until the issue is brought to the tribunal or court. Putting forward a contractual issue to the tribunal or court is obviously not the drafting intention of the contract.

Unlike the rule of repudiation and misrepresentation, the clause is explicitly introduced in the contract. This means that the parties both agree to such a clause (*consensus ad idem*) or else there will be no contract. With the interpretation of the clause awaited, it seems that the contract is not founded concretely.

Resorting the issue to a compensation event is a possible mitigation measure, but once again it begs the question: why the hole cannot be plugged before it leaks? Resolving contractual issues through the compensation event mechanism will essentially increase uncertainty to contract. It is further notable that being a core clause and possibly foundation of the contract, time and cost implication arising from this clause cannot be easily assessed and

agreed. Assessment among different users may deviate significantly depending on their personal understanding of the clause. This thus again becomes a ground for dispute.

The authors also agree that a contract cannot take into account all possible circumstances. However, it is also not desirable to include a clause that is not well explained and provide unnecessary flexibility for the parties to argue.

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Leung RHM and Kwok BCH (2020) How one shall interpret 'spirit of mutual trust and co-operation' in NEC contracts. *Proceedings of the Institution of Civil Engineers – Management, Procurement and Law* **173(1)**: 14–20, https://doi.org/10.1680/jmapl.18.00051.