

COVID-19 and the construction industry

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Prompt Payment Legislation coming to Alberta

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Prompt Payment Legislation (“PPL”) in Canada

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THE NEED FOR PPL

- Stakeholders in the construction industry across Canada have expressed desire to reform older legislation and introduce PPL.
- While each of the provinces has legislation that provides contractors, suppliers and wage earners with an opportunity to register a lien if they do not receive payment, the various lien acts do not help address late payment.
- Late payment can have serious consequences for all parties involved in projects, such as:
 - Inability to complete contractual obligations;
 - Threaten the economic viability of a party.

THE NEED FOR PPL

- Other provinces have enacted or are considering enacting PPL, and include the following:
 - Ontario
 - British Columbia
 - Saskatchewan
 - Nova Scotia
 - Manitoba
 - New Brunswick
 - Quebec
- The Federal Government passed Prompt Payment for Construction Work Act on June 21, 2019. Deals with federal construction projects

PPL IN ONTARIO

- Ontario is the first province to enact PPL.
- The amendments to the *Construction Act* took effect on October 1, 2019.
- The *Construction Act* now serves as a more comprehensive replacement for the old *Construction Lien Act*, which focused primarily on builders' liens.
- Prompt payment is now mandatory in all construction contracts in Ontario.

PPL IN ONTARIO

- Some of the changes that have been made to the *Construction Act* in Ontario to support prompt payment are as follows:
 - Payment Cycle (the 28-14-7 Rule)
 - Owners have 28 days to pay a contractor after receipt of a proper invoice.
 - Owners have 14 days to review the invoice prior to providing a notice of non-payment, specifying amongst other things, the amount of the invoice that is not being paid.
 - Contractors then have 7 days to pay their subcontractors after receiving payment from the owner.

PPL IN ONTARIO

- Invoicing

- The delivery of a proper invoice triggers the payment cycle (28-14-7).
- Parties can still establish individualized payment schedules in their contract. If there is no schedule, then invoices must be submitted monthly.
- The payment cycles is triggered as soon as the contractor's invoice is received by an owner.

- What is a Proper Invoice? Must include the following

- Contractor's name and address;
- Date of the invoice and period during which services or materials were supplied;
- Information identifying the authority (ex. Contract, purchase order, anything else), under which services or materials were supplied;
- A description, including the quantity, of the services or materials supplied;
- Amount payable and payment terms;
- Name, title, telephone number, and mailing address of the person to whom payment is to be sent; and
- Any other information that may be prescribed by the contract.

PPL IN ONTARIO

- Disputes - Owners

- If an owner disputes or partially disputes an invoice, it has 14 days from the date of receipt of the invoice to deliver a notice of non-payment.
- The notice of non-payment must include all reasons for non-payment.
- If the owner fails to deliver a notice of non-payment within the 14 days, the owner must pay the full amount of the invoice within 28 days.
 - Importantly, a owner can dispute the amount paid in a notice of non-payment in subsequent payment cycles

PPL IN ONTARIO

- Disputes – Contractors and Subcontractors
 - If a contractor disputes or partially disputes an invoice from a sub, it has either 7 or 35 days to deliver a notice of non-payment.
 - If a notice of non-payment was issued by the owner, the contractor has 7 days from receiving the owner's notice.
 - If no notice of non-payment was issued by the owner, the contract has 35 days from when the invoice was provided to the owner.
 - The notice of non-payment must include all reasons for non-payment.
 - If a contractor did not receive payment from an owner, it can issue a notice of non-payment to the sub.
 - Notice must state the amount payable to the sub that is not being paid.
 - The contractor must provide an undertaking to refer the matter to adjudication within 21 days of giving notice to the sub.

PPL IN ONTARIO

- Adjudication

- A party to a contract may choose to refer a dispute to adjudication.
- Parties can set out an adjudication process in their contract, provided it meets the minimum requirements of Ontario's legislation.
- Ontario created an entirely new body to deal with the adjudication process.
 - The Ontario Dispute Adjudication for Construction Contracts ("**ODACC**") oversees training and qualification for adjudicators.
 - The ODACC also maintains a fee schedule, code of conduct for adjudicators, and complaints procedure.

- Other Items of Note

- Period to register a lien is 60 days (Increased from 45).
- Increase in time to start a court action.
- 10% holdback still applies to the new payment cycle.

PPL IN ALBERTA

- Service Alberta is currently in the consultation phase, as they seek input from various Construction Industry Stakeholders.
 - Main areas of concern are timely payment; and
 - Concerns with existing legislation.
- If Alberta chooses to enact PPL, there will be many considerations
 - How similar should any legislation be to Ontario?
 - Is a 28 day payment cycle reasonable?
 - Should there be an adjudication procedure?
 - How would adjudication mid-project affect the project and the parties?
 - Should prompt payment apply differently based on the type of projects?
- Target Date?
 - Was previously fall 2020, this date will likely change given the impact of COVID-19 on all the relevant parties.

Change Orders and the COVID-19 pandemic

Simon Elzen-Hoskyn, Associate

Where We Are Headed

1. Change order management – best practices
2. Legal test for proving a claim for an “extra” outside of a formal change order
3. COVID-19 and change management

1. Change Order – Best Practices

Successful Change Management Means...

- Project Team is well briefed on change management process
- Good lines of communication between the Parties
- Adequate staffing for timely reviews
- Giving “good client service” while preparing for the (inevitable?) dispute

1. Change Order – Best Practices

So you've got a good change process...

- ✓ Drafted an extensive change management protocol
- ✓ Explained the process to both the client-facing contacts and the people in the field
- ✓ Created an open and honest source of communication

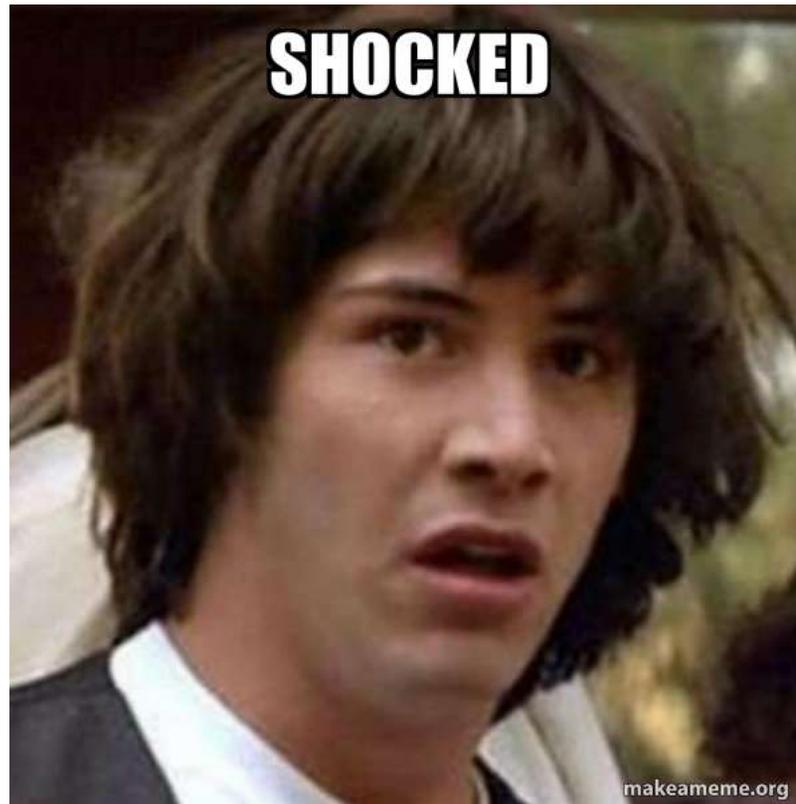
1. Change Order – Best Practices

But what happens when...

... wait for it ...

1. Change Order – Best Practices

.....there is NO change order?



2. Proving An “Extra” Without a Change Order Fortunately – there’s a case for that...

- Legal test: *Impact Painting Ltd. v. Man-Shield (Alta) Construction Inc.*, 2019 ABCA 57
 - Defendant was GC of large construction project
 - Last minute scope change
 - Disputed change orders, extras and back charges involving painting Sub-Contractor
 - Sub did not use formal change order process

2. Proving An “Extra” Without a Change Order

Impact Painting – 4 Part Test

1. Outside Scope
2. Authorized
3. Aware
4. Waiver

2. Proving An “Extra” Without a Change Order

1. Outside Scope?

- Was the work performed in fact extra work (i.e. outside scope of work)?
 - Evaluate the original “scope of work” in the contract. Detailed and specific or broad?
 - Where scope is light, description in a tender or proposal may be incorporated by reference.

2. Proving An “Extra” Without a Change Order

2. Authorized?

- If yes, did Owner/General Contractor give instructions, either express or implied, that the work was authorized?
 - Note: “express” or “implied”
 - Typically evidence is an email or direction
 - Implied direction may open the door (e.g. “Do what you need to do to meet the deadline”)

2. Proving An “Extra” Without a Change Order

3. Aware?

- If yes, was the Owner/General Contractor informed or aware that the work would increase the cost?
 - Note: “informed” or “aware”
 - Typically, sophisticated parties would be aware that most extras increase cost
 - It is always better to get the information during the project

2. Proving An “Extra” Without a Change Order

4. Waiver?

- Did the Owner/General Contractor waive the provision requiring changes to be made in writing, or acquiesce in ignoring those provisions?
 - Note: “waive” (active) or “acquiesce” (passive)
 - Typically done in correspondence or communication
 - Courts seem to apply a low threshold

3. Implications of COVID-19 on Change Orders

Know your contract

- What kind of contractual arrangement do you have?
- How is risk already allocated for changes between parties?
- Know your bare contractual rights
 - E.g. CCDC 2, GC 6.5.3.4

3. Implications of COVID-19 on Change Orders

Know your scope of work

- Review the applicable scope of work
- Consider whether the COVID-19-related change is really outside of scope of work
 - What type of additional work/costs have arisen?
 - Why did those changes arise?

3. Implications of COVID-19 on Change Orders

Think strategically

- Even if justified, other considerations at play regarding change orders
 - Client relationships concerns
 - *Force majeure* or “frustration of contract” may be a better fit
 - Consider success of project as a whole
- Change order may create a mechanism for negotiation

COVID-19 and your Construction Contracts

Force Majeure, Frustration and Practical Advice for Current and Future Contracts

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FORCE MAJEURE

April 15, 2020

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Force Majeure

Definition

- Force majeure applies where an unforeseen and uncontrollable event or condition prevents one party from performing its contractual obligations.
- Force majeure clauses provide relief from performance. Parties, may be:
 - excused from performance, in whole or in part; and/or
 - entitled to suspend or extend the time of performance, as a result of some specified event or condition; and/or
 - entitled to cost relief; and/or
 - able to terminate the contract if the force majeure event continues for an extended time.
- Obligations typically resume once the event or condition has been remedied or can be overcome, unless a termination right has been exercised.

Force Majeure

Read the Contract

- Force majeure is purely a creature of contract.
- The affected party typically has the burden of demonstrating that the event meets the applicable definition and the other criteria set out in the contract.
- Based on the traditional narrow scope of force majeure and the presumption that contracting parties do not intend to exempt performance unless clearly provided for:
 - Force majeure language will tend to be construed narrowly; and
 - Ambiguity will likely be resolved against the claiming party.

Force Majeure

Read the Contract

- Force majeure clauses typically define:
 1. The Triggering Events;
 2. The Impact Requirement;
 3. The Notice Requirement; and
 4. The Mitigation Requirement.

Force Majeure

Read the Contract – Triggering Events

- Whether COVID-19 amounts to a force majeure event depends on the language of the contract.
- COVID-19 may be covered by:
 - specific triggering events listed in a clause (e.g. Acts of God, natural disasters, extreme adverse weather conditions, war, terrorist acts and civil unrest , government action, labour unrest, epidemics, pandemics, quarantine, etc.);
and/or
 - “catch-all” open-ended language (e.g. “any unexpected eventuality outside the control of the impacted party”).

Force Majeure

Read the Contract – Impact Requirement

- The clause will typically specify that the affected party must be impacted by the event, often with express reference to time and cost.
- The clause will often provide that the event must be beyond the reasonable control of the party and must not be self-inflicted.
- Force majeure must generally prevent, and not just hinder or render uneconomic, contractual performance.
- Lack of funds or an increase in the cost of labour or materials will generally not be sufficient impact to be deemed force majeure.
 - e.g. if COVID-19 affects a contractor's ability to pay for needed materials but does not directly affect activities at the project site, such economic considerations would generally not be a relevant factor.

Force Majeure

Read the Contract – Notice Requirement

- The clause will typically require notice of the force majeure event within a certain time after it has commenced.
- Failure to provide the required notice can result in losing the right to claim relief under the clause.
- A party should consult the contract to:
 - see where and how notices should be sent;
 - meet any content requirement (e.g. providing known impacts, details of the event, commencement date, etc.); and
 - include any other information required under the contract.

Force Majeure

Read the Contract – Mitigation

- Some clauses will require the affected party to mitigate the impact of the event, to the extent possible.
- *Atcor Ltd. v. Continental Energy Marketing Ltd.*, 1996 ABCA 40 (“**Atcor**”)
 - Where a force majeure clause expressly requires mitigation, an assessment of commercial practicality and trade practice is necessary in order to determine what steps will satisfy the requirement of mitigation.
 - The onus is on the party attempting to rely on the force majeure clause to demonstrate that certain potential mitigation steps were not taken because those steps were, in all the circumstances, commercially unreasonable.
 - If a contracting party can otherwise continue to satisfy its contractual obligations in a commercially reasonable manner, the force majeure clause will not operate to absolve that party from its contractual responsibilities.
 - The key consideration is whether it was commercially reasonable to mitigate the *effect* of the event, not whether the party could have prevented the event itself from occurring.

Force Majeure

General Duty to Mitigate

- Even where there is no express duty to mitigate, courts will impose a duty to mitigate the event and its effects. The extent of that duty is unclear and highly dependent on the facts.
- General principle of construction contracts: All parties to a contract have a general duty to mitigate and minimize the impact of adverse events on the counterparty.
- Duty to mitigate could include spending money.
- Both parties should:
 - ensure that they accurately document mitigation efforts so that they can demonstrate that their duty has been met.
 - cooperate (on a without prejudice basis) to try to do what is best for the project.

Force Majeure

Read the Contract – Other Clauses

- Force majeure is not always set out in a single clause labeled “force majeure”. A combination of clauses could support a claim for relief.
- CCDC 2 – Stipulated Price Contract: No force majeure clause per se
 - GC 6.5.1: Extension of time if the Contractor is delayed by an action/omission of the Owner or Consultant (e.g. if Owner stops the work for health reasons).
 - GC 6.5.2: Extension of time in the event of a stop work order issued by a court or other public authority.
 - GC 6.5.3.4: Extension of time if the Contractor is delayed by “any cause beyond the Contractor’s control other than one resulting from a default or breach of Contract by the Contractor”.
 - GC 7.2.2: The Contractor has the right to terminate the Contract if the Work is suspended or delayed for 20 Working Days or more under an order of a court or other public authority, providing that such order was not issued as the result of an act or fault of the Contractor.

FRUSTRATION

Frustration

Impossibility of Performance

- In the absence of a force majeure clause (or if the force majeure clause does not apply), the general doctrine of frustration could apply.
- Frustration of contract typically arises as a result of:
 - physical impossibility (e.g. where the subject matter of the contract has been lost or destroyed); or
 - impossibility resulting from a legal development that has rendered the contract unlawful (e.g. where a government ordered shutdown occurs).

Frustration

Supervening Event

- Frustration is triggered upon the occurrence of a supervening event.
- In order for frustration to be found, the supervening event must meet all of the following criteria:
 1. The event must have occurred after the formation of the contract;
 2. The event must have been unforeseen (i.e. parties could not have contemplated its occurrence, and did not deliberately exclude the occurrence of the event out of the contract);
 3. The event must cause performance of the contract to become “a thing radically different from that which was undertaken by the parties.” Not sufficient if the event simply renders the performance of the contract more costly, onerous, or eliminates one party’s advantage under the contract;
 4. The event must cause a disruption that is “permanent, not temporary or transient. The change must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as it concerns either or both parties”;
 5. The event cannot be caused by either party.

Frustration

Remedy

- The party claiming frustration has the onus of proving the constituent elements to establish frustration.
- If these requirements are established, the remedy for frustration is to relieve the parties from any further obligation to perform the contract.
- Courts will consider the experience of the parties.
 - Where sophisticated parties are involved, courts are less likely to view a frustration claim favourably.

Frustration

COVID-19 as a Cause for Frustration

- Whether frustration applies in the context of COVID-19 will depend on the circumstances of each case.
- Given that the construction sector, in large part, was deemed an “essential service” in Alberta, there has not yet been a frustration of contract for many parties to construction contracts in Alberta.
- Even in the context of a province-wide pandemic-related stop work order, an argument that a construction contract has become frustrated may fail on account of the requirements that the supervening event must cause:
 - performance of the contract to become “a thing radically different from that which was undertaken by the parties”; and
 - a disruption that is “permanent, not temporary or transient”;particularly given that a stop work order would likely be of a limited duration.

Practical Advice

Current and Future Contracts

Practical Advice: Current Contracts

Potential Impacts of COVID-19

- Delays on the planned construction schedule caused by:
 - labour disruptions;
 - critical supply chain disruptions;
 - delay or inability to obtain required permits;
 - unforeseen events impacting the availability of financing;
and/or
 - full project shut-down following a government directive to suspend all construction.

Practical Advice: Current Contracts

Potential Impacts of COVID-19

- Delays on an existing project resulting in delays to others.
- Increased costs.
- Additional costs for suppliers.
- Other indirect costs.

Preparing for Potential Impacts of COVID-19

Potential Impacts of COVID-19 (*continued*)

1. Understand your rights and obligations – review the contract
 - Does force majeure apply?
 - Who is liable for delay?
 - Is there cost relief?
 - Are there any termination rights?

Preparing for Potential Impacts of COVID-19

Potential Impacts of COVID-19 (*continued*)

For example, the CCDC-2 Stipulated Price Contract includes the following provisions:

- i. **GC 6.5.2:** “if the Contractor is delayed in the performance of the Work by a stop work order issued by a court or other public authority and providing that such order was not issued as the result of an act or fault of the Contractor...then the Contract Time shall be extended for such reasonable time as the Consultant may recommend in consultation with the Contractor. The Contractor shall be reimbursed by the Owner for reasonable costs incurred by the Contractor as a result of such delay.” (*emphasis added*).
- ii. **GC 7.2.2:** If the Work is suspended or delayed for a period of 20 Working Days or more **under an order** of a court or **other public authority** and providing that such order was not issued as the result of an act or fault of the Contractor...the Contractor may, without prejudice to any other right or remedy the Contractor may have, terminate the Contract by giving the Owner Notice in Writing to that effect. [*emphasis added*]

Preparing for Potential Impacts of COVID-19

Potential Impacts of COVID-19 (*continued*)

2. Understand notice requirements

- For owners: Avoid inadvertently waiving compliance with contractual and notice obligations.
- For contractors/subcontractors: Be vigilant about the possibility of lapse.

Preparing for Potential Impacts of COVID-19 (continued)

- iii. **GC 6.5.4:** No extension shall be made for delay unless *Notice in Writing* of the cause of delay is given to the *Consultant* not later than 10 *Working Days* after commencement of the delay. In the case of a continuing cause of delay only one *Notice in Writing* shall be necessary.

Preparing for Potential Impacts of COVID-19

Potential Impacts of COVID-19 *(continued)*

3. Document updates and developments as they happen
 - Consistent, organized and frequent (daily) documentation.
 - Circulate site meeting minutes.
 - Document causes of delay.

Practical Advice: Current Contracts

Preparing for Potential Impacts of COVID-19 *(continued)*

4. Consider scheduling

- Assess the implications of delay, and measure against the project baseline and critical path.
- Identify the extent scheduling of other work has been affected.

5. Negotiate practical solutions

- Consider the project as a whole.

Practical Advice: Future Contracts

Drafting Considerations

- Since parties entering into new contracts know of COVID-19, parties must:
 - acknowledge the existence of the force majeure event;
 - confirm their ability to fulfill their obligations under the Contract; and
 - address COVID-19 in force majeure and other key clauses under the new contract.

Practical Advice: Future Contracts

Drafting Considerations *(continued)*

- To rely on force majeure under future contracts, parties should:
 - use specific and concise language, and include sufficient detail to ensure risk is being allocated as intended;
 - specifically include COVID-19 as a triggering event (e.g. [...] epidemics, pandemics or quarantines, including, without limitation, the COVID-19 pandemic [...]); and
 - provide that the parties agree to performance of the work under the circumstances as at the date of the contract, and specify under what change of circumstances a party may claim force majeure.

Practical Advice: Future Contracts

Drafting Considerations *(continued)*

- A force majeure clause should also:
 - Define impact requirements:
 - The affected party must show that it has been impacted by COVID-19; and
 - Define how or to what extent the affected party must have been impacted in order to claim force majeure.
 - Set out notice requirements:
 - Specify the deadline to provide notice, where and how notices should be sent and any content requirements (e.g. providing known impacts, details of the event, commencement date, etc.)

Practical Advice: Future Contracts

Drafting Considerations *(continued)*

- Outline mitigation requirements:
 - Parties should specify the extent to which a party declaring force majeure is required to mitigate, including specifying what they are not responsible for mitigating.
 - To contract out of the duty to mitigate, the parties would have to use clear and unequivocal language.

Practical Advice: Future Contracts

Drafting Considerations *(continued)*

- Parties should set out common assumptions regarding the expected consequences of COVID-19, including:
 - Setting a baseline:
 - Parties can perform their obligations with these baseline COVID-19 conditions;
 - Any changes or new conditions would entitle a party to invoke the force majeure protections under the contract;
 - Addressing public health measures and social distancing requirements set forth by the province;

Practical Advice: Future Contracts

Drafting Considerations *(continued)*

- Anticipating a forced suspension and determining:
 - who will be responsible for maintaining the site in a safe and secure state for the duration of the suspension;
 - which of the subcontractors, equipment rentals, material and labour resources should be preserved for the project, for how long and at what cost to the owner;
 - who will be responsible for demobilization and remobilization costs a forced suspension; and
 - who will be responsible for each parties' costs for delay.

Questions?



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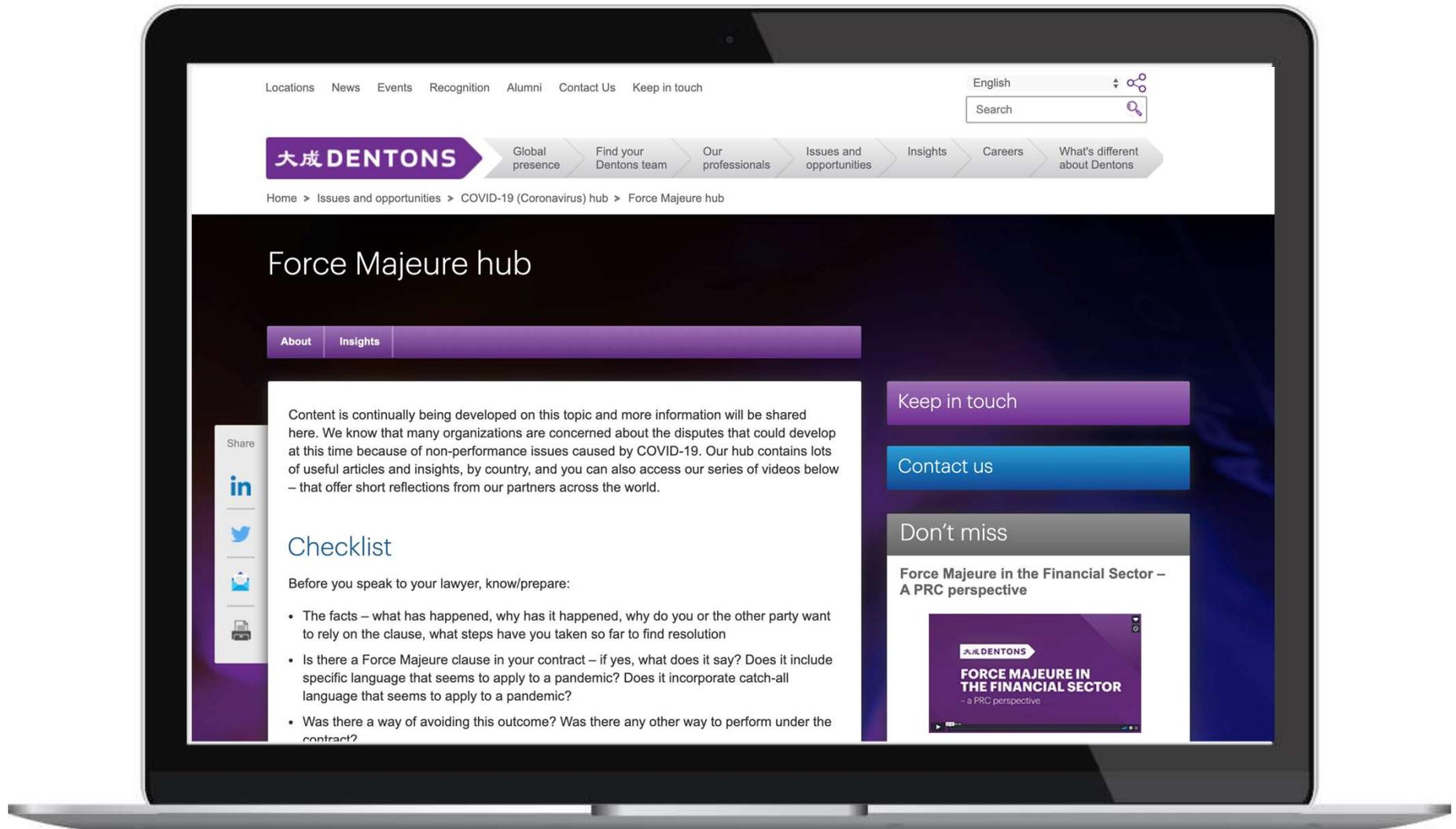
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Force Majeure hub



Thank you

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