

FORCE MAJEURE AND KEEPING CONTRACTS ALIVE DURING COVID-19

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Transcript

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FORCE MAJEURE AND KEEPING CONTRACTS ALIVE WITH GOWLING WLG WEBINAR

Joe: Good morning everybody. Thank you very much for joining us today for the OCNi Gowlings webinar. On the agenda today, Ted, if we could have the next slide, is Ted Betts and Ahab Adel-Aziz, from Gowling webinar, we're talking about force majeure and keeping contracts alive with Gowling WLG. My name is Joe ... I'm going to be your technical advisor for today on the call. At the bottom of your screen you should see a chat

feature. In that chat feature you will be able to send messages to the panelists. The panelists will be able to respond and they will answer all the questions to the best of their ability today. Thank you Ahab for joining us. If you have any questions you can email us at webinars@ocni or you can ask technical questions in the chat feature as well. I'm going to now hand it over to Ron Oberth, President and CEO of OCNi. Ron, your channel is open.

Ron: Thank you, Joe, and welcome OCNi colleagues, partners and stakeholders. To another one of our weekly informational webinars. Today, a topic of significant importance, given the situation we find ourselves in. Force majeure and keeping contracts alive. Which, of course, I'm sure you would all love to do to maintain your financial viability during this crisis. We are very privileged today to have two partners from Canada's top international nuclear law firm, Gowling WLG, who have agreed to speak to us today. It's really my pleasure to introduce the first speaker, Ahab Abdel-Aziz, who is a partner at Gowling WLG and global director of nuclear power generation at Gowling WLG. Ahab has done nuclear law around the world. He has spoken on a variety of topics, both legal topics and integrated project delivery topics. I'm also proud to say that Ahab is a member of the OCNi board of directors and a long time avid supporter of the Toronto Maple Leafs. With that I will turn this over to Ahab.

Ahab: Thank you, Ron. I really don't know what to say. Good morning everybody and thank you for joining us. I hope this will be a productive session for you. Let me introduce the distinguished looking gentleman on your screen in a suit and tie and glasses, that is Ted Betts. Proud to have Ted as my partner at Gowling WLG. Ted is the head of our infrastructure and construction sector group. Ted is also a very active member of the nuclear industry sector group and has done numerous transactions, big, medium and small, in the nuclear industry ranging from work for major nuclear utilities in Canada to engineering companies, contractors and members of the supply chain and international vendors. Ted and I collaborated and negotiating the new build nuclear project for ROSATOM in Egypt and we're getting advice today, largely from Ted. I am just ... pixie dust in the front end and maybe a little bit during the questions in the back, but Ted is the fountain of knowledge.

I will just take a moment to do a little bit of framing. I don't know who's controlling the slides but it feels like time to move on in the slides. The first thing that falls to me to say is that the presentation isn't intended to give legal advice to anyone in particular. It is not meant to be relied upon for your particular circumstances because we don't know what they are and we don't know that the advice will particularly fit your circumstances. To be quite frank, we're happy to help and inform, we don't want the liability of being taken to give legal advice when we haven't talked to you about your circumstances. Can we move

on, Ted? The good looking guy is the one on the left. I'll talk a little bit about the nuclear industry context for the fallout of the COVID-19 crisis. What we're looking at, and what Ted is going to spend quite a bit of time talking about is, what happens within a legal construct, within a contract, within the common law. What happens when a party is not able to perform the obligations that it has in a contract because of events beyond its control? What are the formalities? What steps do you need to go through? What tests do you need to satisfy? Oftentimes what you're really dealing with in a circumstance like we're in today, with the COVID-19 crisis, is not a permanent impossibility to perform. But rather it is an inability to perform obligations in a timely way. So perform the obligations when they are due. In other words we're dealing with delay. In many circumstances, in many industries, a delay is obviously, potentially a serious matter but not necessarily devastating. In the nuclear industry delay has been very much a devastating event. The reasons are many if we're talking about a nuclear project context. What we're looking at is the most complex risk matrix of just about any organized activity. Certainly of any project activity that we undertake in the world. There is nothing more expensive as a single unit than a new build nuclear power plant. There's nothing more complex. Project plan typically involves thousands of tasks, hundreds of players and you need to coordinate within the delivery team. You need to coordinate performance and schedule. Which is extremely complicated because there is a high degree of interdependence and there are a lot of players and I often look at nuclear projects and think of it like attempting to do synchronized swimming with a team of 1,500 swimmers. It's very difficult. When one thing goes wrong it goes wrong down the line for everybody. The one thing you need to be able to do to make it work is collaborate. You need to be able to share information to communicate clearly to make sure everybody knows how to anticipate what everybody else is doing. We call that information symmetry. You need to coordinate your movements and the timing of your movements and, in effect, that's integrated project delivery. When you fail to do that in our industry, that instead of sharing information, people withhold information because they're worried about the fight that's coming. When instead of collaborating on solutions people say, "I don't want to own this problem. I want it to be somebody else's problem." What we typically end up with, Ted can you go back one slide, is colossal failures. Failures in the nuclear industry don't come lightly flavoured. They're bold. They're devastating and in recent years we've learned they're enterprise ending. So when we look at Olkiluoto 3, brought Areva to it's knees, VC Summer and Vogtle, very much brought Westinghouse to it's knees, and this was project risk going to enterprise risk. Now that we're looking, you can move forward Ted, at a world where not just one player in a project delivery context, big, medium or small, is delayed because they've had circumstances beyond their control affect them. Like a lightning strike, for example, at

your plant. The entire world had a disruption of normal activities to varying degrees with varying specific causes.

My simple message here is, while it's important to be sending out notices to make sure that your contracts remain alive and you don't end up in a position where you've defaulted on your contract or your contracts terminate, getting back to normal in our industry, getting back to productivity, picking up where we left off, simply, it isn't going to come by itself, it isn't going to come automatically. I think the members of the supply chain, the different tiers of contractors, the owners, need to show the qualities we spent some time talking about from OCNl in presentations and task forces last year, which is collaboration. This is absolutely the time to be sharing information. To be talking with one another, making plans, about what the road back looks like, what needs to be put in place from all of the players to make sure that their return to productivity is going to be successful, and to identify what you need in terms of supports from organizations like ours, like OCNl, and the government, if that's what it takes. But my message is this is, even though we're talking notices, even though we're talking contracts, this really is the time where you accept each other's notices, say, "I understand why you're doing what you're doing. Now let's roll up our sleeves and plan on saving your project and my contract." With that I'll turn it over to Ted and I'll put my microphone on mute, which I know, Ron will love.

Ted: Thank you, Ahab. So thank you everybody. Good morning, or afternoon, as the case may be, and thank you for joining us. I'm going to start talking about force majeure but I want to emphasize something that Ahab just underscored. Which is the theme of this presentation is about saving the contract, saving the project, saving the workflow. It's not about how to win your case, win your claim, and the solution to the success of the project is going to be everybody's success, and what are the practical collaborative solutions that'll get us there. But it's important to start with an understanding of the legal rights. They do matter and they do frame the discussion that needs to happen, jointly and collaboratively with everybody. We're going to spend the next few minutes looking at the fundamentals of force majeure and delay claim law. We're going to find it's mostly rooted in the contract that you've drafted and signed. Then, if it's not, where do we look and what kind of relief do we have?

Force majeure is a common term. There's our history here. We've got COVID related event, global health emergency, certainly in Canada, declarations of emergency at the Provincial, municipal and Federal levels, significant impact on supply chain and production, as well as construction projects themselves. The importance now, of thinking in terms of the exponentially of the impacts, the longer this lasts the bigger it gets, on an exponential basis and not just on a linear basis of adding up days. The impacts are enormous and so

the critical impacts are bigger and need to be contained. Looking at all of the remedies and discussions that need to happen as well, as I said, starting with the contract. Force majeure is a concept in contract. There is no implied or common law right to relief in your contract just because events, out of your control, have happened. Most contracts will have some kind of force majeure clause, by which we mean a clause that describes events outside of a parties control, and provide some sort of relief. If that event has caused your inability to perform your obligations as set out in the contract. It's contract driven, meaning you have to look at the terms of your force majeure contract, the clause in your contract, to really understand what your rights are, and what your processes are, and what your remedies are. The clauses will typically say, the parties have agreed on a certain allocation of risk through the whole contract. One part of that allocation of risk is how we're going to deal with events that are completing outside of anybody's control, and only those risks are we going to say we're going to have a special regime that says, these risks are shared because they're outside of everybody's control. They're going to be shared in the specific way that the contract has said they're going to be shared. It's contractual right so you have to look at the contractual terms that are expressly put in to your contract. Typically there's going to be three things that we want to look at in terms of a force majeure clause and the event that gives rise to triggering the force majeure clause. The existence of the event, the qualification as the event occurred, the unavailability or the foreseeability of the event and the actual impact on performance. So let's break those down a little bit.

By the existence of the event, we've got a defined term in the contract. We've got a specific provision that will tell us whether certain events are in or out of the clause and the protection given by the clause. In a few minutes we'll look specifically at COVID-19 and this pandemic, but just generally, the contract will often have terms like "events beyond a party's control", "reasonable control", or "acts of God". The contract may specifically identify a whole like of types of events; wars, conflict, abnormally adverse weather conditions and so on. But generally they are similar and they contemplate events outside of your control. It's important to also look at what's excluded. Often sophisticated contracts will have clear exclusions and those are just as important in understanding whether you are covered by the clause or not. This is what courts will look at in understanding what the parties have decided, is the commercial bargain and the right risk allocation that they've agreed to ahead of time. Courts will also look at how foreseeable an event was. It's not just a matter of weather there was a condition that's listed there but how foreseeable was the actual event that we're talking about in terms of the performance under the contract. Whether it's a supply of equipment or materials or an actual construction performance and services on site, how foreseeable was it and what

kind of steps did you take, as a supplier, to avoid the consequences of that event occurring? One simple example would be weather. Rain is always an event that will happen in the course of a year. It's not a force majeure event because we know rain is going to come. Where the force majeure event is triggered is when that weather pattern is severe enough, or abnormal enough, that it's beyond what somebody could reasonably have expected or foreseen. The standard would be what would a reasonable prudent supplier be expected to plan for and take steps to avoid before the occurrence of the event. Finally, the third branch there, what's the final impact? Was the performance actually impossible to perform in accordance with the contract as a result of that event? It will be incumbent on the supplier, or whoever is relying on the force majeure clause, to draw that causal connection between the specific event in the specific part of the work that you're prevented from performing. It's not enough just to say there was a war or there was a severe storm. You have to show how that storm, or how that war, or how that pandemic, as we'll get to, has prevented the specific work that you're required to perform in accordance with and under the terms of the contract. In fact, the standard is quite high, and force majeure clauses are actually harder to deploy than one would imagine. The event has to be specific enough and it has to make the task or the work, the specific part of the work, impossible to perform and impossible to perform in accordance with the contract. That includes performing it in a timely manner. Can the supply of goods or the services that are impacted by the force majeure event still be performed but in an alternate way? Are there alternative sources of supply of goods? If an employee is not available, or workforce is suddenly not available, are there other employees, or other staff, or personal or expertise that can be brought in to replace them?

In a lot of case law, as we'll see in a minute and we won't get into the case law, you'll be happy to know, we find that all sorts of things that are actually would feel outside of one's control, courts have looked at that and said they're not fully outside of your control so that is your risk. It's really important to understand that. Workforce. The unavailability of workforce, generally speaking, is not grounds for force majeure claim. The unavailability or sudden rise in prices that it's outside of your control is generally not considered a force majeure claim. Now, we'll look at that a bit in the context of this pandemic and see if there's anything different. But that's a general. So the view of the courts would be there's lots of steel available in the world. There's lot of sources of concrete. There's lot of sources of materials. That risk is on the supplier to provide and if you can't provide it at the same price, well, that's your risk. Not the owner's risk because you've got a contractual bargain, unless it's a cost plus or time in materials type of clause, or supply. Usually there's a fixed price for such things and that's what the commercial bargain is. The fact that world events have given rise to reduction in availability, or increased prices is,

generally speaking, a risk the supplier carries unless the contract says otherwise. We'll get to some exceptions to that, important exceptions, especially in the pandemic world, but that's the general principal that comes with a force majeure clause. There is lots of case law. We're not going to get into it, you'll be happy to know. Happy to talk about that, or if you want, these are some of the main cases. But what's clear in all of the cases is that every event of delay, or claim for force majeure, is always going to be fact specific. It's going to be based on the specific terms of your specific contract. The specific event and the actions that were taken both before and after. It's going to be important to track all of that, and to document it, especially in establishing any kind of rights or claims to relief that you may have after the fact, and especially in going and sitting down with all parties to the project, or to the supply chain, when we get to working through solutions. Because you want to show exactly what has been done so that we can work out the best plan forward.

So, COVID. COVID-19 and our global pandemic. How is this different? How does this actually work through in a typical force majeure clause? Again, you're going to have to look at your own specific contract. Most force majeure clauses, frankly, do not specifically identify plague or disease or pandemic as a specific identified event. Some do. If it does then your clearly in. I would say and most people would take the view that, a pandemic is part of the world that's covered by the basket clause of events outside of your control. But again, the pandemic has to be looked at very specifically. What is it about the pandemic? What is it about this disease that is actually impacting the work? Is it employees who are sick and can't show up for work? Or is it more likely government orders and conduct that has to follow new rules and laws that government's implement, or block, on the trade groups that are impacting the actual performance under the contract, the supply? So we do have to draw that causal connection between the specific event and what is the event? The event is actually just as often going to be the government actions, or the reactions of other parties to COVID-19, then it is the simple fact of COVID-19. We're going to have to draw that connection, that causal connection, to the specific parts of the work that are no longer possible to be performed. A lot of work would be, in the supply chain, is planning and designing and that may not be impacted one way or at all. It may make it more difficult but making it more difficult isn't going to trigger the force majeure clause in most cases. Because we have alternate, we have ways communicate, we have ways to prepare documents. Even if it's more difficult and we have to set up technology at homes differently in order to continue on with the work and the preparation for the supply. We're going to have to do that because that, in and of itself, is not enough to trigger the force majeure clause. Does it reach the impossible to perform standard that we talked about earlier.

Specifically with workforce, this is one area where we have some direct impact from the disease itself. We've got employees who can't come to work because they've been struck down by the disease. We also have, in most cases, government orders, at least in Ontario and most Canadian Provinces, that say if you have the disease you cannot come into the work. You cannot come to the job site to perform. Even if your workplace is an essential workplace and you're allowed to continue operating, under our shutdown orders, sick employees are not allowed. How does that impact? That starting to get into the force majeure world. Especially in the nuclear sector with such high level of expertise. It's not so easy to just simply swap out employees. So as a result, very quickly you can find that where a normal supply chain, lack of workforce or labour supply, might not get you into a force majeure clause, in the nuclear space, you're going to have to look at the specifics but it could very well get you into a force majeure claim on its own.

Going forward, we've got a different dilemma, and that dilemma is that we now know about the pandemic. So, if we've given our proper notice, if we've given that we have the potential delay, if we've done the mitigation that we need to do to avoid and minimize the impacts, and done all that we are supposed to do under the contract to protect ourselves and the project, going forward though we now know about COVID-19 and the pandemic and most of the government actions that have been taken already. What we call the foreseeability window is closing. The impacts are more knowable and therefore the reliance on force majeure clauses reduces over time. We do have to continue to take those steps to mitigate. We do have to continue to take the steps to monitor and monitor impacts and monitor the actions of governments, not just in our locality, but across the world because the nuclear supply chain is global. But barring any new events, over time, the impacts and the relief that's offered from force majeure clauses reduces because there's nothing unknown now about it. In terms of the occurrence of the event. So we want to be careful and aware of that.

Just to touch on the relief that's offered in a typical force majeure clause, obviously you've got a performance obligation under your contract, and the first and most important thing to be aware of the force majeure clause, if you've claimed it and you're eligible for it, it that it relieves you from the performance. So you're not in default for failing to perform the specific parts of the work that you are prevented from performing because of the event. It does mean, and you have to be aware, that other performance obligations of the contract that are not prevented by the event of force majeure, still must be performed to the extent that you can. Secondly, typically a force majeure clause will provide time relief, schedule relief, for the performance of the obligations. So you're not just lifting the performance, but you will get some relief at the end of this. Once the event is disappeared you're not back

to the same schedule. You will be entitled, generally speaking, to some relief. Again, you're going to have to look at your specific contract to know what that looks like, and whether it's just limited specifically to the time of the event. I would argue in a nuclear case, and especially supply chain, it's much more complicated than that as I have pointed out. You're going to have to consider the design consequences, the regulatory consequences, the impact on other people and other people in the supply chain, to really understand what's the true extent of the delay that should be added to the schedule. But you will, generally speaking, be entitled to some level of schedule relief and that impacts any liquidated damages that are in the contract, typically. There are also other provisions in the contract that you're going to want to look at. We're going to look at those in a minute. But one important aspect, and often the largest part of the difficulty in dispute over force majeure claims, is what are the costs? Who carries the risk of costs? I said at the outset, force majeure events are considered shared risks, because they're outside of everybody's control so we're going to have a special regime for these. Schedule risks and performance risks, we're going to relieve the contractor from that risk, they're not carry that. The cost risk is something else though. That is going to be specifically driven by the contract. A lot of contracts will provide for, explicitly, the relief on the schedule and performance but not cost relief for the extra time of delay. Again, it will come down to the contract. There's no automatic right to the cost that are consequential to the delay. So you're going to have to look at your contract specifically. There is also, in many contracts, an ultimate time duration, suspension and termination trigger. If performance is not capable of continuing on for a certain period of time, as set out in the contract, it may trigger other rights of suspension or termination or a right to redo parts of the contract, for the owner or for the contractor. So, again, you're going to have to look at the specific terms and the regime that's set out in the contract. These are not things that get read out or implied by a court.

One of the key additional terms to bear in mind, and we highlighted this at the beginning but we're going to highlight it more here, the jurisdiction will matter. So we're talking about Canadian common law, and Quebec's a little bit different with their civil code but not too different, but this presentation is about Canadian common law. You will have to look at your contract, and figure out what jurisdiction governs your particular contract, because the local law will matter in how force majeure and frustration and performance is governed.

We'll spend a couple of minutes just talking about other terms of the contract. Force majeure is the most obvious term that everybody turns to in events like pandemics that are impacting and disruptive across the board. But there's all sorts of other terms of the

contract, especially on larger complicated contracts, that may bear looking at. Sometimes you've got a force majeure clause, sometimes you also have other delay clauses, and excusable conditions, and unforeseen conditions clauses that may bear on the particular circumstance of COVID-19. Government order clauses. We also have specific clauses that will set out if government issues orders, changes the laws, directs you to take certain actions, that gives you specific relief. Stop work orders or anything like that. That will give you certain remedies on its own. Those may be separate contractual provisions. Typically you have an obligation in your contract to comply with laws. Even if you don't have a specific government action clause, you need to consider what the new world with all of the government action that's been taken to date, and your obligation to comply with that. Not just stop work orders but what is the new regime for how you carry out the work. If there's health and safety protocols that the government has implemented and imposed on all performance of all contract and all work, then you need to follow that and how does that impact the project. The contracting party that you have, your counter-party, may in fact be the government. Often is in the nuclear sector. So their actions in and of themselves may be trigger for government action that you need to consider. The default clauses themselves, even if you don't fit squarely within a force majeure clause, is it a default in and of itself because you're delayed? You'll have to look at your own contract to make that determination. Often there are thresholds and other specific default provisions and that has to be followed. You fit within the default or you're not a default at all in the contract. Finally, as I mentioned earlier, if there's a long term duration to COVID-19, are the impacts and stop work orders, and government actions, or shutting down of trade routes and customs, are long enough there may be automatic suspension and termination rights or the right of a party to do so. Either the contractor or the owner to say, "Look, this changes everything in the contract to such an extent that we need to start over in terms of what are the terms of the contract. The pricing, the time for delivery, the performance, and so on." So you do need to look at the whole contract beyond just the obvious of the force majeure and delay clauses.

We've looked at the contract and that's obviously important because it will often in clever contracts, especially sophisticated contracts in the nuclear space, will have thought through these kind of issues because they're important to deal with and allocate and to price out beforehand. But what if you don't have a force majeure clause? What if you're just on a purchase order, where you've got a robust contract that just simply did not have a force majeure, or a delay provision, that addresses the situation? There is general law that does apply. It's called the law of frustration. It's a higher bar. A higher threshold. It's very difficult to actually rely on this and it does have difference consequences. The nice thing about a force majeure clause is it will say not only are you allowed some relief, but

your relief is only to the extent of the event that we're talking about, and it doesn't end the contract. The contract still continues. We're still going to work towards and work together to finding resolution past this event so the project is a success. Doctrine of frustration is where you are frustrated in performing the balance of the contract. So it's a fairly high bar. Sorry, not a fairly high bar. It is a very high bar. The totality of the contract needs to be frustrated. Impossible to perform the substantial portion of the contract. So the contractual bargain that people have made is really rendered impossible to perform. As a result the consequences of that finding, and the relief that's available, are equally broad. If the full benefit of the contract has been frustrated then we're going to wind up the contract and the obligations all together. It's not a remedy you want to seek lightly. But it really is a last resort when you don't have a contractual remedy that's been set out in the contract for force majeure. That, in very brief, is the law of frustration and the law of force majeure, as it relates in our nuclear supply chain contracts.

Obviously, as I keep coming back to, the first point of force majeure is to understand that's it driven by the contract. As we started out at the beginning of this whole session with Ahab's comments, the success of the project is going to be beyond just enforcement of the contractual terms. What is success, in fact, in this kind of a case, in nuclear space? And even when you're trying to rely on the specifics of force majeure clause are going to be driven by the conduct and the prudent conduct and practical conduct of the parties. Both in terms of your legal enforcement of your rights under a force majeure clause, but also generally, more generally for the success of the project itself, it's going to be important to be proactive. Really think through the specific causes, the specific events that are giving, and the specific impacts. What specific work is delayed, made more difficult or made impossible and how can we work around that? What are the solutions? You've got a contractual obligation to mitigate but also the success of the project means you're going to come back to the other parties involved. If you're an owner you're going to talk to your contractor. If you're a supply chain supplier you're going to talk to the contractor, or the owner that's hired you, and you're going to work out the best solutions. Because you can't do it on your own. There are so many other parties, as we have mentioned, you need to work collectively. One party's immediate obvious solution may be the least ideal solution when we look at everything. The success means being proactive but proactive with everybody. Responding promptly and getting on with it.

Collaboration is key but that cuts both ways. It's not just a one way street. The suppliers aren't the only one who needs to be flexible here. But you can help owners in finding ways to minimize their concerns and risks by encouraging them to be flexible, finding ways that they can be flexible while still reaching the ultimate goal of the project's success. Jointly

developing creative solutions. It may not be possible to avoid all of the impacts of this COVID-19 but what is the best way to minimize those? One of the best ways is going to be dealing openly, transparently and comprehensively with your analysis and dealing with each other without fear of reprisal or being noted in default. Bearing in mind, at all times throughout, the regulatory requirements and the environment that we're working in because as creative as we would like to be, as commercially sensitive as we might want to be, there is still a regulatory reality that we have to comply with. With safety as the ultimate priority.

A lot of the advice we're finding that works successfully is the proactive planning. We know COVID was coming. We know there's a pandemic here now. We know there's a chance that there might be a resurgent in the fall, at least in Canada, and North America and the northern countries. That these kinds of pandemics often go away and then they come back again. So what kind of planning can we do now? What kind of rescheduling or resequencing can we do to reorganize our work methodology? On the site we are socially distancing. We've got time factored into our day so that we are screening at the gate, and doing all the kinds of things that we need to do to be healthy and safe at the workplace, and comply with government orders and continue on with the project. How are we going to recover costs? What's the best way? We might not be able to install or pour all the concrete that's coming onto site, but maybe we can stockpile some, maybe we can preorder some now, and stockpile it so it's ready and whenever the event, the COVID-19, allows us to proceed with the next step in the project or in the supply, we're ready to go. Maybe we talk to owners about let's just work this without the threat and worry of these delay claims, so that we're not in fight mode but collaboration and work out mode, solution mode. Let's just do away with the damages threat, liquidated damages threat. At least for now. Or at least for certain block. Talk about grace periods right off the bat so nobody's worried about that. Maybe the owner could even offer some incentives to start working overtime when we come out of this, or right now, to the extent that we're allowed to continue. And talk about reallocating or sharing of all the new risks that might come. Let's anticipate some of those that might come and rising prices that might come as a result of the recession that we may already be in.

The key there is collaboration and working through that but eventually we will come out of this. I'm confident, and it will come down to assessing, looking back at and assessing what happened. What was the cost? What was the time delay? What's right in getting back on track? All of this can be loosely described as the quantification of the force majeure. It's a complicated area. It's not going to be easy and we're not going to get into the detail here. You've got a long way to go. There's a lot of factors especially in the

nuclear space that are going to impact that. Design considerations, regulatory, plant shutdown windows, that time when work has to be done and we've scheduled a shutdown and we've missed that window, now what happens and how? So the exponential consequences in the nuclear space of the impacts of COVID-19. The point of this slide, and this part of it is just to identify this is complicated and it's going to be more complicated, if we're not doing our job right now to carefully and closely monitor and document, document, document. Log the delay claims. Log the impacts specifically. What are the productivity impacts beyond just the schedule and the cost? Did we have to do work differently because of certain government orders to work in a safe way? As we mentioned before. Let's document that. Keep track of it and then we've got something we can talk about and look at specifically in order to find the best solution forward.

That's the gist of our presentation. We have carefully allocated some time to address questions. That is a bit of a flyby. We recognize that. Most of these projects will have some force majeure impact without a doubt. It will come down to the contract terms. We've tried to layout the broad parameters, and some of the specific requirements that we would typically see in a force majeure clause, and in these contracts and the best path forward for success of the project. Any kind of dispute is always going to be a failure, not just to the project, for both parties. By the time you get resolution the costs, not that we don't love the legal fees that we earn on these kinds of disputes, but we want to avoid that as best we can for the success of the project. And that means collaboration and starting from understanding what your rights are under the contract. With that, Joe, I think we will open it up to any questions. I think the process is, well, Joe, maybe you can explain the process how we're going to deal with questions, and then we can start addressing them.

Ahab: Ted, I'm just going to jump in for a second and, Joe, I don't know how you can work this but I would be very interested to get feedback from participants on whether they are currently, their organizations are currently, engaged in any kind of extraordinary beyond the usual case planning and communication with customers. Basically looking forward to the day when activities can begin to resume. How that will be done. What to expect. What problems they might anticipate. Is there any kind of joint planning happening between your organization, others that are involved in delivering along side of you, and your customers? Or is that all waiting largely to see what happens when the crisis is over? Don't know how we get that feedback, Joe, but that's your job.

Joe: Okay. So, we're not set up for polling on this webinar right now. But, if people want to type into the chat, a simple, "Yes. I am engaged in contract renegotiations," or, "No. I am not." We can collect and collate that data when we export the chat logs. If companies want to provide any additional detailed information you can put that into the chat feature,

direct it at all panelists and we will collect and collate that for you, Ahab.

Ahab: Thank you.

Ron: Joe, thanks for unmuting me. First of all, Ted and Ahab, that was a wonderful presentation. Very clearly spelled out. Clearly articulated. It really underscores, in my view, what you've been preaching for a good while, Ahab, about the value of integrated project delivery, collaboration, transparency and it's, in my view, essential at a time of crisis that people bring that sense of goodwill and transparency and collaborative problem solving. I can answer to some degree one of your comments because I am in regular discussions with supply chains, at OPG and Moose Power. In discussions with some suppliers who are seeking support but what I found, there's been a high degree of collaboration between the procurement teams, and the life extension teams at Bruce Power and OPG and their suppliers. It's in everybody's mutual interest to ensure that the supply chain is intact and both utilities are doing all they can to ensure that, one specific example is that, with the announced slowdown or delay of drones and UVA refurbishment, companies that were manufacturing components, well needed components, have been encouraged to continue to do so but, because OPG can no longer take delivery of some of those manufactured components, OPG has been telling their suppliers, in a very collaborative partnership fashion, once you've completed the fabrication of the components and we've inspected them, we will pay the invoice upon inspection as opposed to upon delivery. So they're asking suppliers to, if you can, please store those components at your facility because we can't accept them at site. We won't deny the payment of the invoice, and in fact, they've even gone so far as to say if you incur additional storage costs, we will cover them for you. I've seen a huge amount of goodwill, between our utility ,partners and our suppliers, in a very collaborative fashion. Even though theoretically, these aren't necessarily integrated project delivery contracts that they're working under, I see people actually acting as if they are and everybody wants to come up with a mutually beneficial solution.

Ahab: Thank you, Ron, and I see an answer from Michael DuBois, if I'm saying it right, all customer engagements have changed because of COVID-19. Work progresses remotely where possible. Onsite work continues under lockdown/lock in situations. Force majeure clauses have been triggered. Extreme collaboration is occurring to ensure return to normalcy when it does occur. Projects are being pushed out, some by as much as a year. Extreme collaboration is a phrase I'm going to carry with me.

Ted:: I don't see any copyright on that so we're good.

Ron: While we're waiting for more questions I've got one of you, Ted, from your

presentation.

Ted: Sure.

Ron: It appears then that force majeure will be more accepting of schedule delays but the increase costs that a supplier may incur, while the supplier adjusts his workforce or brings in alternative supplies or alternative labour, tends to be less easily recognized as a reasonable cost under the contract. Or a reasonable notification of the contract. Is that generally correct?

Ted: Again, it's going to come down to the specifics of the contract and often cost is dealt with separately. Even excluded if it's addressed. For smaller contracts, people might be familiar with templates, standard form documents often used in the industry in Canada, the CCDC type documents, break it out quite explicitly. If it's an all owner fault that's caused a delay, or an owner decision, then you get schedule relief, performance relief, and costs and profit. If it's government action, a stop work order of some sort, you'll get performance relief, schedule relief and reasonably costs directly associated with the delay. If it's a force majeure clause in a typical CCDC contract you get performance relief for the duration of the event, you'll get schedule relief for a reasonable duration, but not costs. That's just your CCDC contract. Most supply materials or sophisticated construction or engineering contracts wouldn't rely on a CCDC. So I'm just giving that by way of example. You really do have to look at the contract and it's often treated as boilerplate, frankly, and it shouldn't be because, you'll have clear exclusions in the more sophisticated contracts that will say exactly what happens with cost, and what kinds of processes you have to go through to establish those costs. Whether they're directly related, or whether you're schedule remediation plan that you also have to come up with can automatically give you the cost, it might not just be an exclusion right it might be a permission, in order to get back on schedule we need you to work overtime. If that's what the contract requires then you're going to get that cost. It may limit it to just direct third party costs that you incur as a result of the delay but not your overhead. It's probably not going to ever cover something like laying off your employees while you have a long term event that's preventing you from work. But does it cost the physical demobilization and remobilization of the project site itself? If you had to vacate the site of the work, it may. There's no automatic on that. The contracts that generate the most legal work are the ones that are vague, and don't address it clearly and specifically, and gives you permission to say you're freed up from the performance, but it doesn't do the backend. It doesn't tell you what happens as a consequence. How do we figure out what are the contractual relief and recovery plans as a result? We all acknowledge this relief but what does it actually look like? The contracts that are the most difficult, the ones that give Ahab

the most fun and busyness, are the ones that haven't fully addressed that. So you do, again, have to look at the specifics of the contract.

Ron: And those are probably contracts that weren't drafted by Gowling WLG in the first place.

Ted: Another part, just a simple part of the contract, is what kind of a contract it is to begin with? Is it a fixed price contract with a fixed schedule? Or is it a cost plus time and materials contract, where any delays might be relieved? If it's cost plus the price has always been the owner's risk and so you will be able to pass it along. You don't need a force majeure provision to get those extra costs. Those are extra costs you might already be entitled to in a cost plus time and material type contract. You really do have to understand your contract and not just get your lawyers to draft it, sign it and then put it on a shelf. This is the time to bring it out, dust it off and have a look at what your rights are.

Ron: I've got another question or comment while we're waiting for others. For both of you. I know that you're not giving legal advice but do you think it would be prudent for suppliers and customers to jointly start anticipating, even though there's no real evidence of a fall rebound of COVID, in terms of their material supply and their labour? You mentioned you've got to take proactive action and there are some who are speculating, and I don't know how probable this, that there could be a fall rebound. I'm not one of those. It horrifies me to think that way. I won't allow myself to but it may be prudent. So that planning and consideration costs money. Do you think it would be prudent for suppliers to begin to think that way based upon pretty speculative opinion?

Ahab: I'm not sure how speculative that is, Ron. If you listen carefully to the messages we get, I want to say that are non-political, so from public health officials, the messaging is uniform. It is that we are experiencing, at least in North America, in many areas this levelling out of the curve, looking forward to it coming down. There is concern about rebound that's expressed, and there is a statement that doesn't seem speculative, that we will be at risk of recurrences until there is a vaccine and that you're looking at a 12 to 18 month timeline. By the time you've got something rolled out. It would seem to me that in these circumstances, if you're taking on additional contractual obligations, certainly one of the things you've got to think about, because it's more foreseeable, is the prospect that there may be a pandemic, COVID-19 recurrence, and that it may have some impact of a significant level or not in the coming months. Similarly, if you're planning mitigation under an existing contract, I think you have to take that possibility into account. I don't see how you can ignore it. Ted, having set you up that way I'll give you a chance to disagree.

Ted: No. I'm not going to disagree. I'm going to say proactive is obviously what you need to do. You need to be anticipating that. You need to talk to all the parties on the project and the supply chain that you're relying on below you and that you're providing to above you. To make sure that everybody's factored it in because once you sign that contract it is a binding document. If you're signing a brand new contract now, with a specific schedule and a specific price, and you don't address it one way or the other you're relying on the generalness of your force majeure clause. Foreseeability is inherently a very difficult legal concept to describe in definitive terms. It's going to come down to how foreseeable was it when you sign the contract on April 22nd, tomorrow, that there was going to be this delay that you are now claiming in September, because it came back and governments opened up the doors to businesses and then now they're shutting them back down. How foreseeable was that in your planning process? Why not have that conversation now and just address it? Say, "Look, we know this might come back. We're planning this schedule now but reserving our right to have another conversation later on." I was on project, it's just a commercial project in the City of Toronto, multi-use facility, and they've got a big pit right now. So they're digging that out but they're continuing on, the general contractor is continuing on to sign up contracts as they should, and one of them came back and said, "Look, I need to put in all these waivers and releases for COVID-19." We said, "Wait a second. You're not even on the job site until November so let's look at that then but we're not going to give you a carte blanche. We're not going to say you get whatever relief you want. We will factor that in. We'll put in a provision that says if anything new develops then we recognize that might not have been foreseeable. But we're going to sign our schedule now, that with the information we have right now that we're building a good contract, a good price, a good schedule, good work procedures, that are going to be sustainable for the success of the project, in the event other circumventing events that we can anticipate are there." That's just good prudent planning. You do that in any event with weather. So we now know this is possibly like adverse weather. We know that it is a possibility it might come back, let's build in some float in the schedule, if we need to or some specific provisions. We didn't have a schedule remediation plan requirement in the contract before, let's put that in now because we know if it comes back it's not just about holding your hands up, shrugging and saying I can't work. It's about working towards the true success of the project through that next event.

Ron: So what I'm hearing you say, basically, is that given the fact that we're in a slowdown period now, this would be a prudent time, and I think a lot of the contracts on MCR and Darlington have been signed, this may be an opportunity to have both parties look at them and maybe make some modifications in anticipation of what might be a second wave impact in the fall.

Ahab: A question that's related, I just want to put it on the table, Ted, and then carry on with the discussion. ... without the availability of a vaccine and in view of potential future waves of COVID-19. How do we manage the challenge of rescheduling of activities in the contract? I've got a run I want to take at that but I'll let you get rolling, Ted, if you want.

Ted: Well, it is a challenge. There's no question. We've got unfolding events. Just specifically on the force majeure this is typically an obligation to give notice but if it's a continuing ongoing event, give notice only once. You don't need to give a continuing notice about the event unless there's new events or offshoots of that. That would be prudent to give notice about. The only thing you really can do so is stay on top of it and keep a schedule that's flexible enough, or updated constantly enough, that you're projecting out. They way you would normally at the outset of a project with your schedule, and to document, document, document. Track all of these because as you're evolving with the evolution and escalation of government actions to COVID-19, you have to be nimble and be able to respond to that.

Ahab: I want to just add a little bit to that. I want to go back to what Ron said in the early introductory remarks. What Ron said there is that in a time of crisis this business of integrated project delivery as a model becomes all the more important. I think that's a very important observation for this reason. When we've been lecturing on, or using collaborative contracting models in the UK, or integrated project delivery models in Canada and the US, what we've been looking at are these major highly complex infrastructure projects and we've always said, these are, or the data says, these are the projects that benefit immensely from collaborative contracting. There's a really good reason and it actually has to do with your question. The really good reason it benefits is that in these massively complex projects you cannot predict what will go wrong. But you know something will. You're not going to start a major nuclear project with 30, 40, 50, 200, 250 members of the supply chain coordinating with complex technology, complex regulatory requirements and have everything go without an unanticipated event, and indeed an unanticipated event that can really damage the project in terms of schedule or cost or even viability. The difference between a traditional model, where we all kind of line things up in the lineal way, and say if this happens then this will be the result and this will be the consequence. A collaborative contracting, or integrated delivery project approach, the quintessential difference is that the latter collaborative approach says we're going to have a method for dealing with crisis. We know somethings going to go wrong. We know we can't make a list of thousands of things that could go wrong and agree in advance how we're going to respond. But we're going to build resilience into our system. I have a joint project management committee that's going to have different levels of the owner, the

contractor, all the people that you coordinate, when an issue arises we're going to share the information and we'll will devise solutions real time, together, with a view to saving schedule, saving costs, saving the project. We absolutely have to take a page out of that. I think you're question is actually absolutely bang on. You don't know. Welcome to how you've always been living in the nuclear space. You don't know when you're going to be able to perform again. You don't know when others on whom you depend for your work, whether they're delivering to you, or they're part of your delivery, or you need them in a sequence to do their work first, you don't know when and if they'll be able to proceed, you don't even know that the project will remain viable in the near term. But what you can do is create a project management forum and committee, with all of the people that need to be talking and have them talking online, like we are right now, in some sort of video conferencing regular meeting with information sharing, saying this is what's going on on my side. What you can do is begin to build notional milestone driven schedules together, you don't know when the start date is going to be, but you're sharing information about how long it's going to take, and the different parties that are essential to performance to perform these important steps. Where you can identify additional changes and tasks that weren't part of the original performance, that now you need to perform to get things back on track in terms of production, or service delivery or project. Figure out, collectively, what's the best way to address these issues and then also build in contingency saying, this can all go sideways on us again. How will we behave if and when it goes sideways again? I think, in these times of uncertainty, the bravest resiliency you can develop in the system is, to putting in place project management methodologies that allow you to work together, share information, anticipate that there will be crisis, identify potential obstacles on your road back to normalcy, and prepare for how, collectively, you will deal with those. In some ways it may never be going back and doing what you were doing before. You may have to singing a new song or learning a new dance to get to where you were somewhere and now led us to it. I see that we've got other incoming from several participants. I'll let you carry that, Ron.

Ron: There's one here from Saneesha, who's starting a new company, expressing some skepticism about IPD and Saneesha's saying that the utilities won't accept it because they like to have someone who's neck they can wring if things don't go well. Well, we had a couple of IPD workshop last year, that Ahab helped coordinate because he's our IPD task force, one with OPG and one with CNL at their big room in Kanata, and both those organizations are implementing IPD on projects. The one at Chalk River is probably furthest ahead they're using it for the advanced nuclear materials research project. They're still in the planning stage but the parties have come together, they work collaboratively in the big room in Kanata. OPG has been deploying the IPD model at it's

Otto Holden project and it tends to slowly begin to expand into nuclear. I think we're beginning to see the recognition, in the nuclear sector, that there is a better way of doing business, that Ahab has been telling us about for a good while, and it was successfully implemented in the London Olympic Games, which I think we all hold out is a huge success.

Michael ... I knew Michael would come through with a question.

Ahab: The question Michael is asking is, whether this notion of talking about how we will behave is meant to be a discussion between the parties, it happens anyway, or am I suggesting a new contract language? You can do it through new contract language. It's done in the collaborative contracting world, to Saneesha's point, it doesn't have to be. This is about communication at a project management and a business level saying we got to work together if we're going to minimize the impact and improve the feasibility. Even if, as a matter of ordinary business, you're not a huge fan of integrated project delivery, you see it now definitely, but if you're not a big fan of integrated project delivery, collaborative contracting, this is the time to think about suspending that belief and adopting some practices to get a sector of the industry and projects and delivery back on line in the most effective way possible. It could involve some contract language. It could involve some contract language that describes the route back from force majeure, as part of the mitigation, or it could be done on a less legal level that involves more project managers and engineers and less lawyers. Sorry, Ted. Go ahead.

Ted: I was just touching on that point. Even if it's not across the board the whole contract, you can still take some collaboration and collaborative approach on specific assets of the work itself. For example, we're heading into the summer and we're worried about our supply chain below us, our material suppliers and their financial health, for example, we know we're going to source some of the materials from subs and suppliers that might be at risk. Yet, the owner, the utility, their design plans aren't fully baked yet, so we don't want to take the risk of making any pre-orders because the owner hasn't decided which way to go on a certain order. Well, let's talk about that. Maybe the owner can share some of that risk. Maybe we think we're pretty sure we're going to go down this route if we press them, let's get them to agree that we can place some orders down the supply chain, and that they will back that up and we'll just use that to stockpile somewhere. Or they allow us to stockpile more materials, pre-order more materials, stockpile it in the event of the pandemic coming back. So that we've got, located on site, and they're willing to pay for the storage of, or some other creative solutions to the way that we would normally do business on part of the contract. Not necessarily a whole contract. We've got a contract in place, or the utility isn't interested in joining with us on a full IPD kind of

model, but we can still work together in specific ways. That's why, sometimes, the onus is on the supply chain to come up with the creative solutions and the flexibility and to show the owner, really, it's not changing the pricing of the whole project for you, or the risks, but you are helping us deliver the project to success by helping us with the risks that we're dealing with.

Ron: You know, Ted and Ahab, we've learned a lot through COVID-19 about how to communicate differently with one another, how to work remotely. This may be, and should be, an opportunity for us to learn new ways of managing projects, collaboratively. Because it's more essential now than ever. I'm encouraged that we will see a new world at the end of COVID-19 and maybe we'll see a stronger incentive to go towards contracting models that encourage this form of collaboration and problem solving during a crisis. I think we're just. Oh, Michael ... final comment was "Thank you." Saneesha's final comment was, "Great, guys. Good work." Let me echo that. This has been a fabulous session and, Ahab, it makes me think that we should maybe resume and have another integrated project delivery webinar, down the road, as a tie up to this one.

Ahab: Let's do that.

Ron: Thank you, both of you for giving us an hour and 15 minutes of your valuable time and sharing your insights with us. The questions are still coming in but I'm hearing lots and lots of Kudos. Thanks to both of you. Thank you again, Joe, for being the excellent webinar host that you've become and I wish you all a great rest of the day. Let's flatten that curve.

Ted: Great. Thank you, Ron. Thank you for all that you're doing at OCNl and thank you for the chance to put a suit and tie on for a change.

Ron: You really look fantastic.

Ted: Okay.

Ron: So does Ahab. You look good too, Ahab.

Ahab: As long as I don't stand up.

All: <laughter>

Ron: Thanks everybody.

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