

COVID-19: Considerations for Future Construction Contracts

1 April 2020

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Introduction

- In reaction to the COVID-19 pandemic, parties engaged in existing construction projects are increasingly issuing (or receiving) force majeure claims (for a summary of these issues, see [Suspending contractual performance in response to the coronavirus outbreak](#)). For parties looking to embark on new construction contracts in the midst of the COVID-19 pandemic, however, the impact of COVID-19 poses a number of different challenges for project execution.

Entitlements to Relief

- The protection afforded by force majeure provisions for COVID-19-related claims may, in future, be fairly limited due to issues of foreseeability. It is a typical condition of any force majeure entitlement that the event in question was unforeseeable at the time of contracting. Given current awareness of the global nature and current and potential scale of the COVID-19 pandemic today, a COVID-19-related claim for force majeure may be unlikely to satisfy the standard force majeure test of unforeseeability and may therefore be excluded as a force majeure event.
- To some extent, parties may wish to address this concern by giving more thought to force majeure definitions. For example, they may agree that, even if the existence of COVID-19 in itself does not qualify for force majeure relief, parties are able to claim relief where the spread or impact of COVID-19 and the subsequent impact on workforce and supply chains reaches a threshold that is unforeseeable.
- In addition to force majeure, there is a possibility of extension of time and additional cost claims arising on the basis of changes in law as governments continue to implement new legislation and directives in response to the spread of COVID-19. In this context, parties may wish to consider closely what will constitute a change in law under the contract (for example, whether governmental recommendations and guidance will fall within such a definition).
- However, perhaps the greater concern here is that while force majeure and change in law may provide parties with relief from the performance of their contractual obligations or additional time and cost entitlements on projects where unforeseeable events may occur, such relief in itself is of limited use in ensuring a project gets completed on time and on budget.
- While some parties might be wary of entering into any sort of agreement at this time, parties who are currently in the process of negotiating their contracts or who are about to initiate the procurement process may wish to consider the following:

Additional Considerations in Negotiating Contracts

- **Supply Chain Management:** Employers may wish to carry out more stringent due diligence on the robustness of the contractors' supply chains and examine supply chain management at bid stage in order to minimize the risk of any disruption occurring in the future. Given how rapidly the situation is changing due

to COVID-19, contractors would wish to add more flexibility to their supply chains in the event that their supply chain gets affected by the spread of COVID-19.

- **Workforce Management:** Given recent travel restrictions and general uncertainty around travel globally, contractors, particularly international contractors, may want to consider employing more local manpower so that they would be less susceptible to any disruption due to COVID-19-related restrictions on movement or perhaps monitor the movements of their personnel more closely.
- **Health, Safety and Environment (HSE):** Parties should also give greater consideration to their HSE obligations, as relevant authorities all over the world are introducing new HSE regulations and requirements as a result of the COVID-19 outbreak. These new requirements are likely to have an impact on construction methodologies, which in turn are likely to lead to increased costs.
- **Alternative Methods of Procurement:** Given the potential uncertainty in relation to contractual performance at this time, parties may in future want to consider alternative procurement methods based on sharing of risk and collaboration, such as contract alliancing, for example, to minimize possible claims and disputes and to ensure that projects are completed within budget and according to schedule.

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