

CORONAVIRUS: ISSUES FOR THE CONSTRUCTION INDUSTRY

The primary focus of any business responding to Covid-19 will be on ensuring the health and wellbeing of all staff and their families and mitigating the risk of spreading illness. Businesses are now facing an increasing number of challenges that need to be addressed and mitigated and the Construction industry is no exception. In this briefing we touch on the areas where we have been receiving requests for assistance and guidance.

Employees and responsibility for safety

Health and safety on site is always of the utmost importance. In the context of Covid-19, parties may wish to revisit and update their health and safety policies to ensure that adequate, timely and responsive procedures are in place that can be quickly deployed if infection is reported locally. In addition to ensuring compliance with all mandatory duties and obligations in the usual way (including ensuring continued provision, of, for example, PPE), part of this exercise will involve ensuring that those on-site are fully informed of the steps to take if they display symptoms.

Relationship management

Where Covid-19 does affect contractual performance, notwithstanding the application of any contractually agreed requirements of co-operation and good faith, parties may wish to consider how practically to best manage their contractual and commercial relationships. Adopting an adversarial position from the outset may, counterproductively, prevent the free flow of information. This, in turn, may impede the parties' ability to formulate collaborative mitigation strategies.

Managing claims for relief time and money

Projects in all construction industry sectors are susceptible to impacts, for example, due to delays to goods, materials, plant and equipment, or restrictions on travel. Certain projects may be more susceptible to critical consequential delay; for example, potentially exacerbating the effect of seasonal factors or affecting contractors' ability to secure long lead time critical plant or spread.

Parties may seek relief additional time and/or costs under their contracts due to the Covid-19 outbreak. Such claims may be formulated as arising by reason of force majeure, on which we have commented [here](#). Similarly, certain legal jurisdictions may have a codified or supervening principle for force majeure which needs to be taken into account. Claims may also be characterised as arising by reason of a change in law resulting from the responses of governmental authorities to Covid-19, such as restrictions imposed on the movement of people and goods.

Regardless of the proposed nature of the claim, specific analysis to consider the contextual and contractual arrangements will be required. When undertaking this exercise, parties may wish to assess their relative positions throughout the contractual chain. Divergences in approach, due to differing contractual terms or geographical limitations, for example, may ultimately concentrate the risk at one level of the contractual chain, thereby affecting certain parties disproportionately.

Revenues and project financing

Project sponsors and lenders will wish to review the exposure to delay that impacts the developer's ability to service debt and ongoing costs in the absence of any available recourse to delay damages, or insurance.

Risk of termination

Termination rights may be triggered by reason of a prolonged delay itself, either by reason of an express force majeure threshold or the invocation of a separate event of default. These rights may originate in the immediate construction contract itself or, crucially, in an overriding development, concession or project agreement or other key project permit. Parties should be astute to such contractual interfaces and the potential impact that upstream contracts may have in circumstances such as these.

In principle, rights of termination may also arise in certain cases where project continuation becomes impossible (for example, by operation of a legal doctrine of frustration or its equivalent). However, the barrier for such rights to arise is typically high.

New contracts

In the short term, current tender processes may seek to avoid supplies from regions affected by disruption or travel restrictions, or be extended so as to ride out any perceived risks of delay and price fluctuations. This may impact on competitive tension.

How the parties address the current outbreak has become an immediate negotiation 'hot topic,' with parties needing to agree how risks around the current outbreak should be allocated. We are also seeing parties take stock of the exposure of supply chains to global supply chain risks, both in terms of the ability to deliver and solvency risk, which may inspire diversification strategies in the future.

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