COVID-19 Key issues to consider as an international EPC contractor (for English law contracts)

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There are a number of key points to take into account when considering entitlement arising from the COVID-19 virus. The comments in this article are based on a standard FIDIC form of contract whereas in reality many contracts will have been amended. The principles below are of general application and you will always need to consider the specific of your contract and your project before acting.

Preferential Entitlement – Force Majeure vs Change in Law (or Other)

The first issue to consider is what relief should be applied for under the Contract. Initially and instinctively, many contractors will have claimed that a Force Majeure event has arisen (see below). Notices may have been issued to this effect (again see below).

As the pandemic has progressed though, it is also the case that in many jurisdictions governments have imposed restrictions in countries which have significantly impacted construction projects (whether by general lockdown policies, or restrictions in movement). These restrictions may amount to changes in the Law – which also give rise to entitlement to relief.

It is fairly common practice for Force Majeure events to provide relief in time only and not Cost – whereas other relief such as a change to the Law would provide both time and Cost relief (this varies project to project). Even if this is not the case, there may be undesirable (or desirable) consequences of a long running Force Majeure event which may not arise if other relief is claimable.

As a result, it is important to consider which relief is the best relief to seek in all the circumstances. Where changes in the Law have occurred it may be prudent to apply for relief under this provision as well as under Force Majeure (or Exceptional Events), particularly if claims for Force Majeure have been rejected by Owners/Engineers. Note also that in the 2017 Edition of FIDIC, there is additional potential relief in the event of changes arising which make the contract impossible to complete (Clause 18.6).

There is nothing in the standard form FIDIC that would prevent a contractor claiming dual relief under two separate provisions of the Contract.

Force Majeure

Under the FIDIC form of contract, Force Majeure is typically referred to as Exceptional Events. It will depend on
the governing law of the contract whether other considerations relating to the concept of Force Majeure could be considered to apply.

The events listed under Exceptional Events in 2017 FIDIC, do not typically include epidemic or pandemic as a named event. However, the list is expressly said to include but not be limited to the events listed. This gives rise to questions of interpretation – would COVID-19 fall under the Exceptional Events list or not? This, in turn, will depend on concepts of interpretation such as, in English law, *ejusdem generis*.

On the face of it, it certainly seems strongly arguable that COVID-19 would fall under the categories in Clause 18 in Silver Book. However, in Red Book (and other forms), express references to shortages of labour/Goods arising because of epidemic (Clause 8.5) would strongly indicate that epidemic does not fall under the Exceptional Events list. Under Red Book, that is not so much of an issue given the separate relief provided for in Clause 8.5.

In any event, where there are concerns around relief and the impact of COVID-19 on the works it certainly seems prudent to issue appropriate notices claiming relief (subject to the below – see Termination).

See also time bars/procedures relating to initial steps.

**Change in Law**

As noted above, in many countries law makers have imposed new laws, introduced after the Base Date which have impacted the way in which the works can progress. This will vary from country to country and needs to be carefully considered. In some countries, actual legal changes have not been made, governments instead relying upon guidance and civil obedience rather than legislative changes. Consideration of the precise wording of the relevant clauses is needed in order to determine exactly what will give rise to relief in different jurisdictions. Some forms of contract include wording relating to “ministerial guidance” which is a easier test to meet than legislative changes. The legal position can also vary region to region within a country.

Specialist advice is required given the complexity of the position in some countries – for example, in the UK, the construction industry is excluded from legal changes implementing lockdown conditions, and there are significant differences between the approach in Scotland over England and Wales.

Consideration should also be given to how broad the wording in the contract is relating to changes in law – would it affect fabrication works off site and in another country for example, the transportation of goods, the movement of people into and out of countries? It is also possible that some clauses in this category will capture a direct and indirect impact on the works where there has been a change in law. This could extend to the shutdown of suppliers where construction projects continue (for example).

Where it has become unlawful to continue with the works, other potential considerations arise (see Amendment/Frustration below).

**Time Bars & Procedure**

Whatever relief is to be sought, almost all construction contracts now contain some form of time bar provisions relating to notification of relief.

It is always prudent to comply with these provisions to avoid any question about entitlement – to not receive any relief arising as a result of a late/non-existent notice, would be an extremely unfair result but remains a distinct possibility if no notices are served.

Notices should be:

- Issued correctly to the correct addresses/parties – note that certain forms of service have become almost impossible so practical agreements about email service should be made asap;
- Contain the correct, contractually required details and identify as a notice;
- Be updated as required by the contract – in accordance with additional timescales and requirements;

Further, standalone notices are commonly required to set out the details, impact and mitigation proposals of the event notified.
Entitlement

Once an initial notice has been issued, additional work is usually required to analyse and present to the Purchaser/Engineer the impact of the delay. As the impact of COVID-19 (or related legal changes) will not yet be known, this will be an ongoing event for which regular updates are usually required (in accordance with set timescales). A general obligation to mitigate delay is also likely to apply, so practical steps will need to be taken to re-sequence and re-programme the works to mitigate the delays insofar as possible.

There may be some circumstances in which some packages of work can continue without significant impact (such as off site design work) and so re-programming and claims should take into account criticality of works and what measures can be taken to progress the works.

Termination

It should be noted that in most forms of Contract, once a Force Majeure event occurs and the works are suspended as a result, if the works are suspended for a significant period of time (such as 84 days in FIDIC) then either party may terminate. This is one of the key risks arising out of claiming a Force Majeure event rather than seeking other relief – where this outcome is less likely – if the project is not considered to be progressing well one party may use this to its advantage. Obviously, this is likely to be contentious and high risk but is nonetheless a key risk to consider.

Note also that there are procedural provisions in most contracts relating to any termination (and entitlements arising). However, where some works progress (such as off site design) but most works cannot progress the position regarding termination is less clear – FIDIC refers to “substantially all the works” as being the relevant test.

Frustration

Whilst it is unlikely to be a relevant choice for most, other legal principles may assist if there is no contractual relief available and yet the works cannot progress. Frustration (a common law concept) ultimately amounts in the contract coming to an end so is an undesirable outcome, an extreme option and an extremely difficult/high risk position to adopt.

Health & Safety

Health and safety of all personnel on site remains paramount – and should be a key consideration both in relation to how works are progressed and balancing progressing the works set against general safety. In some circumstances, compliance with health and safety laws may give rise to potential claims for extensions of time (and of changes in law entitlement).

Amendment & Waiver

It is worth also considering that the options open to all parties in these unprecedented times are always open for negotiation. Contract amendments to address the potential impact and to try and secure a “fair” outcome to the COVID-19 crisis remain a reasonable and achievable option. Whilst negotiation can be undertaken at any time, it makes sense that negotiation takes place alongside compliance with the Contract (i.e. issuing notices etc) in order to negotiate from a position of strength. It is open to a reasonable Purchaser/Engineer to consider waiving strict compliance with time bar procedures on entitlement and it may be appropriate to ask for a general waiver in relation to COVID-19 related issues in this regard.

We can and have advised on all of the above issues since the COVID-19 outbreak and would be happy to provide further detail if that would assist.

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