

# CONSTRUCTION LAW INTERNATIONAL

FROM THE IBA INTERNATIONAL CONSTRUCTION PROJECTS COMMITTEE OF THE  
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## Covid-19 Special Edition



**Temporarily  
Closed {Due to  
COVID-19}**



**What can  
construction  
contracting learn  
from Covid-19?**

**A catalyst for  
change?**

**Is it safe for  
construction sites  
to stay open?**

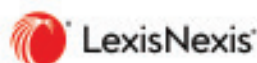


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Cover image: No access sign on a construction site, due to COVID-19.  
Credit: richardjohnson/Shutterstock

# FROM THE EDITORS

Dear readers,

In what is now regularly referred to as ‘unprecedented times’, we bring you an issue that focuses on the impact of Covid-19 on construction contracts and projects around the world.

We are delighted to have an opening editorial by David Mosey, the Director of the Centre of Construction Law and Dispute Resolution at King’s College London. Professor Mosey considers how traditional procurement and contracting could change as we recover from the effects of Covid-19, and how new procurement and contracting models could help to bring the industry up to date so that it is better equipped to deal with future risks.

In this issue we do not have our regular ‘FIDIC around the world’ series; however, Joanne Clarke discusses Covid-19 and FIDIC contracts and the protections and entitlements available to the parties under those forms.

Shona Frame, our International Construction Projects Committee Co-Chair, asks whether Covid-19 will be a catalyst for change given the traditionally adversarial nature of the construction industry and the need for parties to work collaboratively to navigate the challenges to which Covid-19 has given rise.

With countries having varying degrees of lockdown, Wala Al-Daraji discusses the important role the construction sector will play in the economic recovery and the UK’s treatment of construction work as ‘essential’.

There is no doubt that many projects around the world are experiencing delays due to the virus. Julia Villalobos considers productivity claims and the necessity to properly document causation so that claims for lost productivity can be substantiated. On time-related issues, Sena Gbedemah discusses the pitfalls of acceleration agreements as parties emerge from lockdown.

Looking closely at particular jurisdictions, Adrian Neville Akol and Albert Mukasa undertake a comparative overview of health and safety measures affecting ongoing construction contracts in Germany and Uganda. Tomasz Darowski, Josef Hlavička and Ralf Leinemann analyse Covid-19 as a force majeure event in civil law jurisdictions and Emadaldin Abdelrahman looks at Covid-19 from the Egyptian perspective.

Elina Mereminskaya and Álvaro Jara Burotto ask whether the law should foresee the unforeseeable, discussing trends in Chile in the context of the pandemic.

From Asia we have a contribution from Mino Han and Celia Guignet that considers the impact of Covid-19 on the construction industry in South Korea and lastly Kazuma Higuchi discusses the concepts of force majeure and hardship under Japanese Law and their application during Covid-19.

As always, we thank our contributors for their insightful articles and we hope you will enjoy reading this special edition. We invite you all to contribute your thoughts and insights to *Construction Law International* by submitting your articles to **CLInt.submissions@int-bar.org**.

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# FROM THE CO-CHAIRS

Dear fellow ICP members,

During the past few months, we have all witnessed in astonishment and horror how the Covid-19 pandemic has affected millions of lives all over the world. At the time we write this column, many countries are still struggling to control the expansion of the virus, while others have succeeded in that effort, in most cases at great cost. For the most part, it is now evident that, albeit controlled, coronavirus will remain among us for a long time and we will need to continue to adapt to a new normality everywhere.

Although the greatest loss of all is painfully measured in human lives, the negative impact that this health crisis has had, and will probably continue to have for some time, on the global economy is yet to be determined. With jobs lost, businesses forced to shut, in many cases permanently, national economies brought to the brink of bankruptcy, industries collapsing and global trade and exchange of goods and services suffering from closed borders and protective measures, many experts anticipate that the socio-economic losses of the Covid-19 crisis will be the worst in decades<sup>1</sup> – the paradox of a globalised world.

The construction industry in general has not been exempt from these negative effects. In addition to the interruption of construction projects based on government-imposed activities' restrictions, social distancing and isolation measures and lockdown orders, this global crisis, like no other before, at least since the Second World War,<sup>2</sup> has caused massive disruption in the construction supply chain, unmeasured cost overruns and delays and recalculation of costs, among many other effects.

This crisis has put construction contracts, courts and arbitration panels to a heavy test, particularly when it comes to interpreting and applying concepts such as force majeure, hardship and frustration of purpose, all originally thought to address situations with a defined geographical and temporal scope, but which do not seem to fit well in the context of the global scale of the problem and the uncertainty derived from the fact that no one knows for sure for how long the world will continue to live in total or partial quarantine.

It is often said that there is an opportunity in every crisis. The word 'crisis' derives from the Greek 'Krisis', which refers to an 'act of separating, decision, judgment, event, outcome, turning point, sudden change'. This etymological look sets the perfect framework to a great challenge ahead for all those who work in the construction industry: use the present situation as the kick-off to rethink contractual provisions aimed at mitigating non-performance obligations and risk allocation, turn to collaborative ways to address contracts and projects and decisively embrace alternative dispute resolution mechanisms focused on the projects and providing for more sustainable ways to build contractual relationships.

The ICP Committee, as one of the world's pre-eminent organisations fully devoted to the investigation, debating and dissemination of construction law, is in a privileged position to lead these efforts. Our membership expands all over the world and encompasses all existing legal backgrounds, providing a unique environment for discussion of ideas and perspectives. We encourage our membership to take up the challenge and reach out to our officers with their suggestions and ideas on projects aimed at addressing and understanding the new realities and the shift in paradigms that the crisis will leave.

The pandemic also created an opportunity in terms of relationship building and committee activities. Forced by travel and events restrictions all over the world, all our in-person events for this year have been cancelled or postponed. This gave us the motivation and the energy to jump very quickly, and with no previous experience, into the world of on-line events and webinars, aiming at keeping our community active and connected.

As of today, the ICP has organised five webinars (three of which took place in June, July and August, with two expected for September and October), is working closely with the International Bar Association to put together a full virtual program for November in lieu of the IBA Annual Conference and has booked a date for our annual Open Business Meeting, which will take place virtually on Wednesday 11 November at 1300 BST (more details to follow in due course). To learn more about our webinars (past and upcoming) please visit the dedicated webinars page on the IBA website.

We have also been active in increasing the diversity and openness of which we are very proud. Our Diversity Officers are working hard to ensure that our functions present diverse and enriching perspectives and views, with male and female speakers coming from different geographical and legal backgrounds. We are also working on a project specifically dedicated to diversity and inclusion in the construction industry at a global level, which will focus on successful ways to overcome difficulties based on personal stories and lifetime achievements. More details on this project will be released soon. We welcome members to contact our Diversity Officers, Aarta Alkarimi and Kwame Amankwah-Twum, to find out more and learn about ways to collaborate.

<sup>1</sup> 'Covid-19: Socio-economic impact' United Nations Development Programme [www.undp.org/content/undp/en/home/coronavirus/socio-economic-impact-of-covid-19.html](http://www.undp.org/content/undp/en/home/coronavirus/socio-economic-impact-of-covid-19.html) accessed [date].

<sup>2</sup> 'Coronavirus: World Bank confirms deepest recession since World War Two' UN News (8 June 2020) <https://news.un.org/en/story/2020/06/1065902> accessed [date].

The ICP has always been open to attracting new members and providing tangible and immediate opportunities to get involved. In addition to the possibility of publishing papers and articles in our exclusive magazine *Construction Law International* (for which purpose members are welcome to contact our Editor and Deputy Editor, Tom Denehy and China Irwin, respectively), members and particularly newcomers are regularly invited to participate as speakers in our functions through open calls for expressions of interests, distributed by the IBA.

This year, we have also launched the Toolkit for Construction Projects initiative. The ICP will issue a booklet collecting best advice from all over the globe about all stages of construction projects and key issues to be considered under all possible aspects. The toolkit is divided along the lifetime of a project – from initiation to completion to dispute resolution. Each contributor may choose a topic of preference, which allows many contributors and distribution of the workload on many shoulders. An example of such a work product launched by the IBA is the IBA Toolkit for Award Writing, which can be found on the IBA website. All those interested in contributing to this project, please contact our Membership Officer, Rouven Bodenheimer.

In addition to these projects, our three Subcommittees are always working on ongoing projects and thinking of new ones. If you are interested in getting involved or have an idea or suggestion you would like to share, please do contact our Subcommittee Co-Chairs, Jane Davis-Evans and Ioannis Vassardanis (Dispute Resolution), Sarah Sinclair and Julio Bueno (Project Establishment) and Erin Miller-Rankin and Thiago Moreira (Project Execution).

Finally, we have been working along with our Website Officers, Sam Moss and Jarleth Heneghan, and the IBA on other ways to enhance communication with members going forward. Significant progress has been made on this front and we hope to make announcements very soon.

Jawaharlal Nehru, the independence activist who led India as its first Prime Minister from its establishment as an independent nation in 1947 until his death in 1964, once said: ‘Crises and deadlocks when they occur have at least this advantage, that they force us to think.’ This crisis makes us think in relation to technology, diversity, collaboration, inclusion, innovation, sustainability, openness and team effort. These are the words that will define the years to come and that will necessarily have a crucial impact in the global construction industry. The ICP Committee is ready to take up the challenge, evolving into new stages of connectivity and knowledge sharing, and we count on every member to help us to achieve these goals.

We wish you and your families, friends and colleagues well.

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## What can construction contracting learn from Covid-19?

**B**efore we try to predict medium-term and long-term changes to the construction sector that may result from Covid-19, we should first recognise the ways in which the industry and its clients have responded quickly and responsibly to the unprecedented challenges created by the pandemic. For example, in March 2020 the United Kingdom government issued *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency*, encouraging construction clients and teams not to endanger the viability of projects and businesses by rushing to terminate contracts.<sup>1</sup> In the same month, a transnational webinar organised by the Brazilian Institute of Construction Law explored 'Collaborative approaches to dealing with Covid-19 in Construction Projects' and offered detailed recommendations on how

to organise and implement the work of a 'crisis committee'.<sup>2</sup> Also that month, the Austrian Society of Construction Technology established common guidelines agreed among leading developers, contractors and consultants for the treatment of fixed costs, delay costs and disruption costs arising from Covid-19 in new tenders.<sup>3</sup>

Constructive responses to Covid-19 at personal, corporate and governmental levels illustrate how a collaborative approach can be adopted in adversity, but they also raise the broader issue of why this collaborative approach is not the commercial or legal norm. They lead us to question why systems of collaborative risk management are still not widely understood and why the attractions of risk transfer under more arm's length procurement models continue to prevail. To put it bluntly, for many years the construction



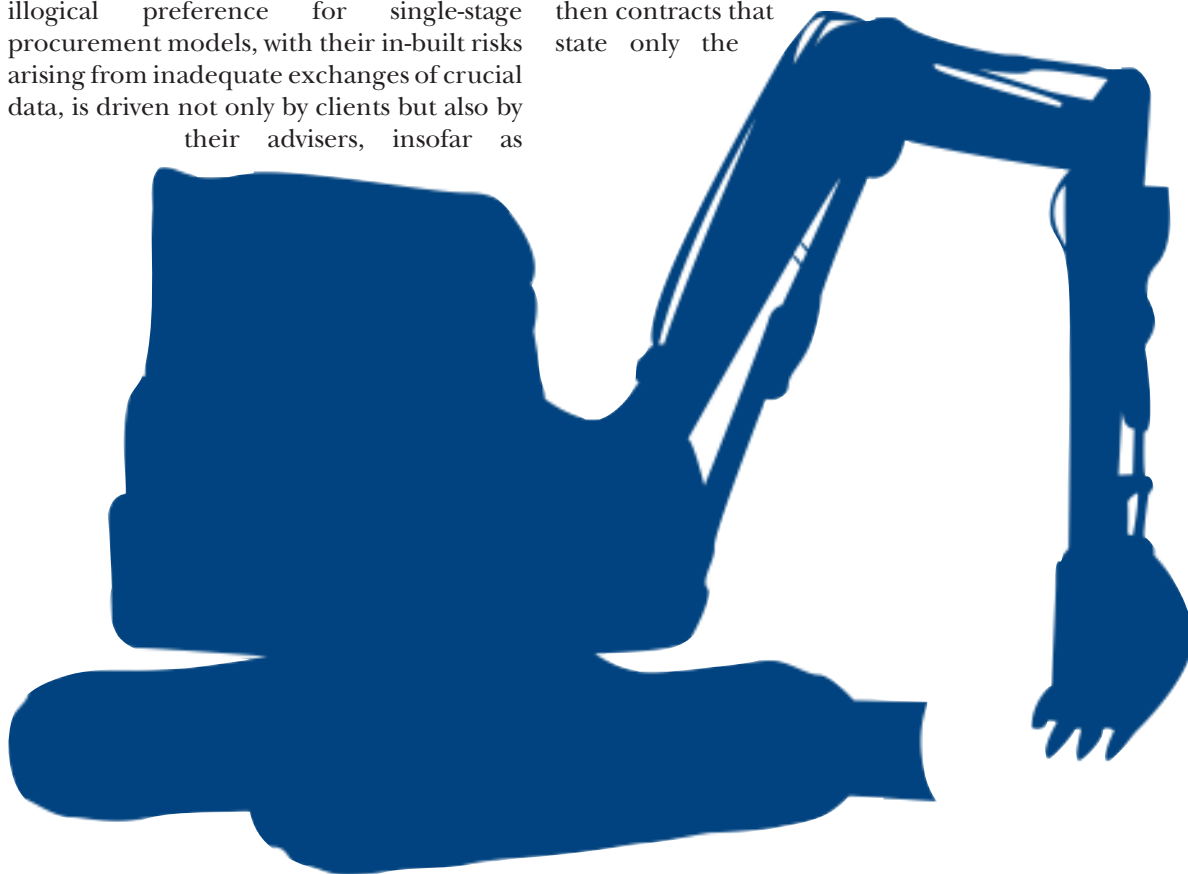
industry and its clients have largely ignored compelling evidence that procurement using the incomplete data of a single-stage tender is essentially a massive gamble supplemented by wishful thinking.<sup>4</sup> In the UK this anomaly was underlined following the Grenfell Tower disaster of 2017, when the Hackitt report *Building a Safer Future* urged an overhaul of procurement systems in order to avoid the present 'race to the bottom' where 'the primary motivation is to do things as quickly and cheaply as possible rather than to deliver quality homes which are safe for people to live in'.<sup>5</sup>

This paper will consider how the fixed paradigm of traditional procurement and contracting could change as we recover from the effects of Covid-19 and how new procurement and contracting models could help to bring the industry up to date and make it better equipped to deal with future risks. We will examine the impact of evolving contract theory on construction procurement and the application of collaborative models that open the door to more effective risk management. We will also look at the impact of collaborative procurement on the efficient use of digital technology and offsite manufacture.

It has been suggested that the seemingly illogical preference for single-stage procurement models, with their in-built risks arising from inadequate exchanges of crucial data, is driven not only by clients but also by their advisers, insofar as

'clients tend to fixate on lowest initial tendered price and this is often perpetuated by their advisers, who, in a traditional procurement model, are implicitly employed (at least partly) to manage a fixed and adversarial transactional interface between clients and industry'.<sup>6</sup> If this criticism is justifiable, it may result in part from the constraints of low fees and client demands, as well as from the limited exposure of advisers to liability for the consequences of their recommendations.<sup>7</sup> Whatever the reasons, for so long as clients and their advisers remain unwilling to invest time and effort in more detailed procurement planning, then simplistic reliance on arm's length, single-stage procurement models is likely to continue without deeper analysis of the scope for improvements.

The weaknesses of single-stage procurement procedures as a basis for achieving improved value and reduced risk are closely linked to the contracts to which these procedures give rise, and a McKinsey Global Institute report in 2017 found that poor productivity can only be properly addressed if we 'rewire the contractual framework'.<sup>8</sup> If a phenomenon such as Covid-19 requires projects to be being suspended and sites to be shut down, then contracts that state only the





time and cost consequences of termination or suspension do not help us to mitigate the commercial effects of demobilisation or to preserve commitments and relationships among the members of the supply chain. Hence, we need to look for other contract mechanisms that can enable intelligent joint risk management by team members working together.

Commentators have distinguished between those risks that can be managed by an 'authoritative' approach, for example, an instruction issued by a project manager, and other risks that involve less obvious answers and demand a structured 'collaborative' approach so as to avoid simply 'muddling through'.<sup>9</sup> To enable this structured approach, the ISO 44001 international standard for collaborative business relationships describes how a collaborative team should 'establish and record the process to be used for joint risk management' and should use a joint risk register 'reviewed at planned intervals as defined under the governance structure and appropriate actions addressed'.<sup>10</sup>

At a time of crisis, when the parties are tempted to run for cover and pass responsibility to someone else, there is a need for these collaborative risk management systems to be clearly set out in a contract. Relevant provisions in the NEC4<sup>11</sup> and PPC2000<sup>12</sup> contract forms include early warning provisions that trigger structured meetings, where the parties are required to seek ways to resolve risk issues using a shared risk register. For example, to encourage a more collaborative response to an unexpected event, NEC4 requires the parties to give early warning of any matter that could increase agreed costs, cause delay or impair performance of the works in use.<sup>13</sup> An early warning leads to a meeting at which the attendees are required to cooperate in:

- making and considering proposals for how the effects of each matter in the early warning register can be avoided or reduced;
- seeking solutions that will bring advantage to all those who will be affected; and
- deciding on the actions to be taken and who, in accordance with the contract, will take them.<sup>14</sup>

The Arcadis 2020 Global Construction Disputes Review suggested that: 'Greater use of collaborative contracts, i.e. PPC2000, TPC2005 and FAC-1, might provide more confidence in project delivery. However,

this can only be driven by owners and their representatives.'<sup>15</sup> The case studies herein illustrate the use of collaborative risk management provisions in the PPC2000 project alliance contract and in the TPC2005 and TAC-1 term alliance contracts.

First, the University Hospital Dubai, a \$900m multiparty project alliance, was on site in 2009 when the effects of the global financial crisis hit the United Arab Emirates. The team working on this project deployed the PPC2000 systems for early warning, core group decision-making and agreement of actions set out in a shared risk register.<sup>16</sup> By these means:

- 'Risk management had to cover the design and construction, the operation side of running the hospital and the business that controlled and funded the hospital, including corporate and clinical governance. These were all linked through joint risk management so that changes in any one of them could be examined to see if they affected any of the others, and so that the agreed course of action to overcome the problem could be reviewed to ensure that it did not cause a problem elsewhere'; and
- 'When the credit crunch first hit Dubai the other 89 projects being undertaken for Dubai Holding were immediately suspended or terminated. The University Hospital Project kept going for a further 18 months, the team members having met and agreed a plan of action to use unamortised advance payments to continue the project and pay all parties from those funds.'<sup>17</sup>

The PPC2000 joint risk management systems enabled the team to make intelligent decisions together and to mitigate the effects of a global crisis. Even when eventually the client had to close down the University Hospital Dubai project, nevertheless 'it was brought to an amicable termination with sufficient funds to pay all parties the monies that they were owed'.<sup>18</sup>

FIDIC contract forms do not provide equivalent joint risk management techniques, which arguably leaves the parties more vulnerable to a fragmented and defensive approach.<sup>19</sup> For example, at the same time as the University Hospital Dubai team were agreeing their joint approach to risk management, the other 89 projects suspended or terminated by the same client were mostly governed by FIDIC-based contracts that only allowed for unilateral instructions issued by the project engineer. The suspension or termination of these

contracts did not provide for joint planning or prior agreement among the project team members and instead ran the risk of misunderstandings, withholding of payments and disputes.

The second case study illustrates how housing clients and teams responded to Covid-19 using equivalent joint risk management systems under the TP2005 and TAC-1 term alliance contracts.<sup>20</sup> By reference to the alliances established by Central Bedfordshire Council with Engie, by St Albans City and District Council with Morgan Sindall and by Victory Housing Trust with Jeakins Wear, Shane Hughes of Savills reported how in response to Covid-19:

- ‘Service Providers under a Partnering or Alliance form raise an Early Warning for an extension of time that is assessed in the normal way’;
- ‘Likely outcomes are that reasonable Site Based Overheads are paid provided the Service Provider mitigates their costs wherever possible’;
- ‘Service Providers are paid up front or on demand so they can pay their supply chain promptly’;
- ‘Those staff who have to be furloughed by contractors are paid their full wage’; and
- ‘Clients get it and are mostly supportive of Procurement Policy Note 02/20 (Supplier relief due to COVID-19) as they firmly encouraged to do.’<sup>21</sup>

Yet why do we need to contractualise the details of a collaborative risk management approach when it is arguable that team members collaborate every day on projects all over the world? Can we not just agree to act in ‘good faith’? Unfortunately, the suggestion that good faith is the key to collaborative procurement, and the implication that there is no need for more rigorous collaborative contractual relationships and processes, can obscure a clear vision of how improved systems deliver results. In addition, the many conflicting court decisions, both in common law jurisdictions where good faith may be agreed or implied and in civil law jurisdictions where good faith is often a statutory obligation, reveal how this well-intentioned principle is open to different interpretations as to how it should be applied.<sup>22</sup>

Even an express good faith clause in a construction contract is difficult to interpret in practice. For example, when the English courts attempted to construe an NEC good faith clause that it was claimed required a party in dispute to seek agreement regarding the

applicable tribunal, the judge observed that even a general obligation to act fairly ‘is a difficult obligation to police because it is so subjective’.<sup>23</sup> In another English case examining a good faith clause in TPC2005, it was held that the requirement for a team to ‘work together and individually in the spirit of trust, fairness and mutual co-operation for the benefit of the Term Programme’ did not oblige the client to act reasonably when exercising a discretionary right of termination.<sup>24</sup>

Therefore, we need to look more closely at the relationships and processes that collaborative contracts can create, and to use the principles of contract theory when assessing what type of contract can provide the detailed machinery that supports collaborative risk management. The basic contract types governing construction transactions comprise:

- a ‘classical contract’ describing a complete transaction ‘which entails comprehensive contracting whereby all relevant future contingencies pertaining to the supply of a good or service are described and discounted with respect to both likelihood and futurity’.<sup>25</sup> An example is a contract for the sale and purchase of bricks collected from a builders’ merchant; and
- a ‘neoclassical contract’ describing a more complex transaction where ‘not all future contingencies for which adaptations are required can be anticipated at the outset’ and where ‘the appropriate adaptations will not be evident for many contingencies until the circumstances materialize’.<sup>26</sup> An example is a typical construction contract where routine construction phase interactions require detailed procedures to govern assessment of progress, interim payments, changes and unforeseen events.

Against this backdrop, some collaborative approaches to procurement have been linked to a more open-ended model of contractual governance classified as a ‘relational contract’, under which:

- as in the case of a neoclassical contract, adaptations will be required so as to meet future contingencies;
- unlike a neoclassical contract, the parties ‘do not agree on detailed plans of action but on goals and objectives’;<sup>27</sup> and
- unlike a neoclassical contract, a relational contract reflects only the commencement of the relationship and is followed by ‘a complex succession of exercises of choice and agreement’.<sup>28</sup>



A joint venture contract has been seen as relational because it has the following features:

- 'A long-term business relationship';
- 'Investment of substantial resources by both parties';
- 'Implicit expectations of co-operation and loyalty that shape performance obligations in order to give business efficacy to the project'; and
- 'Implicit expectations of mutual trust and confidence going beyond the avoidance of dishonesty'.<sup>29</sup>

Macneil also envisaged that 'standardised construction contracts' can be 'relational agreements containing a great deal of process planning'.<sup>30</sup> However, it is harder to reconcile the open-ended nature of a relational contract with the very specific rights and obligations on which the members of a construction team need to rely. Also, a relational contract categorisation does not capture the collaborative machinery through which the parties complete, exchange and agree the data that will equip them for effective risk management when unforeseen issues arise.

Macneil recognised that a contract can have 'enterprise planning' functions,<sup>31</sup> and he suggested the following enterprise planning techniques to govern the completion of missing details and to reconcile potentially conflicting interests without resorting to negotiation: (1) joint dealings with third parties by way of mutual, non-negotiating activities that resolve an issue to the extent that the parties pursuing these activities do not perceive the need for negotiation.<sup>32</sup> For example, while a project team may be aware of scope for negotiation of outstanding costs, many elements of those costs can be completed without negotiation by using an agreed system for subcontract tendering after a main contractor has been appointed;<sup>33</sup> and (2) persuasion by creating a business case for a particular course of

action, sufficient to demonstrate to all parties the benefits of that course of action to the project as a whole, rather than leaving particular team members to negotiate prices or look for alternatives. For example, a construction contract can provide a system whereby a main contractor builds up a preconstruction business case for the use of an in-house team or a preferred subcontractor whose work it believes will benefit the project and will be in the interests of all other team members. Presentation of a business

case for approval by the other team members gives the main contractor the opportunity to demonstrate the cost and qualitative benefits that justify its proposals.

Clear machinery set out in the contract can establish the means to agree design, cost, time and risk data that was not available at the time when the contract was entered into, and in this way a collaborative contract can avoid the challenge that it is unenforceable for uncertainty or incompleteness.<sup>34</sup> For example, the English courts have recognised that 'there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later'.<sup>35</sup> Where these enterprise planning activities and interactions are set out in a contract, the features of this contract can lead to it being categorised as an 'enterprise contract'.<sup>36</sup>

An enterprise contract can provide for a succession of choices in order to accommodate and utilise increasing information. However, unlike a relational contract, an enterprise contract creates the machinery by which joint activities govern the development of all or most of the increasing information and minimise the role of negotiation when the parties make choices as to how the increased information should be used. An enterprise contract thereby maps out the stages of its evolving scope in provisions that go beyond the reactive adaptations of a neoclassical contract. To achieve timely progress and a clear understanding among its parties, an enterprise contract requires a clear brief and a timetable of actions that are more precise than the open-ended goals and objectives of a relational contract.<sup>37</sup>

In establishing detailed plans of action, an enterprise contract:

- provides for default rules to fill information gaps and provides processes that incrementally increase the quantity and quality of that information;
- deals with contingencies in respect of unknown matters and also sets out processes and interfaces that achieve future expectations and agreed objectives; and
- uses conditions precedent to be satisfied before proceeding from one stage to the next and also provides systems that give a clearer structure to the activities that enable progress.<sup>38</sup>

Enterprise contracting is already familiar to the construction sector, for example, in a





design consultant appointment that usually contains incremental processes for:

- the creation and submission of design data in successive levels of detail and for successive interactions with other parties who provide contributions, comments and approvals;
- recognition of approved design data as the basis for each next stage of the design services, being data was not in existence at the start of the previous stage; and
- recognition of approved design data as the basis for an appointment relating to administration of the construction phase of the project.<sup>39</sup>

In the context of a two-stage collaborative procurement model, we can see detailed enterprise processes set out in PPC2000, which the 2008 Arup report described as 'a procurement system that provides the processes and mechanisms for planning, procurement and delivery of construction works.'<sup>40</sup> PPC2000 describes enterprise planning which is integrated through a multiparty 'Partnering Timetable' and governs:

- development, exchange and agreement of designs in successive levels of detail, linked to third-party approvals;<sup>41</sup>
- selection of subcontractors and suppliers, to be appointed by main contractor, and the establishment of their costs through enterprise planning by way of subcontract tenders and business cases;<sup>42</sup>
- early joint risk management assessing the impact of shared design, costs and supply chain data on issues of quality, safety and sustainability;<sup>43</sup> and
- agreement by the team members that the agreed data is sufficient for the project to proceed to construction.<sup>44</sup>

Identification of potential areas of risk and the agreement of actions to reduce them are important features of collaborative procurement. Contractual processes can enable alliance members to identify, assess and prioritise risks as early as possible and to establish what actions, if any, can be taken to reduce or eliminate them. For example:

- main contractors 'should quote any risk contingencies at the point of selection so that joint risk management activities during the Preconstruction Phase can seek ways to reduce or eliminate the need for these risk contingencies';<sup>45</sup> and
- 'The analysis and management of risks relevant to the Project should be by a

methodology agreed by the Partnering Team prior to signing the Project Partnering Agreement and reflected in activities described in the Partnering Documents, for example the preparation and agreement of a risk register with an agreed action plan as to how Partnering Team members will deal with the risks identified and any prospective risk contingencies.'<sup>46</sup>

A collaborative team can use the information built up, exchanged and agreed under an enterprise contract to:

- honestly identify risks and how these risks will be perceived by other parties, for example, a consultant putting itself in the place of a contractor and by a contractor putting itself in the place of a subcontractor;
- estimate to the best extent the likely costs of perceived risks, whether those costs can be accurately identified or will be estimated by way of a risk premium and what additional steps can be taken to identify those costs more accurately;
- establish the steps to be taken to eliminate or reduce risks and their costs, or at least to identify them more accurately;
- provide for insurance of risks wherever affordable and appropriate;
- agree the sharing or apportioning of residual risks according to who is most able to manage those risks and who is most able to afford the cost of risks that cannot be managed; and
- recognise that pricing by consultants, contractors, subcontractors and suppliers will take account of how the team members approach each of the above actions.<sup>47</sup>

The collaborative costing of a project enables careful review of risk contingencies. For example, on the St George's Hospital Keyworker Accommodation project the team agreed for 'preconstruction work to be carried out at the same time as a final Agreed Maximum Price (AMP) was being agreed in which all risks had been quantified'<sup>48</sup>. This gave the team 'the incentive to be proactive in managing risk and expenditure so as to earn rewards available through the shared savings mechanism, openly reviewing buying gains obtained through subcontractor and statutory authority orders. Monthly critical analysis ensured that financial risks could be eliminated or quantified. This proved highly successful, allowing the client to instruct changes which increased the quality of the project further, safe in the knowledge that costs would be confined within the AMP.'<sup>49</sup>

In the joint management of risks, team members may be tempted to populate a risk register with unnecessary contingencies. For example, on the Bermondsey Academy project a 'risk sub-team' incorrectly assumed that their job was to imagine and cost every conceivable possibility, and the wider team had to agree a better-informed approach that enabled unnecessary risk contingencies to be removed.<sup>50</sup>

Where the proposed project workflow is sufficient to justify strategic procurement under a framework contract or term contract, then enterprise contracting can also govern the procedures that lead to the award of successive projects or tasks.<sup>51</sup> In addition, the enterprise-planning processes of a framework contract can be used to build up additional design, cost and risk data during the selection and mobilisation of the team for each project and to agree and embed lessons learned for later projects. Long-term collaborative contracts such as the FAC-1 framework alliance contract<sup>52</sup> and the TAC-1 term alliance contract<sup>53</sup> set out enterprise features that govern:

- exchanges of design, cost, risk and time data through contributions and interactions between alliance members that establish the scope for greater consistency and greater efficiency and that are encouraged by agreed incentives;<sup>54</sup>
- a timetable in respect of those exchanges and interactions;<sup>55</sup>
- reviews after completion of each project or task so as to ensure that improvements can be applied in the later projects or tasks;<sup>56</sup> and
- joint risk management activities including assessment and agreement of actions, timelines and related risks.<sup>57</sup>

The detailed enterprise contract features in FAC-1 and TAC-1 describe how alliance members work with each other, and with supply chain members outside the alliance, to create opportunities for improved value in exchange for improved mutual commitments. This process is known as 'supply chain collaboration' and follows UK government procurement guidance<sup>58</sup> in setting out a sequence whereby alliance members:

- review and compare the value offered by supply chain members;
- review the potential for more consistent, longer-term, larger-scale supply chain contracts and for other improved commitments and supply chain working practices;

- jointly undertake enterprise planning by renegotiating or retendering supply chain contracts; and
- agree more consistent, longer-term, larger-scale supply chain contracts and other improved supply chain commitments and working practices.<sup>59</sup>

The potential of long-term collaborative contracts is particularly evident when the team invest in offsite manufactured approaches, often known as 'modern methods of construction' or MMC. The potential benefits of MMC were summarised in a 2018 UK House of Lords report as:

- better quality;
- enhanced client experience;
- fewer labourers and increased productivity;
- more regional jobs away from large conurbations;
- improved health and safety for workers;
- ensure buildings meet quality assurance standards;
- improved sustainability; and
- reduced disruption to the local community during construction.<sup>60</sup>

These benefits are all the more attractive in a post-Covid-19 world, and Mark Farmer as the UK champion of housing MMC has emphasised the 'crucial need to adopt an integrated procurement model in order to deliver projects more efficiently', for example, through increasing 'pre-manufactured value' by moving processes from the final site into controlled manufacturing environments', failing which 'the construction world will become an increasingly difficult place to make money and survive'.<sup>61</sup>

Examples of how a long-term alliance can enable MMC procurement include the award by the Royal Borough of Greenwich of a £320m programme of modular housing works using the TAC-1 term alliance contract, with a five-year term extendable to ten years and governing all aspects of design, planning, manufacture, delivery and installation.<sup>62</sup>

In 2019 the UK Crown Commercial Service (CCS) awarded a £1.2bn FAC-1 modular framework alliance to 24 suppliers spanning education, healthcare, housing, defence, commercial and retail, and linked to call off by individual users under TAC-1 term alliance contracts.

The FAC-1 and TAC-1 forms were selected as the basis for the CCS modular procurement, and for its £30bn construction alliance and its £2.8bn consultant alliance, in order to:

- share and monitor learning between projects and programmes of work;
- agree and monitor techniques for better team integration;
- share and agree other improvement initiatives created with contractors and other supply chain members.<sup>63</sup>

Another collaborative enabler of improved risk management after Covid-19 is the more effective use of building information management (BIM) and other digital technology. The future outlined in BIM2050 included the prediction that ‘design consultants and principal contractors will be appointed simultaneously, early in the lifecycle, to enable concurrent working at outline business case stage’.<sup>64</sup> Only early, direct contractual relationships between the members of an alliance can support this proposed level of team integration, enabling collective BIM decision-making under ‘multi-party contracts to discourage legal disputes and costly litigations’.<sup>65</sup> An alliance contract can bring BIM contributors into relationships that set out value-adding digital activities and processes that use BIM to build reliable shared data and mutual confidence, and that consider the operational impact of BIM on those who will repair, maintain and operate the completed projects.

A framework for the adoption of BIM with collaborative procurement in Australia recommended:

- ‘Early engagement of facilities management professionals at the design and planning stage to minimise overall operational lifecycle costs of the asset/facility’; and
- ‘Comprehensively contractually binding BIM Management Plans [...] completed jointly by a project owner representative, design team and contractor’.<sup>66</sup>

Alliance contracts that have been proven to support BIM include PPC2000 in the UK and comparable multiparty contracts such as ConsensusDocs in the United States, the latter with a BIM addendum providing that ‘each Model Contributor shall be responsible for the Contributions it makes to a Model or the data that is developed as a result of that Contributor’s access to a model’.<sup>67</sup> A 2016 King’s College London BIM research report explored how an overarching multiparty umbrella contract could:

- set out who works with whom and at what level of responsibility, so that the contributions to BIM under bilateral

contracts can be drawn together more effectively; and

- create mechanisms that ensure stronger commitment to shared objectives and collective self-regulation, as well as improved transparency and efficiency, through the ability to share BIM data on mutually agreed terms.<sup>68</sup>

PPC2000 has been recognised and proven as an effective multiparty contractual integrator in respect of BIM contributions.<sup>69</sup>

As an alternative, so as to draw together a range of two-party contracts, FAC-1 provides for BIM to integrate the agreed approaches to design, supply chain engagement, costing, joint risk management and programming, with relevant clauses and guidance governing:

- data transparency and team integration through direct relationships under the multiparty structure and agreed objectives;<sup>70</sup>
- agreed software and clarity as to reliance on data in the communication systems and template documents;<sup>71</sup>
- mutual reliance on agreed BIM deadlines, gateways and interfaces in a timetable of agreed alliance activities;<sup>72</sup>
- flexibility to agree any combination of BIM contributions;<sup>73</sup>
- flexibility to bring in BIM contributions from specialist subcontractors, suppliers, manufacturers and operators;<sup>74</sup>
- direct mutual licences of intellectual property rights;<sup>75</sup>
- integration of BIM management with governance and clash resolution through the core group and early warning provisions and through the alliance manager;<sup>76</sup>
- flexibility to obtain BIM contributions from additional alliance members involved in the occupation, operation, repair, alteration and demolition of completed projects;<sup>77</sup> and
- potential for BIM to enable learning and improvement from project to project and from task to task.<sup>78</sup>

It is important to note that the BIM international standard ISO 19650<sup>79</sup> emphasises repeatedly the importance of collaboration in ways that reveal how two-party traditional contracts and bolted on two-party BIM protocols have fallen far behind the needs of the industry. For example, only a multiparty instrument such as FAC-1, PPC2000 or Consensus Docs can embody the ISO 19650 requirements for:

- an ‘overall asset or project risk assessment, so that the nature of the information



delivery risks, their consequences and likelihood of occurring are understood, communicated and managed’;<sup>80</sup> and

- a BIM ‘federation strategy’ that is agreed collaboratively and that explains in detail how BIM ‘information containers’ relate to each other, how they connect the delivery and operation phases of an asset and how they are updated as new task teams are appointed.<sup>81</sup>

The global transformative potential of MMC and BIM and the terrible global reach of Covid-19 both underline the value of collaborative contracts that cross legal boundaries in order to ‘rewire the contractual framework’ in line with the McKinsey recommendations. For example, FAC-1 includes no express English law provisions and has already been successfully translated and adapted for use in numerous civil law jurisdictions.<sup>82</sup>

Clients and teams worldwide have a unique opportunity to ensure that the recovery from the impact of Covid-19 is accompanied by a fundamental rethink of prevailing procurement and contracting practices. For example, in May 2020 the UK Construction Leadership Council published a ‘Roadmap to Recovery’, with strategic priorities that include increased prosperity, decarbonisation, modernisation through digital and manufacturing technologies, and delivery of better, safer buildings. The three phases of the Roadmap to Recovery are:

- ‘Restart’: increase output, maximise employment and minimise disruption over a period of 3 months;
- ‘Reset’: drive demand, increase productivity, strengthen capability in the supply chain, over a period of 3 to 12 months; and
- ‘Reinvent’: transform the industry, deliver better value, collaboration and partnership, over a period of 12 to 24 months.<sup>83</sup>

It is essential that the reinvention phase of a roadmap to recovery in every jurisdiction takes full advantage of the collaborative tools and supporting evidence that are available through published contract forms such as FAC-1. This will enable clients and their construction teams to embed their mutual commitment to systems of timely planning, data exchange, integration and incentivisation that are proven to deliver better value and to underpin effective risk management.

## Notes

- 1 For the full guidance see [www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency](http://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency) accessed 11 June 2020.
- 2 For the full proceedings of this webinar see [www.youtube.com/watch?v=L0nXcwuspOw&feature=emb\\_logo](https://www.youtube.com/watch?v=L0nXcwuspOw&feature=emb_logo) accessed 11 June 2020.
- 3 These guidelines were reported by Mathias Fabich of the Porr Group to a June 2020 meeting of the Transnational Alliancing Group, a forum established by the King’s College London Centre of Construction Law and bringing together leading construction lawyers and professional bodies in twelve jurisdictions.
- 4 As made clear in reports such as H Banwell, *The placing and management of contracts for building and engineering work* (1964); M Latham, *Constructing the Team* (1994); and Construction Leadership Council, *Procuring for Value* (2018).
- 5 Dame Judith Hackitt, *Building a Safer Future – Independent Review of Building Regulations and Fire Safety: Final Report* (May 2018) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/707785/Building\\_a\\_Safer\\_Future\\_-\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/707785/Building_a_Safer_Future_-_web.pdf) accessed 11 June 2020.



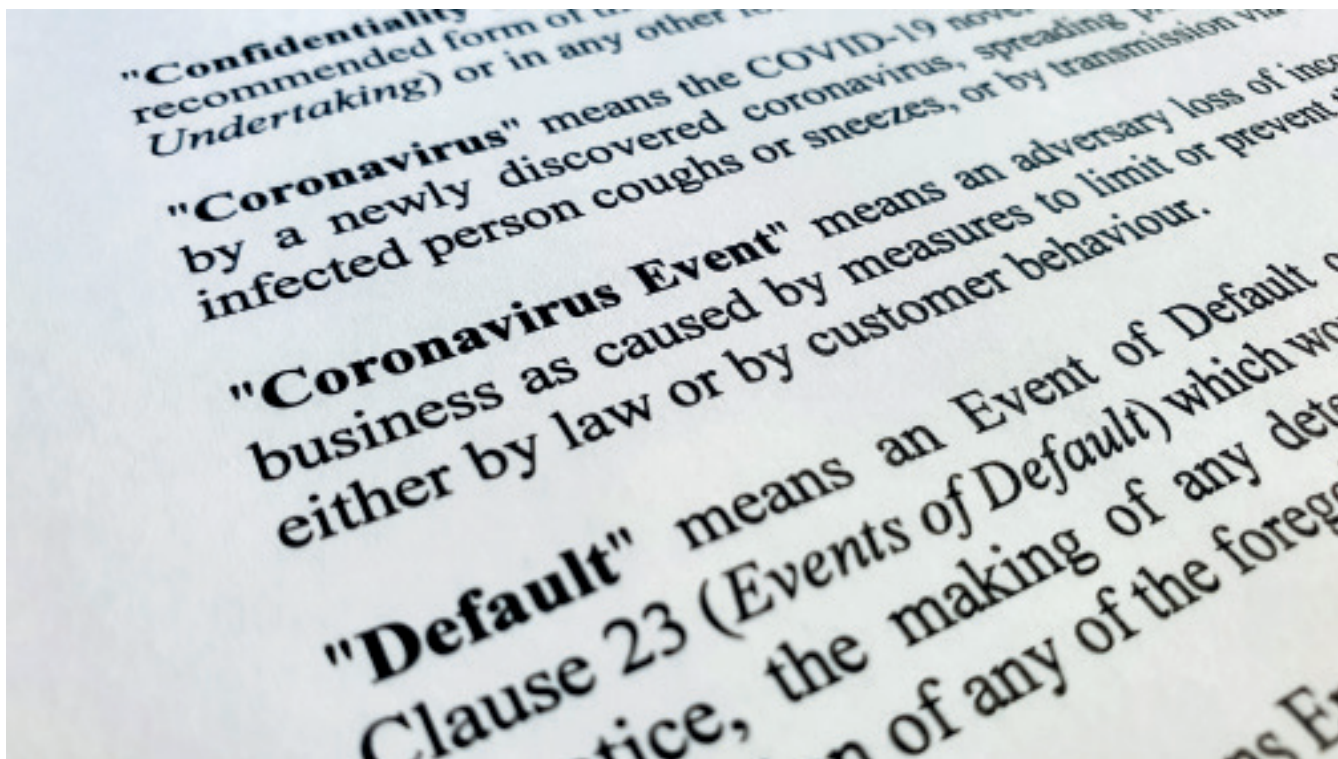
- 6 Mark Farmer, *Modernise or Die* (2016).
- 7 Few English court cases have found consultants to be liable for the failings of a recommended approach to procurement, although there are some notable exceptions such as *Plymouth and south West Cooperative Society v Architecture Structure and Management* [2006] EWHC 5 (TCC).
- 8 McKinsey Global Institute, *Reinventing Construction Through a Productivity Revolution* (2017).
- 9 Dr David Hancock, *Tame, Messy and Wicked Risk Leadership* (2010).
- 10 ISO 44001 'Collaborative business relationship management systems – requirements and framework' (2017).
- 11 NEC4 Engineering and Construction Contract (2017).
- 12 PPC2000 Project Partnering Contract (2013).
- 13 NEC4 cl 15.1.
- 14 NEC4 cl 15.3.
- 15 *10th Annual Global Construction Disputes Report: Collaborating to achieve project excellence* Arcadis (2020) [www.arcadis.com/en/united-kingdom/our-perspectives/2020/june/global-construction-disputes-2020](http://www.arcadis.com/en/united-kingdom/our-perspectives/2020/june/global-construction-disputes-2020) accessed 11 June 2020.
- 16 D Mosey, *Collaborative Construction Procurement and Improved Value* (2019) s 18.10 case study.
- 17 *Ibid.*
- 18 *Ibid.*
- 19 The FIDIC Second Edition 2017 introduced early warning at cl 8.4 but with no related provisions for a risk register or a forum through which to consult on an early warning and to agree appropriate actions.
- 20 TPC Term Partnering Contract (2005) and TAC-I Term Alliance Contract (2016).
- 21 D Mosey, 'Intelligent risk management in response to COVID-19' (LinkedIn, 3 April 2020) [www.linkedin.com/pulse/intelligent-risk-management-](http://www.linkedin.com/pulse/intelligent-risk-management-)
- 22 As reviewed in detail in D Mosey, 'Good Faith and English Construction Law' (2015) *International Construction Law Review* 34(4); and in S Jackson and B Fuchs, 'Good Faith: An Anglo-German Comparison' (2015) *International Construction Law Review* 32 (4).
- 23 *Costain Ltd v Tarmac Holdings Ltd* [2017] EWHC 319 (TCC), para [123], [2017] 2 All ER (Comm) 645, [2017] 1 Lloyd's Rep 331; by reference to NEC cl 10.1, requiring the parties to act 'in a spirit of mutual trust and cooperation'.
- 24 *TSG Building Services v South Anglia Housing* [2014] EWHC 2061 (TCC).
- 25 O E Williamson, 'Transaction – cost economics: the governance of contractual relations' (1979) *Journal of Law & Economics* 22 (2), 233.
- 26 *Ibid.*
- 27 P Milgrom and J Roberts, *Economics Organisation and Management* (1992).
- 28 I R Macneil, 'Economic Analysis of Contractual Relations – its Shortfalls and the Need for a "Rich Classificatory Apparatus"' (1981) *North Western University Law Review* 75(6).
- 29 H Collins, 'Is a Relational Contract a Legal Concept?' *Contracts in Commercial Law* (2016).
- 30 I R Macneil, 'The Many Futures of Contracts' [1974] *Southern California Law Review* 47.
- 31 *Ibid.*
- 32 *Ibid.*
- 33 See also below regarding the system of 'supply chain collaboration'.
- 34 In *Alstom Signalling Ltd v Jarvis Facilities Ltd* [2004] EWHC 1232 (TCC) where Mr Recorder Reese QC held that: 'Neither party could thwart the agreement by refusing to negotiate in good faith and/or by refusing to allow an Adjudicator or a TCC Judge to resolve the matter.'



- 35 Lord Justice Lloyd in *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601 (CA).
- 36 A contract subtype that was not expressly recognised by Williamson or Macneil but which emerges from King's College London research. This subtype was first identified by D Mosey, 'The origins and purposes of the FAC-1 Framework Alliance Contract' (2017) *International Construction Law Review* 34(4).
- 37 See n 16 above, s 8.5, 8.6 and 8.7.
- 38 *Ibid.*, s 8.5.
- 39 *Ibid.*
- 40 Arup Project Management, *Office of Government Commerce, Partnering Contract Review Report* (25 September 2008) [http://ppc2000.co.uk/wp-content/uploads/2016/12/partnering\\_contract\\_review.pdf](http://ppc2000.co.uk/wp-content/uploads/2016/12/partnering_contract_review.pdf) accessed 12 June 2020.
- 41 PPC2000 (2013) cl 8.
- 42 PPC2000 (2013) cl 10.
- 43 PPC2000 (2013) cls 8, 12, 14 and 15.
- 44 In this respect PPC2000 (2013) is also a relational contract in that it provides for certain matters to be subject to unanimous approvals by a 'Core Group', acting through a quorum of those members who attend the meeting (PPC2000 (2013) cl 3.6), and in that proceeding to construction requires all team members to sign a 'Commencement Agreement' (PPC2000 (2013) cl 15 and Appendix 3 pt 2).
- 45 D Mosey, *Project Procurement and Delivery Guidance: Using Two Stage Open Book and Supply Chain Collaboration* (King's College London, HMSO 2014) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/325014/Two\\_Stage\\_Open\\_Book\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/325014/Two_Stage_Open_Book_Guidance.pdf) accessed 11 June 2020.
- 46 *Guide to the ACA Project Partnering Contracts PPC2000 and SPC2000* (2003).
- 47 See n 16 above, s 18.5.
- 48 *Ibid.*, case study.
- 49 *Ibid.*
- 50 *Ibid.*
- 51 For European public sector clients, framework procedures are outlined in Reg 33 of the Public Contracts Regs 2015 or their equivalent. By setting out the rules governing the award of project contracts, a framework contract clarifies rights and obligations that may otherwise be implied but open to dispute.
- 52 FAC-1 Framework Alliance Contract (2016).
- 53 TAC-1 Term Alliance Contract (2016).
- 54 Cls 2.4 and 6 of FAC-1 (2016) and TAC-1 (2016). The prospect of a significant workflow is a significant collaborative incentive that should motivate the parties to seek improvements in advance of and separate from the award of specific project contracts.
- 55 Cls 2.5, 2.6 and 6.1, and Sch 2, of FAC-1 (2016) and TAC-1 (2016).
- 56 Cls 2.1, 2.2, 2.3 and 14.2, and Sch 1, of FAC-1 (2016) and TAC-1 (2016). Measurement of improved value across the alliance as a whole, linked to its continuation or extension or to other agreed incentives, should motivate the parties to share the feedback necessary to agree these improvements.
- 57 Cls 9.3 and 9.4, and Sch 3, of FAC-1 (2016) and TAC-1 (2016).
- 58 See n 45 above.
- 59 Cl 6.3 of FAC-1 (2016) and TAC-1 (2016).
- 60 *Off-site manufacture for construction: Building for change* House of Lords Science and Technology Select Committee (19 July 2018) <https://publications.parliament.uk/pa/ld201719/ldselect/ldscitech/169/169.pdf> accessed 11 June 2020.
- 61 See n 16 above, Introductory review.
- 62 See case study at <http://allianceforms.co.uk/news-and-users> accessed 12 June 2020.
- 63 See n 16 above, s 10.10, case study.
- 64 Construction Industry Council, *A Report on our Digital Future* (2014).
- 65 *Ibid.*
- 66 Strategic Forum for Australasian Building and Construction Industry, as referred to in Centre of Construction Law and Dispute Resolution, *Enabling BIM Through Procurement and Contracts* (King's College London, 2016) [www.kcl.ac.uk/law/research/centres/construction/enabling-bim/ebimtpac-form](http://www.kcl.ac.uk/law/research/centres/construction/enabling-bim/ebimtpac-form) accessed 11 June 2020.
- 67 ConsensusDocs 301 BIM Addendum (2016).
- 68 See n 66 above, *Enabling BIM*.
- 69 For example, in UK Government and Constructing Excellence case studies at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/325950/Cookham\\_Wood\\_case\\_study\\_CE\\_format\\_130614.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/325950/Cookham_Wood_case_study_CE_format_130614.pdf) accessed 11 June 2020; and [https://constructingexcellence.org.uk/wp-content/uploads/2015/12/Trial-Projects-North-Wales-Prison-Case-Study\\_Final.pdf](https://constructingexcellence.org.uk/wp-content/uploads/2015/12/Trial-Projects-North-Wales-Prison-Case-Study_Final.pdf) accessed 11 June 2020.
- 70 FAC-1 (2016) multiparty structure, Sch 1 *Objectives* and cl 13 confidentiality.
- 71 FAC-1 (2016) cl 1.9.3 communications and Sch 5 *Template Project Documents*.
- 72 FAC-1 (2016) Sch 2 *Timetable* and cl 6 *Alliance Activities*.
- 73 FAC-1 (2016) multiparty structure, cl 1.11 and Appendix 2 *Joining Agreement*.
- 74 FAC-1 (2016) cl 6.3 *Supply Chain Collaboration*.
- 75 FAC-1 (2016) cl 11.
- 76 FAC-1 (2016) cls 1.6, 1.7, 1.8 and 3.
- 77 FAC-1 (2016) cl 1.11 and Appendix 2 *Joining Agreement* and recognition of *Operation* as a feature of *Improved Value*.
- 78 FAC-1 (2016) Sch 1 *Success Measures* and *Targets*.
- 79 ISO 19650 'Organisation and digitalisation about buildings and civil engineering works, including BIM' (2018).
- 80 ISO 19650-1 cl 6.3.1.
- 81 ISO 19650-1 cl 10.4.
- 82 FAC-1 (2016) has been translated into Bulgarian, German, Italian, Portuguese (in Brazil), Russian and Spanish (in Chile, Peru and Spain) with amendments for use in those jurisdictions. See [allianceforms.co.uk](http://allianceforms.co.uk).
- 83 Construction Leadership Council, *Roadmap to Recovery: An Industry Recovery Plan for the UK Construction Sector* (1 June 2020) [www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/06/CLC-Roadmap-to-Recovery-01.06.20.pdf](http://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/06/CLC-Roadmap-to-Recovery-01.06.20.pdf) accessed 11 June 2020.

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## Covid-19 and FIDIC contracts: protections and entitlements

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Covid-19 has had huge consequences around the world and unfortunately this looks set to continue. In this article we consider the protection and entitlements, for force majeure and otherwise, that may be available to parties under FIDIC contracts for the pandemic and its consequences. We focus on the FIDIC 1999 forms of contract<sup>1</sup> but briefly consider differences in the FIDIC 2017 forms.<sup>2</sup> We also consider the role that applicable laws may play and we highlight what parties should be aware of as the situation continues to evolve going forward.

### Force majeure under FIDIC 1999

Under the FIDIC 1999 forms, if either Party is prevented from performance of its obligations by force majeure (FM) then, subject to giving notice, it may be excused performance of those obligations. The Contractor may also be entitled to an extension of time and Cost.

### Definition of FM

Clause 19.1 contains a definition of FM. It is 'an exceptional event or circumstance (a) which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not

reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party.’ For the definition to be met, these five criteria (‘exceptional’ plus the criteria (a) to (d)) must be satisfied.

Clause 19.1(i) to (v) contains a list of example events or circumstances that, if they otherwise satisfy the definition, could constitute FM. If an event does not appear on the list, this does not mean that it may not otherwise satisfy the definition. The list does not include ‘epidemic’ or ‘pandemic’ but it is likely that the Covid-19 pandemic and many of its consequences will otherwise satisfy the definition of FM.<sup>3</sup>

#### *Protection that may be available to the Employer for FM*

If the Employer is prevented from performing any of its obligations by FM it may, subject to giving notice, be excused performance of these obligations.

The key Employer obligation that may be prevented because of Covid-19 and its consequences is the obligation to give the Contractor access to and possession of the Site (Clause 2.1). This prevention may occur, for example, where governments have imposed Site closures to prevent spread of the virus.<sup>4</sup> Other obligations that might be prevented include the provision of free issue materials or Employer’s Equipment, the obtaining of licences or approvals, co-operation and the obligations which the Engineer has under the Contract. If the Engineer or its personnel are unable to supervise the Works, progress will come to a halt.

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*The list does not include ‘epidemic’ or ‘pandemic’ but it is likely that the Covid-19 pandemic and many of its consequences will otherwise satisfy the definition of FM.*

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If an Employer is prevented from performing any of its obligations by FM and wishes to be excused performance, it should give notice under Clause 19.2. This notice should specify the event or circumstances constituting the FM and the obligations whose performance are or will be prevented. It should be given within 14 days after the Employer became aware, or should have become aware, of the relevant event or circumstance constituting FM.

As a result of giving the Clause 19.2 notice, the Employer is excused performance of the prevented obligations for as long as the FM prevents it from performing them. However, performance by the Employer of its payment obligations is not excused.

In principle, the Employer should give notice under Clause 19.2 to prevent its non-performance being a breach of contract. However, this notice will constitute an admission and an assertion by the Employer that it is prevented from performing an obligation that otherwise it should be performing. Therefore, the Employer should only give this notice if it is certain that FM exists and is preventing it from performing its obligations in an important way.

The Employer should be aware that once FM has been notified under Clause 19.2, the door is open to a potential termination of the Contract under Clause 19.6. This provides that either Party may terminate the Contract if the execution of substantially all the Works in progress is prevented for a continuous period of 84 days, or for multiple periods which total more than 140 days, by reason of FM in respect of which a Clause 19.2 notice has been given. It is possible that some Contractors will take this opportunity to terminate the Contract if, for example, prior to Covid-19 the Contract had become loss-making.

If the Employer gives notice under Clause 19.2, it is required under Clause 19.3 to use all reasonable endeavours to minimise delay in the performance of the Contract as a result of the FM and to give notice to the Contractor when it ceases to be affected by the FM.

#### *Protection that may be available to the Contractor for FM*

Just like the Employer, if the Contractor is prevented from performing any of its obligations by FM it may, subject to giving notice, be excused performance of these obligations.

Key Contractor obligations that may be prevented because of Covid-19 and its consequences include the Contractor’s obligation to proceed with the Works with due expedition and without delay (Clause 8.1) and to complete the Works within the Time for Completion (Clause 8.2). In some countries where lockdowns are imposed, the Contractor’s Personnel may be prevented from travel to and work at the Site and Goods may be prevented from reaching Site.

If a Contractor is prevented from performing any of its obligations by FM and wishes to be excused performance it should, like the Employer, give notice under Clause 19.2.

As aforementioned, this notice opens the door for a potential termination under clause 19.6 and, like the Employer, the Contractor is required under clause 19.3 to minimise delay and to give notice when it ceases to be affected by the FM.

## *Extension of time and Cost for FM*

Under Clause 19.4(a), if the Contractor is prevented from performing obligations by FM for which it has given notice under Clause 19.2, and suffers delay by reason of the notified by FM it may, subject to giving notice under Clause 20.1, be entitled to an extension of time.

Similarly, under Clause 19.4(b), if the Contractor is prevented from performing obligations by FM for which it has given notice under Clause 19.2, and incurs Cost by reason of the notified FM it may, subject to giving notice under Clause 20.1, be entitled to payment of this Cost. This entitlement only arises if the FM is an event or circumstance of the kind listed in Clauses 19.1(i) to (iv) and, for some of these events, only if they occur in the 'Country'.<sup>5</sup>

The events listed in clauses 19.1(i) to (iv) can loosely be described as 'man-made' (war, rebellion, riot, etc), though some (ionising radiation for example) are not necessarily. 'Natural catastrophes' (which appear in Clause 19.1(v)) are not compensated with Cost. Parties signing up to FIDIC contracts must be aware of this risk allocation.

Covid-19 does not fall within the events listed in Clauses 19.1(i) to (iv) since neither epidemic nor pandemic feature. If anything, Covid-19 would most likely be categorised as a 'natural catastrophe', for which Cost is not compensated.

Accordingly, it seems that the Contractor will only be entitled to Cost for Covid-19 if the consequences of the pandemic fall within the limited circumstances listed in Clauses 19.1(i) to (iv). So, for example, if a consequence of the pandemic is the assumption of military power<sup>6</sup> to enforce a lockdown or riots<sup>7</sup> in case of dire shortage of food or medicine, the Contractor may be entitled to Cost. Contractors may try to argue that a lockdown equates to 'lockout',<sup>8</sup> although as this appears by 'strike', it was

presumably intended to refer to labour conflict and (it is suggested) the list would need to be given a broad interpretation for this argument to succeed.

The limited circumstances in which Cost is compensated may seem 'unfair' to the Contractor in the context of Covid-19. Some DABs or arbitral tribunals may, in due course, sympathise with the Contractor's position and may feel encouraged to do so by

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*what may be 'fair' in a given situation may not reflect the parties' agreed allocation of risk*

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guidance issued by some governments.<sup>9</sup> However, what may be 'fair' in a given situation may not reflect the parties' agreed allocation of risk and may raise difficult questions about the perspective from which 'fairness' is to be judged.

## **Other provisions in FIDIC 1999**

The Contractor may be entitled to time or money in respect of Covid-19 and its consequences under other provisions, even where there is no FM, or in addition to FM. Entitlement is always subject to giving notice under Clause 20.1.

These clauses are as follows.

### *Clause 8.4 (FIDIC 1999 Red and Yellow Books)*

Under this clause, the Contractor may be entitled to an extension of time if it is or will be delayed by Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions. There is no equivalent provision the FIDIC 1999 Silver Book. 'Unforeseeable' means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender. Although Covid-19 is classed by the World Health Organization as a pandemic this, it is suggested, is analogous here to an epidemic. The pandemic, or governmental actions in respect of Covid-19 including the implementation of measures to try to stop the virus spreading, are likely to cause Unforeseeable shortages in personnel or Goods.

### *Clause 8.5*

Under this clause, the Contractor may be entitled to an extension of time where it has



diligently followed procedures laid down by public authorities in the Country, but those authorities delay or disrupt the Contractor's works and this delay or disruption was Unforeseeable. This may apply to action taken by the government or authorities in the Country in respect of Covid-19 which delays or disrupts the Contractor, for example, imposing a lockdown.

#### *Clause 13.7<sup>10</sup>*

Under this clause, the Contractor may be entitled to an extension of time or Cost if the Contractor suffers delay or incurs Cost as a result of changes in the 'Laws of the Country' or changes to the interpretation of those Laws. 'Laws' is widely defined. In some countries, measures to deal with Covid-19 have been introduced under existing Laws or those existing Laws have not been interpreted any differently than before. In these cases, clause 13.7 may not apply. In other countries, new Laws have been introduced to deal with Covid-19, so clause 13.7 may apply.

### **FIDIC 2017**

#### *Exceptional Events*

In the 2017 forms, FIDIC abandons the term 'Force Majeure', possibly because it has a defined meaning in some civil law systems, and instead uses the term 'Exceptional Events', which are dealt with in Clause 18. As a result, the requirement for the event or circumstance to be 'exceptional' no longer features in the definition. Strikes and lockouts are separated from the 'riot' item in the list of events in Clause 18.1. As in the 1999 forms,

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*In other jurisdictions, governments have declared that the pandemic is an FM event for all contracts.*

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the events on this list may give entitlement to Cost except for the last item which is still 'natural catastrophes'. In the 2017 forms, if the Exceptional Event has a continuing effect, the affected Party must give notice under Clause 18.2 describing the effect every 28 days after giving the first notice.

#### *Advance warning*

Clause 8.4 contains a new requirement for a Party or the Engineer to give advance warning about 'any known or probable future events or circumstances' that may adversely affect (essentially) the outcome of the Works. This obligation to give advance notice is likely to occur before the moment from which time starts running for the Clause 18.2 notice of an Exceptional Event.

#### *Unforeseeable shortages*

Clause 8.5 (Red and Yellow Books) gives the Contractor entitlement to an extension of time in case of Unforeseeable shortages in the availability of personnel or Goods or Employer-Supplied Materials caused by epidemic or governmental actions. In the Silver Book, the equivalent entitlement only arises in case of an Unforeseeable shortage of Employer-Supplied Materials.

#### *Changes in Laws*

Clause 13.6<sup>11</sup> contains a new provision that if any 'adjustment to the execution of the Works' becomes necessary as a result of any change in Laws, the Contractor or Engineer may give Notice to the other and the Engineer shall instruct a Variation or ask for a proposal for a Variation. This provision may be relevant if a change in Laws imposes, for example, social distancing or alternative working hours, which may result in an adjustment to the execution of the Works.

#### **Applicable laws**

Parties should keep in mind that, in addition to the Contract, the applicable laws may give protection in respect of Covid-19 and its consequences or may give the Contractor entitlement to time or cost. In some jurisdictions, legislation has been enacted specifically to give parties relief from the consequences of non-performance of contracts because of the pandemic.<sup>12</sup> In other jurisdictions, governments have declared that the pandemic is an FM event for all contracts.<sup>13</sup> Parties to FIDIC contracts should ensure that they are informed of such measures and should be aware of potential conflicts between this sort of legislation or decree and the provisions of their contracts which may otherwise apply.

## Evolving situation

The consequences of Covid-19 are evolving. Some countries remain in full lockdown while others are slowly easing out of lockdown. Further lockdowns remain a possibility in case of future spikes of the virus.

It is possible that some FIDIC contracts will be terminated because of continued prevention (Clause 19.6) or that parties may be discharged from further performance because of impossibility (Clause 19.7). As lockdowns ease, parties may no longer be prevented from performing their obligations; instead, the Works may be more costly, delayed and less efficient, especially where supply chains are involved. Claims for delay, disruption and additional cost as a result of the pandemic therefore seem likely. It is important that parties maintain full and accurate records of prevention, delays and disruption that may have been caused as a result of the pandemic.

Parties may be trying to cooperate and to act as responsibly and fairly as they can in the present conditions. This may be required by law in some jurisdictions, for example, those that require parties to act in good faith. In other jurisdictions, governments may intervene to introduce measures requiring cooperation where the pandemic is concerned or they may issue guidance notes to encourage this.<sup>14</sup> FIDIC has commended all members of the construction community to keep in mind that FIDIC promotes (among other things) cooperation and trust between contracting parties.<sup>15</sup>

## Conclusion

Although applicable laws or government interventions as a result of Covid-19 may affect FIDIC contracts throughout the world, in many cases the parties' strict contractual rights and obligations, which reflect their earlier decisions regarding risk allocation, are likely to remain in place. The Covid-19 situation is evolving and giving rise to different factual and legal scenarios. It is therefore important that parties undertake careful

periodic reviews of their contracts to ensure that they are fully aware of their (evolving) rights and obligations and continue to give the required notices to protect their positions as appropriate.

### Notes

- 1 Yellow, Red and Silver Books.
- 2 *Ibid.*
- 3 That said, there is an argument that the pandemic itself (as opposed to its consequences) is not 'exceptional' because pandemic flus have occurred before.
- 4 Scotland, eg.
- 5 'Country' is defined as the country in which the Site, or most of it, is located where the Permanent Works are to be executed.
- 6 'Military [...] power' is listed in cl 19.1(ii). The English version of the FIDIC forms refers to 'military or usurped power' whereas the Spanish version refers to '*usurpación del poder o asunción militar de éste*' (roughly 'usurpation of power or military assumption of power') and the French version refers to '*putsch militaire ou usurpation de pouvoir*' (roughly 'military putsch or usurpation of power'). So, whereas the English version covers a military or other coup d'état as well as the use of military power by the incumbent government, the Spanish and French versions do not seem to allow for the latter.
- 7 'Riot' is listed in cl 19.1(iii).
- 8 'Lockout' is listed in cl 19.1(iii).
- 9 For example, on 7 May 2020 the UK government published non-statutory guidance to parties to contracts affected by the Covid-19 emergency entitled 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency'. At para 15, this 'strongly encourages', among other things, 'responsible and fair behaviour' in relation to 'requesting, and allowing, extensions, substitute or alternative performance and compensation, including compensation for increased cost or additional performance'.
- 10 Arguably cl 13.7 requires notice to be given under that clause as well as a cl 20.1 notice.
- 11 The equivalent of cl 13.7 in the 1999 forms.
- 12 For example, in Singapore the Covid-19 (Temporary Measures) Act 2020.
- 13 For example, in Iraq.
- 14 See n 9 above, eg.
- 15 See FIDIC, 'COVID-19 guidance memorandum to users of FIDIC standard forms of works contract' (April 2020).

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# A catalyst for change?

**T**he construction industry has long been renowned for its contentious nature. In the UK, going back to the *Constructing the Team* report by Sir Michael Latham in July 1994,<sup>1</sup> there were repeated references to adversarial attitudes within the construction industry. Sir John Egan in his *Rethinking Construction* report in 1998<sup>2</sup> referred to the 'strongly ingrained adversarial culture' within the construction industry.

The Latham report led to the advent of statutory adjudication in the UK. The industry embraced this new, fast-track form of dispute resolution and this quickly led to a transformation in the way disputes were dealt with – earlier, quicker and cheaper – but still very much a dispute culture.

One of the issues flagged by Sir Michael was the impact of economic factors on the construction industry:

'Many of the industry's problems have been worsened by economic difficulties [...] If the economy is weak, the industry will suffer, and its participants will try to

alleviate that suffering at the expense of others (including clients). It is not easy to create teamwork in construction when everyone is struggling to avoid losses. If the economy is going wrong, little will go right in the construction industry.'

The impact of Covid-19 on the world's economy has been unprecedented with no area unaffected. In May 2020, the Asian Development Bank predicted the impact of the pandemic could cost the global economy between \$5.8tn and \$8.8tn, equating to 6.4% –9.7% of the world's economic output.<sup>3</sup> In the first quarter of 2020, Japan had a 3.4% fall in GDP,<sup>4</sup> Germany a 2.2% contraction<sup>5</sup> and France 5.5%.<sup>6</sup> In the UK, the Office for National Statistics reported in June that the economy has experienced a significant shock since the start of the pandemic with GDP falling dramatically and record falls in output for production, services and construction. The monthly decline in GDP in April 2020 of 20.4% is three times greater than the fall

experienced during the 2008–2009 global financial crisis, where in the 13 months from February 2008 to March 2009, GDP contracted 6.9%.<sup>7</sup> Taking Sir Michael Latham’s comment in that context indicates there is a perfect storm brewing for the construction industry.

There are concerns in the context of commercial contracts about the ‘risk of a deluge of litigation and arbitration placing a strain on the system of international dispute resolution, and reducing the prospect of more constructive solutions and increasing the prospect of uncertainty of outcome’.<sup>8</sup>

That concern is very much to the fore in construction. Both government and industry bodies in the UK have spoken out to encourage responsible contractual behaviour, acting fairly and reasonably and collaboration between contracting parties.

The UK Cabinet Office Guidance Note on responsible contractual behaviour in the performance and enforcement of contracts impacted by Covid-19<sup>9</sup> is a request from government for all parties to resolve all contractual issues arising as a result of Covid-19. In particular, parties are encouraged to act fairly and reasonably when administering contracts and agreeing variations.

The Construction Leadership Council issued ‘CLC Covid-19 Contractual Best Practice Guidance’.<sup>10</sup> It encourages parties to recognise the unique circumstances and asks that industry works together to support the long-term health of the sector by constructively resolving all contractual disputes arising from the pandemic. It suggests that, notwithstanding contractual provisions, Employers and Suppliers should seek to take a collaborative approach towards successful project delivery and discuss whether an extension of time can be granted and any additional costs shared in any event, in light of the unforeseeable and unprecedented nature of Covid-19.

The Scottish government’s ‘Coronavirus (COVID-19): impact on construction contracts: CPN 1/2020’<sup>11</sup> is on a similar theme. It suggests that engagement should progress ‘honestly, openly and constructively, recognising the mutual need of clients and contractors to pragmatically address issues relating to COVID-19’. It recommends that the situation is not used as an opportunity for one party to gain from the loss of another party. The overriding objective behind the guidance is to help to ensure that the economy retains a viable construction sector and that

businesses emerge ready to resume work on existing projects and new opportunities.

The Royal Incorporation of Chartered Surveyors (RICS) has also noted the financial cost of disputes in the construction industry and the harm caused to business relationships, brand reputations and delivery of projects by conflict. It is promoting the Conflict Avoidance Pledge.<sup>12</sup> Signatories to the pledge affirm their belief in collaborative working and use of early intervention techniques throughout the supply chain to try to resolve

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*there is a perfect storm brewing for the construction industry.*

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differences of opinion before they escalate into disputes. The pledge emphasises the early identification of potential issues and steps being taken to avoid escalation including:

- incorporating conflict avoidance mechanisms into projects with the aim of identifying, controlling and managing potential conflict, while preventing the need for formal, adversarial dispute resolution procedures;
- working proactively to avoid conflict and to facilitate early resolution of potential disputes;
- early identification of potential disputes and use of conflict avoidance measures;
- promoting the value of collaborative working to prevent issues developing into disputes; and
- working with others in the industry to identify, promote and use conflict avoidance mechanisms.

There has been a trend over many years for more collaborative provisions in contracts. The New Engineering Contract (NEC) was the frontrunner with this and its Clause 10.1 ‘mutual trust and co-operation’ provision. This found favour with Sir Michael, who recommended that: ‘The most effective form of contract in modern conditions should include: A specific duty for all parties to deal fairly with each other, and with their subcontractors, specialists and suppliers, in an atmosphere of mutual cooperation.’ This has been followed by similar provisions in other commonly used standard form contracts.

The latest editions of the FIDIC, NEC4 and JCT forms each contain escalating dispute resolution procedures. It is notable that even the language of the clauses has changed emphasis towards resolution. The NEC4 dispute provisions are contained under the heading ‘Resolving and Avoiding Disputes’



and JCT 2016 'Settlement of Disputes' with only FIDIC 2017 sticking to 'Disputes and Arbitration', though it has included a change in language in its dispute board provisions to Dispute Avoidance/Adjudication Board (DAAB) and in its Guidance notes, records that '[it] is generally accepted that construction projects depend for their success on the avoidance of Disputes between the Employer and the Contractor and, if Disputes do arise, the timely resolution of such Disputes'.

In the 2018 International Arbitration Survey,<sup>13</sup> the increasing use of escalation clauses featured. The majority of those interviewed considered that escalation clauses are beneficial to the overall process of resolving a dispute.

However, it is clear that guidance from government and industry bodies and contractual terms on their own will not deter claims if parties are intent on pursuing this route. The reality is that sometimes, against the background of an often fiercely negotiated contractual structure which allocates parties' rights and obligations and risk, it is difficult for parties to step aside from that to reach a compromise. Sometimes parties find themselves in a position where there is no option but to resort to formal dispute resolution because a matter of principle or a matter which could set a precedent elsewhere is at stake, the financial implications are simply too high or the gulf between them is too wide.

Against that background, it may be said that continuing to do things the way they have always been done contractually is unlikely to bring about different results. Even pre-Covid, alternative contractual mechanisms were starting to attract more interest so might it be that these increased calls from government and industry now start to prompt change?

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*The one thing for sure is that massive change is afoot and the pace of change is only likely to accelerate.*

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Alliancing as a concept has been used to good effect for procurement of infrastructure in Australia, Finland and New Zealand and is gaining real traction in other countries, including Germany. That collaborative model based on principles of good faith, trust, openness and collaboration is predicted by some to start to become more mainstream

given the need for this is likely to be driven by technological developments, such as building information management (BIM), that require more collaborative working between parties for the full benefits to be obtained. It is by no means yet mainstream, but there is a clear direction of travel in favour of this form of contracting that is anticipated to increase over the short to medium term.

The Institution of Civil Engineers (ICE) Project 13<sup>14</sup> is another example. It arose from a perception that 'the transactional model for delivering major infrastructure projects and programmes is broken. It prevents efficient delivery, prohibits innovation and therefore fails to provide the high-performing infrastructure networks that businesses and the public require'. Project 13 promotes use of the 'enterprise model' for infrastructure delivery meaning a long-term relationship between owners, investors, integrators, advisers and suppliers whereby they are commercially incentivised to deliver better outcomes for users from infrastructure investment.

However, this will take a mindset shift and, for that, education is crucial. Availability of labour remains a challenge in the construction sector. However, the need for a skilled labour force goes far beyond traditional technical skills but will also involve both softer skills – leadership, team-working, innovation and collaboration – and technological skills – people who understand how to use the avalanche of new technology to the benefit of the industry. Leadership from those involved in procurement of infrastructure is also required.

It is clear that there is a blend of complex issues at play with competing priorities and interests among stakeholders at all levels of the supply chain. However, the factors at play point towards an industry that is ripe for disruption. The one thing for sure is that massive change is afoot and the pace of change is only likely to accelerate.

A recently published Scottish Government paper: *Under Construction: Building the future of the sector in Scotland*<sup>15</sup> concluded that: 'Only with leadership, collaboration and cultural change will the construction sector be able to realise its full potential contribution to Scotland's economy'; and 'Without such leadership, enduring challenges around procurement, access to finance, innovation and the sector's cultural image continue to act as barriers to progress'.

The UK Infrastructure and Projects Authority's 'Analysis of the National Infrastructure and Construction Procurement Pipeline 2020/21' from June 2020,<sup>16</sup> which sets out plans for up to £37bn of infrastructure spending, includes the statement:

'Government is committed to working collaboratively with industry to ensure that it emerges from this crisis with the capability and capacity required to support the economic rebuilding that will be necessary. This collaboration has already been demonstrated in the initial response to COVID-19, which saw government and industry working together on a number of initiatives including issuing guidance on responsible and fair contractual behaviours. As we move into recovery and renewal, we must take forward this way of working if we are to be successful in our ambition to ensure the construction industry not just survives but thrives.'

With a construction industry that, in the UK, had seen output fall by a record 18.2% in the three months to April 2020,<sup>17</sup> and which is likely to have little appetite going forward for the 'pass the parcel' model of risk allocation combined with continued low margins, these statements are to be welcomed. There is a real opportunity for government to set the tone and lead the change towards a more collaborative way of working.

Given the myriad other challenges that are likely to be faced as a result of Covid-19 and the global economic shockwave it has caused, the construction industry is ripe for change. Perhaps, if Covid-19 acts as a catalyst for this change, then perhaps we may yet see a positive legacy for the construction industry from this situation.

## Notes

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## Is it safe for construction sites to stay open?

**W**hen everything is going online and staff are being asked to work from home, one can still hear construction activities going ahead in several sites in central London and beyond. This article aims to explore the arguments for and against keeping construction sites open during the London lockdown due to the Covid-19 pandemic. If a second wave of the virus eventuates, we may need to address these difficult questions again.

The Prime Minister and Chief Medical Officer announced that we should stay at home because of the health risks associated with community transmission of Covid-19. On construction sites, there is a real risk of transmitting the virus. Social distancing is challenging in supermarkets and even on the streets. How practical is it to apply this rule on a construction site?

The Construction Leadership Council provides recommendations that may reduce the risk of spreading the virus. For example, it suggests staggered start and finish times, removal of fingerprint scanners, staggering break times and asking the workforce to not go outside during a break. These

recommendations are useful; however, screening for temperature prior to entering site may be another important precaution that can be taken on site. The dividing question remains: how do we ensure social distancing is maintained? And if it cannot be maintained, is continuing with construction work worth the risk of spreading the virus? The risk is not only to the workers, but also their flatmates or families. If the risk can be reduced by providing medical-grade masks to workers who cannot maintain the required social distance, then perhaps the government should insist these masks are provided.

### Are construction activities needed now?

Whether all construction activities are critical is a complex question and is linked to the broader economy. At a fundamental level, construction work may not be considered as important as having food available in the supermarkets. However, at a macro-economic level, the contribution to the economy cannot be understated and there are limited activities that still need to be carried out.

For example, essential maintenance of airport runways, railways, roads and port assets are all arguably critical to keep food and medicines flowing to the nation. However, commercial construction, such as office blocks, are arguably not essential in times of crisis and neither are speculative development works. What is considered 'essential' will depend on the scope and duration of the lockdown.

Parties to a contract may be motivated to continue site works for fear of potential liquidated damages claims, which may understandably put pressure on some construction firms to carry on working, especially when there is no direction from the government to stop. If the government can stop construction works except ones that are granted a permit to proceed from local authorities, this may alleviate some of the pressure on contractors and workers from continuing to work, subject to the particular terms of the respective contracts. The German response to Covid-19 provides a good example of how to protect the economy, at least in theory, from potential floods of claims and insolvencies. The Bundestag passed the Act on Mitigating the Consequences of the Covid-19 pandemic, which provides for a temporary right to suspend performance of contracts if the company cannot pay because of Covid-19 or if payment would jeopardise the economic basis of the business entity. The UK should consider similar measures to protect small businesses in construction and also to deter contractual claims from overloading the system.

## Duty to construction workers

As most construction workers are self-employed through agencies, there is a need to make sure they are well informed of their rights. The UK government has established a job retention scheme where if an employer cannot maintain its workforce because its operations have been affected by Covid-19, the employer can furlough employees and apply for a grant to cover a portion of their usual monthly wage costs where the employer records them as being on furlough. This covers agency workers, which is definitely good news for the construction industry. However, one queries the extent to which construction workers are aware of their rights and would be working in fear of losing agency work in the near future. It should be noted that employees hired after 28 February 2020 cannot benefit from this scheme. The

other concern is about who can claim on behalf of agency workers. It is also important to inform all construction workers of their rights under the UK government's statutory sick pay scheme, which purports to cover everyone who becomes ill or has to self-isolate because of Covid-19.

## Coronavirus Act 2020

The UK enacted the Coronavirus Act 2020 to grant the government emergency powers to deal with the pandemic. The Act does not specifically mention construction or construction workers. However, under section 52, the government has a range of powers to 'prohibit or otherwise restrict events or gatherings in England' as well as powers to 'close premises in England or impose restrictions on persons entering or remaining

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*What is considered 'essential' will depend on the scope and duration of the lockdown.*

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in them' as per Schedule 22. These provisions give the government wide ranging powers. However, the mixed messages of allowing sites to be open and legislating against gatherings make it unclear if construction is exempt from section 52 and Schedule 22.

If one looks at the Health and Safety Executive for guidance, its website directs one to the government's website. The government has not made it clear if all construction sites should shut down or keep working. Further clarity is needed to help construction companies plan and adapt to the crisis.

## Conclusion

All lives are equal and construction workers need to be protected like all members of the society. The government has sweeping powers under the Coronavirus Act 2020 and should consider clarifying the contradiction between the Act and the very nature of construction activities involving the gathering of workers within close proximity.

Employment agencies and employers need to inform their staff of their rights under the coronavirus job retention scheme. The UK construction industry will be integral to the economic recovery that will follow Covid-19 and the government, through legislation, is better placed than market forces to put the brakes on collapse and claims.

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## Productivity claims: why you won't win on data alone

Lost productivity claims are not unique to the context of the Covid-19 pandemic; however, as contractors now find themselves performing their work under different conditions from those contemplated at contract formation, it may lead to an increase in contractors pursuing such claims. Documenting causation will be essential as projects move forward post Covid-19 and contractors seek compensation for productivity-related impacts resulting from altered working conditions.

**A**s the construction industry resumes work on projects that were shuttered or slowed due to the Covid-19 pandemic, accurate assessment of lost productivity impacts will be especially important. Owners and contractors will be seeking ways to progress the work

while also taking unprecedented steps to keep workers and the public safe and healthy. Social distancing, medical checks, rotating schedules and other potential mandates associated with the pandemic, as well as labour availability and supply-chain challenges, may create losses of

productivity on projects. Even in the best of times, these types of losses can be obscure, incremental and difficult to quantify. Faced with these challenges, contractors will likely expend more labour hours on the project than planned, resulting in real impacts to the bottom line. Enter the lost productivity claim.

While there are many methods to calculate damages from lost productivity, the 'Measured Mile' is widely recognised in the industry as the 'gold standard'. It is preferred over other methods because it relies on actual project labour records, is a data-intensive analysis and compares impacted versus unaffected areas on the same project. Because of its positive reputation, contractors often select the Measured Mile approach when submitting a lost productivity claim. The problem arises when a contractor believes that by simply performing a Measured Mile calculation it entitles them to recover losses.

At face value, the Measured Mile analysis is simply a calculation method. It makes no distinction between losses caused by the owner or those caused by the contractor. As such, a critical component to proving losses due to productivity impacts is the contractor's ability to establish causation. This is often the difference between a successful and unsuccessful claim.

So, what does that mean? Establishing causation is demonstrating a direct cause-and-effect link between project events and the resulting adverse impact. There are countless potential issues on any given project, caused by the owner, contractor or both. Establishing that additional labour hours are only the result of an owner-caused issue is critical to a contractor's successful claim.

Project records, such as meeting minutes, daily reports, change orders, emails, field notes and the like, are excellent sources for establishing cause-and-effect links and supporting a loss-of-productivity claim. Establishing causation is directly affected by the quality, quantity and relevance of the project records. Poor recordkeeping makes it more difficult to create a cause-and-effect link and, therefore, more difficult to create a strong claim. Keeping detailed project records is a contractor's first line of defence in protecting itself from unplanned labour costs.

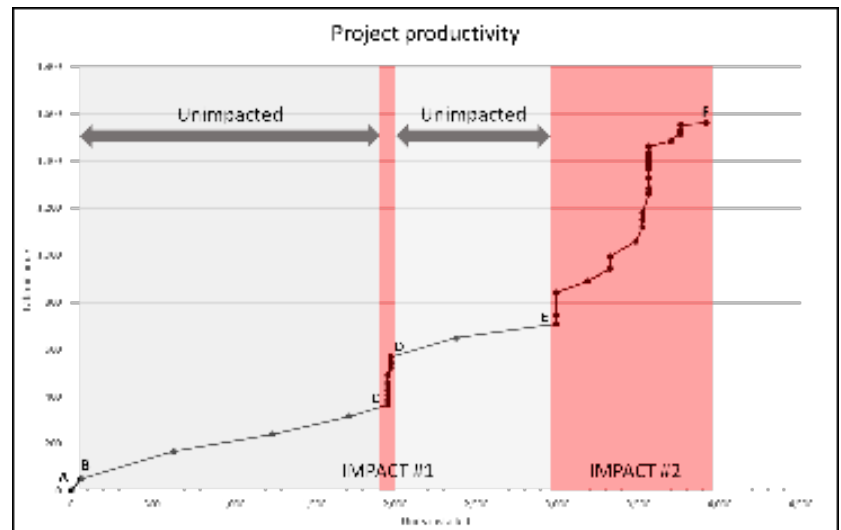
Establishing causation is essential because productivity impacts can occur for numerous reasons that are not the fault or responsibility of the owner. These reasons commonly

include insufficient estimates, poor planning or scheduling of manpower, or unreasonable contractor means and methods. Owners should rightfully be wary of contractor productivity claims that do not include a narrative and supporting documentation demonstrating claim entitlement and instead provide only a calculation accompanied by a simple list of asserted impacts. Additionally, owners should expect that the contractor evaluated and accounted for any self-inflicted impacts in its damage calculations.

To show how data may be misleading and why establishing causation is critical to a successful claim, let us examine a hypothetical project. Figure 1 shows a project's cumulative labour hours expended on the Y axis, versus cumulative units installed on the X axis. The slope of the plotted line represents the contractor's productivity (units installed per labour hour). A steeper slope indicates worse productivity (less units installed per labour hour) and a flatter slope indicates better productivity (more units installed per labour hour).

The example shows that early in the project the contractor performed work productively (B to C). Subsequently, the data shows a vertical line (C to D), indicating the contractor expended about 200 labour hours without installing much work, establishing the first period of poor productivity. After, the contractor returned to productive work between points D and E. After that productive time, the contractor experienced another period of poor productivity (marked in pink). During that second period of poor

Figure 1 – Hypothetical project productivity data plot



productivity, the contractor was affected during installation of the last approximately 1,000 units (E to F).

By looking at solely the data, it appears that the contractor's productivity was affected over more than 1,000 labour hours during the first and second periods of poor productivity (impact periods C to D and E to F). However, as discussed, data plots and calculations by themselves are insufficient to successfully be awarded compensation. The contractor must prove that impacted hours were the result of an owner-caused issue and were not self-inflicted, because the burden of proof of the claim resides with the contractor.

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*it is essential to document changed daily working conditions, owner-mandated sequencing changes and any other disturbances*

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For this example, the analyst reviewed daily records and determined that, after installation of approximately 1,800 units (point C), the contractor was unable to proceed due to design errors. Project meeting minutes fully documented the coordination efforts between the owner and the contractor to resolve those design conflicts. During the design impact period (C to D), the contractor's daily reports showed that it continued to perform work, as required by the owner, but had to do so in an inefficient, incomplete manner until the conflicts were resolved. Therefore, the project records show a direct link between the contractor's increased labour hours and the design errors.

With the causal link established, the next question is: which party is contractually responsible for the design? On a typical bid-build project the owner is responsible. In this scenario, the productivity impacts are the result of an owner-caused issue and the contractor should be compensated. However, on a design-build project the contractor would typically be responsible for the design. The contractor's additional labour hours caused by the contractor's own design errors would be non-compensable. Thus, data or calculations indicating productivity loss does not necessarily mean the contractor is entitled to recover compensation for those losses.

In Figure 1, the contractor's productivity returned to its 'unimpacted', productive performance after resolving the design issues (D to E). However, a second period of lost productivity occurred after the installation of approximately 3,000 units (E to F).

In preparing the claim, the analyst reviewed project records around the impact period and determined that the owner issued numerous unilateral change orders that altered the contractor's planned sequence of work. Daily reports and meeting minutes indicated that the altered sequence of work forced the contractor to demobilise from areas before finishing its work. Multiple demobilisations and remobilisations caused by the unilateral change orders disrupted the contractor's planned flow of work. In this example, the unilateral change orders, meeting minutes and daily reports are all records the contractor must use to establish causation.

Let us assume that instead of unilateral change orders issued by the owner, the second impact was caused by the contractor's own decision to change its installation means and methods. In this scenario, the contractor's poor planning caused the additional hours; therefore, they would be non-compensable. Although the calculation indicated that the contractor expended several hundred labour hours more than it should have, it is impossible to demonstrate merit for a claim that has not first established causation through actual project facts and records. The number of possible reasons for project impacts are simply too numerous for a contractor to assume that, because there were owner issues, those issues caused the increased labour hours.

While there are an endless number of impacts that could have been used in this hypothetical example, the conclusion would be the same: calculations and data alone cannot prove entitlement to recover costs for productivity losses. A contractor must demonstrate a direct cause-and-effect link, using project documents, to establish causation and successfully pursue its asserted damages.

As contractors work through challenges restarting projects after Covid-19, potentially working with new restrictions that differ from those assumed at the time of the bid, it is essential to document changed daily working conditions, owner-mandated sequencing changes and any other disturbances in daily reports, meeting minutes, letters and the like. These documents will aid contractors in proving productivity impacts as it comes time to settle costs for project disruption caused by the pandemic.

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## Recovering from lockdown: the pitfalls of acceleration

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**A**s the commercial world begins to emerge from lockdown, the attention of developers, owners, contractors and suppliers alike refocuses on capital projects that were put on hold. Some of those projects have drivers that require their pre-lockdown completion dates to be met, such as a set deadline (eg, major sporting events), a political driver (eg, installation of a gas supply by a certain date) or financial covenants.

These drivers may mean that stakeholders seek to complete their projects on time regardless of the impacts of lockdown. This, in turn, may lead them to consider acceleration<sup>1</sup> as a means of getting their projects back on target.

For the firms on the contracting side, the situation is just as compelling. Recently there has been commentary on the use of force

majeure and change of law contractual provisions as remedies for the delay and disruption to capital projects arising from the lockdown. Such claims may have their own difficulties when it comes to proving that the lockdown caused all of the delay or disruption experienced. This may stem from various related issues such as site closures, disruption to supply chains and regulation or welfare-imposed working procedures on reopened sites. It is particularly true for large or spread-out sites. In some scenarios the compensation available to the contractor may not cover the full losses experienced on site. For example, standard-form JCT contracts have a remedy of awarding an extension of time for force majeure but not the associated costs.

Consequently an acceleration agreement may provide the solution for all parties to



achieve their commercial objectives. However, while they may start out with good intentions, there are some common pitfalls that can make acceleration agreements unsuccessful.

### **Static acceleration agreement v dynamic project environment**

Before an acceleration agreement is made, the status (ie, the project duration and cost) of the project before the acceleration agreement needs to be established to determine and agree on the extent and cost of the accelerative measures. The parties then enter into what is often a protracted negotiation on the precise terms of the acceleration agreement. Sometimes the arrangement can be slowed down by arguments between the parties on who bears liability for the existing delay.

The problem with this is that the protracted acceleration agreement is based on a project status that is frozen in time. Meanwhile, the project progresses along the original timeline, so the status continues to change. Sometimes there may be further delays that would not be covered by the acceleration agreement.

The acceleration agreement may seek to use a 'snapshot' of the programme and a set budget. The dynamic nature of the project environment means that by the time the acceleration agreement gets made, the snapshot on which it is based may no longer be relevant or turn out to be incorrect.

Furthermore, where further delays occur after the snapshot, the contractor may not disclose their effect to ensure the acceleration agreement goes ahead. Such a scenario may mean that the new completion date is unachievable because it does not account for the further delays experienced.

### **Unrealistic acceleration programmes**

Disputes can arise as a result of delays to projects due to an unachievable acceleration milestone or programme.

Like any negotiation each party will have its own — sometimes hidden — agenda. The owner or developer may be keen on completing the project on a particular date as a result of a combination of the aforementioned drivers.

The contractor may have different motivations for entering into such an agreement. For example, the contractor may be aware of concurrent delay for which it is culpable and consequently sees the acceleration agreement as an opportunity for a new deal.

Either way, if the parties proceed without first establishing whether the acceleration timeline can actually be achieved, the new completion date may be unachievable from the start. This is because the acceleration agreement will be based on an uncertain timeline. Similarly, as the acceleration timeline is uncertain, progress reporting against it would also be unclear.

To ensure achievability, an acceleration programme should be developed showing how the timeline can be delivered. Ideally such a programme should be resourced or, at the very least, consideration should have been given to how and what resources will be deployed to achieve the proposed timeline. This is particularly true if the acceleration measures are resource based.

### **Time is money but money is not time**

Sometimes the parties negotiating the agreement might be motivated by the opportunities presented by a new deal. A new deal may be more lucrative because the project now represents a captive market devoid of competitors, unlike the scenario at the time of the original tender.

For example, the contractor may have an opportunity to increase its rates, given that there is no competition — and conversely, the employer or developer may see it as a chance to drive down the contract price, during negotiations, for performing the work. The balance depends on the respective bargaining power of the parties in any given situation.

Acceleration agreements can end in failure because they are not prepared or arranged properly during the negotiation as a result of power imbalance between the parties.

In one case, the owner sought to incentivise the contractor by way of milestone payments on the new acceleration timeline. On the face of it, incentivisation is good practice and both parties tend to benefit if it is applied properly. The problem in this situation was that compensation for the accelerative measures (eg, additional resources) was set as milestone payments. In the event, the acceleration timeline was not achieved so the milestones were not met. This led to a dispute

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*However, while they may start out with good intentions, there are some common pitfalls that can make acceleration agreements unsuccessful.*

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because the contractor was not compensated for the costs of the accelerative measures it had incorporated.

In another example, the incentivisation arrangement was that if the contractor achieved the accelerated completion date, it would be afforded relief from liquidated damages for a specified period after the completion date. The agreed damages-free period decreased the later the project was actually delivered. The result was a counterintuitive situation where the earlier the project was achieved the more time was afforded the contractor after the completion date.

## Best practice management

How can clients and contractors emerging from a sustained lockdown avoid these problems?

It is best to ensure that the acceleration agreement is based on a current and achievable acceleration programme. This can be achieved in many ways, including:

- the parties endeavour to make the acceleration agreement as quickly as possible;
- the parties agree to carry out status checks and develop an acceleration programme at the time of making the actual agreement after the terms have been negotiated and agreed; and
- the parties opt to agree terms for acceleration, in case they are required, as part of the original contract. The rationale being that if the terms are agreed beforehand, the process will not be slowed down by the protracted negotiation mid-project.

To be achievable, the accelerative measures themselves must be well resourced and subcontractors and the supply chain must be engaged. In addition, the accelerative measures must be well planned ideally with a method statement and increased supervision to ensure success.

In forecasting or estimating the potential time and cost of acceleration, care should be taken to ensure that the timeline and costs of the accelerative measures can be accommodated by the arrangement made. That means estimating the cost of resources and methodology but having regard to issues that may arise from accelerating the works, the key one being lower productivity.

Such considerations include the changed construction method, congested sites, extended working hours, the need for increased supervision and quality control issues.

It is vital to ensure the supply chain is suitably instructed and able to put the accelerative changes into effect.

Setting up the right project culture at the outset can help to avoid many acceleration-related problems. Maintaining trust and communicating clearly on desired project outcomes are all vital elements of that culture, which should be driven from the top down in both employer/owner and contractor organisations.

### Note

- 1 In this paper acceleration is distinct from mitigation or recovery. Acceleration refers to the scenario where a delayed project is brought back on track by adopting measures (eg, additional resources) that require the contractor to incur additional sums for which it is compensated by the employer. Mitigation is commonly understood to comprise measures (eg, resequencing of programme activities) that recover project delay without the contractor incurring additional sums. Recovery refers to the scenario where the contractor addresses its own culpable delays whether that requires additional sums to be incurred or not.

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# Health and safety measures affecting construction contracts in Germany and Uganda

## Introduction

Covid-19 has presented unprecedented challenges in many sectors of the economy, including the global construction industry. This article highlights the effects of the pandemic on the VOB standard conditions of contract predominantly used in Germany and the FIDIC standard forms of contract commonly used in Uganda for public works procured through international bidding.

We look at how the pandemic has affected the construction industry and the measures that have been put in place in the two jurisdictions to safeguard the health and safety of workers at construction sites to curb the spread of the virus in construction sites and the resultant effects.

## German perspective

### Introduction

As is the case all over the world, the pandemic has had many effects on ongoing construction contracts. Germany is no exception.

Most public construction contracts are governed by the VOB/B conditions of contract with the German Civil Code (or *Bürgerliches Gesetzbuch* or BGB) and the State Building Code (*Landesbauordnung* or LBO) being the mandatory law. Health and safety is further governed by the Rules for Occupational Safety and Health on Construction Sites (*Die Regeln zum Arbeitsschutz auf Baustellen* or RAB).

## *What social distancing measures have been introduced?*

Construction site safety is governed by several regulations in Germany. Of interest are those that have been changed to ensure safety during the pandemic.

Some of the notable recommendations are from site accident insurance provider (Berufsgenossenschaft der Bauwirtschaft or BG BAU) requirements for construction sites, which include:

- social distancing on site to be greater than 1.5m. This has been observed to be practically difficult to achieve as construction work is a team effort. The spacing requirement limits effective production;
- regulations that more than three people cannot travel in the same vehicle to work, which has meant more vehicles are needed;
- spacing of break rooms for construction workers in accordance with the requirements of the act on Technical rules for workplaces (Technische Regeln für Arbeitsstätten (ASR) A4.2);
- the need for disinfectants on site for washing hands and cleaning vehicles on a daily basis after use (usually after commuting); and
- fewer laborers allowed to work simultaneously as a result of the spacing requirement. This has been seen to affect the construction of high-rise buildings especially as work is done in confined spaces. Subcontractor inputs have been delayed, which in turn affects completion times for projects because the schedules are distorted by this arrangement (see the Infection Protection Act).

## **Ugandan Perspective**

### *Introduction*

The Ugandan government announced various measures to curb infection rates. Some directly affected the construction industry while other had a general effect over the industry.

The predominant forms of construction contract used in Uganda are the FIDIC forms of contract for varied construction projects procured through international bidding.

The measures put in place to curb the spread of the virus especially in the construction industry stem from the contracts themselves. Others were put in place.

## *Health and safety measures*

The contractor under a FIDIC form of contract has an obligation to comply with all applicable safety regulations<sup>1</sup> and to care for the safety of all persons entitled to be on site and, in collaboration with the local health authorities and in accordance with their requirements, ensure that medical staff, first aid equipment and stores, sick bay and suitable ambulance services are available at the camps, housing and on site at all times throughout the period of the contract and that suitable arrangements are made for the prevention of epidemics and for all necessary welfare and hygiene requirements.<sup>2</sup>

The contractor is equally required to keep records of the health, safety and welfare as may be required by the engineer.<sup>3</sup>

Similarly, in the case of an outbreak of an epidemic, the contractor is required to comply with and carry out such regulations, orders and requirements as may be made by the government, or the local medical or sanitary authorities, for the purpose of dealing with and overcoming the pandemic.<sup>4</sup>

The Minister of Health exercised her powers bestowed by law<sup>5</sup> to prevent the spread of the epidemic and issued several statutory instruments and guidelines, such as that construction sites were to remain open provided that the workers were accommodated on site until 19 May 2020<sup>6</sup> and compulsory wearing of face masks at all times.<sup>7</sup>

FIDIC, as part of the Covid-19 response, published a guidance memorandum<sup>8</sup> for varied scenarios that could arise and affect construction projects. The best scenario that explains Uganda's circumstances is the third scenario. The changes introduced by the government through the Minister of Health are to be treated as a change in the law that may entitle the contractor to treat it as a variation due to the 'adjustments to the execution of the works' or changed or 'new applicable standards' or to treat it as a claim event.<sup>9</sup>

## **Effects of Covid-19 in the two jurisdictions**

A similarity between the two jurisdictions is that there is likely to be an increase in supply chain costs. Subcontractors fall within this category. With the requirement for social distancing even on construction sites, Employers can expect delayed completion



times and corresponding standing time claims from the subcontractors through the main contractors (see Sub-Clause 6.7, Health and Safety and Sub-Clause 13, Variations and Adjustments of the 1999 FIDIC Red Book; section 5, Periods of Completion and section 6, Hindrance and interruption of work of the VOB/B).

There will be an increase in time-related project costs. As mentioned in the previous paragraph, claims for standing time of machinery and equipment will eventually arise (see Sub-Clause 4.8, Safety Procedures; Sub-Clause 12, Measurements and Evaluation; Sub-Clause 13, Variations and Adjustments of the 1999 FIDIC Red Book).

The FIDIC Red Book instructs the contractor to comply with all applicable safety regulations. In the VOB/B, this includes guidelines created during the pandemic that have eventual cost implications.

There is likely to be an increase in task-related project costs, for example, international site labour will definitely become more expensive (see Sub-Clause 6, Staff and Labor and Price schedule adjustment under Sub-Clause 13.8, Adjustments for changes in cost of the 1999 FIDIC Red Book).

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*If there is an increase in supply chain cost, this will in turn trigger an increase in the costs associated with performance of the contract, which is likely to lead to an increase in claims.*

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We will see a delayed taking over of works as a consequence of delays arising from longer activity completion times, rescheduled and delayed tests on completion (see Sub-Clause 9.2, Delayed tests; Sub-Clause 10, Employer's Taking Over of the 1999 FIDIC Red Book).

In relation to the quality of the works, the effects of Covid-19 on defect liability periods will be a matter of contention, particularly having regard to any periods of downtime and the extent to which that affects the standing contractual defect liability period (see Sub-Clause 11 Defects liability).

There is likely to be an increase in the unit costs of items in bills of quantities due to increased costs of the supply chain, delivery times and claims for additional payment. Closed borders and interrupted shipping

lanes have also caused unforeseen interruptions to the supply of materials to construction sites (See Sub-Clause 13.8, Adjustments for Changes in Cost of the 1999 FIDIC Red Book).

Further, there is likely to be an increase in the costs of site safety equipment and personal protective equipment including masks, gloves and sanitising facilities on site. Standing Dispute Adjudication Boards (DABs) in FIDIC contracts are costs that will be incurred even in cases where construction has been completely suspended. Parties to contracts need to resolve the management of such costs and how these will be dealt with. An understanding of the addenda to the contract, including the duration for which the DAB is contracted is important to be able to handle eventual outstanding costs. Standing DABs or ad hoc ones dictate different costs for ongoing contracts.

A further impact includes the cancellation or postponement of periodic site meetings, which has caused slower decision making for technical aspects and queries. Employers distancing themselves in an effort to curb the virus has led to delays in carrying out works. Decision-making for critical ongoing works has therefore caused delays. Contractors seeking clarification for technical queries have not been able to get such decisions at short notice.

Ongoing contracts or contractors have been required to update their health and safety plans (Sicherheits- und Gesundheitsschutzplan SiGe-Plan) in the German construction industry to include new measures to curb the spread of Covid-19 on construction sites and submit them to the employer for approval on short notice. The experience in other jurisdictions using FIDIC standard forms of contract is similar.

## Conclusion

This article illustrates by way of several examples that most of the issues arising as a consequence of Covid-19 affect ongoing contracts and will eventually affect contract sums due to an increase in claims. If there is an increase in supply chain cost, this will in turn trigger an increase in the costs associated with performance of the contract, which is likely to lead to an increase in claims. Employers should therefore brace themselves for significant changes in the originally planned project costs.

Whether the pandemic is considered a force majeure event (see Sub-Clause 19, Force Majeure of the 1999 FIDIC Red Book and section 6 Hindrance and interruption of work, in the VOB/B) will obviously differ from jurisdiction to jurisdiction and contract to contract, but the fundamental effects of this pandemic on construction contracts will be similar. Contractors should therefore also look at refining their internal systems to maintain proper and well documented records of what has transpired on site during this time to help them to defend their positions later on. Records will also be important with regard to the supply chain and subcontractors to help to facilitate discussions later.

The resultant effect of a force majeure event is to negate the liability of either party for claims such as those for delay damages.

Employers should at a minimum provide personnel to monitor works during this time to be able to review submitted claims and variations at a later stage.

Provisions for extensions to cover productive time lost during the interruptions by the pandemic should be considered (see section 6, paragraph 2, Hindrance and interruption of work of the VOB/B and Sub-Clause 8.4 of the 1999 FIDIC Red Book). Covid-19 has in some cases led to the complete suspension of construction activities on sites. The safety of completed permanent works comes into question here. Employers and contractors should establish a means to secure such works in interest of all parties to the contract (see Sub-

Clause 8.8-8.12, Suspension of work of the 1999 FIDIC Red Book and section 6, paragraph 5 of the VOB/B).

A team effort and understanding between parties to a contract should not be ruled out as this may be the way forward for many contracts. Representatives of both the employer and the contractor should have a common understanding about how to go about works in this period. This may be one of the most practical ways to avoid disputes for projects that are under way.

## Notes

- 1 1999 FIDIC Red Book, Cl 4.8.
- 2 *Ibid*, Cl. 6.7; see also Nael Bunni, *The FIDIC Forms of Contract* (Blackwell, 3rd ed) 764.
- 3 *Ibid*.
- 4 *Ibid*, Bunni, 765.
- 5 Public Health Act Ch 281 Laws of Uganda.
- 6 Restrictions on movements from the work sites have since been eased allowing both public and private transport for workers going home from their respective sites.
- 7 Public Health (Control of COVID-19) (No 2) (Amendment No 2) Rules 2020.
- 8 FIDIC Covid-19 Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract.
- 9 *Ibid*, 1999 FIDIC Red Book, Cl. 13.7.

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# Covid-19 as a force majeure event in civil law jurisdictions

The Covid-19 pandemic is affecting almost all aspects of business. The aim of this article is to show how Czech, German and Polish law approach the pandemic as an event of force majeure affecting (the implementation) of construction projects.

## Force majeure event

The Czech Civil Code, the German Civil Code (Bürgerliches Gesetzbuch or BGB) and the Polish Civil Code have no explicit provisions defining a force majeure event. However, in each of these jurisdictions, a force majeure event is generally perceived as an unavoidable and unpredictable event of a widespread and extraordinary nature.<sup>1</sup> In principle, this term also includes diseases and epidemics.<sup>2</sup>

In Polish civil law, a force majeure event would interrupt the statute of limitations and exclude liability for non-performance of obligations even in cases where, based on general principles, there is a strict liability for breach of contract.

Events such as epidemics may also lead to an extraordinary change in circumstances within the meaning of Article 357.1 of the Polish Civil Code (*rebus sic stantibus* clause) or a significant change in circumstances

within the meaning of section 313 of the BGB (frustration of purpose clause).

The Czech Civil Code contains a damage liberation clause in section 2913(2). It states that if a party is prevented, whether temporarily or permanently, from fulfilling an obligation by an exceptional unforeseeable and insurmountable obstacle that is beyond its control, the party is not obliged to compensate for damage. Section 2913(2) still leaves the affected party in contract default – it only prevents damage – but the affected party may still be liable for contractual penalties, contract termination or other remedies. Under the Czech Civil Code (section 2006), contractual obligations expire or are extinguished if a performance cannot be made, even under more difficult conditions, at higher costs, with the help of another person or after a period of time. The burden of proving impossibility to perform lies with the contractor. Thus, in most cases, Covid-19 can lead to frustration of construction contracts under Czech law only in theory.

At the end of March this year, the German construction and infrastructure ministries released statements saying that Covid-19 may be considered a force majeure event if the performance of a construction project was affected by the measures introduced to combat the pandemic. Even though no such statement has been issued by the Polish authorities, the pandemic is widely perceived as a force majeure event in Poland as well.

## Laws and procedures introduced in response to Covid-19

Although the German legislature has not introduced new rules or regulations to help the construction sector cope with the crisis, measures for averting danger to individuals or the general public set out in the German Infection Protection Act are extensive. This includes quarantine measures, which can be ordered by local authorities under section 30. If, for example, workers were ordered to stay home for quarantine or foreign subcontractors were hindered by their government to travel to Germany to avoid infection (or to avoid spreading the virus) or a supplier factory for building material was officially closed for infection measures, a delay to a construction project would be likely to occur. The implementation of these measures gives grounds for a claim for an extension to construction completion dates, the basis of such claim being section 6 paragraph 2 of the VOB/B

(German standard conditions for construction contracts) or section 313 of the BGB.

In response to Covid-19, Poland introduced a state of epidemic on 20 March 2020. Updated every few days, the regulations introduced significant restrictions, including a ban on movement (with some exceptions, for example, the performance of economic and professional activities), restrictions on border traffic (including the re-introduction of EU border controls) and a ban on aircraft landings (except for cargo traffic). The activities of the public administrative authorities have also been significantly limited. Individual employers (especially in the case of critical infrastructure) have themselves begun to introduce special security procedures at construction sites. The Act on Counteracting Covid-19 adopted by parliament has also introduced a specific procedure for notifying the consequences of the pandemic on public contracts leading, after negotiations between the parties, to amendments to public contracts.

Pursuant to a constitutional act, the Czech government declared a 30-day state of emergency throughout the country from 12 March 2020 to combat the health threats arising from Covid-19. Consequently, a number of measures were adopted, such as the closure of restaurants and most shops, quarantine for people returning from abroad and border restrictions.

No measures have been adopted in the Czech Republic, Germany or Poland to stop construction works. Work was carried out on construction sites throughout March and April 2020 and was even encouraged in some places by government agencies. A minimum distance between work stations has been set in the Czech Republic (at least two metres, but 'provided this is possible') and in Poland (at least 1.5 metres, unless impossible due to the nature of the work). In Germany, regulations in this respect are decided by individual states. State regulations generally provide for a minimum distance of at least 1.5 metres, in workplaces too where possible.

## Duty to notify

There is no requirement for formal notification under Czech law in the event of force majeure. However, contracts usually provide for immediate notification

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*At the end of March this year, the German construction and infrastructure ministries released statements saying that Covid-19 may be considered a force majeure event if the performance of a construction project was affected by the measures introduced to combat the pandemic.*

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or at least notification without undue delay. Usually contracts also include a form for notifications and stipulate which rights depend on prior notification.

In most cases, German law does not require any formal notification either. However, under section 642 of the BGB, if in the production of the work an act by the customer is necessary, then the contractor may demand reasonable compensation if the customer, by failing to perform the act, is in default of acceptance. The Federal Court of Justice (Bundesgerichtshof or BGH) requires a formal notice from the contractor in such cases.<sup>3</sup> According to section 6.2(c) of the VOB/B, the contractor must issue a written notice if works are obstructed due to an event of force majeure. This notice is a precondition for an extension of time claim by the contractor unless it is obvious to the employer that the event in question does in fact obstruct the contractor's performance of the works. There is no time limit for the notice ('Behinderungsanzeige'), but it does not have retrospective effect.<sup>4</sup> The employer is free to reject or ignore the notice because its only relevance is to reserve claims for extension of time and compensation to the contractor.

In accordance with Article 651 of the Polish Civil Code, the contractor should immediately notify the employer of circumstances that could hinder the proper performance of construction works. Polish law does not specify the content of or time limit for the notification. Based on general principles, in the absence of or delay in sending a notification, the contractor could be regarded as having contributed to its own damage. Detailed requirements could, of course, derive from the contract.

According to the Polish Act on Counteracting Covid-19, the parties to a public contract have to inform each other of the effects of the pandemic, and related circumstances are grounds for amending public contracts and subcontracts accordingly. Notifications should be made immediately. The Act does not specify the sanctions for the absence of or delay in notification.

## Consequences

### *Procurement*

There are no regulations in either Czech, German or Polish law on how to cope with force majeure events in formal procurement

procedures. Public procurement – relevant in all infrastructure construction projects – is characterised by strict tendering procedures within certain time limits. Employers are not obliged to automatically prolong bid submission deadlines solely due to Covid-19. They do, however, have sole discretion to assess the situation and potentially prolong deadlines in pending procurement procedures. The German Ministry for Economic Affairs and Energy recommended flexibility as regards time and requirements in procurement procedures in a publication on 19 March 2020.

As aforementioned, the Polish Act on Counteracting Covid-19 introduced a special procedure for parties to public contracts to mutually notify a consequence of the pandemic, with the notification setting out the impact of circumstances relating to Covid-19 on the due performance of the contract. This includes the absence of employees, orders issued by the health inspectorate or the suspension of supplies. Based on the notification, the employer may, but does not have to, amend the contract by, for example, extending the deadlines or changing the scope of the works, provided that each change does not lead to an increase of more than 50 per cent in the contractor's remuneration.

An equivalent regulation is included in section 222(6) of the Czech Public Procurement Act. According to this section, if a declared state of emergency affects the performance of the contract, the employer may prolong the time for completion or any milestones. However, a state of emergency declaration does not automatically mean that the conditions for changing the contractual commitments are met. It is always necessary to assess whether: (1) the need to change a commitment arises from circumstances that the employer could not have foreseen; (2) an amendment to a commitment does not change the nature of the contract; and (3) the value of the contractual amendment is not more than 50 per cent of the original contract value.

### *Liability for breach of contract*

As a rule and absent any specific contractual provisions under Czech, German and Polish law, an event deemed to be force majeure gives exemption from liability for non-performance

or improper performance of the contract to the extent that it was the cause of the non-performance or improper performance of the construction contract. However, the specific nature of section 2913(2) of the Czech Civil Code needs to be highlighted. Typically, it is the contractor that has to demonstrate the existence and scale of the impact of the force majeure on its performance of the contract.

Under German law, contractors are also required to take all reasonable measures to limit the impact of the force majeure on the performance of works (under section 6.3 of the VOB/B). This does not mean, however, that contractors have to spend money to mitigate the consequences of events beyond their control; they are only obliged to optimise their works schedules.

## Extension of time

Interestingly, the Czech, German and Polish civil codes do not contain any specific rules on the extension of time specified in construction contracts due to a force majeure event. Issues related to delays in performing a construction contract are therefore usually resolved by determining whether and to what extent the contractor bears liability for breach of contract involving delayed performance (ie, usually whether it should pay a contractual penalty for delay in performance), applying the principles outlined in the preceding paragraph.

The construction contract itself (based on FIDIC or VOB models) may be more specific in this respect. FIDIC-based contracts give grounds for seeking in court a finding that the contractor has the right to perform the work by a longer deadline (which is disputable, at least under Polish law). According to section 6.2.1(c) of the VOB/B, milestones are postponed and, in case of doubt, have to be newly agreed upon by the parties. Extension of time due to force majeure is only granted until the obstructing event passes, though some time may be added for mobilising machinery and workforce in accordance with section 6.4 of the VOB/B.

In any case, the scale of the justified delay and the appropriate extension of the completion deadline will have to be adjusted to the actual impact of the pandemic and the regulations adopted on the agreed work schedule. Appropriate evidence will therefore have to be gathered to demonstrate the impact of the disruption caused by Covid-19 on the original timetable.

## Termination

Despite a force majeure event, the rights of the parties to terminate the contract are preserved under Czech and German law unless otherwise stated in the contract. The standard German conditions of construction contracts (VOB/B) provide for the explicit right to terminate. According to section 6.7.1 of the VOB/B, either party may terminate a construction contract if the construction works are interrupted for more than three consecutive months or if it is certain that an interruption of more than three months is unavoidable.<sup>5</sup> In this context, it is striking that the Polish Act on Counteracting Covid-19 deprives the parties to public contracts of the option to exercise their contractual right to terminate the contract if termination is based on circumstances relating to the pandemic.

## Financial claims

According to the Czech, German and Polish civil codes, a force majeure event (such as a pandemic) does not give the contractor the right to bring financial claims against the employer. However, grounds for such claims could arise from the contracts themselves.

The severity of this rule is modified by the *rebus sic stantibus* and frustration of purpose clauses applicable in all three jurisdictions.

As regards contracts in general, under section 1765 of the Czech Civil Code, if: (1) the contract was concluded at a time when the spread of Covid- epidemic, the severity of its consequences and the measures taken by governments could not have reasonably been foreseen; and at the same time (2) there is a particularly gross disproportion between the performances of the two parties under the contract, the party affected by the disproportionate performance under the contract may request the other party to resume contract negotiations. The affected party must do so within two months of the date on which it becomes aware of the change in circumstances leading to a particularly gross disproportion in performance. If the parties do not reach agreement within a reasonable time, either of them may refer the case to court, which can amend or rescind the contract. However, as long as negotiations or court proceedings to amend the contract are pending, the affected party must perform as originally agreed in the contract. However, neither of

these procedures is available to the party that assumes the risk of a change in circumstances. It is quite common on the Czech market for the contractor to assume this risk, one of the issues that is likely to change in the future.

As regards fixed price or budget works contracts, section 2620(2) of the Czech Civil Code provides that, if an 'entirely extraordinary unforeseeable event that materially hinders completion of the works' occurs, a court can (on the affected party's request) decide 'merely' to increase the price of the works or that the contract be rescinded together with settlement between the parties.

Section 313 of the BGB provides for a frustration of purpose event. The legal provision reads as follows:

'(1) If the circumstances on which a contract was based have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into a

loss; (3) a causal link between (1) and (2); and (4) the parties' failure to foresee the impact of the change of circumstances on contract performance when concluding the contract. In making its judgment, the court should take into account the interests of all the parties to the contract and the principles of social coexistence. A more specific *rebus sic stantibus* clause is set out in Article 632 section 2 of the Polish Civil Code (which is to some extent similar to section 2620(2) of the Czech Civil Code). It applies to specific work contracts and construction works contracts providing for lump sum remuneration. According to Article 632 section 2 of the Polish Civil Code, the court, on the request of a construction works contractor, may increase the lump sum remuneration or terminate the contract, provided that the contractor can prove that each of the following prerequisites is met: (1) a change in circumstances; (2) the change in circumstances could not have been foreseen; and (3) threat of serious loss to the contractor.

In Polish case law, an epidemic is consistently cited as an example of an event causing an extraordinary change in circumstances.<sup>7</sup> Before Covid-19, however, these references served only as an introduction to and illustration of considerations of completely different events leading to an extraordinary change in circumstances, usually concerning economic relations. The fairly extensive Polish case law based on *rebus sic stantibus* clauses may be used in cases arising from Covid-19. It may be assumed that in these cases demonstrating a change in circumstances will be relatively simple and disputes will revolve around serious difficulty in performing the contract and the threat of serious loss. On the basis of past judgments, the courts can be expected to seek to divide costs caused by the pandemic between contractors and employers.

#### Notes

- 1 BGH, judgment of 22 April 2004, III ZR 108/03; judgment of the Court of Appeal in Lublin of 19 October 2019, III APa 15/19.
- 2 BGH, judgment of 16 May 2017, X ZR 142/15.
- 3 BGH, BauR 2000, 732.
- 4 Leinemann, VOB/B-Kommentar, s 6 Rn 20.
- 5 Leinemann VOB/B-Kommentar, s 6 Rn 275.
- 6 See OLG Hamburg, 28 December 2005, 14 U 124/05.
- 7 Judgment of the Court of Appeal in Katowice of 7 December 2018, I ACa 649/18; judgment of the Court of Appeal in Krakow of 10 July 2018, I ACa 1459/17; Supreme Court judgment of 8 March 2018, II CSK 303/17.

*In Polish case law, an epidemic is consistently cited as an example of an event causing an extraordinary change in circumstances.*

contract of a different content if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.'

This alteration could include an adjustment to the remuneration or the time schedule, including penalty clauses. German courts have in the past been hostile to claims for extra payments in respect of rising prices for steel, concrete and fuel.<sup>6</sup> It remains to be seen whether this approach will be relaxed due to Covid-19.

According to Article 357.1 of the Polish Civil Code (general *rebus sic stantibus* clause), the court, on the request of one of the parties to a contract, may change the manner in which the contract is performed, the value of the performance or terminate the contract. The prerequisite for the court interfering in this manner is to demonstrate that each of the following conditions is met: (1) an extraordinary change of circumstances; (2) serious difficulty in performing the contract or threat of serious

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# The Egyptian construction industry during Covid-19

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The construction industry, like many others, has not escaped the effects of the Covid-19 pandemic. However, the magnitude of its impact varies between jurisdictions because of factors such as government measures and cooperation between stakeholders in dealing with these unprecedented circumstances. In this article, we shed light on Egyptian construction law and how the pandemic has been addressed, including whether it can be considered to have disturbed the economic equilibrium of the construction contract.

**T**he consequences of the global uncertainty caused by the Covid-19 pandemic vary over time and across jurisdictions. The intricate relationships between employers, contractors, sub-contractors, owners and end users increase the complexity of the legal consequences.

This article considers the Egyptian construction industry during Covid-19 and the relevant principles of Egyptian law. It describes the effect of Covid-19 on Egyptian

construction contracts, particularly whether it has disturbed economic equilibrium.

## Overview of the construction industry before and during Covid-19

The construction industry is an integral part of both developed and developing economies because of its contribution to economic growth and employment. In the Arab Republic



of Egypt, since 2014 the construction sector has had more investment than other sectors. The construction sector grew by 9.7 per cent in 2015, 7.4 per cent in 2014, 5.9 per cent in 2013, 3.3 in 2012 and 3.7 in 2011.<sup>1</sup> According to the Global Construction Outlook report in the third quarter of last year, the construction sector in Egypt is predicted to expand by 11.3 per cent a year on average until 2023. On 11 May 2020, the Ministry of Planning and Economic Development published *Seven Years of Building*, a report in which it stated that more than EGP 4tn has been invested in projects from July 2014 to December 2021.<sup>2</sup>

Since 2014 mega construction projects have been on the rise in Egypt, including the New Administrative Capital, the Suez Canal Economic Zone, several water and power plants, road expansions and others.<sup>3</sup> The accelerated growth of the construction industry may give a false indication of overall economic performance. In Egypt, the construction sector contributes to 5-10 per cent of overall GDP growth and absorbs 11-20 per cent of the total official employment. By some estimates that include informal labour this rises to 40 per cent.<sup>4</sup>

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*The key question is whether Covid-19 can be characterised as a disturbance to the economic equilibrium in contracts for construction projects in Egypt.*

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The Egyptian Elites, who, according to a model by Acemoglu and Robinson (2006),<sup>5</sup> are the de facto holders of political power, envision further development in the construction industry. However, contractors continue to face exhaustive costs and legal burdens because of the economic reform programme that led to the devaluation of the Egyptian pound, and the high degree of informality in the construction sector. There are regulations for construction enterprises, employment and the process of construction, yet there are those who work without the required permissions or monitoring, and informal buildings that do not fulfil safety or other related requirements. Contractors have also faced rising costs as they are forced to adapt to the pandemic.

Egyptian law regulates the construction sector through several scattered rules under Civil Law No 131/1948, which contains a sector-specific regulation for construction contracts (Articles 646-673),

Unified Building Law No 119/2008 and its executive regulations, introduced to make the sector less informal by providing a framework for the permissions and procedures required of parties in the sector, and the Egyptian Contractors Federation Law No 104/1992.

Also, as more than 30 per cent of construction projects in Egypt are in the public sector, Public Contracting Law No 182/2018 (regulating contracts concluded by public entities) plays a vital role in regulating construction projects.<sup>6</sup>

Besides these rules, a significant number of contractors resort to the FIDIC forms of contracts, noting that FIDIC can be a more reliable option for foreign parties that try to limit the risks of first-time deals in new jurisdictions.

Before Covid-19, the legislative authority introduced various laws to regulate issues facing contractors, the most prominent being Law No 84/2017, which governs the compensations paid under agreements for public contracting, supplies and services. This law established a committee to study damages and compensation claims by contractors against public authorities due to monetary decisions, an example being the currency devaluation between 1 March and 31 December 2016.

In the midst of Covid-19, policy-makers imposed short-term measures to enhance the conditions of the construction sector. For example, the government announced a financial support package of EGP 100bn (US\$ 6.5bn) to vulnerable sectors including construction.<sup>7</sup> The Prime Minister encouraged construction companies to work at full capacity while taking all the precautionary measures,<sup>8</sup> and on 4 April 2020, the presidency recommended postponing the launch of mega-projects including the New Administrative Capital to 2021 owing to Covid-19.<sup>9</sup>

### *Economic disturbance?*

The key question is whether Covid-19 can be characterised as a disturbance to the economic equilibrium in contracts for construction projects in Egypt.

Equilibrium is defined as a pattern that persists, unless disturbed by external or internal forces. The most pertinent definition of a contract for the purpose of economic equilibrium is Shavell's definition that a contract is a 'specification of actions that

named parties are supposed to take at various times, generally as function of the conditions that hold'.<sup>10</sup>

The fact is that contracts are generally incomplete – each construction contract in Egypt or elsewhere may have shortcomings based on the parties' negotiations, foreseeability, expertise, experience and even luck. Simply put, parties may face many conditions and circumstances that they did not foresee, contemplate or regulate for, and these are the factors that disturb the equilibrium in contracts. There are two main doctrines that affect this equilibrium: force majeure and hardship.

Under each doctrine, one of the parties may face a 'contractual holdup'. This refers to situations in which a party accedes to a disadvantageous demand, owing to its position of substantial need.<sup>11</sup> The holdup may be caused by a disturbance of the economic equilibrium in the contract because a disturbance leads always to anti-competitive activities by one of the parties. Thus, contractual holdup justifies the legal intervention, namely: (1) terminating the contract; (2) mitigating the obligations of the party facing a contractual holdup; and (3) compensation that the harmed party may get from the other party.

Notwithstanding the aforementioned, Egyptian law specifically regulates force majeure (Articles 165, 215 and 373 of the Civil Code) and hardship (under Articles 147(2) and 658(4) of the Civil Code) and provides certain conditions that must be fulfilled to successfully invoke either doctrine. In all cases, the governing rule in the Civil Code is party autonomy (*Pacta sunt servanda*) which means that the contract cannot be revoked or altered without the mutual consent of the parties or for the reasons prescribed in law (Article 147(1) of the Civil Code).

## Force majeure under Egyptian law

Article 165 of the Civil Code provides:

'If the person proves that the prejudice has resulted from an external cause which is out of his hands, such as a surprising event, force majeure, the fault of the injured, or the fault of a third party, he shall not be obliged to compensate the prejudice suffered, unless there is a provision or an agreement the contrary.'

Its Article 215 reads:

'If the specific performance is impossible for the debtor, he shall be condemned for

the payment of damages because of the non-performance of his obligation, unless he proves that the impossibility of execution is due to an external cause which is beyond his control. The same rule applies if the debtor has delayed performance of his obligation.'

Furthermore, Article 373 states that 'the obligation expires if the debtor proves that its fulfilment has become impossible for a foreign reason to which it has no power'.

In the specific context of construction contracts, Article 667 of the Civil Code provides that: 'the Employer would be liable to compensate the Contractor for the lesser of (a) the costs of any works already completed by the Contractor and (b) the benefits received by the Employer as arising from such completed works'.

According to the Court of Cassation, two conditions are required to invoke force majeure: an unforeseeable event and impossibility of performing contractual obligations.

Unforeseeability is determined at the conclusion of the contract, for example, if the parties concluded a contract during the pandemic then they ought to have predicted the effect it may have in the near future. Under the Court of Cassation ruling, the prediction criterion is objective, taking into consideration 'the view of the most vigilant and observed'. For example, in the view of the most vigilant person, during the early weeks of the pandemic in Egypt, most forecasting indicated that the country would face a full lockdown. The fact that to date Egypt has not enforced a full lockdown does not mean that the full consequences of the pandemic were not predicted because the more strict view was foreseeable.

In this regard, the Court of Cassation in the Challenge No 677/69 JY dated 10 April 2012 held that:

'the text of Article 165 of the Civil Code describes the force majeure and the sudden event as a foreign cause that the person has no hand in, however the force majeure needs to be specified, as the event must be unpredictable and unavoidable, not only in the view of the respondent, but also in the view of the most vigilant and observed person, and the criterion here is objective, also the condition that the event is impossible to avoid means that if the event may be avoided by a party even if it was unpredictable it will not be considered as a force majeure. The event shall make the performance of the

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*despite the partial lockdown in Egypt, contracting parties may not be able to claim impossibility in performance because of government policies that sought to clear issues facing contractors by directing construction companies to work at full capacity.*

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obligations absolutely impossible, meaning that it is not impossible for the debtor only, but it would be impossible for anyone who is in the position of the debtor.’

The impossibility of performance means that the contracting party cannot perform its obligation at all. It is not only limited to construction but also applies to related sectors, such as manufacturing and transportation. An event that affects any related sector may affect the parties’ ability to perform their obligations. In this regard, the Court of Cassation in the Challenge No 865/53 JY dated 30 January 1991 held that:

‘the force majeure event that leads to the termination of the contract – and according to what was settled in the court’s decisions – is the one that makes the execution of the contract absolutely impossible for a foreign reason to the debtor, which leads to the fact that if the force majeure represents a temporary obstacle to the performance, then it will have no effect but to suspend the performance of the obligation during the period of the event’.

By applying these conditions to Covid-19, all possibilities remain on the table. Scientists and scholars have warned that the world may face many problems, including pandemics. Studies, conferences and even documentaries have indicated that countries are not ready to deal with the next pandemic. It should be noted that discussions about the second wave of Covid-19 make its existence and magnitude foreseeable and hence it may not fall within the scope of force majeure. Discussions about the second wave usually refer to the second wave of the 1918 Spanish flu pandemic, which was worse than the first wave. The second wave of Covid-19 is also predicted to be worse than the first one. In relation to contracts that were executed in January or about that time, at the beginning of the pandemic when the Chinese city of Wuhan was fully quarantined and the number of active cases was increasing exponentially, one could argue that force majeure would not apply because the pandemic was foreseeable.

The impossibility of performance must be examined on a case-by-case basis. However, despite the partial lockdown in Egypt, contracting parties may not be able to claim impossibility in performance because of government policies that sought to clear issues facing contractors by directing construction companies to work at full capacity.

Nevertheless, impossibility of performance may have occurred in some contracts, though

certain rules in Egypt may make it challenging to claim force majeure in construction contracts because of Covid-19. However, a more comprehensive analysis would be required once there is less uncertainty about the impact of Covid-19.

### Is there room to invoke hardship?

There has been no reporting on the significant impact of Covid-19 on construction contracts in Egypt, but it is clear that many projects will be delayed and that costs may increase as a result. Delays may be caused by volatile workflows. In our view this will not necessarily lead to the application of force majeure because work is still possible, but it may result in the obligations of the parties being considered to be onerous. In this regard, the President announced that the launch of mega-projects would be postponed, suggesting that there are further issues to consider especially where the public sector is involved.<sup>12</sup>

Under Article 147(2) of the Civil Code:

‘if exceptional and unpredictable events of a general character occurred, that makes the performance of contractual obligations, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits, the obligation that has become excessive, any agreement to the contrary is void’.

Its Article 685(4) provides that in lump-sum construction contracts:

‘if the economic equilibrium between the respective obligations of the employer and of the contractor disturbed due to exceptional general events that were not predicted at the time of the conclusion of the contract, the judge may grant an increase of the contract’s remuneration or order the termination of the contract’.

Egyptian law thus identifies three conditions to invoke the hardship doctrine: (1) the contract in examination shall be an executory contract, meaning that the performance of the contract would continue for a period of time; (2) the circumstances shall be exceptional, general and unforeseeable; and (3) the performance of contractual obligations, without becoming impossible, becomes excessively onerous such that the debtor is threatened with exorbitant loss.

The conditions under Article 147(2) are similar to those under Article 658(4), which relate to construction contracts in particular. The main difference relates to the consequences of invoking the articles. According to Article 147(2), the judge may only reduce an excessive obligation after taking into consideration the interests of both parties. Thus, the parties cannot seek to terminate an onerous contract by invoking Article 147(2). Nevertheless, as an exception to this rule, in the context of construction contracts the judge may order termination if the conditions for unforeseen circumstances have been satisfied.

Some of these conditions may be fulfilled in the context of Covid-19 and others may not be. The first is satisfied because the performance of a construction contract is always over a period of time. The second may be partially fulfilled as Covid-19 would generally be considered to be exceptional, though depending on the date of entry into the contract it may have been foreseeable. The judge would examine the third condition on a case-by-case basis, while being mindful of the intervention of the Egyptian government to minimise costs for contracting parties.

## Conclusion

Egypt still has active Covid-19 cases and limited protective measures and government intervention, leading us to believe that it is impossible to be certain of the future. At a macro level, it could be predicted that the economic conditions in Egypt will worsen significantly due to the inconsistency of workflow, the incurred costs related to fighting Covid-19 and the related opportunity costs. However, if the pandemic passes without the need for more protective measures, Egypt could be one of the few countries to be unaffected at a macro level.

Ultimately, human lives are the cornerstone of economic activity, and preserving lives ought to be the first priority. For employers and contractors in Egypt, force majeure may not be invoked yet because impossibility is not absolute and unforeseeability is questionable. Although the doctrine of hardship (unforeseen exceptional circumstances) shares the same unforeseeability condition, which is

questionable in the present Covid-19 circumstances, it may still be possible to invoke because the main obligations of the parties to the construction contracts are required to be performed. The President's postponement of some projects to 2021 implies that the government has recognised that Covid-19 has affected the performance of construction contracts.

## Notes

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- 2 Al-Masry Al-Youm, 'Egypt publishes report of building projects from 2014 to 2021 worth LE4 trillion' *Egypt Independent* (11 May 2020) <https://egyptindependent.com/egypt-publishes-comprehensive-report-of-building-projects-from-2014-to-2021> accessed 20 June 2020.
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- 4 M Essam and M Ehab 'Construction Supply Chain, Inter-Sectoral Linkages And Contribution To Economic Growth: The Case Of Egypt' (Egyptian Center for Economic Studies, 2015).
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- 12 See n 9 above.

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# Should the law foresee the unforeseeable?

## The unforeseeable trends in Chile in view of the Covid-19 pandemic

The Chilean legal system does not appear to have foreseen the unforeseeable pandemic that has taken over the world. In this article, we give a concise analysis of the situation within the Chilean construction sector, which is struggling with the challenge of fitting the reality changed by Covid-19 into an outdated legal environment.

### Chilean contract law as a static legal environment

In Chile, private funds account for about two thirds of total investment in the construction sector. The Chilean Civil Code (CCC), in force since 1857, treats a construction contract as a

form of rental work. Only two articles of the CCC are devoted to the construction of buildings.

Due to the strong presence of foreign investors, contracts based on common law are frequently used for projects executed in Chile. However, unlike many other Latin

American countries, Chile almost never uses project financing from international investment banks, such as the Inter-American Development Bank or the World Bank. Thus, projects that are carried out in accordance with FIDIC standards are an exception to the rule. Construction contracts are drafted on an ad hoc basis or follow an owner's pre-established contractual forms. The contracts tend to allocate the risks in a way that is more favorable to the owner, who largely determines its content.

The general contractual framework created by the CCC has not been substantially amended since the 19th century. It still mirrors legal concepts under the Napoleonic Code, that is, the primacy of the autonomy of the parties and the relegated position of the judge, who, according to Montesquieu, acts as *la bouche de la loi*. Thus, as recorded in Article 1545 of the CCC, the sanctity, pre-eminence and the intangibility of the contract continue being the most fundamental principles of the Chilean private law.

The only marginal and partial exception is contained in Article 2003, second rule, of the CCC. Pursuant to that provision, in cases of hidden and unforeseeable soil defects a contractor can claim additional costs and, if no agreement with the owner is reached, may resort to the judge to adjust the contractual terms. This provision has been used as the basis of the so-called unpredictability theory (*teoría de la imprevisión*) within the Chilean legal system.

The doctrine of unpredictability has been applied only exceptionally, mainly by arbitrators acting *ex aequo et bono* and in long-term supply contracts. Based on principles under Article 1545 of the CCC and relying on the most influential doctrine, the ordinary courts have repeatedly rejected the application of the theory of unpredictability.

There is no legal regulation on frustration or hardship. Article 1546 of the CCC provides that contracts have to be construed and performed in good faith. It remains to be seen how this legal provision will be used in court and arbitral proceedings related to Covid-19.

Going further, it is common to find contractual waivers of the right to invoke the unpredictability theory or similar concepts. To quote one example: 'Each party hereby waives any and all rights to invoke any defenses to its respective obligations to perform based

on the doctrine of the *teoría de la imprevisión*, hardship or other similar doctrines.'

In view of such agreement, the question is whether the parties really have waived their possibility of relying on *imprevisión* or hardship, or whether such an agreement does not cover Covid-19. Indeed, it could be argued that a global pandemic was not a situation that could have been foreseen by the parties and therefore is not covered by the waiver.

### Force majeure: a lifesaver or burden?

The primacy of the contractually agreed terms has put a lot of pressure on the parties during the pandemic, as there are no contractual or legal mechanisms to adapt their obligations to the new reality. The only way to be partially liberated from the weight of contractual obligations is by invoking the force majeure clause or legal provision under Article 45 of the CCC.

Under Chilean law, force majeure operates as a disclaimer or exculpation possibility that justifies a party's non-compliance. However, while the party can be discharged from liability, it should bear its own costs. For construction projects, it means that the contractor will receive an extension of time, but will not receive compensation for costs incurred during the force majeure event.

For force majeure provisions to apply, the inability to comply with the contractual obligations needs to be absolute. In turn, if the unforeseen circumstances make the compliance more onerous for one of the parties, the situation cannot be deemed a force majeure event.

The pandemic has had impacts of a different nature. In some cases, projects have been affected by confinement measures ordered by local authorities, making it absolutely impossible for the personnel to circulate or to reach the site. In these cases, contractors seem to be better equipped to rely on force majeure. In other cases, the impact has been caused by social distancing requirements, which require additional transportation, new accommodations and catering facilities for the workers and remote working, to name a few. In many projects, there are discussions under way on whether those conditions constitute force majeure or whether the new conditions have to be complied with, with no extension of time or compensation of cost for the contractor.

## Un(fore)seen trends

Two interesting trends unseen before can be observed in the current practice. The first shows contractors being reluctant to rely on force majeure. Contractors have tended to continue working under the new atypical sanitary conditions as far as their personnel are able to reach the site and as far as their supply chains have been reestablished. Contractors refrain from invoking force majeure as it might reduce their chances to recover the additional cost. Instead, in some cases, owners rely on force majeure to justify their inability to provide their deliverables, for example, transportation of the contractor's workforce, or design approval.

Second, some contracts imported into Chile from common law countries include a change-in-law provision, which provides for compensation for costs caused by legal changes introduced after the contract had entered into force. However, Article 45 of the CCC includes within the definition of force majeure the acts undertaken by public authorities. Therefore, a legal or administrative act ordering border closures, curfews or confinements could be characterised as force majeure as well as a change in law at the same time.

Change-in-law provisions seem to offer more favourable treatment to the contractor than the force majeure clause. Hypothetically, a discussion about whether one of the two clauses has pre-eminence within one and the same contract could arise. Does a force majeure regulation pre-empt the change-in-law provision, leaving the constructor with a time extension but no compensation for cost, or does a change-in-law stipulation secure a contractor's right to seek compensation for costs, notwithstanding the fact that it also might fall within the force majeure definition?

## Existing strategies

Chilean law was clearly unable to provide suitable solutions for the situation caused by Covid-19. Much uncertainty exists with regard to how the pandemic can be treated in an equilibrated and sound way, without causing widespread bankruptcy across the construction sector and leaving projects unfinished. An important tool to overcome the static response from the legal system appears to be recourse to direct negotiation or mediation. With those future-orientated methods, the projects can be brought forward improving what is otherwise an imbalance in risk allocation.

An amendment to the CCC has been recently submitted before the Chilean Congress in order to introduce a regulation dealing with the concept of hardship. It proposed that Articles 1546-bis of the CCC provide that if a change of circumstances, unforeseeable when the contract had been signed, makes compliance excessively burdensome for one of the parties, the latter may request its counterparty to renegotiate the contractual terms. If the renegotiation is not accepted or if it fails, the parties may terminate the contract or request a judge, by mutual agreement, to proceed with its adaptation. In the absence of an agreement, one of the parties may request the judge to review the contractual terms or to terminate it.

It may be a while before this amendment becomes law and enters into force. In the meanwhile, the question is how to improve the contractual framework for future projects in the Chilean territory. For that, a more appropriate risk allocation should be considered. One of the possible shortcuts to reach this goal would be the application of FIDIC forms. Alternatively, the parties should foresee the unforeseeable and not waive their rights to invoke hardship and similar doctrines.

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Credit: DOERS/Shutterstock

# The impact of Covid-19 on the South Korean construction industry

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## Introduction<sup>1</sup>

Lockdowns around the world are slowly easing, but the global consequences of Covid-19 on the construction industry linger on. The direct impact of the pandemic on the South Korean construction industry appears to be limited compared with other countries because the government did not implement such drastic measures. However, there have been modest repercussions because of the introduction of swift measures to curb the

spread of the virus to reduce the burden on construction projects.

On 12 February this year the Ministry of Economy and Finance issued 'Guidelines for Handling Public Contracts to Respond to COVID-19' applicable to public procurement and public construction projects. These set out recommendations that construction works be temporarily suspended and contractors be relieved from liquidated delay damages in the event of an 'inevitable delay'.



A further recommended measure was to allow for an adjustment of the contract price should continuing construction works become 'remarkably difficult' on site due to the spread of Covid-19. However, what 'remarkably difficult' or 'inevitable delay' means was not defined and, since the guidelines specifically refer to public construction contracts, it is unclear whether they also apply to private construction contracts.

On 30 January 2020, the Ministry of Employment and Labour published a 'Response Guidance for Businesses to prevent and control the spread of COVID-19' setting out recommendations on how businesses should operate during the pandemic. This guidance has been updated seven times since its first publication and the eighth edition (which is the latest version as of 4 June 2020) was published on 7 April 2020. According to the guidance, if the government orders a workplace to be shut down due to a confirmed or suspected case of Covid-19, the affected employer will be excused from its obligation to pay any wages to the employees. Even if the workplace itself is not shut down, if an employee is unable to work due to being quarantined as a confirmed or suspected carrier of Covid-19, the guidance states that the employer would not be required to pay wages for the period during which the employee cannot work. However, employers can apply for a government subsidy of up to KRW 130,000 (about US\$ 100) a day per employee to offer paid leave to those confirmed or suspected employees.

### Potential relief under Korean law

The complications of the Covid-19 outbreak for the construction industry are unprecedented and unpredictable. Contractors are facing challenges as a result of Covid-19, such as project suspensions, delays, government or medically ordered quarantines, supply and material shortages, equipment shortages, labour shortages and lost productivity, engendering future construction delays and resulting costs. As such, they may be entitled to relief under Korean law to seek performance or compensation of damages.

### Force majeure

The Standard Form Construction Contract for Private Construction Works, promulgated

by the Ministry of Land, Infrastructure and Transportation, expressly sets out 'epidemics' as one of the force majeure events.<sup>2</sup> The Ministry of Land, Infrastructure and Transportation also issued a public release on 28 February 2020 reinforcing that circumstances arising from the response to the Covid-19 outbreak may qualify as 'epidemics' under a force majeure clause in a standard form contract. Therefore, contractors who conduct construction works under a contract incorporating these standard terms are likely to be able to establish that Covid-19 constitutes a contractual force majeure event.

In the absence of an express force majeure clause in the contract or in the event that the definition of force majeure is unclear or vague, whether Covid-19 may be deemed a force majeure event will be determined by general Korean law principles.

The Supreme Court has ruled that a force majeure event is an event beyond one's control that could not have been foreseen and prevented despite the exercise of commercially reasonable efforts or means.<sup>3</sup> A force majeure event must be unforeseeable and unavoidable despite the full exercise of commercially reasonable efforts or means. A contractor that succeeds to establish that a force majeure event occurred and that it was prevented from proceeding with the works due to such event (ie, causation) will be released under Korean law from performing its contractual obligations or paying damages, including liquidated delay damages, to the employer.

In the past, Korean courts have been cautious about admitting that circumstances amount to force majeure and hence the threshold remains high. For instance, force majeure was denied where the International Monetary Fund crisis in the late 1990s and its resulting disruptions in the supply chain caused a contractor's delay in performance.<sup>4</sup> There is also no reported Korean case in which the outbreak of SARS (Severe Acute Respiratory Syndrome) or MERS (Middle East Respiratory Syndrome) was considered a force majeure event.

Nevertheless, Covid-19 could be distinguished from previous outbreaks due to its widespread nature and the severity of the remedial measures taken all over the world. The chances are higher than before that the courts will consider this situation to be an 'unforeseeable' and 'unavoidable' force majeure event, though this needs to be tested further.

## Termination – change in circumstances

The Korean courts, in principle, recognise the right to terminate a contract due to a change of circumstances (*rebus sic stantibus* jurisprudence) for the contracting party if the following conditions are satisfied: (1) a significant change of circumstances has occurred; (2) the change of circumstances was unforeseeable by the parties at the time of signing of the contract; and (3) a serious imbalance between the parties would arise or the purpose of the contract could not be achieved if the parties remain bound to the terms of the contract.<sup>5</sup>

However, there is no known court precedent to date in which a contracting party was held to be entitled to terminate the contract solely on the basis of a change of circumstances. Even the global financial crisis in 2008, which led to a sharp increase in the exchange rate, did not suffice to be deemed a ‘change of circumstances’ giving rise to an entitlement for termination.<sup>6</sup>

Therefore, it is expected to be difficult under Korean law to terminate a contract based on the mere fact that the outbreak of Covid-19 caused the underlying circumstances of a contract to have changed, unless there is an express termination clause in the contract to such effect.

## Termination – change in law

Whether the remedial measures taken amount to a ‘change in law’ must be primarily determined by how a change in law is defined in the relevant contract. With respect to the construction industry, since the government has only issued guidelines or guidance notes so far (and not ordinances or decrees, let alone special laws), it is expected to be difficult under Korean law for these to be deemed a change in law as typically defined under international standard form contracts (for instance, as in Sub-Clause 13.6 of the FIDIC Silver Book 2017 or Sub-Clause 13.6 of the FIDIC Emerald Book 2017).

## Defending damages

South Korea is a civil law country in which damages due to a breach of contract may only be awarded if the breaching party was at ‘fault’ for its breach. In other words, a contractor is not liable for damages if a breach of contract has occurred without its fault. The same applies to liquidated damages: if a contractor has been in delay but the delay cannot be attributed to the contractor, such as delay due to Covid-19, it may be held not liable for any liquidated delay damages.

## Conclusion and outlook

During the first half of this year, almost all industries in South Korea have been affected by the pandemic. The construction industry, albeit perhaps somewhat less affected in South Korea than in other countries, has not been an exception. As illustrated, whether issues arising due to the pandemic can be remedied through the doctrines of force majeure, change of circumstances or damages will be determined on a case-by-case basis because there are few analogous precedents and the courts have historically been adverse to providing relief. Thus, awareness of the contractual terms is critical to protecting a construction project and avoiding unnecessary costs and delays. Whether the impact of Covid-19 on the South Korean construction industry will have lasting effects and whether the courts will adapt to this new normal situation remains to be seen.

### Notes

- 1 This article encompasses material developed in the South Korea section of the *CMSExpert Guide to Covid-19 Impact on Construction Industry* published on 6 April 2020, which was co-authored by Mino Han and Yona Yoon at Peter & Kim, Seoul.
- 2 Cl 17(1)2.
- 3 Decision 2001Da48057 dated 23 October 2003.
- 4 Decision 2001Da1386 dated 4 September 2002.
- 5 Decision 2016Da249557 dated 8 June 2017.
- 6 Decision 2013Da26746 dated 26 September 2013.

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Visitors in the Tokyo Skytree wearing masks to protect themselves from Covid-19. Credit: Thiti Sukapan/Shutterstock

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## Force majeure, frustration and hardship under Japanese law

This article explains the general concept of force majeure and the doctrine of frustration and hardship under the laws of Japan and considers their application to the Covid-19 pandemic. Under Japanese law, although force majeure may release debtors from their obligations in many cases when the applicable event is proven, the doctrine of frustration or hardship has not been established as a default rule and cannot be expected to apply unless it is clearly stipulated in the contracts.

### Force majeure

Under the Japanese Civil Code, a debtor is released from its contractual obligation and liability when the debtor proves that a force majeure event prevented it from its performance. Traditionally in Japan, a debtor is released from a contractual obligation when there is no fault or negligence on the debtor's side.

This rule is based on judicial precedents and was codified in the Article 415 paragraph 1 of the Civil Code in 2017. When a debtor's performance is prevented by a force majeure event, this means the debtor has no fault or negligence in its breach of contract. A force majeure event can be understood as one of the situations where the debtor has no fault. It should be noted, however, that



any obligation regarding monetary payment is not released even by force majeure under the default rule (Article 419 paragraph 3 of Civil Code).

Under Japanese contract principles, the burden of proof regarding fault or negligence in the case of breach of contract claim is borne by the debtor. When a party to a contract makes a claim against the other party that breached its obligation, the latter has to argue and prove that any fault or negligence did not exist on its side. Accordingly, the debtor must prove the existence and actual negative impact on its performance due to force majeure events.

As such, the concept of force majeure has been established and recognised as a general principle under the Civil Code and there is no specific body or provision of statutory law that provides concrete or detailed explanations of its application. The only provision in the Civil Code that mentions force majeure is Article 419 paragraph 3, which says a breach of monetary payment obligation cannot be justified by a force majeure event. While this provision is regarded as a basis for interpreting that the Civil Code takes for granted that force majeure may release debtors' obligations in general, it does not give any definition. Therefore, the definition and the extent of events it covers are left to interpretation of individual contracts on a case-by-case basis. Courts tend to describe it as 'such events occurrence of which cannot be attributed to the affected party taking into consideration the sources of the obligation such as contracts and the common sense in commercial context', but it is not clear enough to understand exactly what events are covered. Therefore, it is advisable to clarify in the agreement a definition and a list of concrete examples of force majeure events. From a viewpoint of sellers or service providers, it is advisable to include as many events as possible, on a non-exclusive basis. Purchasers, however, should be careful not to stipulate the concept too broadly and should consider excluding some unclear events from the definition, such as economic downturn, decrease in demand, lack of raw materials or lack of labour forces.

The legal effect of force majeure is limited to the release of a debtor's liability to perform its contractual obligation. Under the default rule in Japan, force majeure does not give either party the right to terminate the

contract, though the non-affected party may have the right to terminate the contract based on other grounds, such as the impossibility of the affected party's performance. Therefore, if parties want to have an option to terminate the contract in a force majeure situation, effects and conditions must be stipulated in it.

## Frustration and hardship

The doctrine of frustration or hardship allows one party to ask for changes to the contents or termination of the agreement in case of a material change in the situation after the execution of the contract. In Japan, unlike some European jurisdictions and international model codes, such as the Principles of International Commercial Contracts, that recognise the doctrine of hardship, and some common-law jurisdictions that have developed the doctrine of frustration, the doctrine has not been developed to the level that its application can be expected to be a default rule.

There is no statutory law in Japan that recognises the doctrine or notion of frustration or hardship, though there have been some attempts of legislation. As a general argument, the Supreme Court recognises the possibility to apply the doctrine of frustration or hardship:

'In order to allow a party to terminate the contract based on so-called the Doctrine of Frustration or Hardship or the change of situation, it must be said that it is extremely unfair or unjust to bind the party with the contract after the change of situation based on the notions of goodwill and fairness [12 February 1954].'

However, Japanese courts have been extremely reluctant to apply this doctrine and there has not been any publicised court decision in which it was applied.

Therefore, if parties want to modify or terminate the agreement in case of any hardship or material change of situation in the future, conditions and effects must be clearly stipulated in the agreement.

## Covid-19

There have been no court decisions relating to the effects of Covid-19 on legal obligations, partly because the courts were suspended after the outbreak, and no legislation declaring the legal effect of Covid-19 on contracts.



It is not easy to anticipate the outcome of this unprecedented situation. Public opinion appears to recognise Covid-19 as a force majeure event in general, but decisions must be made for each case based on individual situations.

Where lockdowns are made as mandatory orders or an equivalent action by public authorities, it is highly likely that such orders or actions will be regarded as force majeure in Japan. However, what makes the Japanese situation difficult and unique is that, unlike many other countries, the 'lockdown' has never been mandatory and has almost no sanctions. All instructions given by the national government and local municipalities have been made as 'self-constraint requests'. Most people have 'respected' the requests and complied with the instructions on a voluntary basis. As a practical matter, the official 'requests' have had substantially the same effect as mandatory orders. The primary reason why such requests have been made in such softer way than in other countries is that the Japanese government does not have statutory basis to go any further. However, such difference of legal characteristics of the Japanese 'lockdown' may affect the legal consequence regarding force majeure.

In Japan, Covid-19 first attracted the public attention when an outbreak occurred on the cruise ship *Diamond Princess* at the end of January. As the number of patients increased, the first official instruction was given on 26 February 2020 by the governor of the northern prefecture of Hokkaido, ordering schools to be closed and asking residents to refrain from going out during weekends, but without legal basis. Soon after this, the government made a request requested to postpone or minimise events and to close schools, but again without legal basis. Despite their non-mandatory nature, most, not but all, people tried to follow the requests.

Then the government moved to get ready to issue a lockdown order in early March. Although there was a discussion about enacting a new law to specifically handle this situation, the government decided to cope with it by amending the existing law that was legislated to combat against the flu in 2012. Under this law, the maximum authority that the government can exercise is to issue a declaration of emergency, which is different from the common concept of lockdown, as the declaration cannot be used to force people to obey because there is substantially no penalty for disobedience.

After a series of unofficial stay-at-home requests, a declaration of emergency was finally made on 7 April 2020 for seven prefectures, including Tokyo and Osaka, and it was extended to the entire country on 16 April 2020. It lasted until 25 May 2020 when the declaration was lifted in the entire country, but again the request of self-restraint continued. Despite their soft legal nature, the requests were respected by almost all Japanese people.

It is the author's opinion that the declaration of emergency, despite its non-compulsory nature, should in general be treated as being equivalent to a mandatory lockdown, and thus regarded as a force majeure event, because the declaration was issued based on the legislation and most people took it as mandatory as a matter of practice. However, the legal implication of the self-restraint requests made before and after the declaration is unclear because they were made without clear legislative basis and some people dared to ignore them to maintain their business. Ultimately, future decisions will be made on a case-by-case basis.

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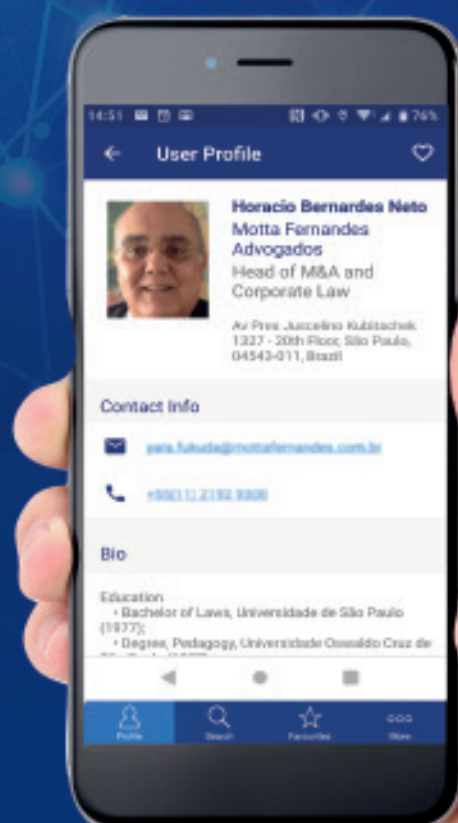
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