

Coronavirus disease 2019 (COVID-19) is disrupting construction projects the world over. Amidst daily changes, project participants are working to mitigate COVID-19 impacts including delays, increased costs and an inability to perform contract obligations.

Our Construction and Engineering Disputes team is helping clients navigate these unprecedented challenges and avoid or reduce disputes arising from them. To assist our clients and friends, we have created a checklist of common contract clauses and local law considerations brought about for COVID-19 disruptions to construction projects and our thoughts on practical workarounds and solutions.



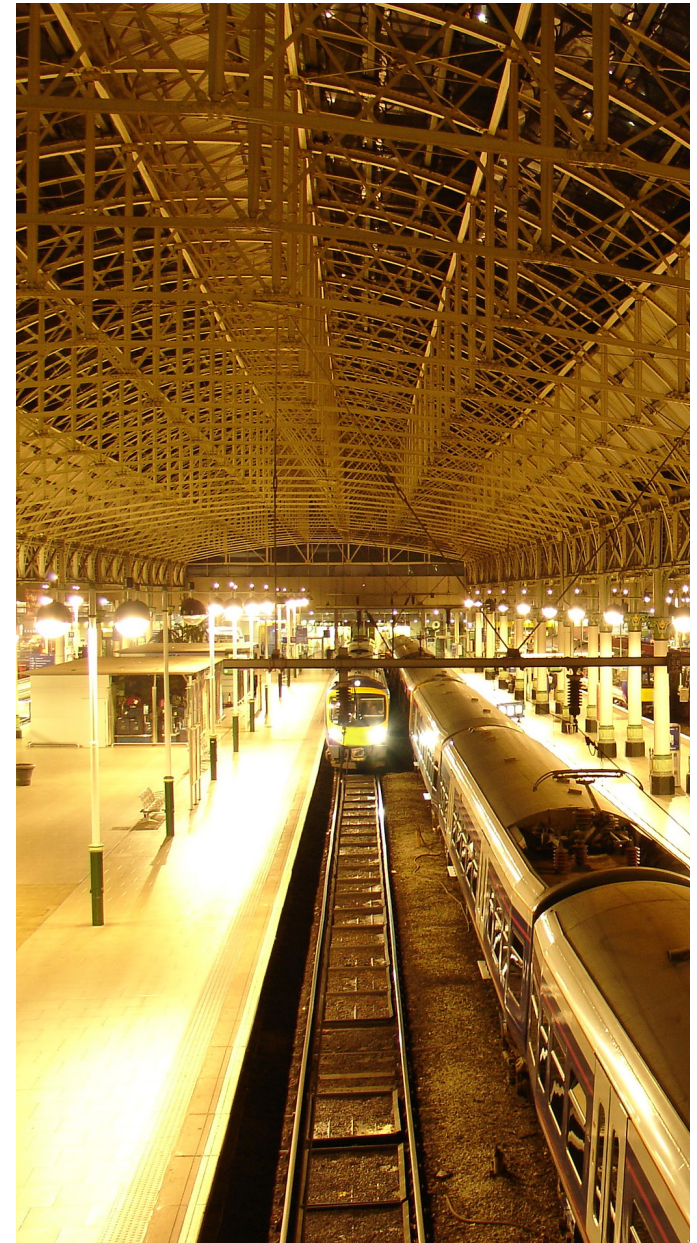
✔ Common Contract Clauses

- **Force Majeure:** Most construction contracts address unforeseeable and exceptional external events that prevent a party's performance. Whether the pandemic or government responses to it qualify as *force majeure* can be difficult questions. Additionally, these provisions usually limit relief to an extension of time for performance of nonmonetary obligations and/or avoidance of penalties for late performance, and impose a duty to mitigate (e.g., in the public-private partnerships (P3) context, *force majeure* events are usually Relief Events rather than Compensation Events).
- **Change in Law:** Most contracts provide for an equitable adjustment where a change in law increases the time and/or cost of performance, or if the change makes performance unlawful, releasing the parties from performance. Some of these provisions are broad enough to include the protective measures instituted by governments in response to COVID-19, such as travel restrictions, quarantines, physical distancing, and stay-at-home and shelter-in-place orders.
- **Delays by Authorities:** Government measures may also implicate provisions that provide time and/or monetary relief when authorities disrupt a contractor's performance. These clauses may also encompass delays to inspections, approvals, etc.
- **Termination:** Some *force majeure* clauses and statutory provisions give one or both parties the option to terminate or rescind the contract in the event of a lengthy interruption to performance. Likewise, termination for convenience may become an option if the impact of COVID-19 make further performance impossible or no longer viable. These options should be approached with caution because determining the amounts owed when a contract is terminated prior to completion is often the source of substantial disputes, especially about differences on the state of progress and the value of partially completed works. In the P3 context, costs arising out of termination for a *force majeure* that continues past a long stop date may include contract breakage fees and expenses, amounts sufficient together with available reserves to make project lenders whole and even partial reimbursement of equity contributions to the project SPV and debt assumed by equity investors. The sum of such public owner payment obligations can come as a surprise to public officials.
- **Claims, Extension of Time and Variations:** Whether you are on the issuing or receiving side, notices of claims arising out of COVID-19 impacts must be carefully examined for compliance with contract requirements. Both the contractor's notices and the owner's evaluation of them may be particularly difficult to carry out given limits on staffing and challenges in estimating the duration of the disruption, determining whether the disruption is caused by the pandemic or a measure taken in reaction to it, and quickly and accurately determining the costs suffered. In some cases, the time limits on presenting and quantifying claims and notices may be one of the obligations impacted by COVID-19. To compound matters, contract documents may be ambiguous as to whether an event can be both a *force majeure* event and give rise to a compensable variation or extension of time.
- **Material Adverse Change (MAC):** MAC clauses often appear in project finance documents and typically allow termination or adjustment of obligations in the event of a material adverse change or effect that threatens a fundamental purpose of the contract. Application of a MAC clause is highly fact-specific. Whether the pandemic and its effects impact a material element of the contract or project will often be hotly contested. While we are seeing that many international lenders are not yet formally calling MACs that have achieved financial close – whether in an attempt to assist the market to stabilize, to continue to service their strong corporate relationships or in anticipation of an improvement in market conditions in the medium- or long-term – this is an area that parties will continue to monitor.

- **Notice Requirements:** For many of the provisions flagged in this checklist, the notice requirements are key to mitigation efforts, often stringent and usually require continuous updating. Given the evolving nature of the pandemic and its impacts, and the added burdens on management resources struggling to keep up due to the impacts of the pandemic on their workplaces and families, compliance with notice requirements may become especially challenging.
- **Suspensions:** Most construction contracts allow owners/employers to suspend work in certain circumstances. If the suspension is not the result of a breach by the suspended contractor, it may be entitled to an extension of time and costs. In many projects, participants are considering suspension during this uncertain COVID-19 period. Suspension is easier to contemplate than to carry out, however, and there are often disputes over suspension-related costs and impacts. Proper management and documentation of suspensions and their impacts warrant careful attention when responding to COVID-19 disruptions.
- **Health and Safety:** Contractual health and safety requirements are under increased scrutiny and may be amended or interpreted to include compliance with government directives, including additional sanitation and physical distancing requirements. Disputes may arise over who should bear these additional costs at site and/or in labor accommodation facilities.
- **Labor, Supplier and Materials Requirements:** Many projects have both contractual and legal requirements governing the proportion of labor, materials and equipment that must be procured locally. Disruptions in the supply chain may require waivers or exceptions from parties or regulators. Additionally, expedited substitutions of approved suppliers and materials may be required.
- **Financing Requirements:** COVID-19 has impacted the finance industry as surely as it has the construction industry. For some projects, the base case financial models on which financing was procured may no longer be valid (particularly in the short term). Where the pandemic impacts the project's financial viability, continued access to funds may be impacted if lenders decide to draw stop further utilization of the financing. Whether this will be the case is likely to depend on the:
 - Strength of the project economics
 - Flexibility of the financing structure
 - Strength of the borrower/sponsors – both in terms of financial strength and relationship, as well as whether the borrower cannot meet utilization conditions due to COVID-19 impacts on actual or forecast project revenues, and
 - Jurisdiction, taking into account the strength and experience of the relevant procuring authority there (for example, the UK government has made it clear that, as far as it is concerned, “the COVID-19 emergency is not, and is not to be, regarded as an event of *force majeure*” in relation to the UK Private Finance Initiative and PF2 Projects).

Planned refinancings and transitions from a bridge construction financing to permanent financing may also be at risk.

- **Inspections and Warranties:** If inspectors cannot travel to the site, can contractors proceed with covering up works? Does this impact warranties and industry certifications? While some regulatory bodies and jurisdictions are offering waivers to certain inspection requirements, some cannot be waived or are nongovernmental and required to ensure satisfaction of quality requirements and as a condition for warranty coverage.
- **Insurance:** Whether available insurance covers costs and losses arising from COVID-19 impacts will depend on the scope and wording of the policies and the facts concerning the impacts. Given notice requirements, however, all participants should review their policies, determine whether coverage is available, and assess the requirements for a claim.



☑ Governing Law Considerations

- **Doctrines of Frustration, Impossibility of Performance and Commercial Impracticability:** Particularly in the absence of a contractual *force majeure* regime, governing law may provide relief from performance or liability or allow cancellation or revision of the contract under doctrines including “frustration of purpose,” “impossibility of performance” and “commercial impracticability.” These doctrines are difficult to rely on, however, because they are less certain than applicable contract provisions and that uncertainty is compounded when parties must wait years for a judge or arbitrator to decide on what relief is available.
- **Judicial Revision Because of Exceptional Circumstances:** Many civil law jurisdictions allow a party to apply for revision of contractual obligations (either by a judge or by arbitrator) where exceptional circumstances make contract performance so excessively onerous as to threaten exorbitant loss to the performing party. Where these laws apply, they cannot be negated by contract and, thus, can be a great help when the impacts of COVID-19 have not prevented performance (as required for relief under *force majeure* clauses), but have made it economically more burdensome. Revision, however, does undo risk allocations already negotiated, and can result in outcomes neither side would have agreed.
- **Government Protective Measures, Exemptions and Critical Industries:** Travel bans, stay-at-home orders, import restrictions, quarantines and production priorities are among the government measures affecting projects now. Many of the restrictions implemented by governments carry exemptions or waivers for critical industries or projects, but the process for applying for exemptions often lacks clarity and speed. As more orders are issued and revised, more questions arise about what the restrictions require.



✔ Workarounds That Might Work

In this unprecedented crisis, first priorities are naturally safety and supporting the efforts to fight the pandemic. “Unprecedented” is an over-used word but not in this context. This crisis – particularly its global nature and the fact that no sector of the economy is immune – creates circumstances for projects that have never before occurred.

Figuring out how the existing risk allocation schemes and contractual rights and remedies can be brought to bear to meet the crisis is the first step. In many cases, however, the best solutions will come from cooperative problem solving across projects, and with solutions that are extra contractual.

Negotiating short- and long-term changes to contracts to fit the “new normal” may be a better solution than working solely within the contract structures already in place. Such adaptations might include:

- Identifying design changes and substitutions to circumvent interruptions in the supply chains. Doing so not only helps mitigate a COVID-19 disruption on particular aspects of the work, but also may give the parties more control over allocating any cost impacts of such measures than the existing contract framework may provide.
- Identifying new work sequences, which might include suspensions to certain parts of work and acceleration of other areas that can more productively be pursued under the current circumstances. This might include identifying which inspections can be waived or postponed.
- Coordinating on immediate schedule mitigation measures to address near term impacts, and as the situation evolves in the coming months, working together on a full schedule revision. These steps can provide the parties better control over the progress of critical works and ability to avoid or mitigate any financial impacts.
- Given the evolving nature of COVID-19 impacts and government responses to them, as well as increased burdens on all project participants to keep up with notice requirements, establishing a multi-entity task force to communicate about and anticipate COVID-19 disruptions can allow all to work more proactively to mitigate them. Such an effort might include establishing agreed procedures for tracking any suspension costs or additional expenses associated with health and safety measures, for example.
- Whether through a task force or other measure, working in a collaborative way to spot and address COVID-19 impacts on a project in real time not only assists all participants in containing risk in the near term, but also has the added benefit of reducing the likelihood of disputes down the road and other unwanted downstream effects on financing and returns on investments once this crisis passes.

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