CONSTRUCTION PROJECTS AND COVID-19

Three practical steps to protect your legal position and minimise future disputes

by Sam Moss

All parties involved in construction projects – contractors, employers, subcontractors, and suppliers – should be mindful that their actions or inaction now could have a significant impact on their legal position once the COVID-19 crisis subsides. Magnanimous expressions of solidarity and understanding by contractual counterparties may be quickly forgotten when the dust settles and lawyers are brought in to allocate responsibility for the consequences of the crisis.

Parties should consider what steps they can take **right now** to minimise their exposure, and ensure they are on a sound legal footing when the time comes.

We set out below **three practical steps** parties on construction projects should be taking to preserve their rights in respect of COVID-19 fallout, and minimise the risk of future disputes.

1. Get a grip on things: get a detailed picture of which activities are affected

The COVID-19 crisis will in many cases not provide a blanket excuse for non-performance. Assuming that it does could land both contractors and employers in trouble. Contractors could be exposing themselves to significant liability down the line if they rely on a broadly-worded force majeure notice to suspend all activity. The same is true for employers who invoke the crisis to suspend the performance of their own obligations (e.g. provision or approval of drawings, utilities on site, etc.). Parties who do not push back against overly broad force majeure notices and suspension of works by their counterparties might also later be considered to have acquiesced to delays or additional costs that were

avoidable, or for which they would not otherwise have had to bear the burden.

Force majeure provisions will often set a high bar for a force majeure event to excuse non-performance. For instance, the FIDIC Red Book 1999 (Clause 19) and 2017 (Clause 18) require that a party "is or will be prevented from performing any of its obligations under the Contract" by a force majeure or an exceptional event, and that the party "specify the obligations, the performance of which is or will be prevented." Similarly, the laws of civilian jurisdictions usually require that force majeure render the performance of an obligation impossible, rather than merely more complex or costly. For instance, under Swiss law, the performance of an obligation must be "objectively" impossible because of circumstances not attributable to the obligor.

Contractors and employers should therefore seek to identify in detail:

- which activities and obligations are affected;

- by which events or measures they are affected – the legal consequences may not be the same depending on whether activities are affected e.g. by unilateral measures taken by a party in reaction to COVID-19, or by governmental measures; and

- how they are affected – are they prevented, or just made more onerous?

In many jurisdictions, including Switzerland, the UK, and US, construction sites can remain open (as at the time of publication) despite government measures to prevent contagion, although various limitations may make many on-site activities more difficult or even impossible. Other activities such as manufacturing, design and planning works, and shipping, may also remain possible.

An accurate picture of affected activities will help contractors and employers to ensure that their force majeure notices comply with the applicable requirements under the contract and the applicable law, and to better assess potential liability for suspending activities. It will also

give parties the tools to respond to, and if necessary object to, the scope of their counterparties' force majeure notices, and their counterparties' decisions.

2. Create a paper trail: keep detailed records of the works and COVID-19 impacts

Once the time comes to take stock of the legal consequences of the COVID-19 crisis, having access to accurate and detailed contemporaneous documentation to prove its impacts will be vital for parties advancing or resisting claims. Good records will be especially important as the COVID-19 crisis presents a tempting opportunity for parties that are responsible for pre-existing delays or additional costs to try to conflate them with the impacts of COVID-19-related measures.

It is therefore important that parties keep detailed records of the works and the impacts of COVID-19-related measures throughout the crisis. In particular, they should:

- maintain a day-by-day timeline of government measures and of the impacts of the measures on their activities and those of their counterparties;

- record in writing any internal assessments of the impact of COVID-19-related measures on specific activities, and the reasoning for the steps taken (including decisions to suspend or restart certain activities); if decisions rely on e.g. advice from health and safety experts or consultants, parties should make sure to have a written record of that advice;

- keep records of which activities are suspended and when, and the exact status of the works (including by means of photos or videos) when each activity was suspended; similarly, keep records of when suspended activities are restarted;

- create a paper trail of key developments in the project correspondence to ensure that counterparties cannot later claim that they were not aware of decisions or measures taken;

- ensure that employees working remotely are recording their time spent on a project in the usual way, preferably on a centralised, easily-accessible system;

- maintain careful records of oral discussions (including by video conferencing or phone) with counterparties, including subcontractors and suppliers – even a simple email sent to all participants summarising the discussion could prove crucial down the line; and

- keep records of efforts made to mitigate and anticipate COVID-19 impacts, e.g. efforts to replace workers who can no longer travel to the site, or to find alternative suppliers where necessary.

3. Mitigate and anticipate COVID-19 impacts

The COVID-19 crisis will in many cases not provide a blanket excuse for non-performance. Also, construction contracts usually impose on parties a duty to mitigate or minimise any delays or additional costs, and the laws of most jurisdictions impose a general duty to mitigate damage. For instance, the FIDIC Red Book 1999 (Clause 19.3) and 2017 (Clause 18.3) require a party to minimise delay resulting from force majeure and exceptional events.

What steps are required to mitigate COVID-19-related impacts will depend on the terms of the contract, and a case-by-case analysis of specific impacts. However, if complying with their obligations is possible but would entail additional costs, parties may well be required to bear those costs. For example, if a supplier is no longer able to deliver essential materials, a contractor may be required to make reasonable efforts to secure alternative suppliers, even if alternative options are more costly. Parties facing such situations should carefully weigh their potential exposure to liability for failing to take steps to mitigate their damage, and also the prospects of negotiating solutions with their contractual counterparts.

Mitigating impacts likely also means anticipating future impacts. For instance, if a party is planning to ship a turbine or other plant in the next months, it should look into whether previously laid plans for the shipment can still be implemented, and if possible develop contingency plans in case their primary option falls through.

Conclusion

Planning and preparation are key for all parties involved in construction projects to ensure they find themselves on a sound legal footing when the COVID-19 crisis subsides. Parties should avoid unfounded assumptions, and methodically take steps to protect their position in respect of COVID-19-related impacts.

Contact the author:

Sam Moss
Counsel
smoss@lalive.law