

Construction contracts - managing risks during the Covid-19 pandemic

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Earlier this year, we published an article discussing some of the key considerations for the construction industry during the global Covid-19 pandemic. We explored, among other things, how Covid-19 and associated lockdowns around the world have given rise to a tangled web of risks and challenges for employers, contractors and other stakeholders in the ultra-globalised modern-day construction industry.



Image source: Gallo/Getty

At the time of our previous article, South Africa was in the process of transitioning from Alert Level 3 to Alert Level 2 under the Covid-19 Risk-adjusted Strategy – a time when most of the construction industry (in respect of both commercial and residential projects) was already back at work, or would soon be able to do so. Since then, South Africa has moved down to Alert Level 1 – enabling most normal activities to resume while adhering to the necessary precautions and health guidelines. However, the return to work for the industry has been, and remains, far from a return to the ‘pre-pandemic normal’.

Although Covid-19 and the associated lockdown regulations have not rendered projects altogether impossible to complete, the concomitant impact on employers and contractors has led to various delays (both in respect of financial and time-related commitments), additional costs and disruption on site.



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In light of these ongoing risks and challenges, most (if not all) parties involved in construction projects have, at some point in 2020, been required to assess their respective positions in relation to ongoing and/or future projects. For many, this has led to more questions than answers and, just as many contracting parties start to appreciate (and get used to) their rights and obligations during these uncertain times, further amendments to lockdown regulations are made. For this reason, it is critical, now more than ever, for parties to remain cognisant of their rights and obligations, and any potential recourse

available to them, under standard construction contracts during times of uncertainty.

We previously pointed out that recourse for Covid-19-related delays and/or additional costs under FIDIC contracts would primarily be found under their force majeure [Clause 19] and so-called “change in law” [Clause 13.7] provisions. The same holds true for other standard form contracts, such as the JBCC, NEC and GCC suite of agreements.

As the construction industry in South Africa continues to find its feet under the ‘new normal’ of Alert Level 1, and while the possibility of stricter lockdowns cannot be ruled out, it is now an opportune time to revisit some of these provisions.



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Force majeure

Although the principle of force majeure is a widely recognised legal concept and a common provision in construction contracts across the world, it is not a codified principle in common law jurisdictions such as South Africa. The definition of, and provisions relating to, a particular force majeure clause in a contract will determine its meaning and scope of application. This notion was succinctly explained in the case of *Sucden Middle-East v Yagci Denizcilik ve Ticaret Ltd Sirketi* (The ‘Muammer Yagci’) – [2020] 1 Lloyd’s rep. 107, in which the UK court noted that the phrase “force majeure” is simply a phrase used in contracts to label a list that includes a mixture of matters. The list informs the meaning of the phrase, and not the other way around.

It is for this reason that force majeure clauses in construction contracts should not be accepted at face value, but rather be analysed independently on each project and exhaustively considered in each contract.

Sub-Clause 19.1 [Definition of Force Majeure] of the 1999 FIDIC Red Book (still being one of the most prominently used FIDIC forms of contract globally) details the general requirements for an event to be considered one of force majeure. The event must comply with the following requirements:

- a. It must be an exceptional event or circumstance;
- b. that is beyond a party’s control;
- c. which such party could not reasonably have provided against before entering into the contract;
- d. which, having arisen, such party could not reasonably have avoided or overcome; and
- e. which is not substantially attributable to either party.

Sub-Clause 19.4 provides further that, if the contractor is prevented from performing its obligations by force majeure, then it (i.e., the contractor) shall be entitled to an extension of time and under limited (non-Covid-19 related) circumstances, to

additional costs.

Similarly, in the JBCC Edition 6.1 [March 2014] contract, force majeure is defined as an exceptional event or circumstance that could not have been reasonably foreseen and/or is beyond the control of the parties and/or could not reasonably have been avoided or overcome. The general consequences of force majeure events under the JBCC Edition 6.1 contract are similar to those in FIDIC – in that they entitle the contractor to additional time, but not additional costs.

It can be argued that the effects of the Covid-19 pandemic satisfy these requirements and therefore may be considered a force majeure event for projects where the contract was entered into prior to the declaration of a pandemic. A contractor should therefore be entitled to claim extensions of time to the extent that it can be established that the force majeure event (eg., the announcement of Alert Levels 4 / 5 in South Africa) prevented it from progressing with the works.

Force majeure provisions in standard form construction contracts generally do not extend to an employer's payment obligations, which must continue to be met, notwithstanding the force majeure event. Should an employer therefore fail to comply with its payment obligations during this period, it may risk the contractor asserting its right to suspend works or potentially terminate the contract depending on the particular provisions of the contract.



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Potential change in the laws of the country

Further important aspects to remain cognisant of in standard form construction contracts during these times are so-called “change in law” provisions, particularly in circumstances where there are regular changes to the alert level of lockdown and, therefore, regular changes to health and safety requirements on construction sites. Generally, to the extent that a contractor suffers delay and/or incurs additional costs due to a change in the laws of the country of the project, these provisions will provide recourse to the contractor (both in respect of time and costs).

The new laws or regulations may impose specific Covid-19 health and safety measures on construction activities, such as social distancing, limitations on number of personnel allowed on site, supply of face masks and sanitisers, alternative arrangements for transportation, facilities, and working hours for staff and labour – all of which may impact the rate of progress of, and funding requirements for, many construction projects. Should the contractor therefore suffer delay and/or incur additional costs (now or in the future) as a result of these changes in the regulations issued under the respective alert levels in South Africa, the contractor will, subject to compliance with the requirements of the particular contract, be entitled to claim an extension of time and/or additional costs.

These change in law provisions are dealt with in Sub-Clause 13.7 of FIDIC (1999), Clause 6.8.4 of GCC (2015) and Clause X2.1 of NEC3 – all of which, broadly speaking, entitle a contractor to claim additional costs in circumstances where the change in law has led to the incurring of additional costs.

Conclusion

As the outbreak of Covid-19 and its impact on the construction industry continue to develop, it is imperative for contracting parties to continuously consider and assess their positions in relation to ongoing and future projects. The variable and unpredictable nature of the pandemic and governments' reactions thereto are further cause for parties to regularly and critically assess where their projects are, how the pandemic is impacting their progress and funding requirements and how they can, and in many circumstances should, pro-actively address potential disputes.

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