大成 DENTONS

COVID-19
construction contract checklist in common and civil law countries

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Introduction

The construction sector is unique, unpredictable and involves a wide variety of actors. The socio-economic fallout of COVID-19 represents an enormous challenge for all involved, from employers and contractors to subcontractors, workers and suppliers. This note is a Q&A guide covering the entire chronology of a construction project, whether it be a public works infrastructure project or a private sector renewable energy project. The questions are relevant to any international construction contract affected by COVID-19.

The keystone for dealing with problems that arise on construction projects is the construction contract agreed to by the relevant parties. When referring to international standard forms, we base our analysis mainly on the FIDIC Conditions of Contract for Building and Engineering Works Designed by the Employer (commonly known as the "Red Book") 2017 and the NEC4 Engineering and Construction Contract since they are the most widely used model international construction contracts.[1]

Notwithstanding the preponderance of the contractual provisions, sometimes the law can intervene. It may supplement contractual provisions through rights or obligations that apply, where the contract is silent or vague on a certain point. It may also override contractual provisions where they are contrary to mandatory elements of the relevant law. This is why the governing law must be examined alongside the contract when problems are encountered.

This guide covers both common and civil law approaches to dealing with the most likely questions to be asked by General Counsel or construction contract managers. This dual approach is necessary to provide meaningful answers to companies with projects in both types of jurisdiction since the approach taken to resolving construction problems can differ in important ways in each.

The most fundamental difference is that common law jurisdictions are more deferential to the letter of the contract than their civil law peers. This deference is a corollary of the principles of freedom of contract and *pacta sunt servanda*, while civil law courts (although recognizing the same principles) are more willing to intervene on the basis of mandatory provisions, principles or doctrines. To keep the guide to a digestible length, we have focused on some of the main common and civil law legal systems in Europe, which are, needless to say, reflective of the approach taken in other common and civil jurisdictions in Europe and beyond.

It is drafted mainly from the perspective of contractors but will also be of interest to subcontractors and suppliers in terms of project risk management. Many answers also approach the relevant questions from the employer's point of view. While a survey of measures taken in Europe regarding the construction sector reveals that only a small portion of project sites have been shut down, most projects have suffered time and cost impacts as a result of the virus. The focus, then, is on the legal options available when responding to time and cost consequences. It also provides practical pointers in terms of navigating this period of uncertainty while minimizing economic and dispute risk. The final part of the guide sets out a number of takeaways in respect of future projects that may currently be in the planning stage. This is in recognition of the fact that the virus has revealed certain aspects of large construction projects that may need to be re-assessed in light of a threat that may be with us for some time yet.

1. Note that while FIDIC refers to "employer" and NEC to "client", "employer" will be used throughout this guide.

Completed projects

The works were substantially complete when COVID-19 struck but no completion/takeover certificate has been issued – where do I stand?

The common law distinguishes between substantial completion (when the works are capable of being used for their intended purpose) and full performance (when all items of work completed). Most model form international construction contracts are based on the assumption that the employer will take over the project upon substantial completion, but that the contractor is still subject to its contractual obligations until full performance is certified.

Sub-Clause 10.1 FIDIC, concerning taking over of the works by the employer, refers to the works being completed such that they can be used for their intended purpose without any minor outstanding work and defects substantially affecting safe use of the works. Under NEC4, completion means that the contractor has done the work set out in the scope has corrected defects which would have prevented the employer from using the works or others from doing their work.[2]

Whether substantial completion has occurred is a common bone of contention on projects since it typically means that, since the works should thereupon be taken over by the employer, the employer assumes responsibility for the care of the works (subject to the defects liability period) and/or cannot impose contractual penalties or delay damages. Also, in many civil law jurisdictions, a statutory decennial defects strict liability period (independent of any contractual defects liability period) runs from the time of takeover, for example, 10 or 15 years after completion under art. 1591 Spanish Civil Code. This is a further incentive for the contractor to claim that takeover should take place, or has taken place, as soon as this can credibly be argued.

Typically, this question will be covered by the provisions in the contract which normally provide that, if the contractor has notified the engineer that the works are ready to be taken over, but the employer does not reply within a certain time after notification (28 days in FIDIC), the works are considered completed and a taking over certificate is considered to have been issued within weeks (14 days in FIDIC) after receipt of the notification by the engineer.[3] There can also be deemed takeover where the employer has used the works.[4] Under NEC4, once the contractor has completed the works in accordance with Clause 11.2, it has achieved completion and the employer has no say in relation to this. The employer must take over the works no later than two weeks after completion and any use by the employer of the works is deemed takeover of the same subject to limited exceptions.[5]

Where the contract does not set out the procedure for takeover (or does so in very vague terms which are not inconsistent with any applicable provisions of any civil codes), civil law jurisdictions typically have codified provisions on what constitutes takeover. This can provide more certainty than a purely case law approach in common law jurisdictions. In France, for example, takeover is defined in the Civil Code as "the act by which the employer declares acceptance

2 Clause 11.2(2) NEC4.
3 Sub-Clause 10.1 FIDIC.
4 Sub-Clause 10.2 FIDIC.
5 Clause 35 NEC4.

of the work with or without qualifications".[6] There can also be deemed takeover by the employer where the works are essentially complete; the employer has taken possession and the contract price has been paid in full.

This can lead to situations where it is in the employer's interest to argue that there has been implicit takeover e.g., if the contractor is insolvent, the employer could thus achieve recovery through the provider of the decennial insurance.

However, a recent French Court of Cassation decision makes it clear that, despite the vast majority of the contract sum being paid by the employer, and the latter having taken possession of the works, the presumption of tacit takeover can be overridden by a prior formal notice of dissatisfaction sent by the employer wherein it demands that paid-for unexecuted work be completed.[7] It is also relevant that, in the cited case, the employer had started legal proceedings against the contractor and had another party complete the works before it took possession. In these circumstances, the court held that there had been no implicit takeover and the employer's claim against the insurer on this basis was rejected.

Completion has taken place and the defects liability period has ended but the performance security has not yet been returned – what can I do?

There may be a delay by the employer in issuing the performance certificate, which in turn causes a delay getting back the performance security. Under Sub-Clause 4.2.3(a) FIDIC, the Employer must return the performance security to the Contractor within 21 days after the performance certificate has been issued and the Contractor has thereafter cleared the site.

If the Contractor has not been able to clear the site, it may be in the parties' mutual interests to agree that the security will be released upon the contractor's clearing of the site provided that is feasible within a reasonable time. Otherwise, the contractor may have to make a claim under Sub-Clause 20.1 FIDIC. NEC4 ECC does not expressly address this question.

6 French Civil Code, art. 1792-6.
7. Court of Cassation, Third Civil Chamber, 5 March 2020, Appeal no. Z 19-13.024.

Ongoing projects

Progress and completion have been delayed – can I get an extension of time (EOT)?

In FIDIC, the contractor is most likely entitled to an EOT where completion is delayed for the following reasons:[8]

- Unforeseeable shortages in the availability of personnel, goods or employer-supplied materials caused by epidemic or governmental actions.[9] Although the provision refers to an epidemic, it is almost certain to cover the current pandemic.
- Unforeseeable delay or disruption caused to the contractor by diligent adherence to public authority procedures.[10] This could be the case where frequent site inspections or site-entry requirements hinder the work of the contractor.
- Delay as a result of one or more changes in laws.[11] "Laws" are defined broadly as encompassing "all national (or state or provincial) legislation, statutes, acts, decrees, rules, ordinances, orders, treaties, international law and other laws, and regulations and by-laws of any legally constituted public authority."[12] A recent FIDIC Guidance Memorandum on COVID-19 states that such changes can be dealt with either as a variation – as an "adjustment to the execution of the Works"[13] – or as a claim event.[14]
- Prevention from performing certain obligations due to an "Exceptional Event" (the 2017 FIDIC suite term for force majeure).[15] Where continued performance has become impossible due to government-declared shutdowns of project sites or restrictions on movement, the relevant measures should be evaluated to determine whether they meet the requirements for an Exceptional Event. The FIDIC Guidance states that such prohibition of construction activities may qualify as an Exceptional Event but emphasizes that "the most problematic part of the test" is likely whether a party "could reasonably have avoided or overcome" the event though implementation of the relevant health and safety measures.[16]

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8. This entitlement is subject to compliance with the claims procedure in Sub-Clause 20.2, as is the case with all entitlements under FIDIC provisions mentioned in this guide. This requires providing notice, keeping records and detailing the claim (including claims at monthly intervals if the event's effect is prolonged). Under NEC4 ECC, sub-clause 61.3 applies and time and cost entitlement is assessed under Clauses 61 to 66. Failure to give adequate notice may result in a loss of entitlement to relief.
9. Sub-Clause 8.5 FIDIC. "Unforeseeable" means not reasonably foreseeable by an experienced contractor by the Base Date i.e., 28 days before the date for submission of the tender (Sub-Clauses 1.1.4 and 1.1.8.5 FIDIC).
10. Sub-Clause 8.6 FIDIC. Note that there may also be scope for a disruption claim against the employer where the employer takes disruptive measures beyond those legally required. For instance, it may be that self-imposed measures of an employer necessitate a change in the method of performance as planned by the contractor at the time of the bid such that the work can no longer be carried out in that manner and/or productivity decreases. However, disruption is not in itself a cause of action and the contractor must establish a legal basis under the governing law.
11. Sub-Clause 13.6 FIDIC.
12. Sub-Clause 1.1.49 FIDIC.
13. Sub-Clause 13.6 FIDIC.
14. FIDIC Guidance Memorandum to Users of FIDIC Standard Forms of Works Contract, April 2020, pp. 7-8.
15. Sub-Clause 18.1 defines an Exceptional Event as "an event or circumstance which: (i) is beyond a Party's control; (ii) the Party could not reasonably have provided against beyond entering into the Contract; (iii) having arisen, such Party could not reasonably have avoided or overcome; and (iv) is not substantially attributable to the other Party." An important point to note, in the context of future outbreaks, is the lack of requirement of the unforeseeable nature of the event or circumstance. Note that the ICC has recently updated its suggested model force majeure provision, which defines force majeure as " the occurrence of an event or circumstance that prevents or impedes a party from performing one or more of its contractual obligations under the contract, if and to the extent that that party proves: (a) that such impediment is beyond its reasonable control; and (b) that it could not reasonably have been foreseen at the time of the conclusion of the contract; and (c) that the effects of the impediment could not reasonably have been avoided or overcome by the affected party."
See https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/.
16. FIDIC Guidance Memorandum, p. 8.

- Where an employer has unilaterally decided, without there being any government-imposed shutdown of construction activities, to suspend progress of part or all of the works under Sub-Clause 8.9.[17]
- If the contractor suffers delay due to a decision by the employer to restrict the contractually agreed access to the site without being legally required to do so.[18]
- If the contract suffers delay due to changed working arrangements and slower decision-making of the employer's personnel (including the engineer or the employer's representative), unless the employer successfully argues that the circumstances are due to an Exceptional Event.[19]

In the NEC4 ECC, there is no specific force majeure clause, but Clause 19.1 deals with "Prevention" and provides that if an event occurs which a) stops the contractor from completing the whole of the works, or from completing the whole of the works by the programmed date, and which b) neither party could prevent and "an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it", then the project manager gives an instruction to the contractor stating how the event is to be dealt with.

The same wording as in clause 19.1 is found in Clause 60.1(19) regarding events which constitute "compensation events" i.e., events that may result in additional time and costs being granted to the contractor.[20] The contractor must notify the employer within eight weeks of becoming aware that the event has happened and failure to do so may disentitle the contractor to relief.[21]

It is noteworthy that, under Sub-Clause 18.3 FIDIC, there is an express duty to "use all reasonable endeavors to minimize any delay" caused by an Exceptional Event. NEC4 does not contain such an express duty but provides that the contractor and project manager have an early warning obligation where an event could affect price, dates of completion or performance.[22] Failure to warn will be taken into account by the project manager under Clause 61.5. Contractors should give such warning if they have not already done so. Mitigation commonly has two dimensions, as stated in the SCL Protocol: the Contractor must take reasonable steps to minimize its loss, and not take unreasonable steps that increase it. In the short term, this could involve

17. Sub-Clause 8.10 FIDIC.
18. Sub-Clause 2.1 FIDIC. Note also that, under Sub-Clause 4.15 FIDIC, if an access route to the works becomes unavailable because of changes of a third party (who, for example, goes further than legally required in responding to COVID-19) after the Base Date, and the Contract suffers delay, the Contractor may be entitled to an EOT.
19. Sub-Clause 8.5(e) FIDIC.
20. Any additional time entitlements of the contractor are dealt with in Clauses 61 to 66 NEC4, as noted above.
21. Clauses 61.3 and 61.4 NEC4.
22. Clause 15.1 NEC4.

efforts to source alternative suppliers, equipment, materials or workers or methods of transport.

It is difficult to know how far courts will extend the practical implications of the concept of mitigation in the future. For example, in view of the likelihood of future "lockdowns" or economic "shutdowns" after the current ones are eased, should contractors consider the use of alternative construction methodologies or practices for the remainder of the project, where they are practicable and could circumvent potential future lockdown-induced delays? Upon remobilization, parties should sit down to decide how already known time (and cost) consequences should be dealt with rather than letting such issues fester.

Should I accelerate the works?

The contractor may be instructed to accelerate works or may take the initiative to do so in order to avoid significant delay damages. In the latter case, however, the contractor should first seek to agree with the employer the time (and cost) consequences of the acceleration measures it plans to take.

Under Sub-Clause 8.7 FIDIC, if delay is caused by an unforeseeable shortage of labor or materials due to an epidemic or governmental actions, and the engineer orders acceleration measures, then Sub-Clause 13.3.1 applies to this variation by instruction such that the contractor is entitled to an EOT (and costs). This is, therefore, a relatively straightforward measure with a set procedure.

Under NEC4, the contractor (or the project manager) can propose acceleration to achieve completion at a date prior to the scheduled completion date (it does not contemplate acceleration in order to achieve the completion date) and such proposal and the contractor's quotation for the acceleration is subject to the project manager's approval.[23]

However, if the employer argues that the contractor's delay is not excusable (e.g., that the force majeure clause in the contract does not cover COVID-19), the contractor may wish to accelerate to avoid potentially having to pay liquated damages for late completion. The contractor should also make it clear to the employer that it is entitled to the EOT and that it is undertaking constructive acceleration measures.

It is important to point out, however, that certain common and civil law jurisdictions, like England, Wales, France and Ireland have no established case law on constructive acceleration, so one should not rely on the doctrine as a means of recovering the resultant costs. As a practical matter, given that the lifting of COVID-19-related restrictions will likely be piecemeal, remobilization of many construction sites will likely be staggered, and so acceleration may be difficult.

Should I pace the works?

Where the contractor is facing delays in deliveries of material or equipment essential to tasks on the critical path, it may make economic sense for the contractor to decelerate (i.e., pace) non-critical works, especially if these works are more expensive during the quarantine period than they might be later on with fewer restrictions in place. This is also true where part of the delay is due to the employer's acts or omissions.

In all cases, it is critical that the contractor:

1. Understand float ownership on the project;
2. Notify the employer and the contract administrator of its reasons for pacing; and
3. Document its resource management to justify its decisions.

Should I terminate the works?

As a rule, termination should be considered a last resort, due to its potentially far-reaching economic, relational and reputational consequences. Many payment issues may be resolved in the coming weeks as further financial support is agreed at international and national levels.

Nevertheless, circumstances may dictate that it is the most prudent, or only, option. Under FIDIC, 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" due to a notified Exceptional Event, then either party may terminate the contract. Valuation of the work performed is then required.[24]

23. Clause 36 NEC4.
24. Sub-Clause 18.5 FIDIC.

The contractor can also terminate:

- If the employer has failed to make a payment and cannot provide evidence of its ability to pay the contract price within 42 days of the contractor's request;
- If a prolonged suspension or more than 84 days affects the works (and no permission to proceed is provided within 28 days of request and no further suspension agreed); or
- If the employer has issues with its solvency.[25]

Under NEC4 ECC, a contractor can terminate where:

- The employer has not paid an amount due under the contract within 13 weeks of the date it should have made the payment;
- The employer has issues with its solvency;
- The parties "have been released under the law from further performance of the whole of the contract";
- The contractor was instructed to cease or not to start any substantial work and has not been instructed to begin again within 13 weeks;
- A "prevention" event under Clause 19.1 has occurred.[26]

Generally, suspension of the works should be carefully considered before termination and, where that suspension is justified by, for example, the employer's failure to make payment, any time or cost consequences of the suspension (or from "reducing the rate of the work", similar to pacing) suffered by the contractor can be recovered from the employer.[27]

One should also bear in mind any duty to mitigate when assessing termination options.

As an employer, should I terminate the works?

The same caution that contractors should exercise when considering termination also applies to employers. The employer is entitled to terminate due to an Exceptional Event in the same way as the contractor under Sub-Cause 18.5. Sub-Clause 15.2 FIDIC sets out the employer's entitlement to terminate for default of the contractor under a range of circumstances.

The most likely cause to occur owing to COVID-19 (assuming a narrowly drafted force majeure clause and prolonged and detrimental COVID-related restrictions) are financial difficulties of the contractor and abandonment of the works by the contractor or delay damages exceeding the maximum agreed amount.[28] Under NEC4 ECC, the employer can terminate for similar reasons.[29]

In international construction contracts, termination for convenience may also be an option and it is typically afforded only to the employer. However, local laws may prevent or restrict an express contractual right to terminate for convenience, particularly in civil law jurisdictions, where both parties have an obligation to act in good faith, and if the employer either is in breach at the time of seeking to exercise the right or seeks to exercise the right to avoid paying profits to the contractor on the remainder of the contract price. Indeed, such a step by the employer could constitute a breach of contract. An example of a civil law protection afforded to contractors in this regard is Article 707 of the Qatar Civil Code, according to which the employer has a right to terminate a construction contract at any time subject to the contractor's entitlement to payment for loss of profit on unperformed works.

By contrast, in its recent decision in *Northrop v BAE*, the English Court of Appeal upheld a provision allowing termination for convenience in the context of a dispute concerning a license agreement, despite the fact that the supplier might not be compensated in respect of certain purchase orders to which it applied.[30] This broadly follows a prior English High Court decision, *TSG v South Anglia Housing*, where the Technology and Construction Court upheld

25. Sub-Clauses 8.12 and 16.2 FIDIC.
26. Clauses 91.4, 91.5, 91.6 and 91.7 NEC4.
27. Sub-Clause 16.1 FIDIC provides for an EOT and/or payment of costs plus profit.
28. Sub-Clause 15.2.1(g), (a) and (b), respectively. Sub-Clause15.2.1(g) sets out the employer's entitlement to terminate if the contractor "becomes bankrupt or insolvent; goes into liquidation, administration, reorganisation, winding-up or dissolution; becomes subject to the appointment of a liquidator, receiver, administrator, manager or trustee; enters into a composition or arrangement with the Contractor's creditors; or any act is done or any event occurs which is analogous to or has a similar effect to any of these acts or events under applicable Laws."
29. Clauses 91.1 and 91.7 NEC4. Note that Clause 91.3 NEC4 also entitles the owner to terminate where the contractor has "[s]ubstantially broken a health or safety regulation" and Clause 91.5 allows the employer to terminate where the parties have been released under the law from further contractual performance.
30. *Northrop Grumman Mission Systems Europe Ltd v BAE Systems (Al Diriyah C41) Ltd* [2015] EWCA Civ 844.

a contractual clause providing for termination at will without any compensation for termination costs or lost profits.[31] This was despite the Claimant's argument that there was an implied term of good faith based on the parties' contractual agreement to work together in a spirit of "trust fairness and mutual cooperation". The Court held that "[e]ven if there was some implied term of good faith, it would not and could not circumscribe or restrict what the parties had expressly agreed" in their termination clause.

However, in the case of civil law jurisdictions, the use of such clauses in circumstances where the employer is in breach of the contract is more controversial. Equitable principles may well come into play to limit the right e.g., the maxim that a person should not derive an advantage from his own wrongdoing (*Commodum Ex Injuria Sua Nemo Habere Debet*).

FIDIC provides for termination for convenience by the employer and Sub-Clause 15.6 FIDIC provides that valuation of the performed works upon termination for convenience by the employer shall include the amount of any loss of profit or other losses and damages suffered by the contractor as a result of the termination. This may discourage the employer from exercising the option. NEC4 ECC does not entitle the employer to terminate for convenience and any such termination by the employer would entitle the contractor to various costs.[32]

Although the above options are open to the employer, one should bear in mind that most contractors in the construction industry are being negatively affected by COVID-19 and that many industry bodies, including FIDIC, have called for solidarity and understanding in the implementation of contracts during this difficult time.[33] Termination under such circumstances could risk compromising relationships, or ultimately being considered wrongful, and the search for a financially stronger replacement contractor may take time. Moreover, governments have already provided, and may well need to provide more, financial support measures to contractors. This may go some way to shoring up their balance sheets and preventing insolvency. As such, one should not make rash decisions simply because the contractual entitlement exists, and one should always seek expert legal advice.

Is there any other time-related relief outside of the contract?

Outside of the four corners of the contract, and in both common and civil law jurisdictions, certain measures taken by governments can assist parties in proving force majeure so as to obtain an EOT under their contract or under governing law. For example, on January 30, 2020, the China Council for The Promotion of International Trade announced that it would issue force majeure certificates to

31. *TSG Building Services PLC v South Anglia Housing Limited* [2013] EWHC 1151 (TCC).
32. Clauses 90.2 and 91.6.
33. FIDIC Guidance Memorandum and FIEC Press Release dated 23 March 2020.

qualifying applicants. Sufficient documentary evidence of the delays including proof of cancellation of transportation, export contracts and customs declarations are required to secure certificates.[34] However, affected parties must bear in mind that even such certificates will mostly corroborate, but not prove, the occurrence of force majeure.

Many countries have declared states of emergency or alarm, which also serve to strengthen force majeure-related arguments. In Spain, due to the extraordinary nature of COVID-19, Royal Decree 8/2020 of March 17, 2020 granted concessionaires the right to request the economic rebalance of the concession agreements by extending their term by up to 15% or by modifying the economic terms of the agreement.[35] The subsequent Royal Decree 10/2020 of March 29, 2020 effectively suspended construction projects from March 30 through April 9, 2020, and work on existing buildings has been significantly restricted since April 12, 2020.[36] On a related note, the European Construction Industry Federation ("FIEC") has requested the European Commission to declare COVID-19 a force majeure.[37] Contractors who are involved in projects with a completion date during such periods would be well advised to request a time extension from the granting authority.

In civil law jurisdictions, force majeure provisions in the relevant civil law codes can also provide relief although this is typically subject to contrary provision in the parties' contract. Article 1105 of the Spanish Civil Code, for example, allows a party to avoid liability for unforeseeable events or unavoidable foreseeable events but its terms are overridden by any express contractual stipulation regarding liability in the event of force majeure. In France, art. 1218 of the French Civil Code defines force majeure but it is possible for the parties to contractually override this definition (or to exclude its application entirely).

Can I recover my increased costs due to COVID-19?

It is unlikely that Sub-Clause 18.2 FIDIC relating to Exceptional Events allows recovery of COVID-19-induced additional costs where the virus is deemed an Exceptional Event. Such recovery is available only for a closed list of qualifying events, which does not include anything directly comparable to a pandemic. As such, a Contractor may be best-advised to seek recovery through the change of laws provision instead.[38] Under Sub-Clause 13.6 FIDIC, if the Contractor incurs additional costs as a result of a change in laws (as broadly defined in the Red Book), the Contractor is entitled to payment of such costs. An optional clause in NEC4 ECC also entitles the contractor to costs in such event.[39]

Where an employer has unilaterally decided, without there being any government-imposed shutdown of construction activities, to suspend progress of part or all of the works under Sub-Clause 8.9, the contractor may be entitled to costs plus profit under Sub-Clause 8.10 for any resultant additional costs incurred. If the contractor incurs additional costs due to a decision by the employer to restrict the contractually agreed access to the site, the contractor may be entitled to costs plus profit under Sub-Clause 2.1.[40] Recoverable increased costs could include, without limitation, the cost of equipment, materials, labor and overheads.

Restriction of access by the employer, a test or inspection by the supervisor which causes unnecessary delay, failure of the employer to provide materials, facilities and samples for tests and inspections, and an event which is a "Prevention" (comparable to force majeure) under Clause 19.1, also entitle the contractor to costs under Clauses 60.1(2), (11), (16) and (19) NEC4.

34. https://www.reuters.com/article/us-china-health-trade/china-trade-agency-to-offer-firms-force-majeure-certificates-amid-.
35. Royal Decree-Law 8/2020, of 17 March 2020, on urgent extraordinary measures to tackle the economic and social impact of COVID-19, Art. 34.4.
36. Also relevant is the subsequent Royal Decree-Law 10/2020 of 29 March 2020 on a recoverable period of paid leave for employees who render in person services related to activities not classified as essential, with the aim of reducing people's movement in an effort to fight the spread of the COVID-19 virus. Art. 2 of this instrument effectively suspended construction projects from 30 March through 9 April 2020. and work on existing buildings has been significantly restricted since 12 April 2020 under Order SND 340/2020, of 12 April 2020, regarding suspension of certain activities relating to works on existing buildings where the is a risk of COVID-19 infection for persons not related to those activities. Construction was not deemed an essential service under this instrument.
37. FIEC Press Release entitled "Negative Impact of COVID-19 on the Construction Industry: 3 Urgent Measures Required Immediately", dated 23 March 2020.
38. FIDIC Guidance Memorandum, p. 9.
39. Option X2 Changes in the Law, NEC4.
40. It should also be noted that, under Sub-Clause 4.15 FIDIC, a Contractor may be entitled to costs resulting from unavailability of an access route as a result of the changes to the route by a third party.

Am I exposed to supply chain risk such as claims from subcontractors?

Whether force majeure disruptions further down the supply chain can excuse a party from non- or varied performance under its own construction contract is not always a straightforward matter. With back-to-back risk allocation in the force majeure clauses, a qualifying event at the initial raw material supply level can be accepted all the way up the line to the contractors and owner. However, this is often not the case and the risk allocation can become complicated where a) the force majeure provisions in the relevant contracts are drafted differently, and/or b) where the governing law of the contracts is different.

In the case of a), there are two scenarios. The first is that the contract between the owner and main contractor is silent as to force majeure events further down the line. The second is the approach of some standard form contracts that provide that a main contractor seeking relief on the basis of a subcontractor's inability to perform due to force majeure can only do so where the event being relied on also qualifies as a force majeure under the main contract.[41]

In each scenario, the contractor may be in an awkward position if the force majeure provision in its contract with the subcontractor encompasses the event in question, but the force majeure provision in its contract with the owner does not. In this case, the contractor may be on the hook for delay damages without the ability to claim, in turn, against the subcontractor. If the opposite occurs, the contractor can, in theory, rely on the force majeure clause in the main contract but its subcontractor cannot do the same in its contract with the contractor. In effect, the subcontractor is in breach of the subcontract, and whether this impacts on the main contractor's reliance on the force majeure provision in its contract with the owner will depend on the wording of the latter and detailed analysis of causal links. The subcontractor would most likely be liable to the contractor for any delay even though the contractor is not so liable to the owner further up the chain.

In relation to governing law, one of the main difficulties springs from the fact that, as previously mentioned, many civil law systems provide for force majeure relief in the relevant civil codes, whether or not the contract provides for the same. This is not the case in common law systems, which are creatures of contract in this respect. Therefore, a contractor may not qualify for relief under the force majeure clause in its English law-governed contract with the employer, whereas its subcontractor may obtain relief as against the contractor in the civil law-governed contractor between the two parties (usually provided that no express contrary provision was made by the parties). As a practical matter, to avoid asymmetry in the risk allocation despite different governing laws, careful drafting is crucial.

The currency of payment in my contract has fallen considerably in value – what can I do?

Currency fluctuation is a problem in countries facing severe inflation or deflation and COVID-19 presents risks of either. Several emerging market currencies have been hit by a global market sell-off in favor of the US dollar as a perceived safe-haven currency. The foreign exchange risk has been further aggravated by falling oil and other commodity prices, since many emerging market economies heavily depend on such commodities such that the performance of their currencies and demand for their commodities are linked.

Currency fluctuation is typically addressed in international construction contracts through the use of formulas designed to adjust payment in response to fluctuations or through the choice of a major currency. Even where the chosen currency is a major currency, the foreign reserves of developing countries may be depleted. This could be an issue in the context of a large construction project with a state as an owner. An important factor in terms of whether this improves is whether the IMF issues further Special Drawing Rights (international reserves that can be used to obtain major foreign currencies from other countries) to such countries – a step that is currently being debated.

41. Sub-Clause 19.5 of the FIDIC Conditions of Contract for EPC/Turnkey Project (1999 Edition).

Can I apply for some form of state aid?

At the EU level, the Commission issued a Temporary Framework to enable EU Member States to provide aid to support their economies within the framework of the existing state aid rules. The Framework is based on Article 107(3)(b) of the Treaty on the Functioning of the European Union, which provides that state aid can be declared compatible with the common market if it remedies a serious disturbance in the economy of a Member State. It has enabled governments across the EU to provide a range of relief measures such as state guarantees for commercial loans for nationally registered companies (which have been provided in France, Germany, Ireland and Spain along other Member States). The amounts guaranteed vary considerably depending on the state but it is an option worth exploring for financially stressed construction companies.

At the same time, contractors should be mindful of potential contractual implications of receiving state aid. They should obtain warranties from their counterparty that the acceptance of any relief from the state will not constitute breach of any warranties. In addition, the contractor may have to accept to forego certain possible legal rights, such as not paying its own subcontractors further down the supply chain, or enforcing securities against third parties, in return for receiving the state aid. The contractor may also be subject to additional positive obligations as a result of accepting the relief, such as making cost data available to the contracting authority on an open book basis. Some of these issues are expressly set out, for example, in the model deed of variation of NEC3 and JCT standard forms of contract under the UK government's Procurement Policy Note PPN 02/20 for example. In this case, one should seek legal advice to ensure that the model deeds are consistent with the contracts sought to be varied.

Is there any other cost-related relief outside of the contract?

The principle of *pacta sunt servanda* – the sanctity of the written word of contracts – is a fundamental principle of contract law in both civil and common law jurisdictions. Since parties are deemed to have freely entered into a contract, they should not, in principle, be permitted to avoid or unilaterally modify their obligations. Nevertheless, faced with an event as significant as COVID-19, parties may rely on certain legal doctrines beyond the legal remedies provided in their contracts.

In common like jurisdictions like England, Wales and Ireland, the doctrine of frustration may provide relief. This typically requires that:[42]

- A supervening event occurs without the default of either party;
- The contract makes insufficient provision for this event;
- The event changes the outstanding contractual rights and obligations beyond what the parties could reasonably have contemplated at the time the contract was entered into, and/or the event makes it physically or commercially impossible to fulfil the contract; and
- It would be unjust to hold the parties to the contract.

While these criteria constitute a high bar to reach, in particular because – unlike force majeure, which is a contractual creature that often affects only certain obligations under the contract – frustration applies extra-contractually and cancels the entire contract, as opposed to just certain contractual obligations. Nevertheless, certain courts, like those in Ireland, have considered the doctrine of frustration to be flexible and capable of new applications in appropriate circumstances and the potential of COVID-19 to frustrate the purpose of contracts is great. Therefore, the doctrine remains highly relevant.

In certain civil law jurisdictions, the effects of particularly stringent government measures can relieve a party from liability for failure to perform its contractual obligations. In France, for example, this doctrine is termed "*fait du prince*" and requires definitive impossibility for the relevant party to

42. *Collins v Gleeson & Ors* [2011] IEHC 200, also discussing relevant English case law.

perform the contract as a result of the measures.[43] Certain hardship provisions set out in civil codes may also apply in civil law jurisdictions, assuming the parties have not expressly excluded their application in the contract in preference for a bespoke clause.

For example, art. 1195 of the French Civil Code provides that, if a change of circumstances, that was unforeseeable at the time the contract was entered into, renders performance excessively onerous for a party that never agreed to assume such risk, that party can request renegotiation of the contract from its counterparty (while continuing to perform its obligations as much as possible during renegotiation). Should the counterparty refuse to renegotiate, either party may agree to terminate the contract or jointly request a judge to modify it. If the parties cannot agree on the course to take, the judge can terminate or modify the contract as he/she sees fit.[44]

A similar concept to this French concept of hardship (termed "*imprévision*") is found in other jurisdictions under the label of the doctrine of *rebus sic stantibus*. For example, the Spanish Supreme Court recently confirmed the contours of this doctrine in a decision dated March 6, 2020. The doctrine is typically invoked to reestablish the equilibrium of contractual performance where, due to intervening and unpredictable events, it becomes excessively onerous for one of the parties to perform its contractual obligations or there is a significantly higher risk that the purpose of the contract will be frustrated.[45] The test of unpredictability of the circumstances takes into account the circumstances and nature of the contract and whether the parties could be deemed to have implicitly foreseen the occurrence of the events. The court held that, typically, the remedy is modification, not termination, of the contract and that the doctrine is most likely to apply to long-term contracts which require continuous performance. It thus excluded the application of the doctrine to a contract with a two-year duration subject to renewal periods of one year. Since it is a doctrine and not codified, the party alleging it must expressly mention it in its claim for variation (or, less commonly, termination) since the doctrine of *iura novit curia* (allowing a judge to apply the law s/he deems appropriate, irrespective of whether the parties put it forward) does not apply.

43. Court of Cassation, Commercial Chamber, 20 September 2017, Appeal no. 15-25.502.
44. This remedy is available only in relation to contracts concluded on or after October, 1, 2016 since it was introduced via the 2016 reform of the French Civil Code.
45. STS 791/2020.

Practical matters

Maintain detailed records

Contractors should keep project records evidencing the impact of the virus on cost, availability of labor and materials, progress and critical sequence changes, approvals, and other project areas that have been disrupted. They should make contingency plans, along with a detailed inventory of the equipment and materials on site in case of future termination. Where additional work, or changed work is required (e.g., a lack of a certain type of material means the design must be changed), the contractor should immediately track the individual cost and schedule impacts related to the required change, using individual activity/cost codes. Failure to do so could see any claim significantly reduced.

Discipline in record-keeping by all parties is all the more important given that some parties may seek to opportunistically shore-up cash flow by commencing various proceedings e.g., adjudication, which is cost neutral and relatively rapid. In the English courts, it has proven difficult to obtain injunctions against such proceedings, even where the manner of appointment of the adjudicator has been called into question.

Sub-Clause 6.10 FIDIC sets out the required content of progress reports, including the working hours of staff and equipment and the quantities and types of materials used for each work activity, location and day of work.

Strictly comply with notice periods

Notifications are typically required in respect of events which will likely cause delays or increase costs; of material changes in financial circumstances, and of the continuance of certain adverse circumstances like force majeure. The specific time periods will depend on the clause in question and failure to comply can affect the ability to recover the related time or cost entitlements.

FIDIC sets out the following notice obligations: [46]

- The contractor must notify the engineer if the works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued within a reasonable time. A failure by the engineer in this regard can entitle the contractor to an EOT and/or costs plus profit.
- The employer must notify the contractor of any material change in its ability to pay the remainder of the contract price. Under certain circumstances (including in relation to non-payment or an instruction to carry out a significant variation), the contractor has the right to request the employer to demonstrate that it can pay the remainder of the contract price.
- Each party must give advance warning to each other and the engineer of any circumstances that may adversely affect the work of the contractor's workers, increase the contract price or delay completion.
- The party affected by the Exceptional Event must notify the other party at the time the effect is first felt, at regular intervals during the Exceptional Event when it is prolonged, and when the Exceptional Event ends.

Similar notice requirements apply under NEC4 ECC.[47]

Keep abreast of government announcements

Beyond government laws and regulations, there is proliferating governmental guidance, which, although not mandatory, can be extremely helpful in making

46. Sub-Clauses 1.9, 2.4, 8.4 and 18.2/18.3 FIDIC, respectively.
47. Clauses 16 and 61 NEC4.

arguments of force majeure and claiming additional time and cost (see Question II.i.e above) or simply obtaining greater visibility regarding likely cash flow from contractual counterparties during the crisis.

For example, the UK Cabinet Office has released helpful policy notes relevant to the construction sector, such as PPN 02/20 on procurement policy and payment of suppliers to ensure continuity of service during the COVID-19 pandemic, together with guidance on how to implement the measures contained therein. This guidance sets out a number of options for relief in construction contracts such as:

- Accelerated payment of invoices submitted by suppliers to enhance cash flow for the supplier and its own supply chain. If invoices are disputed, they may still be paid but the contract should be amended to provide for subsequent reconciliation and potentially set-off rights of the authority against future invoices.
- Certification of interim valuations where work has not been undertaken, based on valuations in the previous three months less supplier profit. The guidance provides for contract terms to be amended to prevent contractual claims for costs due to COVID19 being claimed in addition to this relief.
- It also makes clear that, as a general matter, suppliers may not obtain double relief by claiming from both the contracting authority (under the contract) and the government (e.g., under the Coronavirus Job Retention Scheme (CJRS) or other COVID-19 support schemes) in order to achieve double recovery for the same disruptive event.

For a regularly updated hub of information on government announcements and legal changes relevant to construction, please visit the Dentons COVID-19 Hub.

Keep the construction site safe and secure

During the crisis, one should pay particular attention to keeping construction sites safe, healthy and secure.

Health and safety regulations have long been a standard feature of international construction contracts. Under Sub-Clause 4.8 FIDIC, the contractor must comply with all applicable health and safety regulations and laws. Moreover, the contractor or its health and safety officer must revise the health and safety manual on an ongoing basis, which is a separate requirement to that of compliance with any applicable health and safety regulations and laws. The revised manual must be submitted promptly to the engineer. The employer is obliged to ensure that its personnel and any contracted workers comply with the same health, safety (and environmental) requirements as the contractor.[48] The contractor must also ensure that "suitable arrangements are made for all necessary welfare and hygiene requirements and for the prevention of epidemics" under Sub-Clause 6.7 FIDIC. Under Clause 27.4 NEC4 ECC, the contractor must act in accordance with the health and safety requirements included in the scope of works.

Where the project is located in a jurisdiction with an increased risk of seizures, nationalization or expropriation – e.g., for projects deemed to be vital to the relevant state's interests or public health and safety – particular vigilance should be exercised in terms of site security, and plant and machinery left on site. Under FIDIC and NEC4, ownership of plant and materials can pass to the employer on delivery to the site, and on bringing them within the designated work areas, respectively.[49] If the contractor fears future payment issues, it may wish to arrange for alternative storage of the equipment, especially during a shutdown.

Verify the requirements that apply in the event of rescheduling

Where rescheduling part or all of the works, the contractor should quickly ascertain whether further approvals or permits are required and who is responsible for obtaining them.

Under Sub-Clause 1.13(a) FIDIC, the employer is responsible for obtaining the required permits, licenses and approvals for the permanent (as opposed to temporary) works. The employer indemnifies the contractor in respect of delay or failure to do so, provided the contractor has provided

48. Sub-Clause 2.3 FIDIC.
49. Sub-Clause 7.7(a) FIDIC and Clause 70.2 NEC4.

reasonable assistance, and the contractor is entitled to an EOT and/or costs plus profit if needed. Under Sub-Clause 4.2.1 FIDIC, the contractor must also be mindful of its obligation to extend the validity, at the latest 20 days before it expires, of any performance security where, by reason of the COVID-induced delay, the contractor has not been issued with the performance certificate at the planned date.

Carefully consider the prudence of participating in remote hearings

Several international arbitration institutions have issued guidance on measures to mitigate the effects of COVID-19 on arbitration.[50] While many procedural matters can be efficiently carried out remotely via videoconference (or teleconference in certain cases), and indeed have been for many years, there are certain areas where parties may understandably have reservations as to whether the virtual option is the most prudent.

In the case of hearings, for example, and irrespective of the arbitral institution in question, it is important for a party to ensure that evidence being provided by the other side's witnesses has not been interfered with in any way. As such, cross-examination of the other side's witnesses should ideally take place in the presence of a lawyer representing the client of the cross-examiner. Where there are many witnesses to cross-examine and such travel arrangements are not possible, one should carefully assess the prudence of continuing with the hearing instead of waiting until a physical hearing is possible. There may also be a particularly impactful demonstrative that a party wishes to use at the hearing, the effect of which might be lost in a remote hearing.

50. See, for example, the ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic; the Seoul Protocol on Video Conferencing in International Arbitration; *Nota sobre Organización de Audiencias Virtuales* of the Madrid Court of Arbitration.

Future projects

What contractual issues should be reconsidered?

Method of procurement

COVID-19 has had an almost unique impact in that all parties to a typical international construction contract are affected in one way or another. As a result, parties may consider alternative types of procurement, which tackle such challenges in a more concerted manner.

A good example is contract alliancing. Although it is not yet a widespread practice internationally, it has had project successes, particularly in Australia where it has been used on large public sector infrastructure projects since the mid-1990s, and in Finland where it appeared a decade later.[51] It involves an agreement, whereby all parties agree to act in a certain way to achieve a common goal. It marks a move away from the adversarial approach of traditional procurement. The basic approach involves bespoke or heavily amended model form contracts between the contractor and owner with limited claims allowed and a third party appointed to break deadlock. A pure form involves a wider contract involving all parties (owner, contractor, architect, engineer and subcontractors) where claims are heavily limited e.g., to willful misconduct or statutory breach. The various parties operate as a cohesive entity whereby all parties participate in decisions and risk management and jointly share profits and losses based on an agreed formula. For example, all uninsured risks are shared. An alliance can be formed either through a SPV, in which all stakeholders have a shareholding, or by forming a quasi-alliance without a formal SPV. Apart from its technical advantages in developing innovative solutions outside the parameters of traditional contracts, there are several reasons why it is particularly appropriate in this current time of COVID:

- More effective scoping of uncertainty;
- Greater flexibility to overcome scarcities (of materials etc.) and necessary changes to scheduling and performance;
- A common approach at a time that all parties are adversely affected by a common obstacle which means risk sharing, cooperation and openness make more sense than ever; and
- The availability of Integrated Project Insurance that is based on risks and outcomes rather than liabilities and causes.

A further example is that of public-private partnerships ("PPPs"). In the short to medium term, low tax receipts and very high levels of public debt will reduce the borrowing capacity of public institutions at all levels and will, as a matter of economic expediency, increase the need for private sector financing of infrastructure projects, such as healthcare facilities.

The prospect of increasing numbers of PPPs is welcome, thanks to the sophisticated technology and management which private companies can bring to the table. Moreover, given that such projects are typically costed at the bid stage using a life-cycle cost model (including long-term energy, maintenance, operational and financing costs), there is incentive and thus scope for value-engineering through optimization of energy and other operational and maintenance costs by the concessionaire. Cost certainty will be increasingly important for public authorities and carefully planned PPPs can provide this on many projects via fixed monthly availability payments during the operations period.

51. Note that the NEC4 Alliance Contract ("ALC") was introduced in 2018. Designed for use on major projects, it engages under a single contract the client and all key members of the supply chain, called 'Partners' in the ALC. All alliance members have an equal voice and share in the performance of the alliance as a whole as opposed to their own individual performance.

However, there is also a wide variety of pitfalls to be aware of. First, there will likely be new legislation in this area and demands for stricter security arrangements by private financiers. This could lead to more complex contracts that will need to be carefully negotiated (a PPP master contract typically covers all stages of the project, over a period of decades, from design through to operation and maintenance, as well as financing). Parties should pay particular attention to clauses dealing with the developer's responsibility for labor shortages, delay and increased construction costs (which are typically assumed by developers in PPPs).

Second, certain projects may be particularly exposed to the effects of future upsurges in COVID-19 infection rates. For example, toll road concessionaires' revenues are disproportionately affected by decreased traffic or fees during the crisis and indeed, we are seeing potential claims in relation to government measures that have resulted in suspended toll fees. The renegotiation of concession agreements for three motorway projects in Greece (in 2013 and 2015, as a result of reduced traffic and thus toll revenue due to the financial crisis) shows how seriously a prolonged downturn can impact such works.[52]

For this reason, developers may therefore wish to ensure their return is not dependent, or dependent to a very limited extent, on such revenue sources. Instead, availability payments may be a preferable option. For PPP social infrastructure projects like hospitals, it is likely that the government would insist on availability payments being linked to the availability of hospital beds or certain hospital departments (like A&E and ICU) as a priority, with a significant payment reduction in the event of their unavailability.

Third, it will be crucial to avoid some of the mistakes made in the wave of PPP projects that followed in the EU in the wake of the 2008 financial crisis. A 2018 Special Report of the European Court of Auditors found that many of these projects were poorly prepared by public partners "resulting in premature and insufficiently effective contracts with private concessionaires", delays and cost overruns and that prior analyses were based on overly optimistic scenarios of the level of final use.[53]

It also found that "[m]ost of the audited PPP projects demonstrated inadequacies in the use of the PPP option. Risk-sharing arrangements were poorly conceived, resulting in ineffective or incoherent risk allocation" favoring at times the public entity and at times the private partner.[54] Despite the reservations signaled in this Report, it is inevitable that budgetary limitations will require use of PPP. If correctly planned and contractually set out, PPPs can achieve the anticipated results e.g., the Rion Antirion Bridge in Greece which was completely ahead of schedule and within budget. Indeed, the EU has already committed €45 million in a €90 million PPP for COVID-19 vaccine research through the Innovative Medicines Initiative, a partnership between the EU and the pharmaceutical industry.[55]

Performance security

Different forms of performance security may be appropriate going forward. Performance and payment bonds as well as letters of credit and guarantees are most common in current international construction projects. Given the greater uncertainty generated by COVID-19 and a greater risk of insolvency of project participants, letters of credit may ("LoC"s) increasingly be chosen over performance bonds given the greater security they provide. This greater security naturally requires a more burdensome commitment from the party providing it e.g., the issuing bank freezing the corresponding amount of funds of its client providing the LoC or the latter having to use a line of credit with the bank. This is because the bank that issues the letter of credit is obliged to pay the beneficiary upon demand, regardless of whether the bank's client has properly performed under the underlying contract. The bank's obligation is thus primary compared to the secondary obligation in the case of a bond (normally issued by an insurer) which requires default under the underlying contract before the bond becomes payable.

Drafting of force majeure and change of law clauses

There are two basic ways to draft force majeure clauses. The first is to begin by setting out general

52. European Court of Auditors, Special Report on Public Private Partnerships in the EU: Widespread shortcomings and limited benefits, 2018, p. 29.
53. ECA Special Report, pp. 11-12.
54. ECA Special Report, p. 52.
55. https://sciencebusiness.net/news/eu-puts-eu45m-eu90m-public-private-partnership-coronavirus-vaccine-research

principles and then provide an illustrative, non-exhaustive list of qualifying events. The second is to provide an exhaustive list of events, followed by a list of general principles with which those events must comply in order to qualify as force majeure events. Events such as "epidemic" and "pandemic" will likely, and should, now be scrupulously defined. This is similar to how extreme weather events should be dealt with given what is now known about the severity of climate change. Reference should be made to the most authoritative sources of relevant information, such as the WHO.

Regarding change of law clauses, it makes sense for both parties to, henceforth, define the notion of "law" in as much detail as possible. This will help ensure that any COVID-19-related measures are covered and risk can be allocated by the parties in a predictable fashion. In certain contracts, broadly drafted force majeure clauses can catch the effects of changes in law where such specific clause does not exist.

Inclusion of hardship clauses

Particularly in common law jurisdictions – where the main non-contractually based judicial relief in the face of the effects of COVID-19 is the doctrine of frustration – contractors would be well advised to insist on the inclusion of a hardship clause in their contracts. Contractors in civil law jurisdictions may also wish to do so for greater certainty as to the consequences of its invocation.

The UNIDROIT Principles of International Commercial Contracts 2016 contain art. 6.2 relating to hardship, and the ICC has issued a revised model hardship clause in March 2020. Either of these clauses could be adapted for incorporation in the relevant contract.

What other ways can I protect my business?

Enhanced due diligence of suppliers

In view of the possibility of further upsurges in infection rates of COVID-19, one should pay special attention to the reliability of supply lines and put in place contingency plans, in case one or more suppliers are prevented from performing their contractual obligations.

Pandemic insurance

Many business interruption insurance policies currently in place do not cover COVID-19.[56] Such policies will need to be renegotiated with insurance companies in the future to ensure that coverage is extended to the extent possible.

56. https://www.insurancebusinessmag.com/us/news/breaking-news/calls-for-business-interruption-insurance-cover-for-coronavirus-grow-louder-220751.aspx.

Contacts

Risteard de Paor
Partner, International Dispute Settlement
Madrid
D +34 682207359
risteard.depaor@dentons.com

Jean-Christophe Honlet
Partner, International Arbitration
Paris
D +33 6 73 73 72 38
jeanchristophe.honlet@dentons.com

Amy Kläsener
Partner, Litigation and Dispute Resolution
Frankfurt
D +49 172 638 5198
amy.klaesener@dentons.com

Alastair Young
Partner, Construction and Engineering
Dubai
D +971 56 5113001
alastair.young@dentons.com

Bas van Schouwenburg
Partner, Real Estate
Amsterdam
D +31 6 28 15 94 99
bas.vanschouwenburg@dentons.com

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CSBrand-30759-COVID-19_Construction_Brochure — 15/05/2020