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WHITE PAPER

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Construction Projects and Disputes: A Look Beyond the COVID-19 Lockdown, Part II

It is becoming increasingly clear that the impact of the pandemic will continue to be felt once lockdown measures are relaxed and goods and services are remobilized and deals are rekindled. In addition, many governments are easing restrictions gradually rather than directing a full and complete end to lockdown status, eliminating any hope of an immediate return to the way things were. Further, how owners and contractors respond to the easing of restrictions may themselves be the source of claims.

This second part of a three-part White Paper provides an overview of the impact of COVID-19 on a select number of key sectors within the construction industry: real estate development, oil and gas, renewable energy, social infrastructure, transportation infrastructure, and telecoms. The analysis is from both a transactional and disputes perspective and addresses issues of global relevance, including several questions that Jones Day has encountered in the few months since the start of the pandemic, from owners, contractors, and design professionals. It also reviews the typical insurance policies that cover construction projects and how they may or may not apply to a project that suffers financial consequences as a result of COVID-19.

Part I, published on May 1, 2020, set out an overview of some of the recurring issues facing construction industry participants. It sought to convey a global perspective on these issues, as major companies, particularly those with global operations, must have an understanding of the legal challenges presented by the virus to proactively address the challenges it presents across jurisdictions.

The final part, which will be issued shortly after this Part II, looks beyond the lockdown to examine what effects the pandemic may have for new or suspended projects as well as issues that may require formal dispute resolution. It also discusses some prudent strategies that companies may wish to follow in navigating the long-term fallout from the pandemic.

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INTRODUCTION

With respect to the construction industry, the short-term economic devastation of COVID-19 has consequences for individual projects and capital programs, as well as the demand for engineering and construction services. All of this must be considered in the face of a dynamic and changing backdrop. It is becoming increasingly clear that the impact of the pandemic will continue to be felt once lockdown measures are relaxed and goods and services are remobilized and deals are rekindled. In addition, many governments are easing restrictions gradually rather than directing a full and complete end to lockdown status, eliminating any hope of an immediate return to the way things were. Further, how owners and contractors respond to the easing of restrictions may themselves be the source of claims. Simply put, the impact of COVID-19 on the construction and engineering industry does not have a specified substantial completion date.

The issues and their implications are many. For this reason, we have prepared a three-part White Paper. It does not address in detail the legal doctrines of force majeure, impossibility, impracticability, or the contractual arguments being asserted on individual projects, all of which are important (and on which we have commented in other publications). Instead, the focus of this White Paper is on the global response to the pandemic from both a country and sector perspective, the types of issues that have been (and likely will be) raised as projects shoulder the impact of COVID-19, and strategic considerations as they relate to contract drafting, disputes, and the intersection of the construction business and the law.

Part I, published on May 1, 2020, provided an overview of the recurring issues relevant to the construction industry, as well as specific legislative and regulatory measures implemented in the countries with the most active energy and infrastructure development programs. Many of our clients are located in these countries, have projects in these countries, or depend on these countries for their supply chain. An overview of these issues and measures in multiple jurisdictions is useful to develop a global, proactive strategy rather than a narrow view confined only to the challenges posed by COVID-19 in the jurisdiction where specific projects are located. The construction industry is a global industry and the progress of a major project and its timely and successful completion is seldom a function of purely local conditions in the jurisdiction where the site is located. The COVID-19 pandemic has reinforced this reality.

This **Part II** provides an overview of the impact of COVID-19 on a select number of key sectors within the construction industry: real estate development; oil and gas; renewable energy; social infrastructure; transport infrastructure; and telecoms. The analysis is from both a transactional and disputes perspective and addresses issues of global relevance, including several questions that Jones Day has encountered in the few months since the start of the pandemic, from owners, contractors, and design professionals. It also reviews the typical insurance policies that cover construction projects and how they may or may not apply to a project that suffers financial consequences as a result of COVID-19.

Part III will offer thought-leadership scenarios that may arise at project inception and during the construction phase, as well as associated strategies that may be adopted in navigating the path of least peril as the consequences of the pandemic continue to be felt.

While this Part II cannot practically address all industry sectors or issues manifested in those sectors, the aim is to provide sufficient coverage of issues to be of assistance to owners, design professionals, and contractors with global operations, all of whom are best served by a global understanding of the legal and sector challenges presented by the COVID-19 pandemic.

SECTOR REVIEW

Real Estate Development

Within real estate as an asset class, there is no uniform reaction. The appetite for investing in new developments in certain sectors like retail and hospitality has decreased significantly across the globe, whereas other sectors such as logistics and multifamily are, as yet, not as adversely affected. The current climate brings with it a number of new challenges in the negotiation and completion of transactions, as all parties look to protect their positions and seek to allocate risk in relation to the pandemic, the consequences and timeframe of which cannot be fully assessed. The focus of contract negotiations

has been on delay risks (and their cost consequences), provisions relating to termination rights and the cessation of works, and the consequences of contractor and subcontractor insolvencies. Lenders' understandable caution during this crisis is inevitably inhibiting investment into and progress with new developments.

While the propensity for disputes to arise out of the pandemic will depend on the specific factual nexus, works, and relationship between the parties, we have already seen repetitive contractual flashpoints in particular subsectors. For example, where the time sensitivity of works is a key factor to the financial modelling of a development scheme (in, for example, the student accommodation sector), the management of delay issues is of paramount importance and increases the probability of disputes developing. Similarly, the adverse impact of the pandemic on the retail sector and the lack of tenant appetite for new leasing space have already seen an increased focus on delay mechanisms, target completion dates, and default "long stop" date triggers within the underlying property and funding arrangements and their interface with the construction documents.

This is not just an issue affecting the owners of real estate development assets. With respect to their existing loan portfolios, real estate lenders are assessing their potential defensive and offensive strategies amid the rapidly changing economic climate. However, we have, for example, already been considering with real estate lender clients the mechanics of enforcement and the legal and practical implications of completing a "project in distress." Popular areas of client interest have included assessing the granular details of title ownership of goods and materials on- and off-site under contractual arrangements, lender "step-in" mechanics, and demands against performance bonds and guarantees. We expect interest in these areas to increase alongside the likely global uptick in distressed real estate development opportunities.

Some examples of the issues that we have encountered to date include:

- In the United Kingdom, we have advised on the critical decision-making process and contractual implications following government COVID-19 guidance and mandatory measures enacted and, in particular, the closure of sites across a number of large multifamily and student accommodation portfolios throughout the United Kingdom. There are different contractual consequences from a cost and time perspective depending on the actions taken by the employer and contractor, and we have been advising clients on these consequences alongside their ongoing statutory duties and the regularly updated site operational guidance.
- Across Europe, we are working with a number of large landlords in the commercial and retail sectors in relation to the contractual consequences of delays to works they are procuring under their construction, property, and financing documents, and the interplay between these documents. We have, for example, been assisting in the management of extension of time notices and potential delay claims, and advising on scenarios where there are competing delays. Further, we have considered the contractual interpretation of events of default under construction, property, and financing documents, including the interpretation of the usual event of default under development facility agreements relating to an abandonment of developments for a continuous period.
- In Asia, we have advised developers on claims of force majeure with respect to construction delays caused by shortages or unavailability of construction materials (e.g., concrete and gravel, rebar, reinforcing wire, template nails, and steel plate) as a result of supply chain disruptions in China. For this early stage issue, we are advising on how to react to the force majeure notice received from the contractor as well as the availability to our client of force majeure, the evidence that is required to substantiate the event, and the loss that flows from the event, together with what the client is contractually required to do, and can do, to minimize the effects of the event.
- In the United States, we have been advising real estate development clients, including developers, landlords, tenants, and investors, in two primary areas: (i) interpretation of existing contract language related to delay or performance relief; and (ii) negotiation of delay or performance relief in the midst of COVID-19. The concept of force majeure under U.S. law is jurisdiction and contract-specific, with the precise language of the clause and common law dictating its applicability to the facts of a particular occurrence. Likewise, we have analyzed the relevant rights, remedies, notification requirements, and mitigation obligations implicated by these clauses, as they vary significantly from contract to contract. Additionally, since some states and local jurisdictions have restricted or prohibited construction activities altogether, we have analyzed the impact of government action

on the application of these clauses. Where force majeure or other delay or performance relief is not expressly made available in the contract, we have also considered the applicability of common law relief, such as impracticability, impossibility, and frustration of purpose.

- Regarding new contracts entered into during the COVID-19 crisis, we have considered the extent to which the delays real estate development clients are facing would be considered foreseeable and/or beyond the impacted party's control. Since the COVID-19 outbreak has been ongoing in many U.S. jurisdictions for some time, its impact on real estate development has existed for a period of months. We have considered the extent to which foreseeability and/or a party's ability to contract around a particular COVID-19-related delay may negate potential relief under a force majeure or similar delay or performance relief clause. We have, for example, assisted in the review and revision of standard force majeure and other delay relief language in form contracts to more specifically tailor the provision for delays that, although considered unforeseeable and/or beyond a party's control several weeks ago, have now become commonplace in the industry.

Energy: Oil and Gas

Globally, the oil and gas sector is suffering from a perfect storm that combines the effects of generally lower demand and oversupply of oil as a result of globally stagnant economies, a further collapse in prices resulting from the oil price issues between Saudi Arabia and Russia, and a further, deep drop in global demand arising as a consequence of the COVID-19 pandemic. The combined effect has resulted in historically low oil prices, with some indices temporarily falling into negative territory. For those contracts that link LNG pricing to an oil-based price curve, customers are benefiting from substantially lower prices. Those prices, however, are making some existing and planned projects uneconomical, with knock-on effects to the industry. At the same time, continued malaise in the price of natural gas (particularly in the United States) has created opportunities for investment for those projects that utilize natural gas as a source of fuel or component part of an industrial process, provided that demand is otherwise in place.

The situation remains uncertain and difficult to predict, but the sector is unlikely to experience a quick V-shaped recovery, even if measures (including those currently being taken by OPEC and Russia) lead to a meaningful reduction in global supply. Despite very early indications of demand firming and prices recovering, it is likely there will continue to be significant volatility as factors out of producers' control continue to impact the levers of demand (and, therefore, prices).

The low prices, price volatility, and decreases in demand have impacted the feasibility of related construction projects, causing industry participants to cut capex budgets and reconsider proposed exploration and developments. Construction projects that have not yet commenced may be delayed, suspended, or shelved entirely. In addition, we have been advising clients on how to cost effectively curtail projects already under construction based on strategic and other considerations arising as a result of the pandemic.

In Australia, we have already seen delays to several new developments and planned expansions in the oil and gas industry. Several large LNG projects have been shelved. In Saudi Arabia, Aramco announced that it expects capital spending for 2020 to be between $25 billion and $30 billion as the result of current market conditions and recent price volatility, compared to a projected $35 billion to $40 billion. Several of the oil majors have announced multibillion-dollar reductions in their capital programs. Producers elsewhere have made major curtailments in their projected capital spending, in some cases by as much as 50%, to account for the evaporation of demand, lack of access to traditional sources of capital, and other financial and operational pressures. This means, in part, that those with access to capital, and much longer investment horizons, will continue with certain of their planned capital projects (particularly for projects that are at a stage in their development cycle that would create more liability for breakage costs than the completion of development). But most are less fortunate, and the reduction of spend in the upstream will have significant ripple effects through the remainder of the value chain in hydrocarbons.

Oil and gas related construction projects that have already commenced will encounter a range of difficulties resulting from the current environment. In addition to the (well-publicized) increasing number of force majeure claims (for example, as a result of a contractor experiencing an outbreak of COVID-19 among its workforce, or due to government restrictions leading to labor difficulties or supply chain interruptions), a number of contractual issues that have a particular impact on the oil and gas industry may arise. We are advising our clients in the sector to consider: (i) change of law clauses

where parties are financially impacted by relevant government restrictions; (i) issues arising under joint venture agreements where a participant is experiencing cash flow difficulties; and (iii) issues around the application of credit support clauses where the financial standing of a party to a contract is affected.

Self-evidently, such issues have the potential to lead to disputes between contracting parties and JV participants, and we expect to see an increasing reliance on the dispute resolution clauses in relevant contracts. Disputes common to the construction industry may also occur, including disputes concerning force majeure claims, principles of frustration or economic impossibility and impracticability, extension of time and delay cost claims, the application of delay liquidated damages clauses, and termination (for breach or convenience) provisions. In the oil and gas industry in particular, disputes may also arise throughout the value chain when project principals have entered into supply or sales contracts with third parties in order to support the development and/or financing of a project, where a delay in construction affects the sponsor's ability to meet its supply or sales obligations.

Clients are looking beyond the principles of force majeure or frustration, and as noted above, we are now advising our clients in relation to several sector-specific issues affecting their projects. These include:

- Where a party to a contract experiences an increase in costs or a decrease in benefits due to the government response to COVID-19, it may seek to pass through such increase or decrease to its counterparty under a change of law clause. This may occur where costs of obtaining labor or supply increases due to government restrictions (such as, in the Australian and Saudi Arabian context, where restrictions impact the availability of the fly-in, fly-out workforce, and in jurisdictions such as the United States where different state-by-state responses to the pandemic complicate the free flow of workers and goods). We are seeing issues around the drafting of such clauses and the extent to which relevant government policies and regulations may form the basis for a pass-through.
- Issues have arisen where a joint venture participant has been financially affected and does not have sufficient cash flow available to meet its cash call or approval for expenditure obligations, particularly with respect to expenditure for major construction projects. Failure to comply with funding obligations may trigger various contractual consequences under the joint venture agreement, including a right for nondefaulting participants to dilute the interest of the funding defaulter. Disputes may also arise around the application of these contractual mechanisms and the failure to fund generally. We expect to see a significant amount of attention on such provisions in the very near future.
- If a party is experiencing financial difficulties (or considers that its counterparty is), it should be aware of the circumstances in which credit support (or additional credit support) may be sought under relevant contracts. We see an increasing number of attempts to rely on such clauses where parties have been impacted by the pandemic or low oil prices generally. Triggers entitling a party to require credit support (or additional credit support) may include a decrease in the credit rating of an entity or a material deterioration in financial standing.

Energy: Renewables

While renewable energy projects were originally forecasted to have a boon year in 2020, the COVID-19 pandemic has changed that, both for this year and potentially beyond.

For example, most renewable energy projects rely on a supply chain of equipment and materials that is sourced from around the world. Many of these projects are at risk of being delayed due to slowdowns in the delivery of materials and parts from overseas as result of, among other things, port closures, and reduced manufacturing operations. Wind and solar projects are particularly vulnerable in this regard because China is one of the major producers of solar photovoltaic panels and turbines.

However, with regard to financing requirements and obligations, funders and banks typically have not exercised the draconian rights available to them under the relevant financing agreements. Instead, they have agreed to the necessary waivers (albeit sometimes with conditions) to ensure that the project remains financially viable and continues through to the completion of construction or the end of the financing term. Construction delays that affect the financial base case may lead to the revision of finance documents, but the complete restructuring of projects (as occurred in the 2008 financial crisis, which affected most of the existing financing structures) is unlikely to materialize.

The impact on this sector varies from country to country. In India, for example, the Ministry of New and Renewable Energy has insisted on the continuance of the "must run" status of renewable energy projects. It has also confirmed that projects where construction is delayed due to COVID-19 will be entitled to an automatic extension of time for the entire period of lockdown and an additional 30-day period to allow for normalization of the project. Notwithstanding this, even the renewable energy companies that are doing well are seeking to sell off some projects/stakes to raise money and increase liquidity, and the opportunity in the market for acquisition of distressed assets has spiked in the last few months.

In Europe, the impact of COVID-19 has led to a dramatic shift in the region's energy mix. The pandemic has effectively accelerated the energy transition away from traditional energy sources such as coal and toward renewable sources. For example, it is reported that, in the United Kingdom in the last month, renewables had a 43% share of generation (up 10% from the same period last year), with coal power down 35% and gas down 24%. In Spain, 49% of its energy came from renewables, with coal power down 41%. Far from hampering the sector, COVID-19 has provided insight into how existing renewable energy systems can withstand these higher demands and may serve to accelerate further investment into the sector.

In the United States, the President recently issued a new executive order, "Securing the United States Bulk-Power System," under the International Emergency Economic Powers Act, which could result in additional project delays for U.S. developers that source equipment from China or other non-allied countries, as the order provides a basis for the Secretary of Energy to regulate and potentially prohibit this activity.[1]

Accordingly, as the Unites States ramps up its preventive measures, many renewable energy project construction starts have been paused indefinitely. Renewable energy projects that benefit from production tax credits ("PTCs") or investment tax credits ("ITCs") are among those with the most at stake as a result of such delays. Such projects have always been vulnerable to construction-related timing delays, due to strict rules that cause the value of the PTCs or ITCs for which a project may qualify to depend on the year in which project construction begins and is completed. Solar and wind projects currently under construction and financed with tax equity or otherwise dependent on the PTC or ITC for their economic viability may have the most at stake. Because none of the relief packages that have been passed by the U.S. Congress thus far have included legislation to extend either the PTC or the ITC to account for COVID-19-related delays, stakeholders in the renewable energy tax equity industry face added pressure to overcome delays and to successfully complete construction of such projects before the expiration of these valuable tax credits. Fortunately, the Treasury Department indicated in a March 7, 2020, letter sent to the U.S. Senate that it is considering modifying the current rules in the near future, presumably including extending the four-year rule to a five-year rule, which would almost certainly be a lifeline to wind developers as they rush to overcome COVID-19-related equipment supply and construction delays

While it is almost certain that renewable energy projects will be slower coming online in 2020, where the industry is headed beyond that may largely depend on corporate demand as a result of the lockdown and whether there is a continued trend toward sustainability. In addition, as state and local governments continue to support renewable energy projects by, for example, issuing policy directives affirming clean energy as a top priority and setting aggressive renewable portfolio standards, it is likely the demand for renewable energy projects will remain strong. Over the past two months, we have been regularly providing advice on issues arising from the impact of COVID-19 on renewable energy assets. These include:

- Claims from supply chain counterparties where the performance of equipment suppliers was allegedly delayed or impacted as a result of shutdowns at ports and/or manufacturing facilities due to COVID-19.
- The renegotiation of construction contracts for a developer where an equipment supplier delay or claim of force majeure forced an extension of guaranteed completion dates.
- Advising on the impact of COVID-19 on security. For example, a subcontractor who jointly bid along with the developer for a renewable energy project and provided a financial guarantee may be faced with claims related to COVID-19 disruption as a result of the expiration of the financial guarantee despite the bid date being extended as result of the pandemic.

Social Infrastructure

Social infrastructure is a subset of the wider construction and infrastructure sector and typically includes projects for public

social services such as schools and universities, hospitals and care facilities, civic centers, prisons, and similar publicly procured projects. Many of these projects may be owned and procured by nonprofit public benefit corporations, especially private hospitals and universities in the United States. We have seen a number of issues arise on these projects as a result of the pandemic, the nature and severity of which depend on many factors, including the type of owner, the procurement and financing structure for the project, and the stage of construction and location of the project.

Social infrastructure projects may be funded through state or local taxes, bonds, net income from operations, fundraising, and public–private partnerships ("PPP"). PPP procurements are used globally, particularly in Canada, much of Europe, Australia, and (to a lesser extent) Asia, but are relatively the exception in the United States. Generally, the social infrastructure sector differs from other "economic infrastructure" sectors that involve more "user pay" or demand-based revenue streams (such as those often connected to a toll road project or an airport or seaport concession). Demand risk on social infrastructure projects is usually retained by the government sponsor and is ultimately financed based on an "availability payment" structure where debt and equity returns are met over a long period (commonly at least over 20 years) and the government pays based on the availability of the project asset(s), not actual usage of the asset(s).

The availability payment structure has allowed many existing PPP social infrastructure projects to fare significantly better financially in response to the pandemic than other infrastructure sectors experiencing immediate and drastic reductions in revenues (such as passenger airports). For well-structured projects with good governmental off-takers, government contract payments have continued, provided the private sector can maintain general availability criteria. However, some cities and counties in the United States that have seen significant drops in tax revenue attributed to pandemic-related shutdowns have deferred certain projects that are funded by tax revenue. The same is true in the Middle East, where some social infrastructure and utilities projects are being delayed as regional governments rework their spending priorities in the wake of reductions in hydrocarbon revenue.

Similarly, the timing of many social infrastructure projects in bidding or early feasibility stages has been impacted. Generally, projects undergoing tender have not been outright cancelled, although we are seeing some governmental procurers suspend bidding—some to a defined future date, others indefinitely. Some projects at feasibility stages are not currently moving into final tender stage. There are many reasons for this. For example, national and international restrictions on travel mean that bidding, particularly for international bidders, cannot physically be completed, which is commonly required under many public procurement rules. Several jurisdictions in the United States have swiftly passed laws to allow virtual submission of bids. Other developing jurisdictions tendering rules are being amended to allow electronic bidding. Further, social infrastructure bidding commonly requires committed funding or at least "in principle" lender commitments. Even where bidders can secure some level of commitment for bidding, we are seeing financing spreads widen, and lenders are finding it harder to price risk.

In addition to financing challenges, government and public health orders have shut down some projects while others have been allowed to continue. By way of illustration, in several jurisdictions in the United States, hospital and certain health care infrastructure projects have been treated as essential infrastructure projects permitted to continue. Even where such construction may proceed, we have seen contractors and subcontractors seek relief related to the pandemic based on force majeure, change in law, excusable or compensable delay, and other contract clauses and legal doctrines (e.g., impossibility, impracticability, frustration of purpose, etc.). The following examples are illustrative of the type of claims we have seen:

- On a hospital project, the contractor has provided a broad notice of potential claims for time and money related to asserted impacts from the pandemic. The contractor claims three categories of potential delays and cost impacts, which typify the types of claims we are seeing:
  - First, the contractor claims that substantial management resources are diverted to mitigate impacts to labor availability and productivity due to COVID-19. Consequently, according to the contractor, significant management time is not available to manage the work to ensure that it proceeds efficiently, thereby indirectly delaying the work and increasing its costs.
  - Second, the contractor claims COVID-19 safety procedures and rules recommended or imposed by public authorities, and others adopted voluntarily by the contractor to ensure

a safe workplace in the face of the pandemic, negatively impact productivity. The contractor claims a reduction in work force and key supervisory personnel has led to reduced productivity. The contractor also points to loss of productivity caused by social distancing requirements, including limits on the number of workers who can be transported at any one time in an elevator or lift (e.g., six persons rather than 12), additional time training workers on safety requirements, additional cleaning time, and even "mental distraction of the crisis."

- Third, the contractor claims additional safety-related enhancement costs such as manpower and material to sanitize high-contact surfaces, installation of additional handwashing and other sanitation stations, elevator operator costs to support staggered start times to implement distancing requirements, and the cost of required personal protective equipment.

- On another health care-related project, the contractor made a time extension claim in an effort to avoid potential liquidated damages based on the apparent unavailability of a public authority's inspector who was assigned to a time-intensive COVID-19 task force. As is often the case, the parties may dispute whether this inspection was on the critical path and whether delays in other work on the critical path would have delayed completion of the project.
- On existing PPP social infrastructure projects, we have seen joint force majeure and change in law claims where private-sector participants and their lenders seek the maximum protection for extensions of time, relief from being held in breach, and financial compensation. Some PPP forms and standardized concession contracts used for social infrastructure projects contain express protection for epidemic and/or pandemics, while many do not. Where force majeure relief is available, it usually allows for extension of time claims and can provide relief from breach, although force majeure clauses often do not allow for compensatory relief. For this reason, private-sector participants are looking at other supporting options under their contracts, such as change in law provisions that often provide relief beyond the nonfinancial relief common to force majeure provisions. In contracts that are currently being negotiated, many contractors are requesting that force majeure clauses be modified to allow for financial relief, not just time relief.

In our experience, owners, contractors, and subcontractors, with very few exceptions, recognize the difficult circumstances associated with the pandemic and have worked cooperatively and transparently to move projects forward. We expect that many of the potential claims on social infrastructure projects will be resolved by the parties without resort to the courts or arbitration, although inevitably there will be disputes that will need to be resolved on an adversarial basis.

Transportation Infrastructure

There are a multitude of issues affecting the transportation infrastructure sector around the globe in light of the COVID-19 pandemic and the associated societal shutdowns. In most cities across the world, public transport services for the most part have continued only to the limited extent considered essential, and those that have continued have been subject to strict social distancing measures. Front-line staff numbers have been reduced accordingly.

With workplace shutdowns and many populations "working from home," demand for public transport has been reduced significantly, and there is some speculation that such demand will be reduced in the medium term, with potentially more permanent structural changes to the way people work after the pandemic has passed. As a result of the lower demand, many transport infrastructure operators have suffered serious declines in revenue and cash flow, have laid off staff, and may face liquidity issues. The sector has been the subject of government "bail outs" and stimulus packages in various jurisdictions, particularly in the aviation industry. In the United States, for example, the Trump administration negotiated a bailout with certain airlines to save salaries and benefits for employees through October 2020. In Colombia, Avianca, which employs approximately 11,000 Colombians, is requesting relief from the Colombian government, which is being met with resistance from Colombian taxpayers who recognize it would benefit a foreign majority-owned, foreign-domiciled company.

- Despite these challenges, the sector outlook remains positive. S&P has stated that "the sector's rating outlooks continue to be overwhelmingly (almost 80%) stable." Ecuador, for example, is one of the countries in Latin America with the highest rates of COVID-19 and yet plans to launch a formal tender for the $245 million Cuenca-Azogues-Biblian road project in June 2020. And while the COVID-19 pandemic has slightly delayed the launch of the $12.5 billion 5G road PPPs in Colombia, the government has decided to move ahead with the new roads program, and the first project should be launched in the next few weeks. In the United States, Texas is moving forward with its $3 billion

highway project in Houston and, earlier this month, at least five teams comprising international companies submitted bids for Georgia's SR 400 Express Lanes P3. As governments across the world seek to inject funds into and stimulate their economies, it is highly likely they will continue to invest in long-term transport infrastructure.

As for ongoing transport infrastructure projects, the situation varies widely by jurisdiction and by project. Delays have been caused by construction site closures, as well as difficulties in sourcing equipment, especially from China. While this may represent a significant delay in achieving certain milestones for some long-term construction projects, if restrictions are lifted such that work sites and supply chains can resume, many projects will be in a position to complete largely on time with the ability to recover schedules or to run only slightly over schedule. We are already seeing the easing of restrictions and construction resuming in some jurisdictions in Asia, Europe, and Latin America. In certain cases, projects have not suffered any gap in construction funding from lenders, and new projects have been awarded and have closed and funded during the midst of the lockdowns. Should the impacts of the pandemic continue longer and the path out of the shutdowns take longer, the impacts on project timelines, budgets, schedules, and project participants will be greater.

Interestingly, on some transportation projects, the pandemic may allow work to proceed faster than planned. As widely reported in the press, this may be the case on a subway project in Los Angeles County that goes through the well-known city of Beverly Hills. The city imposed significant restrictions on when certain work could be performed due to heavy traffic in high-end shopping areas. As a result of the California stay-at-home order and public health orders issued by the county, traffic is sparse at best. For this reason, the city and the public owner appear to be working cooperatively to permit the subway contractor to close ordinarily heavily congested streets so that work that might otherwise interfere with regular traffic can be completed much more quickly and efficiently by the contractor during the period of the shutdown orders. This example underscores that every project must be looked at individually, and broad statements about the impact of the pandemic on the progress of projects must be qualified.

On most ongoing transportation infrastructure construction projects, parties are dealing with the delays (and cost impacts) with a two-pronged approach—namely, contractually and commercially. Parties are first seeking to apply the terms of their contracts to leverage their contractual rights and seek relief from their obligations, if appropriate. That means that contractors are routinely noticing relief under force majeure provisions, change in law provisions (which, unlike the typical force majeure provisions, allow for both time and cost entitlements), as well as for standard variations and other grounds for extensions of time. For some projects that were already experiencing delays and other stress, some developers have opted to exit where the pandemic made the situation worse. Where financing is in place, waivers are being sought from lenders where appropriate given the impact of the pandemic on the ability to complete audits, finalize administrative procedures for registrations and permits, and negotiations with authorities relating to specific relief with respect to the relaxation of deadlines due to the pandemic.

Owners, on the other hand, in some cases are enforcing notice requirements and requiring contractors to substantiate claimed impacts on the critical path. This becomes particularly difficult where there is potential preexisting (culpable) delay or in circumstances of concurrency. A fertile area for dispute in this context relates to the contractor's duty to mitigate. Where claiming schedule relief on the basis of force majeure, the question arises: Must a contractor incur greater expense to avoid the impact of the force majeure event and even to accelerate its works? The duty to mitigate is certainly not settled in many jurisdictions and has been an area of focus since the English case of *Seadrill Ghana Operations v Tullow Ghana* ([2018] EWHC 1640 (Comm)). These and other questions will be at the forefront in the months to come.

In some circumstances, it is the owner that seeks relief from force majeure (perhaps with a desire to put certain projects on hold). In that regard, we are also seeing use of suspension rights and, in some cases, termination for convenience. Where a project is suspended, the cause attributed to the suspension ordinarily will determine liability for the time and cost consequences. We are working on a confidential matter where the owner (a public authority) has suspended the works for a so-called breach, thereby seeking to transfer all liability to the contractor. The contractor has claimed that the

suspension was not due to its breach but was made necessary by the wider shutdowns of construction sites in the jurisdiction for reasons of public safety. We suspect that there will be many more instances like this where the impacts of the pandemic will be analyzed and litigated in light of specific project realities.

Telecoms

In the context of the COVID-19 pandemic, the telecommunications industry tells a two-sided story: Although it is affected by the pandemic, as are many other sectors, it also has the capacity to mitigate the consequences. Virtual private networks, videoconferencing services, intensive use of emails, and the like are key teleworking tools enabling individuals all around the globe to continue working while remaining at home, and they all rely on electronic communications infrastructures (submarine cables, satellite networks, terrestrial backbones, mobile infrastructures, etc.). In that respect, countries with good telecommunications infrastructures, in particular countrywide high-speed networks (e.g., fiber-to-the-home and 4G/5G networks) have a competitive advantage, both to ensure compliance with containment measures from individuals able to work remotely and to guarantee the continuation of economic activities despite such measures. As another example, in emerging countries such as Togo, the distribution of financial support to the population has been carried out through electronic communications means (mobile payment), which was more efficient and prevented people from claiming such subsidies in breach of containment measures.

From a financial standpoint, telecommunications operators benefit from recurring revenues arising from long-term agreements with their customers, which reduces their financial hardship. However, clients' recruitment has been virtually halted, which raises challenges in emerging countries where mobile customers are mostly under pay-as-you-go arrangements. In addition, telecommunications operators need to review their policy in relation to delinquency management since suspension of services may not be an acceptable option in the present context, and they may thus face an increase in arrears.

Telecommunications operators are also facing multiple challenges to avoid congestions (for both voice and data services) on various critical segments of their networks. These include terminal segments connecting individuals that were not designed to absorb so much traffic as compared to dedicated networks set up for companies, mobile networks that are limited by the scarcity of spectrum resources available, interconnection infrastructures between telecommunications operators/data storage facilities that required an upgrade to enable more exchange of traffic, or even international infrastructures in some emerging countries where capacities available on submarine cables were not sufficient.

Requests were made for derogations to net neutrality principles (in jurisdictions where they are legally recognized, such as in the European Union) to enable prioritization of work-related traffic (e.g., videoconference) and measures reducing video quality were implemented by some major streaming service providers, but more sustainable actions were needed. In the United States, the Federal Communications Commission ("FCC") has waived certain inter-carrier compensation rules to permit more network capacity to be devoted to conference calling services. The U.S. Congress and the FCC have also recently allocated substantial funding and distributed grants for the development of increased telemedical services to support patients in remote locations suffering from the virus or other medical conditions.

Yet, telecommunications operators are currently experiencing significant issues in carrying out work critical to avoid congestions and to improve their infrastructures, caused by:

- Possible shortage of fiber-optic and telecommunications equipment (due to goods being blocked on vessels or in ports or possibly to difficulties affecting China's factories);
- Difficulties for operators/subcontractors to carry out maintenance and repair operations (due to movement restrictions or shutdown of hotels, for instance); and
- Impossibility for subcontractors to roll out fiber-optic/new mobile sites or improve them (due to the halt of construction activities, for instance).

These difficulties may lead to months of delays in the roll-out/improvement of telecommunications infrastructures and to a suboptimal quality of services for clients, possibly bringing telecommunications operators into breach of not only their contractual obligations but also of their legal and regulatory obligations. In addition, subcontractors facing cash flow difficulties may be subject to insolvency procedures, which will

create additional challenges for telecommunications operators attempting to catch up on their projects.

Finally, leaving aside the destruction of 5G mobile sites in some countries as a result of alleged health risks attaching to the technology, the postponement or suspension of 5G spectrum auctions (such as in Austria, France, Poland, New Zealand, Spain, etc.) will delay operators' investments in their networks. However, it should be noted that some operators found unusual and innovative solutions to overcome the scarcity of spectrum resources available, such as in the United States, where the FCC has given major wireless carriers temporary use of fallow spectrum that was otherwise assigned to an unbuilt carrier and federal government agencies.

Some of the issues that we have encountered recently include:

- Mitigating difficulties faced by a telecommunications operator in relation to its infrastructures during the COVID-19 pandemic. Some of its equipment is blocked and, due to travel restrictions and the shutdown of hotels, its employees have difficulties carrying out the works necessary to avoid congestion on its mobile networks and to construct new telecommunications infrastructures that are necessary to comply with its license and its related technical specifications. In addition, interventions at customers' premises (for the installation or repair of equipment) are no longer possible, and customers are not able to purchase their prepaid cards to access telecommunications services due to the shutdown of shops or the restrictions affecting their opening hours.
- Advising a telecommunications operator in obtaining the necessary authorizations for the reactivation of a submarine telecommunications cable that had long been deactivated. This operation is necessary to increase the country's access to international capacities that was not sufficient to absorb traffic from customers in the context of the COVID-19 pandemic. We worked to develop a solution that will survive the COVID-19 crisis, involving a complex restructuring of the ownership of the submarine cable and a new scheme for its future operating conditions. Further, we are working on terms governing the investments necessary to ensure the infrastructure is functioning after years of inactivity as well as its future upgrades and the distribution of additional capacities that will then be available.
- Assisting governmental authorities in the implementation of a submarine cable project. The marine survey ship that had left to establish the optimal route for the cable system had to interrupt its assignment and return to port to replace the crew due to a COVID-19 outbreak, incurring further delay in the project. External consultants hired to establish suitable locations for the beach manhole and the construction of the cable landing station have been unable to enter the country, and the client had to mobilize additional internal resources to provide ground support in-country and conduct field work and provide data.
- Negotiating new financing, government loans, and/or restructuring to ensure continued operations of telecommunications service providers. Although most telecommunications service providers are experiencing a significant increase in traffic as a result of the COVID-19 outbreak, certain service providers that largely support niche end-user markets are experiencing substantial reductions in traffic and suspensions of payments by end users in those market segments. For example, we are advising on the availability of new debtor financing, government-backed loan assistance, and/or restructuring solutions for telecommunications service providers that normally receive a significant share of their revenues from such vertical market segments as the cruise ship industry, leisure vessels, live sporting and concert events, and oil and gas exploration, all of which have been hit hard by the virus.
- Assisting a client in the accelerated rollout of new communications products in Europe. This is in relation to a global communications provider and a project to roll out a connectivity product, including conferencing and meeting functionalities at an accelerated speed. We are advising on regulatory requirements in circumstances where regulatory agencies are effectively closed.

INSURANCE OVERVIEW

A variety of insurance issues may be implicated by losses at construction projects that arise from COVID-19. Most construction projects involve, at a minimum, the following insurance coverages:

- **Builder's Risk Insurance** covers losses at projects under construction. Most Builder's Risk insurance is written on an "all risk" basis, so it covers losses unless the cause of the loss is specifically excluded from coverage. Most Builder's Risk policies require proof of "physical loss of or damage to" property (or similar language), which may include coverage for the "loss of use" of property. Many Builder's Risk policies cover losses due to construction delays if the delays arise from a non-excluded cause of loss.

- **Property Insurance** typically covers losses at completed projects arising from "physical loss of or damage to" covered property. Some construction projects are covered under "course of construction" coverage provided by a Property policy rather than under a separate Builder's Risk policy. Property insurance, like Builder's Risk insurance, is typically written on an "all risk" basis and may cover the "loss of use" of property. Most Property policies cover business interruption losses.
- **Commercial General Liability ("CGL") Insurance** generally covers the policyholder's liability to third parties for bodily injury and property damage.
- **Professional Liability Insurance** typically covers the policyholder's liability for financial losses, bodily injury, and property damage to third parties resulting from a professional error or omission.

Based on publications, filings, and media reports, the insurance industry will likely resist and contest coronavirus claims vigorously, arguing, inter alia, the following:

- Virus and/or similar exclusions in some policies apply to exclude coverage.
- Coronavirus contamination is not "loss of or damage to" property.
- The losses did not result from covered physical damage but, rather, labor disruptions, supply chain disruptions, etc.
- Insurers never intended to cover risks associated with pandemics.

Despite insurance industry pronouncements, many policyholders will have strong arguments in favor of coverage. We discuss below how each of these types of insurance may apply to COVID-19-related losses on construction projects.

Builder's Risk Insurance

Builder's Risk insurance is the coverage most likely to be implicated by COVID-19 issues at active construction sites. Builder's Risk policies typically cover additional costs incurred by the owner or contractors due to construction delays, so long as the policyholder can prove that the cause of the loss was covered physical damage. Thus, if the presence of the coronavirus is deemed to be "loss of or damage to" covered property, these policies may provide coverage for financial losses suffered due to the presence of the coronavirus. Moreover, while most Builder's Risk policies contain "contamination" or similar exclusions, those exclusions often do not define "contamination" as including the presence of a virus. Many Builder's Risk policies cover losses resulting from government-ordered shutdowns (called "Civil Authority" coverage), although the policyholder sometimes must show that the Civil Authority order resulted from some form of covered physical damage at, or near, the affected project. Additionally, some Builder's Risk policies specifically provide coverage for communicable disease business interruption and/or communicable disease cleanup (usually subject to sublimits and deductibles), although such coverage is more typically found in Property policies.

The key issue in establishing coverage for losses due to the effect of coronavirus is likely to be showing that the presence of coronavirus caused "loss of or damage to," or the loss of use of, covered property. There is some helpful language in certain orders issued by public authorities, which expressly state that the presence of the virus is associated with physical damage to property. For example, the Broward County Administrator's Emergency Order 20-01 recites that the order "is necessary … because the virus is physically causing property damage due to its proclivity to attach to surfaces for prolonged periods of time." The original statewide "Stay Home – Stay Healthy" proclamation issued by Governor Inslee in Washington indicated that the order was issued, among other reasons, "to help preserve and maintain . . . property," that the pandemic was a "public disaster affecting . . . property," and that public authorities in Washington were taking steps to "alleviat[e] the impacts on . . . property."

Property Insurance

Coverage for a construction project that is provided under an existing Property insurance policy will generally be comparable to the coverage provided under Builder's Risk insurance. The basic coverages and exclusions are typically fairly similar, although there can be some variance in the types of financial losses that are covered under "course of construction" coverage, as compared to Builder's Risk insurance. Since the coverages are generally similar, addressing coverage under a Property insurance policy will generally involve many of the same issues as under a Builders' Risk policy.

CGL Insurance

As noted above, CGL insurance is designed to cover the policyholder's potential liability to third parties for bodily injury and property damage. In the context of a loss occurring at a construction site due to COVID-19, the scenario most likely to arise would be that a claimant alleges that the policyholder

allowed workers infected with COVID-19 on site, and/or failed to observe reasonable safety practices, resulting in the claimant (e.g., an employee of a subcontractor or another contractor) becoming infected. A more remote (but possible) situation is that a project owner, or a general contractor, asserts that the policyholder (e.g., a subcontractor) failed to observe proper health screening and/or safety practices, resulting in the site becoming "damaged" by the presence of the coronavirus, in turn causing financial losses, for example because the owner or the general contractor had to shut down all or a portion of the site. Depending on the specific policy language and factual circumstances involved, CGL policies might cover such claims.

Professional Liability Insurance

Depending upon the precise circumstances of a claim, a project participant's professional liability insurance could be implicated by a COVID-19 claim. The potential for coverage will vary greatly based on policy terms; some policies provide broad coverage for financial losses arising from errors and omissions, while some provide narrower coverage. A claim scenario that could arise is that the owner or another project participant asserts that a construction manager or other professional did not take adequate precautions to prevent the introduction or spread of coronavirus, resulting in a project closure or delay. While insurers likely will assert that there is no coverage unless it is shown that the error specifically caused the loss (rather than the presence or spread of coronavirus), policyholders should have solid coverage arguments, depending on how the claims against them are framed.

In summary, it is important to keep the following points in mind:

- Although establishing coverage may present some barriers, policyholders may have sound arguments for coverage depending on the specific facts and circumstances of claims and losses.
- Governmental closure orders are likely to be helpful in pursuing coverage, particularly orders that state that the presence of the coronavirus is causing property damage.
- There will be continuing governmental pressure on insurers in some jurisdictions to provide at least some coverage for coronavirus losses.
- In order to develop a strategy that maximizes potential insurance rights, policyholders should have counsel carefully review policies, give prompt notice of losses, articulate a theory of coverage that is mindful of specific policy language, and carefully document losses.
- As always, owners and other parties need to coordinate their positions on contractual disputes with positions taken on insurance claims to avoid inconsistent positions that can negatively affect resolution of contract or insurance disputes.

CONCLUSION

The impacts to the construction industry resulting from COVID-19 have reached most sectors and have been far-reaching and varied in scope. Some sectors are experiencing particularly difficult challenges, both financially and in implementing the guidance and requirements received from regulatory authorities. Other sectors are better suited to face the impacts of the pandemic and might even see new opportunities as a result of the pandemic.

Given the myriad issues in play, it is important for owners, contractors, and others operating in the construction industry to develop a working understanding of the likely pitfalls and gird themselves to weather the storm. Also, because the effects of COVID-19 are likely to be felt for many months, if not years, to come—and considering the dynamic environment—businesses must be nimble in their approach, flexible enough to adjust to changing circumstances, and prepared to protect their assets (via insurance claims or otherwise) if and when it becomes necessary to do so. The repercussions of the pandemic are global in nature—an impact in one country or region may impact projects in a different country or region. Thus, even when considering the impacts on individual sectors in any one jurisdiction, global impacts invariably warrant consideration regardless of the location of a major project.

Part III of this White Paper will examine the effects the pandemic may have for new or suspended projects, issues that may require formal dispute resolution, and strategies for navigating the long-term fallout from COVID-19.

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ENDNOTES

1 The order prohibits any acquisition, importation, transfer, or installation of any bulk-power system electric equipment (in each case, a "transaction") where the Secretary of Energy, in consultation with other agency heads, determines that: (i) the transaction involves bulk-power system electric equipment designed, developed, manufactured, or supplied, by persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary; and (ii) the transaction (a) poses an undue risk of sabotage to or subversion of the design, integrity, manufacturing, production, distribution, installation, operation, or maintenance of the bulk-power system in the United States; (b) poses an undue risk of catastrophic effects on the security or resiliency of United States critical infrastructure or the economy of the United States; or (c) otherwise poses an unacceptable risk to the national security of the United States or the security and safety of U.S. persons.