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MECHANISMS TO DEAL WITH UNFORESEEN UNPRECEDENTED CONTRACTUAL IMPACTS



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THE BEGINNING: Contracting before Covid 19

- The options:
- **Traditional:** Employer designs, contractor builds to the design;
- **With Contractor's Design Portion:** Employer designs part of the works, Contractor designs part, Contractor builds;
- **Design & Build:** Employer settles Requirements, or provides a concept, Contractor designs and builds;
- **Turnkey** – Contractor provides design, construction and all services up to handover to Owner.

THE BEGINNING: Contracting before Covid 19 Risk Allocation

- **Traditional:** substantially on Employer; construction, on Contractor;
- **With Contractor's Design Portion:** Substantially on Employer, shared risk as to design; construction risks on Contractor;
- **Design & Build:** Greater control by Employer, carrying associated risks, but design and construction risks substantially with the Contractor;
- **Turnkey** – risks intended to shift to the Contractor.

THE BEGINNING: Contracting before Covid 19

Risk allocation under FIDIC:

Generally, apportioned to the party best able to carry the risk:

- **Traditional:** Red Book, substantially on Owner; construction, on Contractor;
- **Design & Build:** Yellow Book: Design risk shifts to Contractor, Owner still carries substantial risks.
- **Turnkey** – Silver Book: minimal Employer Risks, risks intended to shift to the Contractor.

UNFORESEEN ISSUES: PRE-COVID

- e.g. Difficult ground conditions – especially contamination: **Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2015] EWCA Civ 712** FIDIC Cl.4.12 – Contractor cannot “*simply accept someone else's interpretation of the data and say that is all that was foreseeable*”. Must use own judgment and explore risks.
- NEC₄: CC60.2 data which C is assumed to have taken into account.

UNFORESEEN ISSUES: THE EXPERIENCED CONTRACTOR

- FIDIC, Cl. 4.12 and NEC 3 60.1(12) SFCs apply an objective test of foreseeability of difficult physical conditions in EC's price and programme. **Van Oord UK Ltd & Anor v Allseas UK Ltd [2015] EWHC 3074 (TCC)**
- NEC 3 and NEC 4, CC 60.1(12) conditions are that the unforeseen physical condition must be:
 - Within the Site;
 - Not weather conditions; and
 - An EC at the Contract Date would regard as so minimal that it would be unreasonable to have allowed for them.

UNFORESEEN ISSUES: THE EXPERIENCED CONTRACTOR [2]

NEC₄, CC60.2 is explicit about the material the Contractor is assumed to have taken into account:

- a. The Site Information [usually the cause of the problem!]
- b. Publicly available information referred to in the Site Information;
- c. Information obtained by a visual inspection of the Site; and
- d. Other information which an Experienced Contractor could reasonably be expected to have **or to obtain**. [my emphasis]
- See also Optional Clause X2: changes in the law...
- NB potential to alter risks via Z clauses.

COVID ISSUES

- Supply Chain/Goods And Materials Issues;
- Personnel Health And Safety;
- Travel Restrictions;
- Delay To Project– Extension Of Time For Completion;
- Increased costs;
- Impact of forced Suspension Of Works;
- Inability To Continue The Project.

UNPRECEDENTED ISSUES: COVID

FIDIC Red/Yellow Books:

- Cl. 18: **Exceptional Events:** (previously Force Majeure) EoT, and in some instances, recovery of costs.
- Cl. 8.5(d): Unforeseen shortages in the availability of personnel or goods (or Employer supplied materials)... due to epidemic or government actions.
- Cl. 8.5(e): Delay caused by Employer...
- Cl. 8.6 Unforeseen delays by Authorities.
- Cl.13.6 Changes in law affecting costs.

UNPRECEDENTED ISSUES: COVID

- **FIDIC Silver Book:**
- Cl. 18: Exceptional Events: EoT, and in some instances, recovery of costs arising from...
- Cl. 8.5(c), Employer caused delays, unforeseen shortages in the availability of Employer supplied materials... due to epidemic or government actions.
- Cl. 8.6 Unforeseen delays by Authorities.
- Cl.13.6 Change in law affecting costs.

UNPRECEDENTED ISSUES:

- **NEC 4:** Cl.60: CEs permit EOTs and recovery of costs.
- Cl. 60.1(13) Adverse weather: objectively determined by data, occurrence likely less than once every 10 years;
- Cl.60.1(19) Prevention (Force Majeure) which prevents completion, or delays it; and neither Party could prevent, and an EC would have judged... so small as to make it unreasonable to allow for it.
- Optional clause X2: changes in the law.

WHAT ARE THE ISSUES POST PANDEMIC, NOW WAR IN UKRAINE

- Shortages of materials;
- Shortages of labour;
- Steep price inflation labour and materials;
- Project delays;
- Security issues/uncertainty;
- Insolvency risks / Debt.

THE POST PANDEMIC CONTRACTUAL LANDSCAPE

- Historic contractual provisions in existing – pre-pandemic contracts have managed most of the impacts.
- Where not covered, parties have had to be creative –
 - work out the issues, share the burdens, or risk failure of the project.
- Find fresh ways to avoid or resolve issues outside the strict contractual envelope.

CONCLUSION

The dilemma: Keep calm and carry on;
or evolve on the basis of lessons learned

What did we learn:

- Negotiation, collaboration and compromise worked to secure continuation and completion of projects.
- The commercial creativity which was deployed during the pandemic should be preserved.
- Formal contractual mechanisms were not always appropriate to deal with unforeseen/unprecedented contractual impacts.
- Pandemic and post-pandemic disputes would be better managed and resolved by means other than adjudication, arbitration or litigation.

Thank you for listening

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