Significant health and safety adaptations, communications, cost implications and agreement on who is to take responsibility for costs and revised delivery programmes will need to be considered in light of the Covid-19 pandemic.

The Irish Construction Industry Federation (CIF) issued the Construction Sector C-19 Standard Operating Procedure (SOPs), an industry written document in line with HSE and WHO advice[1]. This document has served as a useful guide for the management of COVID-19 on a construction site throughout the pandemic. Whilst the CIF Guidance represents good practice, it is not a statutory document.

**Responsibilities for the Employer**

- COVID-19 was a previously unknown Particular Risk in respect of the Works and within the ambit of the Safety, Health and Welfare at Work (Construction) Regulations 2013, as amended.
- Project Supervisor for the Design Project (PSDP) to instruct both the PSCS and Contractor for the Works and update their "Construction Management Plan" to outline how they will manage to work safely on site.
- The Employer has a statutory obligation to comply with Section 8 (1) of the Safety, Health and Welfare at Work Act 2005 which obliges that "*Every employer shall ensure, so far as is reasonably practicable, the safety, health and welfare at work of his or her employees"*
- The Employer is expected to co-operate with the Contractor.

**Responsibilities for the Contractor**

- The Contractor is to develop the Covid-19 Plan as part of the Construction Management Plan.
- The Contractor is obliged to enforce this plan in carrying out its construction activities and those of its sub-contractors on site.
- The Contractor is to identify a Covid-19 compliance officer to ensure compliance of the plan in line with issued guidance including the CIF C-19 SOPs.

**Cost Implications**

There has been and will be significant cost implications as a result of COVID-19; increased health and safety training at all levels; allocation of new responsibilities; new working methods; increased supervision, monitoring and reporting; site adaptations; potential supply chain disruption; and new delivery schedules.

Clause 4 of the RIAI construction contract concerning variations arising from legislative enactments states that where the cost of performance of the Contract increases or decreases as a result of any legislative enactment, rule or order or the exercise by the Government of powers vested in it, the amount of such increase or decrease as certified by the Architect shall be added to or deducted from the Contract Sum.

In the private sector, parties have amended this standard form contract to both reflect the extent of the recoverable sum which will accommodate the scale of the change envisaged as a result of the Covid-19 pandemic legislation.

Briefly whilst Clause 36 of the RIAI construction contract is concerned with variations in respect of wages and prices. Whilst it is often deleted from the contract by way of an Employer's Schedule of Amendments if it not the Contractor may be able to rely on it to base a claim in respect of an increase in the contract price.

The PW-CF1 contains an optional clause which will allow for an adjustment to the Contract Sum. What constitute "compensation event" are defined in part 1K of the Schedule to the PW – CF1.

[1] Available here https://cif.ie/2020/05/11/new-operating-procedures/

Therefore for an compensation event to apply, some type of action is required on the part of the employer of the employer's representative. For this to occur the employer's representative needs to present the contractor with a change order, suspends works on site, fails to deal with an impossibility under Clause 4.5.4 or where the employer refuses to permit access to the site or part of it by the contractor under Clause 7.1.

In the absence of a force majeure clause in the PWC Contract ultimately means that there is no mechanism for dealing with force majeure events and results in an increase in the possibility of the contract being frustrated.

However, The Office of Government Procurement Note on procurement and contractual matters associated with the COVID-19 Response Measures acknowledges that the Public Works Contracts do not provide an entitlement to the Contractor to recover costs associated with a delay arising from site closure in the current circumstances. Instead, they have developed guidance for 'an ex gratia payment' to relieve financial pressure on contractors. Payment is intended to cover Contractor's preliminaries unavoidably incurred for the duration of site closure. To be eligible for this payment, the contractor must provide a full breakdown of all costs under the contract on an 'open book' basis and make all relevant records available to the employer.

Office of Government Procurement has also published the model terms of a Supplemental Agreement to be entered into between the parties. The model agreement is in the form of a letter to be exchanged between the Employer and the Contractor. The Contractor is required to give some warranties relating to the cost information provided to the Employer including that the ex gratia payment does not cover any costs already addressed through the Government's Temporary Covid-19 Subsidy Scheme. If there is a bond in place, evidence is required from the bond provider that it consents to the agreement.

The supplemental agreement makes provision for claw back of the ex gratia payment if the Contractor breaches the terms of the agreement. While the Contractor is not required to waive any claim under the contract in connection with the Public Health Measures or the related Regulations, if such a claim is successful, the ex gratia payment will be deducted from any amount determined to be due to the Contractor.

**Change in Law**

Contracts may also provide a mechanic for dealing with the impact of changes in law, although these may be limited to changes that could not reasonably have been foreseen by the parties.

Emergency legislation[2] has caused a restriction on movement and led to sites being temporarily shut down. The result has been short-term labour shortages and disruption to supply chains. If a party is unable to perform its contractual obligations for the price, time, or specification agreed, then it may be able to apply under a Change in Law provision for adjustment to those terms. It is important to note that these provisions will only cover mandatory restrictions and recommendations from the government or otherwise will not fall under this provision.

Clause 18 FIDIC (Yellow Book) provides for Exceptional Events, defined as an event or circumstance which

(a) is beyond a party's control;
(b) could not have been reasonably provided against before entering the contract;
(c) having arisen could not reasonably have been avoided or overcome; and
(d) is not substantially attributable to the other party.

Exceptional Events may comprise a number of occurrences which are expressly mentioned, including strike or lockout. The resulting entitlement may include extension of time; payment of costs for some of the occurrences expressly mentioned; optional termination if the Exceptional Event continues for 84 continuous days or 140 cumulative days (unless parties are able to agree on an amendment that would

[2] Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020
Health Act 1947 (Section 31A -Temporary Restrictions) (COVID-19) Regulations 2020
Health Act 1947 (Section 31 A-Temporary Restrictions) (COVID-19) (Amendment) Regulations 2020

permit continued performance). It is worth noting that a pandemic is not expressly covered under Clause 18.

Clauses 19.1 NEC provides for prevention, Clause 60.1(9) details compensation events and Clause 91.7 covers Reasons for Termination. Each of these clauses provide for an event which:

(a) stops the Contractor completing the whole of the works or from completing them by the date for planned Completion; and
(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 allow for it.

As a result, a party may be entitled to extension of time; adjustment to Prices; termination by the Employer if the event stops the Contractor from completing the Works or from completing them by planned Completion and they are forecast to be delayed by more than 13 weeks.

**Time & Cost Entitlements**

There is contractual entitlement to additional time and protection against LADs under Clause 9 of the PWC Contract and Clause 30 of the RIAI standard form. This recovery of costs will depending on establishing the delay event is one which the Contractor is entitled to compensation for. Under PWC, the issue causing delay must be a Delay Event as set out in Schedule 1K.

Of note here is Delay Event 15 which is usually a Delay Event only where no entitlement to costs arises. If the event is identified in the schedule as a Compensation Event as well as a Delay Event, costs will be recoverable.

Under Clause 30 RIAI standard form, an EOT will be granted where the Architect forms the view that the event has caused delay and is not due to a default of the Contractor. This list captures Architect instruction, variation and force majeure.

A collaborative approach and the inclusion of provisions which will enable negotiation of increased health and safety costs is advised. Clause 15 of NEC4 is an example of such a clause, requiring parties to notify each other with an early warning of issues that could increase price or delay Key Dates or Completion. Further, Clause 15 sets out requirements for meetings and how those in attendance should cooperate by making proposals to reduce the effect of each matter, seeking solutions to advantage those who will be affected, and deciding on the actions to be taken and who (in accordance with the contract) will take them.

**Cost Recovery**

Clause 10 PWC requires the Contractor to establish that their claim for an adjustment arises due to a Compensation Event (Schedule 1K). If a Compensation Event has occurred, the Contractor is entitled to an adjustment to the Contract Sum, calculated in accordance with the value of any additional, substituted and omitted work arising as a result of the Compensation Event.

Clause 2 of the RIAI standard form provides for the issue of Architect's instructions. If loss is cause to the Contractor in complying with an instruction, beyond that provided for by the Contract Sum, the loss shall be recoverable.

**Claims Procedures**

Under the PWC, there is a condition precedent notice procedure for claims. Where a contractor fails to comply strictly, this will result in a loss of entitlement. The RIAI standard form similarly requires notice of claims to be given, although it is not a condition precedent to entitlement. Private contracts may include similar provisions to the PWC by amendment.

COVID-19 is a notifiable event as it impacts on time and costs. Claim notices should be served within specified periods, be continuously updated and include as much detail as possible.

In managing the Covid-19 crisis implications and as part of a proactive advisory position, advice should include which activities and contractual obligations are affected by COVID-19, push back on broad force majeure notices and suspension of works, observe all obligations especially notification and notification particulars, advise clients to mitigate COVID-19 impacts, review clients potential exposure to liability for failure to mitigate damages, review applicability of insurance policies, work with clients to prepare contingency plans and remind clients to keep good/accurate records.

**Additional**

**Force Majeure**

- Demonstrate able and willingness to perform contractual obligations BUT FOR the force majeure event – *Tennants (Lanschire) Ltd v G.S. Wilson 7 Co. Ltd [1917]AC 495*

- Provide evidence of steps taken to mitigate the impact of the event

Although not defined in most standard form contracts, parties frequently utilise 'force majeure' clauses to deal with unforeseen difficulties. These are particularly common where the contract is of a kind where the parties can foresee that such problems are likely to occur but cannot foresee their nature or extent, such as in building or engineering contracts[3].

Like all contractual clauses the exact meaning and effect of a force majeure clause will depend its specific wording and interpretation. Parties who are either seeking to assert a claim of force majeure, or are in receipt of one, should carefully review the requirements of their contract. In light of the Covid-19 pandemic, the force majeure clause should specify an event capable of encompassing the outbreak. Evidently, the wording "COVID-19" will not have been included in any contracts entered prior to March 2020, however, it is worth checking if a force majeure clause includes the word "pandemic" or the word "epidemic".

It could be argued that the general catch-all clause in the FIDIC contracts that covers "*exceptional events that:*

- *is beyond a Party's control*; or
- *having arisen, could not reasonably have been avoided or overcome*";

could capture the current outbreak.

It has been stated that any clause which included language referring to events "*beyond the control of the relevant party*" could only be relied on if that party had taken all reasonable steps to avoid its operation or mitigate its results[4].

Under the JCT contracts, force majeure is one of the Relevant Events that entitle a contractor to an extension of time to comply with its obligations. If works are suspended for a period specified in the contract particulars, then, upon the expiration of that period, either party may terminate the contract on seven days' notice. However, force majeure is not defined, so the meaning would have to be determined in each individual case.

The RIAI contract provides for delay on the grounds of force majeure. Similar to the JCT, force majeure is not defined under the standard form of RIAI contract and as it is frequently amended it would depend on the terms of the specific contract.

Should COVID-19 or an associated disruption (which would need to be specified) be defined as triggering the clause, this still may not be enough. Force majeure clauses sometimes provide that the triggering event must "prevent" performance and the relevant party must demonstrate that performance is legally or physically impossible, not just difficult or unprofitable[5].

Where there is a force majeure clause which properly applies, the parties' obligations that are affected by the event may be suspended until the force majeure event passes. This is in contrast to frustration, which will bring the contract to an end.

[3] McDermott, P., & McDermott, J. (n.d. ). "I. Introduction". In Contract Law.: Bloomsbury Professional. Retrieved Mar 17, 2020
[4] *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323
[5] *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd* 1917] AC 495

**Frustration**

Generally, if there is no force majeure clause in the contract, the next question to ask is whether the contract has been frustrated. However, in respect of a force majeure clause it has been stated that:

"… the presence of a force majeure clause does not of itself exclude the operation of the doctrine of frustration. But a force majeure clause may be relied upon as evidence that the parties have made express provision for the alleged frustrating event or at least that the event was one which was within their reasonable contemplation at the time of entry into the contract."

Frustration occurs when contractual obligations can no longer be either physically or commercially performed as a result of unforeseen circumstances which are beyond the control of either party. In effect, frustration transforms the obligations to perform the Contract from those which were agreed.

"The defence of frustration is one of limited application and narrowness. It arises in circumstances where performance of a contract in the manner envisaged by the parties is rendered impossible because of some supervening event not within the contemplation of the parties."[6]

It is clear from the above that the threshold for frustration is extremely high. The deliberate use of the word "impossible" is worth noting. Its inclusion is likely related to the preference of Irish courts to enforce contracts and that traditionally it is for the party seeking to be excused from its contractual obligations to establish why, in exceptional circumstances, it should be allowed to do so.

Commentators have noted that the doctrine of frustration has a number of features that give cause for some concern. The result of the high threshold can be that one of the parties suffers extreme hardship without being able to rely on the doctrine of frustration. In addition, frustration operates in an all-or-nothing fashion. In other words, the contract generally stands or falls as a whole and there is no such thing as selective frustration .

In a SARs epidemic-related case, a Hong Kong court rejected a tenant's claim that a tenancy agreement was frustrated because the premises were affected by an isolation order by the Department of Health due to the outbreak of SARS, which meant that it could not be inhabited for 10 days. The Hong Kong District Court held that the 10-day period did not frustrate the tenancy agreement, which had a two-year term. Whilst SARS was arguably an unforeseeable event, it did not "significantly change the nature of the outstanding contractual rights or obligations" of the parties in the case[7].



[6] *Ringsend Property Ltd v Donatex Ltd* [2009] IEHC 568
[7] Li Ching Wing v Xuan Yi Xiong