

Infrastructure and Energy Projects

COVID 19 – Health Check: How we can help

The ongoing and wide spread of the COVID-19 virus affects all industries and sectors worldwide and is endangering many projects. It is an unprecedented challenge for all stakeholders.

What is the current situation?

COVID-19 was declared by the WHO as a pandemic which is infecting people across all continents. After the outbreak in China, COVID-19 has hit other Asian countries, currently in particular Europe and also the United States. The global spread has caused countless disruptions of supply chains, severe travel restrictions and working restrictions affecting almost all business worldwide. This is also particularly severe for infrastructure and energy projects – first of all for those currently under construction but also existing infrastructure and energy facilities.

What are the risks for infrastructure and energy projects?

For all projects that are currently under construction the main risk is a delay in completion. Delays are caused by:

- the disruptions of supply chains making the required material unavailable;
- the travel restrictions making it impossible for the contractor to have the required project staff available on site; and
- the working limitations making the required backoffice work or even works on site impossible.

These delays result in significant additional costs, stressing the project budgets and making it difficult to estimate when the projects will indeed be completed. Project financing will also be significantly impacted and projects may require restructuring.

For existing infrastructure and energy facilities the impact of COVID-19 will also be significant and in particular stress their financing models. Infrastructure projects such as airports or ports will suffer from less users and goods generating less income. Energy projects might also be affected as a downturn in the industry production and the shutdown of shops and offices will likely lead to a decrease in energy consumption.

These effects will be particularly severe for all projects that are project financed as they directly rely on the income from the projects themselves. But also projects which are based on (limited) recourse-financing will be impacted with immediate effects being seen on the companies' balance sheets.

What risks do Contractors and Employers in particular face?

As the **Contractor** is prevented from performing within the agreed completion dates, it faces significant risk exposure due to delays, in the form of pre-defined liquidated damages or other delay damages. For extraordinary events such as the emergence of the COVID, the construction contracts usually provide for so-called „force majeure“ clauses, which the Contractor might try to invoke. Further, the Contractor might try to rely on further statutory law or concepts developed by the jurisprudence (such as hardship or frustration of contract) to relieve it from his contractual obligations. At the same time, the Contractor will strive to be compensated for his own additional costs caused by the project delays.

Employers will on other side try to enforce the timely completion of the project to the extent possible. For the inevitable project delays, it will claim liquidated damages and compensation for his additional costs (and, of course, try to reject the Contractor's claims).

As to his own contractual actions, the Employer might, however, also be affected as it could be prevented from exercising rights in regards to inspection and testing of material and works which might lead to quality issues.

How can Employers and Contractors deal with the risks?

For both, Employers and Contractors, it is therefore important to know how to handle the situation and what actions they should take.

Knowing and managing your contract

It is important to familiarise oneself with the relevant contractual provisions. In order to assume contractual rights it is particularly important that the parties are aware of the notification formalities and deadlines and fully comply with them.

Proper documentation

The Contractor needs to be able to substantiate and prove the „cause and effect“ of the disruptions or the prevention of his performance. This is because not every obstacle justifies non-performance or delays and the Contractor has the duty to mitigate the losses and delays. The Employer should also request specific proof from the Contractor.

Manage communication

It is important to establish and engage in good communication with the other contract party. A regular information exchange regarding the impact of COVID-19 should be set up and maintained so that disputes about the impacts can be resolved at an early stage. If it is possible, the parties should avoid „piling up“ of claims which would need to be resolved at later stage. For contractors, it is further more very important to manage subcontracts properly and to pass down risks to the extent possible. To the outside world, appropriate crises communication is essential.

What we can offer you

To manage the enormous challenges arising from COVID-19 to your infrastructure and energy projects, we offer you:

- Free-of-charge HL Topic Centre COVID-19
- Free-of-charge Webinar on „How to deal with the impact of COVID-19 on Construction and Energy projects?“ in which we will give further detailed information on contractual provisions (e.g. in FIDIC Contracts) and legislation
- Free-of-charge Online Corona Checklist Tool to assess how your contract might be affected by COVID-19
- Free-of-charge „Fireside Videoconference“ (15min) to discuss your current challenges deriving from COVID-19
- Fix-price „Virus scanner“: A review of your contract and providing you with a high-level-assessment and checklists to safeguard your rights.



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