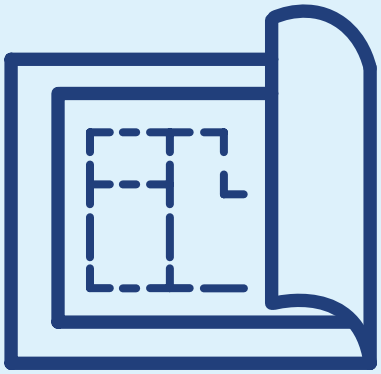
COVID-19 AND VARIATIONS

The COVID-19 crisis has often required contractors to change the way they are working on site, resulting in significant extra costs. The contract provision people normally focus on to begin with is Force Majeure, which we have considered in an earlier briefing. This briefing looks instead at the right to compensation under the variations clause and also the related subject of Change in Law.

1. Changes to the Permanent Work

Certain materials and equipment may not be available as a consequence of COVID-19, resulting in contractors utilising alternatives instead. If instructed, this could be a contract variation. However, it depends on the nature of the contractual duties and risk allocation. A contractor (in particular one under a design & build contract) may have a duty to alter the equipment and materials originally contemplated in order to achieve the wider project scope. For example, where a D&B contractor agrees to build to a design but it transpires that there are errors with that design then it is obliged to resolve the errors at its own risk. This change away from the original contract scope is not a variation because the contractor's wider responsibilities mean that it has a duty to supply a functioning project. Looked at holistically there is no variation to the contractor's duties.



We consider this subject by reference to three standard form contracts – FIDIC 1999 Yellow Book, NEC4 EEC and JCT D&B 2016. We analyse the position under English law but we would emphasise that many of the issues discussed have application in other jurisdictions. This is because contractors working internationally (for example, using FIDIC) will have to look at the same points of interpretation; i.e. how the contract variations provisions operate in the context of similar changes to site operating rules and local legal regimes.

Changes to procedures

We typically think of a variation as being a change to the permanent works. The COVID-19 crisis has led to situations where this has indeed happened; e.g. a specific product that was going to be used may no longer be available and is replaced with something different. This will often constitute a variation entitling the contractor to additional monies. See highlighted box, Changes to the Permanent Work, for a more detailed discussion on this point.

In this briefing, we are not principally considering changes to the permanent works. Instead we are looking at situations where there is a change to the way the contractor is undertaking the works; i.e. where the contractor is required to introduce new working methods or procedures on the project. For example, in the UK new procedures on building sites called Site Operating Procedures (SOPs) are being followed, which we will consider later in this briefing. The question arises as to whether the introduction of SOPs (or other changes to the working methodology or procedures) could amount to a variation.

In considering this issue, it is useful to break down the subject by looking at three points:

1. Need for Variation Instruction
2. Are changes a defined Variation?
3. Outside the contractor's risk?

This briefing considers each of these in turn, before then looking at the implications for a contractor if it is able to establish that the changes are a contract variation.

1. Need for Variation Instruction

Most construction contracts will only give the contractor extra money for changes where they have been positively instructed by the employer.

It is important to carefully consider what type of instruction your contract requires. Normally a written instruction is needed. Under most standard form contracts, that written instruction does not need to be in any particular format; i.e. it can simply be an email directing the change and the email does not need to say it is a "variation instruction". There are, however, some construction contracts that contain tighter stipulations. For example, saying that the instruction has to be written on a pro-forma. Or, saying that the written communication (e.g. email) has to specifically state that the work is an instructed variation under clause X of the contract. This is the approach taken by the new FIDIC 2017 forms of contract.

With the type of situation considered by this briefing, the contractor may be able to identify emails where the employer or its representative has stipulated that revised working measures must be implemented. Under most standard form contracts, including the three considered by this briefing, that would be sufficient.

2. Are changes a defined Variation?

The next point to consider is whether changes to the working methodology or site procedures amount to a variation as defined by the contract. It is crucial to consider the wording of the particular contract. Most contracts define variations so as to cover changes to the way the works are undertaken rather than just the permanent works.

FIDIC Yellow Book 1999. "Variation" is defined as being any change to the Employer's Requirements or the Works (in turn defined as including both permanent works and temporary works).

JCT D&B 2016. "Change" (clause 5.1) is said to include "the imposition… of any obligations or restrictions in regard to the following matters or any addition or alteration… that are so imposed in the Employer's Requirements in regard to… access to the site… limitations of working space/ hours… the execution or completion of the work in any specific order."

NEC4. Compensation Events include an instruction changing the Scope (Works Information under NEC3), which is defined as information which either specifies and describes the work or states any constraints on how the Contractor provides them.

Therefore, under each of these contracts, an alteration to the working methodology or procedures could be

a variation. Typically, the assessment will depend on what is described or stipulated within the technical appendices to the contract, such as the Employer's Requirements.

3. Outside the contractor's risk?

This will often be the most difficult of the three tests to apply.

In order for an item of work to be a variation it needs to involve a change in the contractor's duties under the contract. If the contractor is already obliged to undertake the work then this is not a change to its duties. In the context of permanent works, see highlighted box, Changes to the Permanent Work, for a discussion of an example of a design & build contractor whose contractual design duties require it to fix problems at its own cost.

When it comes to working procedures/ methodology, one has to consider whether the contractor is already obliged to implement these under the contract. It is therefore important to consider the following:

1. COVID-19 may have resulted in changes to working procedures but the contract could already oblige the contractor to adopt such new measures. It depends on the nature of the changes introduced and the laws applying in the relevant country. It will be necessary to consider this point in conjunction with the contract duties to follow local laws, as well as the Change in Law clause. See the highlighted box on Changes in law for a discussion on this point in the context of COVID-19 working procedures in England.
2. The employer may be entitled to direct changes to the way the contractor operates its site without this amounting to a variation. It depends on whether the contractor can establish that it had a right to undertake the works in a particular way. The technical documents appended to the contract may describe the way the contractor planned to carry out its work but such descriptions will not always be something it can insist on. See the highlighted box discussing the relevant English case law on this subject. The lesson to be learnt from the cases is that a change to the working method can be a variation but it depends on the contract wording.

2. Change in law?

In many countries contractors are now obliged to operate their site in accordance new rules (i.e. adopting social distancing etc.). In the context of changes under a construction contract, they could be one of three things:

1. A change in law in which case the contract will typically provide compensation in some form.
2. Not a change in law but the contractor is already obliged to follow the new rules under the terms of its contract. See below.
3. Not a change in law and the contractor has no contractual obligation to follow the new rules. In such circumstances, any directive from the employer requiring the contractor to adopt the new procedures may be a variation.

It is important to emphasise that many of the measures contractors are now adopting in countries across the world do not always fall within in the definition of change in law contained in contracts. Governments are often introducing guidance rather than the legislative changes that such clauses envisage.

The position in England is a useful case in point. The UK government has imposed some changes as part of new legislation (e.g. The Coronavirus Act 2020) which would amount to a change in law. However, most changes to site working practices arise from the guidance issued by government bodies, such as the Department for Business, Energy & Industrial Strategy's document "Working safely during coronavirus (COVID-19)" published 11 May 2020, updated 19 May 2020. It states that firms should follow sector advice, which for the construction industry means the Construction Leadership Council (CLC) code – Site Operating Procedures (SOPs) which contain various, relatively broad guidance on how construction sites should now operate.

But are the SOPs law and is their introduction a change in law? The starting point is that a principal contractor on a UK project will have health and safety obligations under the Construction (Design and Management) Regulations 2015 (CDM Regulations). These impose numerous duties many of which are relatively broad. For example, Regulation 13 states that the contractor must manage the works to ensure that they are carried out as safely as reasonably practicable. In practice, what has happened since the onset of the COVID-19 crisis, is that what is considered "safe" has changed. It seems likely that compliance with the CDM Regulations requires compliance with the SOPs. Indeed on 3 April 2020, the UK Health & Safety Executive (HSE) – which is charged with enforcing the CDM Regulations – issued a statement stating that it will seek to enforce the relevant COVID-19 measures in workplaces via enforcement and prohibition notices.

Therefore, it's highly arguable that the SOPs do not represent a change in law, as such, but a contractor needs to adopt them via its duties under the CDM Regulations. It is only the surrounding factual circumstances that have changed.

In short, therefore, changes to site procedures may not be a change in law and may not even be a change to the contractor's obligations under its contract. In the context of variations – an instruction directing the contractor to adopt new measures cannot be a variation if it does not represent a change to the contractor's contractual duties.

In conclusion, therefore, changes to working procedures can be a contract variation depending on the nature of the change and the wording of the contract.

Relevance of Variation?

If the change to working procedures or method is a variation, what is the upshot?

There may be various grounds for a contractor to claim additional time and/or money under a construction contract as a result of the consequences of COVID-19. Force Majeure and Change in Law are the obvious ones. But, there may be a claim based on general employer prevention or site access limitations. If a contractor can claim as a variation then it provides another option which may be considered.

The entitlements under various contracts and clauses will be different. A variation will typically give a right to direct costs (i.e. the cost of measures themselves) but also an EOT and time-related costs. Other clauses may give time only. Or, they may give time-related costs but not direct costs.

In addition, the basis for compensation for variations is different to most other claims clauses. Compensation for a variation is normally calculated by reference to the contract rates (i.e. it is priced), whilst most claims clauses involve payment of cost. This price-based formula may give more money and is less burdensome evidentially.

Different clauses have different claims procedures. Most claims require the contractor to give notice within a specified period of time. Variations clauses in standard form contracts rarely require the contractor to give notice. Provided it has an instruction; that is sufficient.

In conclusion, therefore, being able to claim as a variation will not always be an option. But where a contractor can establish entitlement by reference to the three tests set out above, this may give a right to money or time which other clauses do not trigger.

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3. Relevant case law

There are two English law cases that have considered whether a change to the way construction works are undertaken (as opposed to changes to the permanent works themselves) can be a variation. The courts came to opposite conclusions. Any decision on this issue is highly dependent on the way in which the contract scope is defined and the references within the agreement to the method of construction.

Strachan & Henshaw v. Stein (1997) 87 BLR 52.[1]

The project was for the construction of a power station and the subcontractor involved was undertaking the installation of the generators. They employed a large number of operatives and had a site facilities camp for clocking in/out and welfare (canteen, toilets etc.). The camp was initially close to where the generators were being installed but it was then instructed to be moved half a mile away, resulting in increased walking time and reduced productivity. The variations clause allowed for "any alteration to the Works whether by way of addition, modification or omission". The term "Works" was defined as "work to be done by the Contractor under the Contract". The court found that this definition of "Works" did not encompass the arrangements for operatives to be transported to the workface and so the change to the working arrangements was not a variation as defined by the contract.

English Industrial Estates v Kier (1991) 56 BLR 93.[2]

The contractor was employed to demolish old factory buildings and to fill soft spots and voids. The contract allowed it to either crush the arisings from the demolition work for use as fill material; or alternatively, to import fill material. Part-way through the works, the engineer instructed the contractor to crush all arisings and to use that as the fill. The court found that the instruction amounted to a variation. It involved a change to the method by which the works were undertaken in the sense that it restricted the contractor's legitimate choice.

1 http://www.bailii.org/ew/cases/EWCA/Civ/1997/2940.html

2 https://www.i-law.com/ilaw/doc/view.htm?id=151493

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