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## WHITE PAPER

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### Construction Projects and Disputes: A Look Beyond the COVID-19 Lockdown

The impact of COVID-19 on construction projects will vary significantly from jurisdiction to jurisdiction depending on a myriad of factors, including the severity of the pandemic, the nature and significance of government orders issued to address the virus, and the effect of government action taken to mitigate financial hardships resulting from the virus. Companies must carefully weigh the considerations for a project on a case-by-case basis based on the contract language, the applicable law, and the particular facts and circumstances. And they must consider both where the project is located and all associated jurisdictions.

This first part of a three-part *White Paper* sets out an overview of some of the recurring issues facing construction industry participants. It seeks 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. Part II, which will be issued shortly after this part, will provide an overview of the impact COVID-19 has had, and likely will continue to have, on specific industry sectors, as they relate to construction projects. It will also set out salient insurance issues project participants need to consider. The final part, which will be issued shortly after Part II, looks beyond the lockdown to examine what effect 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

The COVID-19 pandemic has had an unprecedented impact on the global economy and has created a number of challenges for the construction industry in particular. The current global economic shock, length of recession, and trajectory of the recovery will largely determine the nature and severity of these challenges. The overall economic consequence of COVID-19 are currently unknown in this unprecedented environment—a “V,” “U,” “W,” “inverted square root,” or the even worse “L” may ultimately be the appropriate letters or symbols to describe the economic recovery.

Whatever the end result, participants on complex construction projects must deal with the immediate crisis and be prepared and nimble to anticipate challenges the pandemic may present. At first, many construction industry participants focused on figuring out their basic rights and obligations. As time goes on and the pandemic persists, construction-industry participants have been forced to confront a growing number of complex legal issues such as the effect of force majeure and other contractual clauses and legal doctrines.

The industry is realizing with increasingly certainty that the pandemic will continue having a significant impact on the construction industry even when lockdown measures are relaxed or lifted. Considerable time may be required to remobilize the production of goods and services and rekindle the deals and projects that have been put on hold or canceled. How long it will take to return to normal or the “new” normal is impossible to predict, but it is no longer unthinkable that it will take a year or more, rather than a few months.

The issues that this pandemic raises are many, both in the immediate and long term. For that reason, we have prepared a White Paper that will be published in three parts. This paper does not focus on the legal doctrines of force majeure, impossibility, impracticability, and contractual arguments being asserted on individual projects, all of which are important. Instead, the focus is on the global response to the pandemic in various countries, the sort of issues that have been raised on projects, and strategic considerations as they relate to contract drafting, disputes and the intersection of the business of the construction industry and the law.

**Part I** sets out an overview of some of the recurring issues facing construction industry participants. In particular, it seeks 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.

**Part II**, which will be issued shortly after Part I, will provide an overview of the impact COVID-19 has had, and likely will continue to have, on specific industry sectors, as they relate to construction projects. Part II will also set out salient insurance issues project participants need to consider.

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

## A GLOBAL OVERVIEW

The impact of COVID-19 on construction projects will vary significantly from jurisdiction to jurisdiction depending on a myriad of factors, including the severity of the pandemic, the nature and significance of government orders issued to address the virus, and the effect of government action taken to mitigate financial hardships resulting from the virus. There is no one-size-fits-all solution to these issues. Rather, companies must carefully weigh the considerations for a project on a case-by-case basis based on the contract language, the applicable law, and the facts and particular facts and circumstances. And they must not only consider where the project is *located* but all *associated* jurisdictions. A company building a gas plant in Saudi Arabia, for example, may use materials from countries that have been hit hard by the pandemic such as Italy or China and find supply chains interrupted. For these reasons, project participants and their counsel must have a global understanding in developing a proactive and meaningful response to the virus.

Projects in the bidding or structuring stage have generally been delayed or postponed, rather than canceled (although cancellations have occurred as well). A number of governments

have declared infrastructure projects to be critically important to revamping local economies after COVID-19. Still, as a result of the delays, increased costs and other effects of COVID-19 on major construction projects, we expect many lawsuits will be brought relating to these projects and that renegotiation of some contracts will occur. The good news is that financing structures for major projects typically have six or 12 months of debt reserves, which may allow many of the COVID-19 issues to be resolved during that window of financial flexibility.

For projects already in the construction stage, in many cases COVID-19 may not leave completion impossible. Construction projects rarely require performance to be completed within a certain time window or not at all, although there may be liquidated damages or other consequences for not adhering to a specified time frame. COVID-19, however, has undoubtedly delayed—or even forced construction to pause—for many current projects for a variety of reasons such as government orders, reluctance by contractors to report to ongoing projects and disruption of supply chains.

Ongoing construction projects, though, have generally been excluded from government-ordered shutdowns for a number of reasons. Many governments have noted the importance of continuing construction projects because they are critical to essential businesses like electricity generation or are otherwise important public infrastructure. Some governments have recognized, too, that the health risks posed by COVID-19 vary, and construction workers who are not physically close may work in relative safety. Even where government orders have extended shutdowns to construction or certain sectors, construction projects have been among the first sectors to reopen after lockdown due to their importance.

The ability of any ongoing project to weather the COVID-19 storm depends on a variety of factors. The length of the project, by way of illustration, will greatly affect how a project's schedule can absorb and recover from a several-month lockdown. A project with a three-year construction schedule can probably re-sequence the work to complete the project in time notwithstanding a several-month lockdown occurring early in the construction process. A project with a nine-month timeline, by contrast, may not be able to compensate for even a two-month delay.

## IMPACTS ON COUNTRIES WITH THE LARGEST CONSTRUCTION INDUSTRIES

Seventy-three percent of the world's construction and infrastructure investment is located in 10 countries: Australia, China, France, India, Italy, Japan, Saudi Arabia, Spain, the United Kingdom, and the United States.<sup>1</sup> In addition to these countries, Singapore and Latin America play particularly important roles in construction projects. Many of our clients are located in these countries, have projects in these countries, or depend on these countries for their supply chain. It is thus useful to have a global, proactive strategy rather than a narrow view confined to the jurisdiction where specific projects are located when it comes to the challenges posed by COVID-19, many of which know no geographical boundaries.

The following summarizes the current situation in each of these countries as it pertains to COVID-19 and the construction industry. The situation in many of these countries is rapidly changing as governments continue to react to the evolving pandemic and some begin to transition to “opening” up the economy and “getting back to business.” But understanding the current situation in these jurisdictions at this particular moment, even though it is changing, highlights some of the legal challenges the pandemic presents and will continue to present. More importantly, it reinforces the need for global clients and their legal counsel to anticipate issues and develop a global, proactive strategy in this rapidly changing environment, rather than a reactive, narrow jurisdictional approach.

### Australia

Australia's response to the virus has been predominately developed by the National Cabinet, comprised of representatives of the federal, state and territory governments. In March 2020, the Australian government introduced strict social-distancing measures, effectively requiring residents to stay in their homes unless undertaking an essential activity.

Following the steady decline in new cases of COVID-19 throughout April 2020, the Government has shifted focus toward rolling back these restrictions. Although the Government is yet to officially adopt a specific plan, some features have been tentatively identified. Before the restrictions are eased, transmission rates must continue to fall, pressure on the health system

must be alleviated, and capacity for widespread testing must be bolstered. When these things do occur, the reopening of businesses will be a gradual process, likely undertaken in several targeted tranches over several weeks.

Because the construction industry is such an important part of Australia's economy, there have been widespread calls by government officials for further government assistance to the industry as an integral part of Australia's economic rebound. Prime Minister Morrison has also emphasized the Federal Government's willingness to work with State Governments to fast-track planned infrastructure projects worth more than \$100 billion. And the New South Wales Government has already implemented several measures to support construction projects. These measures include waiving license fees, fast-tracking the project approval process for both new and existing applications, and increasing expenditure on the construction and maintenance of its transport infrastructure network. It is likely that other states and territories in Australia will follow suit.

## China

China imposed a set of widespread measures including city lockdowns, travel restrictions and quarantine requirements. The Lunar New Year Holiday was extended for most of the economy until February 9, 2020, and only "essential" projects were permitted to continue during that time.

Afterward, Chinese authorities pivoted toward restarting the economy, placing particular emphasize on resuming construction. They have extended the validity period of operating licenses, allowing tendering and other matters to be completed remotely where possible, and required state-owned enterprises ("SOEs") to promptly pay amounts owed to contractors on projects. At the same time, authorities have also imposed a number of safety requirements on construction projects, including tracking workers' travel history, quarantining workers from high-risk areas, and conducting temperature checks and requiring the use of face masks.

Nonetheless, the Chinese economy has been hard hit. China's GDP fell 6.8% in Q1 2020, fixed asset investment was down 16.1%, and construction activity has also declined. This is due to a number of factors, including delays in restarting operations, the unavailability of migrant labor (a problem now largely resolved), disruption of construction material supply chains, and financing pressures.

As far as liability for delays and increased costs, the Ministry of Housing and Urban-Rural Development has encouraged parties to negotiate in good faith to extend construction periods and allocate responsibility for increased costs. Costs associated with preventive measures taken in response to the pandemic can be included by contractors within overall construction costs, and for other increased costs parties should negotiate in good faith based on the cost adjustment provisions in their contracts.

The Supreme Court in China has also weighed in on the impact of force majeure clauses. The Court held that the party asserting force majeure must provide notice, mitigate its losses, and provide evidence that its performance was prevented. One common practice in China to assist providing such evidence is to obtain a Force Majeure Certificate from the China Council for the Promotion of International Trade; 7,004 such certificates had already been issued by late April 2020 for contracts worth US\$100 billion. Based on judgments issued by Chinese courts after the SARS outbreak, success on force majeure claims will depend on the particular terms of the agreement between the parties and the underlying factual circumstances. When issuing SARS-related judgments, Chinese courts emphasized flexibility and fairness in requiring performance of contractual obligations. Parties can be expected to argue over the relevance and effect of such certificates when supply chain impacts contested on projects located outside of China are asserted in arbitrations and courts outside of China.

## France

On March 16, 2020, the French Government passed a decree providing for nationwide lockdown measures that were set to run through May 11, 2020. On March 22, 2020, this decree was followed by emergency legislation allowing the Government to take exceptional measures to contain the spread of the virus. The implementation of preventive measures precluding citizens from leaving their homes has resulted in severe operational hurdles affecting the construction sector, sometimes leading to a suspension of all activities on a construction site.

The French economy is highly dependent on companies in the construction industry and so measures were developed between the Government, construction-industry professionals, and experts from the French Professional Agency for Risk Prevention in Building and Civil Engineering aiming to ensure that projects would continue. These measures include

a number of safety recommendations to ensure worker safety that will inevitably require adjustments and revisions to work methods and programs. The Government, construction-industry professionals, and others have urged employers not to bring contractual claims against contractors, subcontractors, or suppliers that have had to suspend performance in compliance with safety guidelines for COVID-19.

One measure put in place allows the Government to adapt the provisions relating to procurement, milestones, performance, and termination provided for in public contracts and the Public Procurement Code, in particular those relating to contractual penalties. In that respect, the French Government announced that COVID-19 is to be considered as a case of force majeure in the context of public procurement contracts, meaning liquidated damages will not be due for late delivery.

For private contracts, another set of measures has the effect of freezing termination for breach provisions, contractual penalties, and liquidated damages during the so-called “emergency sanitary period,” currently scheduled to end on June 24, 2020. The freeze applies to both contractors that incur delays in supply or construction as well as to employers for late payments. In addition to the freeze, contractors are automatically granted an extension of time for contractual milestones that fall after the expiration of this period, which basically equals the duration of the emergency sanitary period (or a shorter period for contracts entered into after the period commenced). This regulation is expected to be characterized as an overriding mandatory provision within the meaning of the Rome I Regulation.<sup>2</sup> Accordingly, in many circumstances, an automatic freeze and extension of time should apply to contracts with French companies or that have a strong French nexus, regardless of the governing law of the contract. Parties can agree, however, to waive the benefit of the Rome I Regulation in writing.

Contractors dissatisfied with these measures and lacking force majeure clauses in their contracts will have to establish that all force majeure conditions as set forth at Article 1218 of the French Civil Code are met. Alternatively, contractors undertaking private works may also assert hardship as provided for in Article 1195 of the French Civil Code if they have not previously agreed to waive the benefit of those provisions.

## India

Federal and State Governments have imposed widespread restrictions pursuant to the Indian Disaster Management Act 2005, the Epidemic Disease Act 1897, and the Code of Criminal Procedure 1973. The Disaster Management Act empowers the Federal Government to declare the country or parts of it as affected by a disaster and to make plans to reduce “risks, impact, and effects” of the disaster.

Exercising its powers under that statute, the National Disaster Management Authority issued an order on March 24, 2020, directing federal, state, and territory authorities to take effective measures to prevent the spread of COVID-19 in the country. On that day, the Ministry of Home issued guidelines imposing a complete lockdown throughout the country for a period of 21 days. Most construction activity was prohibited during this same time as a result of these measures.

Power projects were required to continue as they were deemed essential services. But the demand for power has dropped significantly, and rates have collapsed. The Ministry of Power passed directions to the central regulator and the state regulators to waive or reduce the late payment surcharge under power purchase agreements entered into by Government distribution companies. The Ministry of New and Renewable Energy, however, has insisted on deeming renewable energy projects as “must run” and has also confirmed that projects will be entitled to extensions of time in case of construction delays attributable to the pandemic.

Significant relaxations were also made with respect to industrial and commercial activities, including construction activities, which were allowed to resume work with adequate precautions and social distancing norms.

The Reserve Bank of India announced a COVID-19 regulatory package permitting all banks and regulated non-banking financial corporations to offer a moratorium on all fund and non-fund based loan facilities. Any nonpayment of interest or principal between March 1 and May 31, 2020, will not be considered a default (although interest will continue to accrue), and the borrower will not be subjected to ratings downgrade or any other penal actions. The provisions of the Insolvency

and Bankruptcy Code relating to the initiation of corporate insolvency resolution proceedings have also been suspended for six months, meaning borrowers will be protected from insolvency measures.

The Government has issued Press Note 3 on April 17, 2020, in order to curb “opportunistic takeovers/acquisitions” of Indian companies due to the pandemic. The press note states that an entity of a country that shares a land border with India, or where the beneficial owner of an investment into India is situated in or is a citizen of any such adjoining nation, can invest only through Government-funded schemes, even in sectors where investment was automatic. This measure is widely considered as a step to prevent acquisitions by Chinese companies but nonetheless has an impact across the infrastructure sector.

### Italy

The pandemic legislation implemented in Italy is complex, multilayered, and in some ways varies from region to region. Broadly speaking, industrial businesses were shut down between March 21 and March 28, 2020, with the exception of “essential businesses.” The essential businesses most relevant to the construction sector are:

1. Remote or smart working;
2. Businesses that are instrumental to ensuring the continuity of an “essential business” or national defense;
3. Manufacturing, transportation, sale, and delivery of pharmaceuticals, health care technology, and medical and surgery devices, as well as agricultural and food products;
4. Businesses carried out at continuous manufacturing process plants, whose interruption could cause material harm to the plants themselves or accidents/hazards; and
5. Businesses pertaining to the aerospace and defense industry and other activities having strategic relevance for the national economy.

Save for these exceptions, construction companies were included among those businesses required to shut down. Thus, the progress on construction sites nationwide has been in stasis for several weeks, although companies have been impacted in different ways due to the exceptions to the shutdown.

From April 14 to May 3, 2020, businesses have been slowly reopening, with priority being given to those businesses

considered by the Government to be most important, provided that work can be performed safely. Construction companies and operations, however, will not recommence until May 4 2020, pursuant to the direction of the Government.

More generally, the emergency legislation provides that compliance with the emergency legislation itself shall be considered any time a contractual dispute in connection thereof arises, and also as a factor to consider when determining whether nonperformance may be excused without fault under the Italian Civil Code (this notion is similar to the concept of force majeure).

### Japan

The Japanese Government declared a state of emergency for Tokyo and six other prefectures on April 7, 2020, and declared a nationwide state of emergency on April 16, 2020, which will remain in force until at least May 6, 2020.

Under the state of emergency, the governor of each prefecture has been given the power to request citizens to stay home and to request or instruct certain types of businesses specified by the Japanese Government to close until May 6, 2020. Based on the request made by each governor, many businesses have been closing.

Construction companies, however, are not covered by the declarations, and so any closures within the construction sector are voluntary.

For public projects, the Ministry of Land, Infrastructure, Transport, and Tourism made an announcement that if a construction contractor makes an offer of suspension of the construction work or claims an extension of time for completion based on COVID-19, the public employer will, based on discussion between the parties, take appropriate measures, including accepting the extension of time for completion on the assumption that the Ministry will bear the costs.

For private projects, the Ministry took the position that “force majeure event” clauses will cover a contractor’s inability to continue its work due to the coronavirus. These clauses are included in the standard contract form widely used or referred to in the Japanese construction industry. This amounts to a Government agency “certificate” of a force majeure event.

While it is not certain that the courts will accept such certificates, it is expected to be probative evidence, at a minimum, that a force majeure event has occurred.

Most major contractors have suspended all operations across the country while the state of emergency is in force, although some have suspended operations only in those prefectures where the spread of coronavirus has been most virulent.

The approach being taken on most construction projects within Japan is consultative and collaborative. Where owners and contractor along the supply chain agree, many projects have been voluntarily suspended until early May 2020, with any further suspension to be considered at that time. While extensions of time are being claimed (and, in many cases, granted), our general observation is that disputes are being avoided.

As of May 1, 2020, the Japanese Government is considering whether to extend the state of emergency.

### Latin America

At the outset of the COVID-19 pandemic, the governments in the Latin American region generally issued orders and decrees to close their borders, impose restrictions on international and domestic travel, institute national quarantines, and prohibit all nonessential commercial activities. For example, in Colombia, on March 22, 2020, the National Infrastructure Agency (“ANI”) suspended certain obligations under concession agreements, including construction works but did not suspend obligations related to the operation of roads, ports, airports, and railroads.

In Peru, social restrictions and other protective measures were implemented on March 15, 2020, which included the suspension of construction work but permitted certain essential commercial activities, including the transport of cargo and supplies at Peruvian ports of entry.

In Mexico, as a response to the beginning of phase 2 of the spread of COVID-19, on March 24, 2020, the Mexican Ministry of Health established preventive measures to mitigate and control health risks resulting from COVID-19, which included the suspension of nonessential activities. With the exception of activities related to the conservation, maintenance, and repair of the critical infrastructure that ensures the production and distribution of essential services, infrastructure construction works were included within the suspension.

On April 5, 2020, Mexico’s President Andrés Manuel López Obrador announced that the current administration’s emblematic governmental infrastructure projects, such as the Santa Lucía International Airport (Estado de México), Dos Bocas refinery (Tabasco), and the Mayan Train project (Southeast region), would continue. Similar proclamations were made early on by the Colombian government with respect to certain transportation infrastructure projects which are considered to be high priority.

In mid-late April 2020, certain Latin American countries began to initiate the gradual restart of construction in the infrastructure sector. For example, on April 13, 2020, the government of Colombia made an exception to the stay-at-home order for individuals involved in the construction of public transportation works. Such exception was conditioned upon developers implementing policies and procedures to ensure that their employees and contractors comply with biosecurity guidelines issued by the Colombian Ministry of Health. Even in jurisdictions where social distancing measures to combat COVID-19 have been more conservative, like Peru, a general restart of economic activity including construction is expected to occur in mid-May 2020.

In contrast, on April 21, 2020, the Mexican Ministry of Health announced phase 3 of COVID-19 spread in Mexico, extending the suspension of all nonessential activities until May 30, 2020. The decision was accompanied by a set of measures, including a Presidential Decree setting aside funds to face the financial crisis resulting from the COVID-19 spread. Under the decision, construction activities remain suspended, excluding those governmental infrastructure projects that have been expressly identified as being excluded. The Mexican federal government’s response has been mainly focused on relief actions for the poorest population sector and has not included any clear policy to address infrastructure investments or the effects of the economic slowdown in the country on corporations and other sectors of the population.

In contrast, on April 21, 2020, the Mexican Central Bank (which by constitutional mandate is an organism that acts independently from the federal government) adopted 10 extraordinary economic relief measures in order to mitigate the economic adverse effects of the health crisis, including reducing its representative interest rate by 50 basis points to 6%.

We have been responding to contractual interpretation questions raised by clients quickly and efficiently, and working,



where necessary, with local counsel in the relevant jurisdictions to provide clients with a holistic analysis of current and future issues that have arisen, or could arise, in their projects. There is no one size-fits-all approach given the differences in jurisdictional approaches to the health crisis and the particular realities of individual projects. Despite the negative economic impact caused by COVID-19, Latin American countries are looking to infrastructure projects to help mitigate the economic effects of the lockdowns and stimulate the restart of their economies. Among other initiatives, Brazil's infrastructure ministry has announced plans to invest in four airport improvement projects. Similarly, Costa Rica has announced that it is looking to private infrastructure concessions to help drive the country's economic recovery. Countries in the region are evaluating their options to help stimulate their economies post-COVID-19, and investments in infrastructure development are often cited as key areas of focus to aid in the economic recovery.

### **Saudi Arabia**

During March and April 2020, Saudi Arabia implemented various measures designed to limit the spread of COVID-19.<sup>3</sup> Together these measures resulted in strict 24-hour curfews for the Kingdom's major cities. Those employed in the public and private sectors were required to work remotely, and many government services were suspended unless available online. There is also a prohibition on traveling between provinces/cities and restrictions on international and domestic air travel and immigration. These rules are currently in place on an open-ended basis. Excluded from some of these measures are "essential services such as security, health, utilities" and other sectors as determined by the Ministry of Interior.

The construction sector has not been expressly named by the Government in its measures. The Ministry of Interior's April 6, 2020, announcement, however, specified that commercial activity relating to "maintenance and operation, plumbing, electricity and air conditioning services, water delivery services and sanitation tank services" would be excluded from the daily urban curfews that are in place.

Saudi Arabia is presently undergoing a reform program, known as Vision 2030, which envisions the construction of significant amounts of new national infrastructure. These range from entire new cities to entertainment and tourist zones; social, utilities, and transportation projects; and oil, gas, and industrial

facilities. The Government is under pressure to deliver this infrastructure without severe delays occurring.

Companies considering bidding for forthcoming construction projects in the Kingdom, or that are already involved in existing construction projects, are working to clarify how the Government's COVID-19 measures will affect the project in question. Exemptions or dispensations for construction work in the security, health, and utilities sectors may well be available. However, setting up and maintaining a legal presence in Saudi Arabia typically involves a great deal of physical interaction with Government departments, municipalities, and local banks (to obtain registrations, open accounts, recruit manpower, submit bids, arrange notarized documents, etc.). Much of this physical interaction is not currently possible as a result of the Kingdom's COVID-19 restrictions.

### **Singapore**

While Singapore's energy and infrastructure development program is not itself of the scale of the other jurisdictions discussed in this White Paper, much of the procurement work and project oversight is controlled out of Singapore, and disputes across the Asia region are arbitrated in Singapore.

Singapore enacted "circuit-break" measures that took effect on April 7, 2020, and closed most workplaces. Certain "essential" construction projects, however, are exempted from the closure orders. In order to be essential, the project must either be for the purposes of securing critical social infrastructure or ensuring the security and safety of the site. In either case, work must conform with strict social distancing rules. Under the current legislation, the circuit-break measures will continue until May 4, 2020, and there are indications they may be extended.

Singapore has also enacted legislation providing that no party can act on any failures of a counterparty to perform as a result of COVID-19 for a period of six months. This includes levying liquidated damages, terminating a contract, or commencing litigation. The intention is to give those parties that are impacted by COVID-19 breathing space with respect to their contractual obligations.

There is an acknowledgement within the industry that many projects, even in sectors hit hard by the pandemic, will still constitute good investments over the long term (particularly for

Government concession projects, which usually involve 20 to 30 terms). For ongoing projects and pre-construction projects (i.e., those under current tender procurement or pre-procurement), we are mostly seeing owners or Government entities suspending or delaying bidding, rather than outright canceling them. Governmental infrastructure sectors hit hard by the current pandemic, such as airports and toll roads, fall into this category. At the time of this writing, however, we are still acting for a major bidding consortium on an airport project where the Government is requiring bids by the middle of this year. We are also acting on regional toll road projects under current tender that have been suspended rather than canceled.

## Spain

On March 14, 2020, the Spanish Government approved Royal Decree 463/2020 (modified by Royal Decree 465/2020 of March 17, 2020), enacting a State of Alarm for an initial period of 15 days. The State of Alarm was later extended until May 10, 2020, and additional extensions are possible. The State of Alarm has resulted in restrictions on movements, opening of establishments, and transportation. In addition, Legislative Royal Decree 10/2020 imposed a mandatory recoverable paid leave from March 30 to April 9, 2020, for employees who do not provide essential services. This implied, in practice, a temporary suspension of all nonessential activities. Construction was not considered an essential service.

On March 17, 2020 the Government passed Royal Decree 8/2020, providing for extraordinary measures to fight against economic and social consequences stemming from COVID-19. Among other measures, this Royal Decree approved certain measures related to public-private partnership projects, which are usually financed through project finance schemes. It provided the right to ask for the economic rebalance of a concession by extending the concession term by up to 15% of the initial term or by amending the economic terms of the concession along with other indemnities.

Under this Royal Decree, most construction projects were suspended between March 30 and April 9, 2020, and resumed thereafter (except for works on existing buildings, which have been suspended since April 12). However, the general limitations on movement, opening establishments, and transportation are still causing issues for certain projects. The main business associations for the construction sector and the

trade unions reached an agreement on April 8, 2020, on guidelines to prevent COVID-19 at construction sites.

With regard to private construction contracts, Article 1105 of the Spanish Civil Code allows a party to avoid liability for unforeseeable events or for unavoidable foreseeable events. This Article, though, only applies when the parties' contract lacks a provision governing distribution of risk. When the parties have such a contractual provision, they will have to analyze whether the COVID-19 pandemic qualifies as a force majeure event under the particular contract terms. It is possible that at least the compulsory discontinuance imposed by Royal Decree 10/2020 could amount to a force majeure event, although it is not certain.

Regarding public works contracts with an end date falling within the State of Alarm, the contractor may request an extension of the final delivery deadline. In this situation, the contractor may request compensation from the granting authority for the damages suffered by the delay. These damages could include payment of salaries, rents, maintenance costs, and insurance policies. For the rest of the public work contracts, compensation will be considered on a case-by-case basis, depending on the extent of the impact the pandemic had on the project.

## United Kingdom

To date, the UK Government has not issued plans to force closure of construction sites, leaving employers and contractors to decide on a site-by-site basis and based on current guidance by devolved administrations. The UK Government, however, has the statutory powers to force closure if necessary.

Publicly listed construction, infrastructure, and oil and gas companies are, more often than not, taking measures to remove or significantly curtail workers from visiting sites, possibly because of the negative publicity impact of requiring workers to continue.

Publicly funded works appear to be pressing on. The Cabinet Office has published guidance that identifies various forms of relief to which a public body may agree with a supplier in order to deal with the business disruption caused by COVID-19. It considers accelerating the payment of invoices, certifying future interim payments where work has not been done

based on previous valuations, increasing the frequency or order of payments, and making advance payments, among other things. A further factor fueling the impetus to continue with these works during lockdown is the drastically reduced reliance on them by the public, while the stay-at-home mandate is in place.

Projects or works that are performed in close quarters in the United Kingdom have generally been suspended. This may be because the Construction Leadership Council and Build UK published guidance (the third version) of its Site Operating Procedures, which suggests that workers should be a minimum of two meters apart, among other things.

A growing number of companies are announcing plans to reopen but with extra safety measures and with reduced or staggered workforce. Further, the Government is considering temporarily amending a law which currently restricts “noisy” construction works to the hours of 8:00 a.m. to 6:00 p.m. Monday to Friday, and 8:00 a.m. and 1:00 p.m. on Saturdays, as one of the measures to counteract the impact of reduced productivity that may arise as a result of these measures and to allow projects to “catch up” on delay suffered during lockdown.

Emergency UK Government funding schemes such as the Covid Corporate Financing Facility (“CCFF”), the Coronavirus Business Interruption Loan Scheme (“CBILS”), and the Coronavirus Large Business Interruption Loan Scheme (“CLBILS”) may be available to construction businesses, subject to satisfaction of eligibility criteria. The CCFF is intended to provide access to short-term funding for large enterprises making “material contributions to the UK economy” via commercial paper of up to one-year maturity. The CBILS is intended to help small businesses (less than £45 million turnover annually) with loans of between £1,000 to £5 million. The CLBILS is intended for mid-cap to larger businesses (over £45 million turnover annually) with loans of up to £25 million for smaller groups structures and up to £50 million for larger groups structures. The UK Government will guarantee 80% of the loan under the CBILS and CLBILS.

Changes to the UK insolvency regime have been proposed to provide support to businesses during and after COVID-19. The changes include a three-month suspension of the wrongful trading regime during COVID-19 with a retrospective commencement date of March 1, 2020 and the introduction of a

temporary moratorium for businesses undergoing a restructuring process, during which time creditors will not be able to force a company into administration and the company will continue to be able to access all raw materials. These changes will enable businesses suffering solvency issues as a result of COVID-19 to continue trading while they consider their options.

## United States

The impact of the COVID-19 pandemic in the United States is particularly complex for construction industry participants with operations in multiple states, cities, or counties. This complexity arises because there is no one set of rules that applies across the country governing whether construction may proceed or whether projects must be shut down.

On March 13, 2020, President Trump declared a national emergency, which did not itself stop construction. Thereafter, on March 19, 2020, the Federal Government, through the Cybersecurity & Infrastructure Security Agency (“CISA”), issued “guidance” identifying “essential critical infrastructure workers” across 16 industries, which has been subsequently revised. Yet, this guidance is not binding on the states, resulting in a patchwork of orders and rules.

Further, within states, there may be differences between state orders and those at the city or county level, with varying degrees of restrictiveness, resulting in compliance challenges and unresolved issues among dueling orders. The landscape will remain complex as restrictions at both state and local levels begin to ease, something that is already being seen.

California provides an example of the complexity and the divergent approaches across a single state. On March 16, 2020, six counties in the Bay Area, including the City and County of San Francisco, issued shelter-in-place orders. These orders originally identified “public works construction and construction of housing” as among the “Essential Infrastructure” for which workers could continue to provide labor consistent with social distancing requirements. On March 24, 2020, the orders of the six counties were extended from April 7 to May 3, 2020, with construction and public works removed from the definition of essential infrastructure, effectively shutting down virtually all construction. On April 29, 2020, the orders of the six counties were updated once again to allow certain businesses and activities to resume, including all construction projects that follow certain construction project safety protocols. The orders in

these six counties are good examples of the evolving response to COVID-19 and the resulting impact on construction projects.

At the state level, on March 19, 2020, California Governor Gavin Newsom issued a statewide order requiring sheltering in place with an exception for critical infrastructure workforce consistent in scope with the CISA guidelines. Following lobbying by various industries, the state issued a list of “essential services” that effectively included all construction. Consistent with the Governor’s order and contrary to the initial approach in the six Bay Area counties, construction continues in Los Angeles County, and Los Angeles Building & Safety has issued COVID-19 safety guidelines for construction sites within the city, the violation of which can result in citations or shutdown of projects.

Regardless of the orders in place in a particular state, county, or city, contractors and owners are grappling with COVID-19 claims. Some in the industry are advising contractors and subcontractors to submit notice of force majeure claims for impacts from COVID-19 as a prophylactic measure, leaving owners to respond. Contractors are claiming supply chain interruptions, lost productivity (e.g., due to professional social distancing requirements on project sites), increased costs (e.g., for additional protective equipment and sanitizing stations), and time extensions. We have had to advise owners whose projects are in the design phase, preconstruction phase, or construction phase on how to conclude or suspend projects where economic pain caused by COVID-19 has resulted in cut-backs in budgets for capital projects or necessitate temporary suspension or abandonment of a project. Worse yet, we have had to advise owners and contractors on the potential insolvency issues and potential bankruptcy exposure where the viability of contractors, subcontractors, or design professionals may be in jeopardy prior to completion of a project.

Similarly, gauging the impact of COVID-19 on financing—new and existing—is an issue, particularly as the effects of COVID-19 are prolonged. Issues to be analyzed include: potential draw-stops and the ability to declare a default by project lenders, as well as whether the impacts on a given project constitute a material adverse event under financing instruments, whether loan agreements or bond indentures.

The law applicable to the incipient disputes engendered by the COVID-19 pandemic may vary by state. New York is often characterized as having one of the least forgiving approaches

to force majeure and excusing performance. Some suggest California law might be less exacting. Generalizations are difficult to make. Indeed, issues being raised by the COVID-19 pandemic require careful consideration of relevant contract language, the facts and circumstances pertinent to the matter, and the law of the particular jurisdiction.

Due to the vagaries of the laws between the states, the differences in stay-at-home orders and their impact on construction, and this quickly evolving situation, we have taken two steps to be able to quickly and efficiently advise clients. We have a team of lawyers monitoring the status of statewide orders in all 50 states and have prepared a 50-state review of the various approaches to the key legal issues arising as a result of the pandemic, including approaches to applying force majeure clauses and various legal doctrines that might excuse performance (e.g., impossibility, impracticability, frustration of purpose, illegality, etc.).

## CONCLUSION

It is readily apparent that COVID-19 is a global issue with widespread consequences across all industries, including construction. COVID-19 is slowing down many construction projects and causing significant delays and disruptions, although as apparent from the snapshot reports from those jurisdictions addressed in Part I of this White Paper, the regulatory and legislative changes and measures implemented by governments varies considerably. There is therefore no one-size-fits-all approach. Owners, design professionals, and contractors with global operations must have a global understanding of the legal challenges presented by the virus and seek advice from counsel with a global presence and understanding of the issues so that a cohesive and proactive strategy can be developed.

The next part to this White Paper will provide an overview of COVID-19’s effect on a select number of industry sectors to which construction activities are highly relevant, namely commercial development, oil and gas, renewable energy, transportation infrastructure, social infrastructure, and telecoms. It will also provide an overview of the sorts of insurance considerations implicated by the pandemic that should be considered across industry sectors.

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## ENDNOTES

- 1 Fey M. et al., *Hitting the Trillion Mark: A Look at How Much Countries Are Spending on Infrastructure*, 2019, Policy Research Working Paper 8730, World Bank Group.
- 2 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
- 3 Including several decisions of the Ministry of Interior and the Ministry of Human Resources & Social Development, as well as Royal Order No. 45942 issued on 22 March 2020 (27/7/1441H).

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