On 8 August 2014, the World Health Organisation (WHO) categorised the Ebola outbreak in Guinea, Sierra Leone and Liberia as a Public Health Emergency of International Concern. As well as the obvious immediate human impact of this epidemic, the potential ramifications are of interest to all multinational corporations and sponsors with a presence in West Africa, particularly those with projects, assets and personnel in the affected countries. The fact that the WHO has only twice previously described an outbreak in such terms underlines the severity of the situation as well as the seriousness of its immediate impact, and its potential future impact, on projects in West Africa.

On the date of the WHO announcement, a leading steel producer published a press release noting that contractors undertaking expansion works at its mines in Liberia had declared the outbreak a force majeure event and were moving personnel out of the country. The company noted that it was assessing the potential impact on the project schedule. This assessment will no doubt involve a review of its key contracts and the impact of the outbreak on completion dates and costs. A number of airlines have also cancelled flights to West Africa, and several mining companies have restricted non-essential travel to the region.

Multinational companies with interests in West Africa are implementing measures in order to manage the impact of the current outbreak on their businesses in the region and beyond. Our clients are assessing potential exposure to the consequences of this outbreak and we highlight below a number of critical contractual issues that parties must consider and take into account when responding to this crisis.

**WHAT IS FORCE MAJEURE?**

In contrast to many civil law jurisdictions, there is no doctrine of force majeure in English common law. Therefore, commercial parties who want to be able to rely on force majeure can do so only by including a provision into their contract in accordance with the general principles of English contract law (which generally gives parties the freedom to contract on the terms they see fit). Where parties include a force majeure clause in their contract, the consequences of an exceptional event will ultimately be determined by the precise construction and interpretation of that clause.

As a result, the scope and extent of the force majeure clause in any given contract is of paramount importance when dealing with the unexpected or uncontrollable. A typical force majeure clause permits a party to extend, suspend and/or terminate the performance of the contract when an extraordinary event occurs beyond the parties’ control. The English courts will give effect to a properly drafted and applicable force majeure clause as a provision allocating risk between such parties.

**INTERPRETATION OF FORCE MAJEURE CLAUSES**

Given the wide use of the Fédération Internationale Des Ingénieurs-Conseils (FIDIC) forms in international construction projects, it is instructive to consider whether the Ebola outbreak could be considered a force majeure event within the meaning of the relevant FIDIC clause, and whether the outbreak would give rise to an entitlement for additional time or money.

By way of example, Clause 19.1 of the FIDIC Silver Book sets out a broad definition of a force majeure event as:

“... an exceptional event or circumstance:

- which is beyond a Party’s control,
- which such Party could not reasonably have provided against before entering into the Contract,
- which, having arisen, such Party could not reasonably have avoided or overcome, and
- which is not substantially attributable to the other Party.”

Provided an event satisfies the above conditions, then under FIDIC it is a force majeure event (if Clause 19.1 is read in isolation).

Clause 19.1 of the FIDIC Silver Book then goes on to set out a non-exhaustive list of examples of force majeure events, including war, rebellion, riot and natural catastrophes (such as earthquake, hurricane, typhoon or volcanic activity).

Whether the Ebola epidemic qualifies as a force majeure event will depend on the drafting and interpretation of the relevant clause. It is common for “… epidemic...” to be expressly included in the definition of force majeure, as is the case in the standard form IADC International Offshore Daywork Drilling Contract (in contrast to the LOGIC General Conditions of Contract which...
has closed standard wording and does not refer to an epidemic). Clause 19.1 does not expressly reference an epidemic as a force majeure event, though that does not in itself prevent it being such an event. The critical question in determining whether or not an Ebol outbreak is a force majeure event under FIDIC, is whether the four criteria set out above have been satisfied.

There can be little doubt that the Ebol outbreak is an event which is exceptional. Whether it is an event “which such Party could not reasonably have provided against before entering into the Contract” will in part be affected by the place of its required performance and when the Contract was entered into (though query whether or not such an outbreak was foreseeable).

**FORESEABILITY**

Entitlement to a force majeure event may well be very different in circumstances where the relevant clause includes a requirement that the event be unforeseeable (the FIDIC example does not). The element of foreseeability is incorporated in Art 1148 of the French Civil Code, which stipulates that a force majeure event must be (a) unforeseeable; (b) render performance impossible; and (c) be outside of the control of the party invoking suspension of the relevant contractual obligation. This is a higher threshold than that in FIDIC and we have seen agreements where parties have agreed to allocate risk in this way. Given that, in recent history in certain parts of Africa, there have been Ebol outbreaks, albeit occasional and confined and not necessarily in the countries currently affected, an Ebol outbreak may fall foul of a force majeure provision that requires an event to be unforeseeable.

**EXTENSION OF TIME**

Under the FIDIC Silver Book, a contractor is entitled to an extension of time “if the Contractor is prevented from performing any of his obligations under the Contract... and suffers delay... by reason of such force majeure”. This would, of course, be subject to the time bar provisions found in Clause 19.2 relating to notice. For such notice to be adequate, it will need to (a) set out the event or circumstances constituting force majeure, and (b) specify the obligations, the performance of which is or will be prevented. So, where circumstances fall within each of the required defined elements for force majeure, the Contractor would be entitled to obtain an extension of time where it can demonstrate delay by reason of those circumstances affecting completion.

**ENTITLEMENT TO ADDITIONAL COST**

The question of entitlement to additional costs (although cost is defined so as to exclude profit in the FIDIC Silver Book) arising from a force majeure event is more complex. Clause 19.4 of the FIDIC Silver Book makes a distinction between different kinds of force majeure events and where they occur. In fact, the entitlement to costs refers back to the categories of force majeure events listed in Clause 19.1. For example, an entitlement to additional costs will accrue in the event that war and/or hostilities in a neighbouring country (or indeed anywhere) effect the progress of the works. In contrast the balance of the “categories” of events listed in Clause 19.1 must occur in the country of the works so as to qualify as a relief event and give rise to an entitlement to costs.

An Ebol epidemic does not sit well in any of the categories listed in Clause 19.1, thus creating an uncertainty in the drafting. Is there an entitlement to an extension of time but no money? Further, if parties are undertaking projects in adjoining countries, even if they are proximate to the sites of the Ebol epidemic, does that preclude entitlement to costs?

Whilst the drafting is unclear on this issue and there is no case-law on epidemics that would provide useful guidance, the most likely interpretation is that there is more likelihood of an entitlement to an extension of time, than costs.

**MITIGATION**

In addition to the general duty to mitigate under English common law, Clause 19.3 of the FIDIC Silver Book imposes a duty to use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of force majeure.

In addition, the third limb of the definition of force majeure in Clause 19.1 provides that the event or circumstance will only constitute force majeure to the extent that “… having arisen, such Party could not reasonably have avoided [the event or circumstance]...”

These clauses are likely to be a key challenge to the Contractor, ie it will need to show that it could not have reasonably avoided the epidemic and that it did all it could have reasonably done to mitigate the problems and continue to work. In any discussion of whether the current outbreak of Ebol entitles a contractor to declare force majeure and its entitlements, it is inevitable that there will be much focus of these aspects.

Much has been written about how Ebol is transmitted and precautions that can be taken to avoid its transmission. With regard to mitigation, consideration will need to be given not only to the direct health aspects but also the impact on the availability of food, transportation of materials necessary for contract performance, the Contractor’s supply chain and to what extent the contract has specific requirements as to where and how the contact is to be performed. For instance, it may be permitted for more fabrication to be carried out offsite. It is important to distinguish between the “fear factor” of Ebol and the extent of the actual risk in a particular relevant locality – not simply its existence elsewhere in the country and recognise the measures that can be taken to mitigate the risk. In that light, it will often place contractors in a difficult position. Many may be tempted to withdraw staff, perhaps to comply with a general or specific duty under their employment contracts, only to find themselves in breach of contract under a contract for works or services.

**TERMINATION**

Clause 19.6 of the FIDIC Silver Book
provides a right for either party to terminate the contract if the progress of the works is prevented for a continuous period of 84 days by reason of force majeure of which notice has been given under Clause 19.2, or for multiple periods which total more than 140 days due to the same notified force majeure.

Threatened termination could provide sufficient leverage to encourage the parties to work together to continue the contract.

FRUSTRATION: A BRIEF REFRESHER

Parties to contracts without an express risk allocation for force-majeure-type events may need to consider alternative routes through which to escape sanction/obtain relief. In such circumstances, the English common law doctrine of frustration may be invoked to provide some level of protection to the party who would otherwise be in default.

A contract will be frustrated only in very limited circumstances where, for reasons attributable to none of the relevant parties, performance has become impossible, illegal or would be totally different to what was contemplated by the parties when the contract was formed. To some extent this mirrors Clause 19.7 of the Silver Book which provides that the parties are discharged from further performance if any event or circumstance occurs outside the control of the parties (whether or not it falls within the defined force majeure events) which makes it impossible or unlawful for one or more of the parties to fulfil their contractual obligations or entitles the parties to be released from further performance of the contract under the governing law of the contract.

The English courts have made it very clear that parties will not be entitled to relief from performance for frustration merely when performance is rendered more difficult, time-consuming or expensive.

POINTS TO CONSIDER FOR FUTURE CONTRACTS

In light of the recent events noted above it is advisable that contractors review and analyse their force majeure clauses in order to manage the impact of extraordinary events. Useful points to consider include:

- setting out in detail in the contract the circumstances which constitute a force majeure event;
- consider specifying more, detailed, thresholds required to invoke force majeure;
- carefully outlining the relief and remedies that the parties may seek in the event of force majeure (e.g. suspension, termination, reduced rates);
- setting out whether there are obligations to mitigate the impact of a force majeure event and specifying a practical notice procedure;
- considering the knock-on effect that declaring a force majeure event may have on other contracts; and
- assessing the logistical, financial and reputational risks that may result from relying on force majeure.

CONCLUSION: THE CONTRACTUAL CONSEQUENCES OF EBOLA

In summary, the rights and obligations of employers and contractors undertaking projects in West Africa under English law governed contracts will be determined by a close reading of the provisions of the relevant contracts (and employing modern means of interpreting contracts holistically). In many circumstances, an outbreak of Ebola which has a demonstrable effect on the progress of a project may qualify as a force majeure event giving rise to an entitlement for additional time and/or monetary relief. But this will depend on the express terms of the relevant contract. It may also be the case that in some civil law jurisdictions parties will be entitled to rely on the provisions of the civil code in that country to obtain relief.

As the leader of the Eversheds Africa Law Institute network, and with a presence in 37 African jurisdictions, including Liberia and Sierra Leone, Eversheds is uniquely placed to assist clients across the region.