SOCIAL IMPACT BONDS 2.0?

PANDEMIC SHOWS RISKS OF EXTREME EVENTS TO SIB BENEFICIARIES
The pandemic reveals a need to build resilience into SIB relationships and the pay for performance contracts that undergird SIBs. Deborah Burand details how COVID-19 and catastrophic weather events should prompt a rethink of SIB contracts and relationships.

The first Social Impact Bonds were launched about ten years ago. Much has happened since. Economic and social upheavals followed the 2008 financial crisis. Then came the COVID-19 pandemic. These events compounded new and increasing social needs including ageing populations, the rise of long-term health conditions such as diabetes, high rates of unemployment for young people, a mental health epidemic, plus loneliness across the generations and homelessness. This transformed landscape makes now a timely moment to think again about Social Impact Bonds and their future development.

This series of briefings on the future of Social Impact Bonds has been produced by the Policy Evaluation and Research Unit at Manchester Metropolitan University and the Price Center for Social Innovation at the University of Southern California. The series editors are Professor Chris Fox and Professor Susan Baines from the Policy Evaluation and Research Unit and Professor Gary Painter from the Price Center for Social Innovation.

The pandemic and recent catastrophic weather events are focusing attention on what happens when something really bad and very unexpected occurs that can suddenly paralyze some – or even all – of the parties to a Social Impact Bond (SIB).

The vexing societal and environmental problems that SIBs and their close cousins, DIBs (development impact bonds), attempt to address are hard to fix in the best of times. But this past year has seen scenarios where nearly everything that could go wrong does go horribly wrong.

How do you improve the education of girls if their schools are closed? How do you tackle recidivism if offenders are dying of disease while incarcerated? How do you reduce unemployment or homelessness in cities that are under strict quarantines and when government authorities allow only essential businesses to operate?

Some SIBs and DIBs are confronting situations where service providers may be unable to provide contracted services to target beneficiaries. Evaluators may be precluded from measuring impact outcomes. Investors may be reluctant to continue disbursing funds. Even outcome payers may be facing challenges in meeting their financial obligations.

The contracts that undergird many SIBs commonly provide for contractual governance mechanisms that bring parties back to the negotiation table, should these transactions stumble. For example, SIBs typically allow for the replacement of non-performing parties with substitutes. But what do you do when no service providers or no impact evaluators can perform their tasks because of unforeseen catastrophic events such as a pandemic or extreme weather conditions?

"FORCE MAJEURE" CLAUSES

Chances are you (or your lawyer) will look to see if your SIB contracts include a "force majeure" clause. When a force majeure event occurs – be it an "act of God" or "act of man" – this clause typically excuses or suspends performance obligations of contracting parties for a designated time.

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The pandemic reveals a need to build resilience into SIB relationships and the pay for performance contracts that undergird SIBs. This is particularly important for Social Impact Bonds 2.0.

The Policy Evaluation and Research Unit at Manchester Metropolitan University is a multi-disciplinary team of evaluators, economists, sociologists and criminologists. We specialise in evaluating policies, programmes and projects and advising national and local policy-makers on the development of evidence-informed policy. We have a long-standing interest in social investment and Social Impact Bonds. See www.mmuperu.co.uk for details of relevant publications.

The Sol Price School of Public Policy at the University of Southern California is a leading urban planning, public policy, public administration and health policy and management school. The Sol Price Center for Social Innovation is located within the School and develops ideas and illuminates strategies to improve the quality of life for people in low-income, urban communities.

In civil law jurisdictions, you may find that force majeure is provided by law. In those jurisdictions, parties do not need to expressly provide for a force majeure clause in their contracts, unless they want to vary the clause’s contents from what the law would otherwise provide.
Law and Social Entrepreneurship.

example, one DIB expressly excludes from its
of needed services to vulnerable populations. For
party – the would-be beneficiary.'

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University, where she directs the International Transactions
impacts of extreme weather events on the delivery
https://www.jdsupra.com/legalnews/force-

Deborah Burand

SIB's demise is not dumped on its most vulnerable
parties – such as insurers?

in the decision-making process for determining when
the capacities to plan for catastrophic, exogenous
events. Do they have contingency planning in
a force majeure event is triggered; and developing
a force majeure clause. That involves identifying
additional limits on what types of events can trigger a
force majeure clause. Yet, these clauses often take a
similar approach to dealing with extraordinary
crisis? Accordingly, some who are interpreting
force majeure clauses are now looking, not to the
reasons for their inclusion in the context of
social impact bonds, but rather to “acts of man” as the triggering event –
among them the pandemic as the possible triggering event, but
extraordinary events that are unforeseen and outside of the
reasonable control of the contracting parties.

There is no single standardized form of force
majeure clauses, nor is it clear how any of these force
majeure clauses are intended to work – or even if any of these clauses are intended to work in
practice. Force majeure clauses are not meant to be escape
channels for parties – such as insurers? – that see
in the recent past to the current circumstances,
there are now breathing spells for the parties:

A breathing spell that excuses the performance of
a force majeure clause. Yet, these clauses often take a
protracted, and increasingly foreseeable, health
problems endured by some of our most vulnerable
citizens. We should make sure that, when an
unusual act of God or man strikes, the risk of the
performance, or even terminate the transaction.

However, invoking a “force majeure” clause is not
as straightforward as it might initially seem,
have terrible, even deadly, consequences for SIB
beneficiaries.

In practice, this means rethinking the elements of
DIBs designed expressly to meet the needs of vulnerable
populations who are affected by “wicked”
problems. Their needs may be urgent. Moreover,
in the end, much of this is a discussion about
how to anticipate, allocate, and manage risk.

In the context of the contracting parties,
how to get the wheels back on the bus.
If parties want to get back to work.

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