

FIDIC Contracts and the law of the countries in the Middle East provide Contractors with relief from the adverse impact of the Coronavirus

Introduction

The World Health Organisation's (WHO) "Situation Report-34" indicates that the new coronavirus (formally named COVID-19) (**Coronavirus**) has infected over 78,000 people globally and has caused the death of over 2400 people in China.

Reports indicate that Coronavirus is adversely affecting the Chinese economy, which in turn will have an adverse impact on all industries, including the Construction and Engineering industry, across the globe.

Specifically, China exports approximately \$3.7 billion of building materials annually (Observatory of Economic Complexity/MIT – www.oec.world). Further, its construction and engineering contractors are some of the largest in the world and operate globally including throughout the Middle East (**ME**).

Given the above it is a matter of high probability that the Coronavirus will adversely affect those working within the Construction and Engineering supply chain in the ME.

In this context, mindful that the ME countries generally use construction and engineering contracts based loosely on the FIDIC standard form contracts (**ME Contracts**), we discuss whether the Coronavirus constitutes an "epidemic" and/or a "Force Majeure" event under FIDIC's 1999 Yellow Book below.

In addition, we refer to the relevant Articles of the different laws in the ME (**ME Law**) which Contractor's may use to support a claim and obtain relief from the Coronavirus' adverse impact on a project.

Finally, we set out the Contractor's optimal strategy to protect its position and, if necessary, enhance its prospects of success if the matter evolves into a "dispute".

FIDIC: Epidemic / Governmental Actions – Delay to the Works

FIDIC provides the Contractor with the right to submit a claim for an "extension of Time to Completion" (CI/8.4) if the completion of the Works is or will be delayed due to:

"...(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions,

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor's Claims]" (CI/8.4 /final para.) (emphasis added)

The Contractor, therefore, must provide the Engineer with a notice of its claim no later than 28 days from the date it became aware, or should have become aware, of the event i.e. the Coronavirus, which is or could cause a delay to completion of the Works in the above context. If the Contractor fails to comply with the notice period, it loses its right to claim (CI./20.1).

FIDIC does not define the term “*epidemic*”, however, the WHO provides the following definition:

“Epidemic: The occurrence in a community or region of cases of an illness, specific health-related behaviour, or other health-related events clearly in excess of normal expectancy. The community or region and the period in which the cases occur are specified precisely. The number of cases indicating the presence of an epidemic varies according to the agent, size, and type of population exposed, previous experience or lack of exposure to the disease, and time and place of occurrence.” (<https://www.who.int/hac/about/definitions/en/>) (emphasis added)

In addition, the WHO defines the “*Epidemic Threshold*” as follows:

“Epidemic Threshold: Is the critical number or density of susceptible hosts required for an epidemic to occur. The epidemic threshold is used to confirm the emergence of an epidemic so as to step up appropriate control measures.”

Further, we note that on 30 January 2020 the WHO’s Director General convened a second meeting of the International Health Regulations (2005) Emergency Committee (**Committee**) to discuss whether Coronavirus constituted a “*Public Health Emergency of International Concern*” (**PHEIC**) and advised

“The Committee agreed that the outbreak now meets the criteria for a Public Health Emergency of International Concern and proposed the following advice to be issued as Temporary Recommendations.” (emphasis added)

Notwithstanding the above, the WHO does not appear to have formally categorised the Coronavirus as an “*epidemic*”. It may, therefore, be necessary to obtain expert evidence (epidemiological), to determine the date on which Coronavirus reached the “*Epidemic Threshold*”, which is the minimum “*number of cases*” the Coronavirus is required to reach, to categorise the virus as an “*Epidemic*” in accordance with the WHO’s definition.

In addition, FIDIC does not define “*governmental actions*”, however, if the Chinese Government’s actions, including its “*coronavirus shutdown*” of factories and “*quarantine measures*” (Financial Times/10 February 2020), cause a shortage in the availability of personnel and/or Goods then the Contractor may rely on the above.

FIDIC: “Force Majeure” – Delay to the Works / Additional Costs

In addition, CI/19 is titled “*Force Majeure*” and excludes the Contractor’s liability for an event which is beyond its reasonable control.

Specifically, CI/19.1 provides a list of “*Force Majeure*” events and it would be difficult to construe any of the events to incorporate the Coronavirus. The preceding paragraph, however, uses the term “*but is not limited to*” which means that FIDIC’s list is non exhaustive.

Consequently, a Contractor may categorise the Coronavirus, as a “*Force Majeure*” event and seek to rely on the same to exclude any liability it has incurred because of the event.

In this context, the Contractor is required to provide a “*Notice of Force Majeure*” event to the Engineer no later than 14 days after it become aware, or should have become aware, of the event (CI.19.4).

In addition, if the “*Force Majeure*” event prevents the Contractor from completing any obligation under the Contract and this causes it to suffer “*delay and/or incur Costs*” it has a right to raise a claim under CI/20.1 [Contractor’s Claim] for an “*extension of time*” and additional Costs (CI/19.4).

It should be noted, however, that for the Contractor to obtain any additional Costs the “*Force Majeure*” event must occur in the Country i.e. ME country as opposed to China (CI/19.4(b)).

Further be mindful that the above could lead to “*Optional Termination*” (CI/19.6) and/or “*Release from Performance under the Law*” (CI/19.7) (see “*Force Majeure – Performance Impossible*” - Qatar: Art. 188, Bahrain: Art. 145, Kuwait: Art. 215, Oman: Art. 172 and UAE: Art. 273).

ME Law: Exceptional and Unforeseeable Events

Generally, ME Countries operate a civil code system of law, based on the French Napoleonic Civil Code, which includes several legal principles, including one titled “*Exceptional and Unforeseeable Events*”, which may assist a Contractor claiming the above or merely advancing a claim under the “*governing law*” of the Contract.

The principle provides the Courts/Arbitral Tribunal with a wide discretion. Specifically, it allows the Courts/Arbitral Tribunal to adjust the Contract’s effect, in relation to both the Time for Completion and Costs, if an exceptional and unforeseeable event occurs, such as the Coronavirus, which causes the Contractor to suffer “*grave loss*”.

Generally, the above principle constitutes a mandatory law which the Contract may not exclude (Qatar: Art. 171 (2), Bahrain: Art. 130, Kuwait: Art. 198, Oman: Art. 159 and UAE: Art. 249).

FIDIC: Fully Detailed Claim

In addition to the above, the Contractor is required to submit: a “*fully detailed claim*” as follows:

“...Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the claim, or within such other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed...” (CI/20.1/Para.5)

In addition, CI/20.1/Para.5 sets out the approach the Contractor’s “*fully detailed claim*” should adopt if the event has a “*continuing effect*”. Specifically, the Contractor is required to submit an “*Interim...fully detailed claim*” and the Contractor is required to submit a “*final claim*” no later than 28 days “*...after the end of the effects...*” of the event (CI/20.1/Para.5(c)).

If the Contractor fails to comply with the above or any other “*Sub-Clause in relation to a Claim*” then the Engineer will take account of the extent that the Contractor’s failure has prejudiced its investigation into the Claim within his assessment for any additional time and/or costs (CI/20.1/Para.10).

It should be noted, however, that the above does not apply to the 28-day period in which the Contractor must provide its initial Notice of the “*event*” (CI/20.1/Para.2) or risk being “*time barred*”.

Observations / Strategy

The WHO’s “*Situation Report – 1*” dated 21 January 2020 indicates that it was first informed of the Coronavirus on 31 December 2019 at which time there were 44 cases. Since that date, approximately 9 weeks, the Coronavirus has spread to approximately 25 countries and there are over 75,000 cases across the globe.

As mentioned at the outset it is a matter of high probability that the Coronavirus will adversely affect the Construction and Engineering supply chain in ME. That being the case the Contractor should consider the following:

Protect your Position: Contractor's Claim

The Contractor's first consideration, in relation to the Coronavirus and any event that may adversely impact its performance, should be to protect its position as a matter of the Contract and the relevant "governing law". In this context:

Notices

The Contractor, whether working under an unamended or amended FIDIC 1999 Yellow Book, should ensure that it submits its notice/s in accordance with the Contract's requirements and reserve its legal rights.

Specifically, under CI/8.4 the Contractor is required to submit a notice under CI/20.1 "Contractor's Claims" only, no later than 28 days from the date it became aware, or should have become aware, of the event causing a shortage in the availability of personnel and/or Goods to complete the Works.

Under CI/19, however, the Contractor is required to submit two Notices: (1) under CI/19.2 "Notice of Force Majeure" no later than 14 days after becoming aware of the event, and (2) under CI/19.4 a CI/20.1 "Contractor's Claims" Notice, no later than 28 days from the date it became aware, or should have become aware, of the event preventing its performance.

The Contractor should note that if it fails to submit its initial notice within the 28-day period mentioned above it may lose its right to claim i.e. "time barred" (CI./20.1/Para.2). However, depending on the Contract's terms and the facts, the Contractor may rely on Article 418(1) "Prescription" as a defence to the Employer's claim that it has failed to comply with an arbitrary short time frame in which to provide such notices.

Fully Detailed Claim

Subsequent to its notice/s the Contractor should prepare and submit a "fully detailed claim" in accordance with the Contract's requirements and reserve its legal rights.

Specifically, under CI/20.1/Para.5 the Contractor is required to submit a "fully detailed claim", which complies with the same, no later than 42 days from the date it became aware, or should have become aware, of the event giving rise to the claim. This includes the 28-day period to provide the initial Notice under CI/20.1/Para.2.

However, given the Coronavirus will have a "continuing effect", the Contractor is required, in the first instance, to submit an "Interim...fully detailed claim" which complies with the requirements set out in CI/20.1.

Further, which may well follow several months of submitting "Interim...fully detailed claim", the Contractor is required to submit a "final claim", no later than 28 days "...after the end of the effects..." of the event (CI/20.1/Para.5(c)) i.e. the Coronavirus.

The Contractor should note that it is required to particularise and substantiate the above claims it should refer to and apply the relevant Articles of the "governing law".

If the Contractor is working under an amended FIDIC 1999 Yellow Book, or any other contract, which does not include relief for an "epidemic" and/or "Force Majeure" event then it may well be necessary to formulate a claim using the "governing law" only.

Contractor's Claim is not a Dispute

We are conscious that some Contractors in the ME may be concerned that submitting the "Notices" and "Contractor's Claim", as mentioned, may have a detrimental impact on its relationship with the Employer.

In this context, however, it should be noted that the "Notices" and a "Contractor's Claim" are merely a contractual mechanism which protects the Contractor's rights/position and not a "dispute".

Specifically, the Contractor should note that a "dispute" crystallises if it disagrees with the "Engineer's Determination" (CI/3.5), pertaining to its "Contractor's Claim", following which it may choose to initiate the remainder of the FIDIC 1999 Yellow Book's tiered dispute resolution mechanism, which concludes with "Arbitration" (CI/20.6).

Conclusion

In conclusion, the Contractor may, depending on the evidence, argue that the Chinese Government's "governmental actions" are causing delay to the Works. In addition, it may argue that the Coronavirus constitutes an "epidemic" and/or a "Force Majeure" event under the FIDIC 1999 Yellow Book (see above).

Specifically, the Contractor should think strategically and ensure that it understands its Contract's relevant terms and the "governing law", together with the consequences of the same, to protect its position. Further, it should define its objectives, mindful of the project's position and its relationship with both the Employer and other members of the supply chain, to formulate a flexible optimal strategy to reach its objectives.

In this context, the Contractor's claim could rely on and apply several legal principles within ME Law including, but not limited to, the following: **(1)** Contract Interpretation (Qatar: Arts. 169 & 170, Bahrain: Art. 125, Kuwait: Art. 193, Oman: Art. 165 and UAE: Art. 258), **(2)** Good Faith (Qatar: Art. 172, Bahrain: Art. 129, Kuwait: Art. 197, Oman: n/a, and UAE: Art. 246) **(3)** Exceptional and Unforeseeable Events (Qatar: Art. 171 (2), Bahrain: Art. 130, Kuwait: Art. 198, Oman: Art. 159 and UAE: Art. 249) **(4)** Prescription (Qatar: Art. 418(1), Bahrain: Art. 380, Kuwait: Art. 453, Oman: Art. 354 and UAE: Art. 487(1)), to formulate a robust argument to support its "Contractor's Claim" and/or advance a claim as a matter of the "governing law" only.

The Contractor would be wise to instruct an experienced Construction and Engineering lawyer to enhance its prospects of success.

