

FIDIC Contracts and the Governing Law, whether Civil or Common Law, provide relief from COVID-19's adverse impact on Construction and Engineering Projects across the Globe.

1 Introduction

- 1.1 On 11 March 2020, the World Health Organisation's (**WHO**) Director General categorised the new coronavirus (**COVID-19**) as a pandemic and its recent "*Situation Reports*" indicates that it has infected over 350,000 people globally.
- 1.2 Consequently, governments across the globe are implementing different emergency measures, including imposing travel bans, quarantining citizens and restricting social interaction, in an attempt to delay and stop COVID-19 spreading further. Such measures are adversely affecting all industries, including the global Construction and Engineering Industry and its extensive supply chain, which generates approximately \$10 trillion annually (*McKinsey Global Institute – Reinventing Construction*).
- 1.3 Given the above and FIDIC's recent announcement that the Asian Infrastructure Investment Bank (**AIIB**) (26/11/19) will use FIDIC's contracts, including the 1999 First Edition of its "... *Plant & Design-Build...by the Contractor*" (**Yellow Book**), to procure Construction & Engineering projects, we discuss the Yellow Book's clauses, together with the Governing Law, which provide Contractors with relief from the adverse effects of COVID-19, below.
- 1.4 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 formal "*dispute*".

2 FIDIC: Epidemic / Governmental Actions – Delay to the Works

- 2.1 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)

- 2.2 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. COVID-19 and/or "*governmental actions*", which are 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).

2.3 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)

2.4 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.”

2.5 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 COVID-19 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)

2.6 In addition, on 11 March 2020 the WHO’s Director General stated the following:

“WHO has been assessing this outbreak around the clock and we are deeply concerned both by the alarming levels of spread and severity...

We have therefore made the assessment that COVID-19 can be characterized as a pandemic...” (emphasis added)

2.7 The WHO’s “*Definitions: emergencies*” does not define a “*pandemic*”, however, its “*Bulletin*” provides:

“A pandemic is defined as “an epidemic occurring worldwide, or over a very wide area, crossing international boundaries and usually affecting a large number of people”¹

2.8 Notwithstanding the above, the WHO does not appear to have formally categorised COVID-19 as an “*epidemic*”. It may, therefore, be necessary to obtain expert evidence (epidemiological), to determine the date on which COVID-19 reached the “*Epidemic Threshold*”, which is the minimum “*number of cases*” COVID-19 is required to reach, prior to the virus being categorised as a “*pandemic*”, to categorise the virus as an “*Epidemic*” in accordance with the WHO’s definition.

2.9 In addition, FIDIC does not define “*governmental actions*”, however, if such actions, including China’s “*coronavirus shutdown*” of factories and “*quarantine measures*” (Financial Times/10 February 2020) and/or Malaysia’s “*...strict nationwide controls locking down all travel in or out of the country in an effort to stem infections of Covid-19...*” (CNN/17 March 2020) and/or the UK government’s “*coronavirus lockdown*” (BBC/25 March 2020) cause a shortage in the availability of personnel and/or Goods then the Contractor may rely on the above.

¹ WHO Bulletin Volume 89, Number 7, July 2011, 469-544.

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

- 3.1 In addition, Cl/19 is titled “*Force Majeure*” and excludes the Contractor’s liability for an event which is beyond its reasonable control.
- 3.2 Specifically, Cl/19.1 provides a list of “*Force Majeure*” events, however, it would be difficult to construe any of the events to incorporate COVID-19. The preceding paragraph within Cl/19.1, however, uses the term “*but is not limited to*” which means that FIDIC’s list is non exhaustive.
- 3.3 Consequently, a Contractor may categorise COVID-19, as a “*Force Majeure*” event and seek to rely on the same to exclude any liability it has incurred because of the event.
- 3.4 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 (Cl.19.4).
- 3.5 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 Cl/20.1 [Contractor’s Claim] for an “*extension of time*” and additional Costs (Cl/19.4).
- 3.6 It should be noted, however, that for the Contractor to obtain any additional Costs the “*Force Majeure*” event must occur in the Country (Cl/19.4(b)), which is defined as “...*the Country in which the Site (or most of it) is located...*” (Cl/1.1.6.2).
- 3.7 Finally, the Contractor should be mindful that the above could lead to “*Optional Termination*” (Cl/19.6) and/or “*Release from Performance under the Law*” (Cl/19.7).

4 FIDIC: Change in Law – Delay to the Works / Additional Costs

- 4.1 Further, governments are introducing new laws to stop COVID-19 spreading, for example the UK’s emergency “*Coronavirus Act 2020*” (**CA/20**) on 25 March 2020 and the Malaysian’s “*Movement Control Order*” (**MCO**), which initially applied from 18 March until 31 March 2020 and has now been extended to 14 April 2020.
- 4.2 The UK’s CA/20 is designed to protect life and the nation’s public health together with support the medical staff dealing with the crisis. Specifically, its aims may be defined as follows:
- (a) “*containing and slowing the virus;*
 - (b) *easing legislative and regulatory requirements;*
 - (c) *enhancing capacity and the flexible deployment of staff across essential services;*
 - (d) *managing the deceased in a dignified way; and*
 - (e) *supporting and protecting the public to do the right thing and follow public health advice*”. (<https://www.gov.uk/>)
- 4.3 At the date of writing it could be argued, however, that the UK government has not provided clear and instructions/guidance regarding whether the UK’s construction and engineering projects, save essential projects such as hospital maintenance etc, should close.

- 4.4 In contrast, Malaysia's MCO, which derives its authority from the "*Prevention and Control of Infectious Diseases Act 1988*" and "*Police Act 1967*", prohibits individuals from leaving their homes, with limited exceptions, and closes all government and private premises.
- 4.5 In addition the "*Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020*" sets out measures to stop COVID-19 spreading, and includes a list of "*essential services*", which does not include the construction and engineering industry/projects, to remain open.
- 4.6 On 18 March 2020, the Malaysian National Security Council provided a statement which defines an "*essential service*" which may operate throughout the period of the MCO. In addition, it states that construction and engineering projects may operate if closing the same would create a risk to "*public security and safety*". In this context, the Malaysian Department of Works and Department of Occupational Safety and Health are required to provide formal approval for the project to remain open. In other words, those managing such projects should ensure that they apply for an obtain the approval in question, however, the remainder are required to close to comply with the above.
- 4.7 That being the case, FIDIC's CI/13.7 is titled "*Adjustments for changes in Legislation*" and provides:

"The Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in the Laws of the Country...which affect the Contractor in the performance of obligations under the Contract... If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in the Laws..."

- 4.8 In the above circumstances, the Contractor has a right to raise a claim under CI/20.1 [Contractor's Claim] for an "*extension of time*" and additional Costs (CI/13.7(a) and (b)), however, it must notify the Engineer no later than 28 days from the date it became aware, or should have become aware, of the event i.e. change in law, failing which it loses its right to claim (CI./20.1).

5 Governing Law: "Force Majeure"?

- 5.1 FIDIC's CI/1.4 is titled "*Law and Language*" and provides:

"...The Contract shall be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender..."

- 5.2 The Parties, therefore, have the right to decide on the law which governs the Contract, which in many cases is not the law of the Country in which the project is being completed, and any disputes (CI/20) arising from the same (**Governing Law**).
- 5.3 The Governing Law will include the rules which apply to the Contract's interpretation and the meaning/application of other legal principles such as "*Force Majeure*".
- 5.4 Specifically, Force Majeure" (**FM**) derives from France and is used, in both civil law and common law legal systems across the globe, as a method of excluding liability for an event which is beyond the Parties' control and renders performance, on an objective analysis, too onerous and/or impossible.

- 5.5 In civil law legal systems, such as the People's Republic of China (**PRC**) and countries within the Middle East the FM principle is set out within the respective civil codes i.e. statutes. For instance, in the PRC the FM principle exists within Article 180 of the PRC's General Rules on the Civil Law and Articles 117 & 118 of the PRC's Contract Law – these apply automatically if the Contract is silent regarding the same.
- 5.6 In contrast, in common law legal systems, such as England and Malaysia, the Parties have the freedom to agree whether to include a FM clause within their construction and engineering contracts. The FM principle, therefore, is a “creature of contract” which evolves through the Court's binding authorities i.e. case law, of high ranking courts (Supreme Court/Court of Appeal) which, in a common law legal system, the lower courts are bound to follow in subsequent cases with similar facts. For example, the Court of Appeal in England & Wales has found that the word “*prevent*” within an FM clause meant that the FM event rendered performance “*legally or physically impossible*” and not merely “*difficult or unprofitable*”². In addition, it held that an FM clause which required the FM event to be “beyond the control”³ of a party could only be relied upon if that party had taken all reasonable steps to avoid the event or mitigate its results.
- 5.7 Given the above, the key, therefore, is to construe the Contract as a whole, in accordance with the Governing Law, to be able to advise on its meaning including, as part of a wider strategy (see Section 8 below), whether Cl/19 “*Force Majeure*” and/or the relevant Governing Law's application of the FM principle is beneficial. The Contractor should of course be mindful that it is required to prove that the FM event caused it to fail to perform its obligations and, as mentioned in paragraph 3.7 above, there may be consequences to relying on the same.

6 FIDIC: Fully Detailed Claim

- 6.1 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... (Cl/20.1/Para.5)*
- 6.2 In addition, Cl/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 (Cl/20.1/Para.5(c)).
- 6.3 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 (Cl/20.1/Para.10).
- 6.4 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*” (Cl/20.1/Para.2) failing which the Contractor risks being “time barred”.

² *Tennants (Lancashire) Ltd v G.S. Wilson & Co. Ltd [1917] AC 495.*

³ *Channel Island Ferries Ltd v Sealink UK Ltd [1988] 1 Lloyd's Rep 323.*

7 Observations / Strategy

- 7.1 The WHO's "*Situation Report – 1*" dated 21 January 2020 indicates that it was first informed of COVID-19 on 31 December 2019 at which time there were 44 cases.
- 7.2 On 11 March 2020, the WHO Director General categorised COVID-19 as a pandemic and its recent "*Situation Reports*", approximately 4 months after the initial report, indicate that it has infected over 350,000 people globally.
- 7.3 As mentioned at the outset COVID-19 is and will continue to adversely affect Construction and Engineering projects across the globe for some time and the Contractor, therefore, should consider the following:

Protect your Position: Contractor's Claim

- 7.4 The Contractor's first consideration, in relation to COVID-19 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

- 7.5 The Contractor, whether working under an unamended or amended Yellow Book, should ensure that it submits its notice/s in accordance with the Contract's requirements and reserve its legal rights.
- 7.6 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.
- 7.7 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.
- 7.8 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).

Fully Detailed Claim

- 7.9 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.
- 7.10 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.
- 7.11 However, given COVID-19 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.
- 7.12 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)).

- 7.13 The Contractor should note that it is required to particularise and substantiate the above claims it should refer to and apply the relevant elements of the Governing Law.
- 7.14 If the Contractor is working under an amended Yellow Book, or any other contract, which does not include the above relief, including “epidemic...governmental actions” and/or “Force Majeure” events, then it may well be necessary to formulate a claim using the Governing Law only. In this context, as set out in see Section 5 above, PRC Law applies Article 180 of the PRC’s General Rules on the Civil Law and Articles 117 & 118 of the PRC’s Contract Law automatically if the Contract is silent regarding the same and the relevant case law of England and Wales may apply.

Contractor’s Claim is not a Dispute

- 7.15 We are conscious that some Contractors may be concerned that submitting the “Notices” and “Contractor’s Claim”, as mentioned, may have a detrimental impact on its relationship with the Employer.
- 7.16 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 formal “dispute”.
- 7.17 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 Yellow Book’s tiered dispute resolution mechanism, which concludes with “Arbitration” (CI/20.6).

8 Conclusion

- 8.1 In conclusion, the Contractor may, depending on the evidence, argue that “*governmental actions*” and/or a “*change in law*” are causing delay to the Works and the latter is also causing it to incur additional Costs. In addition, it may contest that COVID-19 constitutes an “*epidemic*” and/or a “*Force Majeure*” event under the Yellow Book (see above).
- 8.2 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 manage the process and reach its objectives.
- 8.3 The Contractor would be wise to instruct an experienced Construction and Engineering lawyer to enhance its prospects of success.

