

FIDIC Contracts and Qatar Law provide relief from COVID-19's adverse impact on Construction and Engineering Projects in Qatar

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 1.7 million people globally.
- 1.2 Consequently, governments around the world, including the government of the State of Qatar (**Qatar**), are implementing different emergency measures, including imposing travel bans, quarantining citizens, restricting social interaction and attendance at offices to delay and stop COVID-19 spreading further.
- 1.3 For instance, on 1 April 2020, Qatar's Council of Ministers, within its twelfth meeting of 2020 introduced six measures, effective for two weeks from 2 April 2020, to delay and stop the spread of COVID-19 (**QCM/12**), however, the position is fluid and no doubt will change.
- 1.4 In this context, mindful that Qatar uses construction and engineering contracts based loosely on the FIDIC standard form contracts, we discuss FIDIC's 1999 Yellow Book's clauses below and the relevant Articles of Qatar Law which Contractor's may use to obtain relief from COVID-19's adverse effects.
- 1.5 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*".

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 “...*Qatar Airways suspends flights to mainland China...*” (Reuters/1 February 2020) and/or suspending “...*public transit services...*” (Peninsula/13 March 2020) and/or “*Qatar suspends entry of non-Qataris...[from 17 March 2020]*” (Reuters/15 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: Change in Law – Delay to the Works / Additional Costs

3.1 As mentioned, governments are introducing new laws to stop COVID-19 spreading including Qatar's government. For instance, on 1 April 2020, Qatar's Council of Ministers, within its twelfth meeting of 2020 (**QCM/12**) introduced six measures (**M/1-6**), to stop the spread of COVID-19.

3.2 Specifically, QCM/12 provides, but is not limited to, the following:

- (a) No more than 20% of the private sector's workforce may attend the "workplace" - the remaining 80% are required to work from home (M/2);
- (b) The private and public sector workforce may work no more than 6 hours, starting at 07:00, a day at their "workplace" (M/3/1);
- (c) All meetings should be held digitally, however, if a physical meeting is necessary it shall be limited to no more than 5 attendees and they are required to follow the Ministry of Public Health's preventative measures (M/3/3);
- (d) The number of workers transported to projects on buses shall be reduced by 50% (M/4/2); and
- (e) Extend the decision to suspend incoming flights, except transit and cargo, to Qatar (M/6).

3.3 The Council of Ministers' measures are effective for two weeks from 2 April 2020; however, M/5 includes seven categories of individuals to whom the measures do not apply and includes: "Workers on major state projects" (M/5/7).

3.4 It is a matter of high probability that QCM/12, similar to earlier measures, will fit within FIDIC's CI/13.7 titled "*Adjustments for changes in Legislation*" which 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..."

3.5 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).

4 FIDIC: "Force Majeure" – Delay to the Works / Additional Costs

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

4.2 Specifically, CI/19.1 provides a list of "*Force Majeure*" events and it would be difficult to construe any of the events to incorporate COVID-19. The preceding paragraph, however, uses the term "*but is not limited to*" which means that FIDIC's list is non exhaustive.

4.3 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.

- 4.4 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 (CI/19.4).
- 4.5 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 CI/20.1 [Contractor’s Claim] for an “*extension of time*” and additional Costs (CI/19.4).
- 4.6 It should be noted, however, that for the Contractor to obtain any additional Costs the “*Force Majeure*” event must occur in the Country (CI/19.4(b)), which is defined as “...*the Country in which the Site (or most of it) is located...*” (CI/1.1.6.2). Qatar reported its initial cases of COVID-19 in late February 2020 and, as indicated in paragraph 2.9 above, started to implement measures to delay the spread of the same as soon as possible thereafter.
- 4.7 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) – also see “*Force Majeure – Performance Impossible*” - Qatar: Art. 188.

5 Law of Qatar: Exceptional and Unforeseeable Events

- 5.1 Article 171(2) of the Qatar Civil Code 2004 provides:

*“Where, however, as a result of **exceptional and unforeseeable events**, the fulfilment of the contractual obligation, though not impossible, becomes excessively onerous in such a way as to threaten the obligor with exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level. **Any agreement to the contrary shall be void.**”* (emphasis added)

- 5.2 The above provides the Courts/Arbitral Tribunal with a wide discretion. Specifically, it allows the Courts/Arbitral Tribunal to adjust the Contract’s effect if an “*exceptional and unforeseeable event*” occurs, such as COVID-19 which causes the Contractor to suffer “*exorbitant loss*”.
- 5.3 Importantly, Article 172(2) is a mandatory law, which means that the Contract may not exclude 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... (CI/20.1/Para.5)

- 6.2 Further, 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)).

- 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 (CI/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*” (CI/20.1/Para.2) failing which the Contractor risks being “time barred”.

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 1,000,000 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 Law of Qatar. In this context:

Notices

- 7.5 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.
- 7.6 Specifically, under CI/8.4 and CI/13.7 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 and/or a “change in law”.
- 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). However, depending on the Contract’s terms and the facts, the Contractor may be able to rely on Article 418(1) “*Prescription*”, among other Articles, 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

- 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)) i.e. COVID-19.
- 7.13 The Contractor should note that it is required to particularise and substantiate the above claims it should refer to and apply the law of Qatar including mandatory Article 171(2) “*Exceptional and Unforeseeable Events*” of the Qatar Civil Code 2004.
- 7.14 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 Qatar Law only.

Contractor’s Claim is not a Dispute

- 7.15 We are conscious that some Contractors in Qatar 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 protect 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 FIDIC 1999 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 the Qatari Government’s “*governmental actions*” are causing delay to the Works and/or constitute a “*change in law*” for which it is entitled to an extension of time and additional Costs.
- 8.2 In addition, it may argue that COVID-19 constitutes an “*epidemic*” and/or a “*Force Majeure*” event under the FIDIC 1999 Yellow Book (see above).
- 8.3 Specifically, the Contractor should think strategically and ensure that it understands its Contract’s relevant terms and the Law of Qatar, together with the consequences of implementing 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.

- 8.4 In this context, the Contractor's claim could rely on and apply several legal principles within Qatar's Law including, but not limited to, the following: **(1)** Contract Interpretation (Qatar: Arts. 169 & 170,), **(2)** Good Faith (Qatar: Art. 172), **(3)** Exceptional and Unforeseeable Events (Qatar: Art. 171(2)) **(4)** Force Majeure – Performance Impossible (Qatar: Art. 188) and **(5)** Prescription (Qatar: Art. 418(1)), to formulate a robust argument to support its "*Contractor's Claim*" and/or advance a claim as a matter of Qatar Law.
- 8.5 The Contractor would be wise to instruct an experienced Construction and Engineering lawyer to enhance its prospects of success.

