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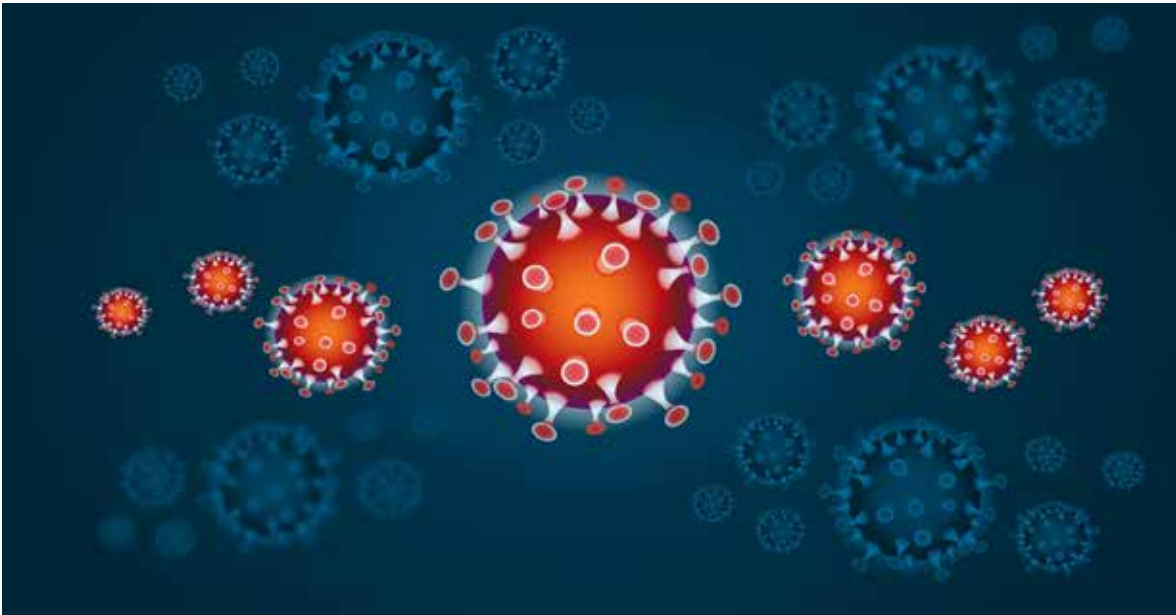
Quantum on Coronavirus

Quantum Global Solutions is an independent global construction support consultancy dedicated to supporting the construction industry to manage their projects and avoid disputes. British founded and managed we partner with many of the leading contractors, lawyers and employers around the world.

Our experienced teams, working across the MENA region, Asia, Europe, Africa and the USA, provide contractual, commercial and planning support to construction teams with expertise in forensic delay, quantum analysis and the preparation of entitlement submissions for the resolution of construction claims and disputes.

As a leading industry specialist the Quantum team comprises over 120 industry specialists with experts in many fields including Chartered Engineers, Chartered Surveyors, Contracts/Commercial Specialists, Quantity Surveyors, Forensic Delay Analysts and Media Specialists. Our strong reputation around the world for exceptional quality of service is at the heart of our company's customer-centric focus.

Quantum is regulated by the Royal Institution of Chartered Surveyors (RICS) and is committed to setting and upholding the highest standards of excellence.



Introduction

The outbreak of the COVID-19 (Coronavirus) is increasingly and adversely affecting contractors who may be facing unexpected delays in the supply of materials or a shortage in manpower. In an escalating number of cases, construction sites are being closed on grounds of health and safety. It is therefore important to consider whether there are relieving provisions in the Contract and, if so, the timeframe for serving a notice to employers under the related clauses. In this briefing note, Quantum refers only to standard and unamended clauses of the FIDIC Red Book (1999).

General Considerations

Two preliminary issues are important. The first is whether the standard FIDIC wording has been amended and the second is the jurisdiction clause. The interaction of these two issues will determine whether a Contractor can claim a relief event in respect to delays caused by lack of materials and/or labour due to Coronavirus.

In a common law jurisdiction, an event of Force Majeure is a matter of what has been contractually agreed and what definition of Force Majeure has been agreed and what the clause says it is. Anything falling outside an express definition will not be Force Majeure as English law gives no relief for the French Civil Law concept. The nearest equivalent under English law would be frustration which demands a high bar and, if met results in termination of the Contract.

In simple terms the UAE law on what constitutes an event of Force Majeure is reserved to the Court of Cassation. The Court decides if an event is a Force Majeure issue. No cases have been brought for the new Coronavirus, but jurisprudence may be expected over the coming years. The effect of a finding of Force Majeure is the cancellation of the Contract.

Regional Civil Codes provide that a Contractor may rely on Force Majeure if performance of the Contract has become impossible. It is not sufficient that the Force Majeure event has merely made performance more onerous or costly. For example, in the UAE Civil Code Article 273, Qatar Civil Code Article 188 and Kuwait Civil Code Article 215, the effect of Force Majeure is that the corresponding obligation shall cease, and the Contract shall be automatically cancelled. This may not be the relief required where realistically a three-month extension and additional costs may remedy the position.

Claims under Sub-Clause 8.4 and 17.3 of Standard FIDIC

The word 'epidemic' is used once in the standard form in Sub-Clause 8.4. Contractors operating on standard terms may rely on Sub-Clause 8.4 to justify time and expense claims resulted from the consequences of Coronavirus. Clause 8.4, provides at paragraph (d) for

“Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions.”

Secondly Clause 17.3 outlining Employer's Risks, states at paragraph (h) that “any operation of the forces of nature which is Unforeseeable or against which an experienced Contractor could not reasonably have been expected to have taken adequate preventative precautions” will give rise to a right to claim. There is a definition of “unforeseeable” set out in Sub-Clause 1.1.6.8 where it is given the meaning “not reasonably foreseeable by an experienced Contractor by the date for submission of the Tender”.

Both Sub-Clause 8.4 and 17.3 are linked to clause 17.4 [Consequences of Employer's Risks] and states as follows:

“If and to the extent that any of the risks listed in Sub-Clause 17.3 above results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Engineer and shall rectify this loss or damage to the extent required by the Engineer.

If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion],*
- and*
- (b) payment of any such Cost, which shall be included in the Contract Price. In the case of sub-paragraphs*
- (f) and*
- (g) of Sub-Clause 17.3 [Employer's Risks], reasonable profit on the Cost shall also be included.*

After receiving this further notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters”.

Claims for relief under Sub-Clauses 8.4 and 17.3 are to be brought under Sub-Clause 20.1 in the normal way. This Sub-Clause stipulates that if the Contractor considers itself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of the FIDIC Red Book, conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance. It follows that a Contractor is entitled to submit an EOT claim under sub-clauses 8.3 and 17.3 by way of the notice provisions of Sub-Clause 20.1. Please also note the follow up notice requirements every 42 days.

Force Majeure has a different and additional regime for giving notice for which see below.

Claims for Change in Law

Clause 13.7 of the FIDIC Red Book provides for claims for additional time and money in relation to changes in laws as follows:

“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 (including the introduction of new Laws and the repeal or modification of existing Laws) or in the judicial or official governmental interpretation of such Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.”

The clause requires a change in law. The definition of Laws is set out in 1.1.6.5 as 'Laws' means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority. It is a broad definition which includes regulations and by-laws. If changes in law or regulations, or their interpretation, arise as a result of Coronavirus, which have impacted on the works, it may be able to ground a claim for additional cost.

Claims under Sub-Clause 8.5

Allied to a change in law claim is a provision set out in Sub-Clause 8.5 that claims for the unforeseeable conduct of governmental authorities can be made in particular circumstances. Sub Clause 8.5 provides:

If the following conditions apply, namely:

- (a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,
 - (b) these authorities delay or disrupt the Contractor's work, and
 - (c) the delay or disruption was Unforeseeable,
- then this delay or disruption will be considered as a cause of delay under subparagraph
- (b) of Sub-Clause 8.4 [Extension of Time for Completion].

There is a definition of 'Unforeseeable' set out in Sub-Clause 1.1.6.8 where it is given the meaning "not reasonably foreseeable by an experienced Contractor by the date for submission of the Tender". It is clear as of today, that the world leaders and all of their best advisers of the year 2019, could not reasonably foresee the current events, yet alone 'an experienced Contractor'.

'Change in Law' claims are rarely successful and may be difficult to prove. Claims may only be successful if a Contractor can also show the direct effect of such a change on performance.

The 2017 diplomatic crisis in Qatar, with the resulting blockade, caused significant issues on construction and engineering sites, although many subsequent claims based upon 'Change in law' were unsuccessful.

The clause does not provide for claims in circumstances where existing laws are activated to deal with the pandemic, although the broader definition of 'regulations and by-laws' could provide basis for a valid claim.



Force Majeure

There are additional provisions as to how to treat a claim for 'Force Majeure' under Clause 19. An unamended FIDIC has both general provisions as to what characteristics constitutes 'Force Majeure' in Clause 19.1 (a) to (d) followed by a non-exclusive list of examples of Force Majeure in (i) to (v).

Sub-Clause 19.1

In this Clause, 'Force Majeure' means an exceptional event or circumstance which:

- (a) is beyond a Party's control,
- (b) such Party could not reasonably have provided against before entering into the Contract,
- (c) having arisen, such Party could not reasonably have avoided or overcome, and
- (d) is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

- (i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- (ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
- (iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-contractors,
- (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and
- (v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

Notice is given under Sub-Clause 19.2 within 14 days of the event. If there is a claim this should be addressed under Sub-Clause 19.4 and the claim should be made be brought under Sub-Clause 20.1 within 28 days.

Notice of Force Majeure

There is a particular notice regime and provisions for advising the Employer/Engineer of 'Force Majeure'. These are set out in Sub-Clause 19.2. The mechanism for claims for loss of time and expense are to be found in Sub-Clause 19.4 and are not specifically dealt with in this note.

Sub-Clause 19.2

If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.

The Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them. Notwithstanding any other provision of this Clause, Force Majeure shall not apply to obligations of either Party to make payments to the other Party under the Contract.



Analysis

The Notice requirements are set out in the list below:

- a) The Notice must be given to the 'other Party' not the Engineer. Under Sub-Clause 1.1.2.1 'Party' means the Employer or the Contractor, as the context requires. Sub-Clause 1.3 does however, require the Engineer to be copied on the issue of any Notice to the Employer;
- b) The Contractor must establish that it is prevented or believes that it will be prevented from performing one or more obligations under the Contract;
- c) If so established, the requirement is to give notice of the event or circumstance giving rise to such prevention and constituting Force Majeure;
- d) The Notice must state which obligations (or work) which will be prevented; and
- e) The Notice must be given within 14 days of when the Contractor became aware or ought to have become aware of the event or circumstance.

Commentary

Force Majeure does not apply to obligations to pay money, the reason being that there must always be another way of paying. On the wording of the standard FIDIC the Employer cannot use Force Majeure to avoid payment to the Contractor. The notice requirement emphasises the need to establish cause and effect in a clear and concise manner. The notice must be given within 14 days which is shorter than the usual notice provisions of 28 days.

This is not a notice tasked with claiming time and money. There is a further requirement under Sub-Clause 19.4 to make a claim for loss and expense under Sub-Clause 20.1 in the normal way and in the normal time frame of 28 days. The Sub-Clause 19.2 notice is intended as purely an advisory communication claiming that there is a Force Majeure, no fault problem of external origin, which will affect the progress of the Works.

A 'Notice' does not have to be aggressive or have the word NOTICE in red flashing lights. The Notice does not have to use legal language. The Notice must however comply with the requirements of Sub-Clause 1.3 of the standard FIDIC which deals with communications and how communication is to be achieved. The list of communications covered includes 'notice' and specifies how these are to be sent. Communications provisions are frequently changed and amended so please make sure to check your own Contract. In the standard FIDIC wording the requirements are that a notice is "in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in the Appendix to Tender; and (b) delivered, sent or transmitted to the address for the recipient's communications as stated in the Appendix to Tender."

Whilst there is no express form for notice it must be in writing. Sub-Clause 1.2 (d) defines 'written' or 'in writing' as being 'hand-written, type-written, printed or electronically made, and resulting in a permanent record.' Any notice should therefore follow the normal and agreed method of communication used or agreed to be used on the project. The Notice can be informally written in the same manner as any other communication with the Employer or Engineer. The Notice should ideally mention all 4 requirements in Sub-Clause 19.1 as well as the matters set out in Sub-Clause 19.2.

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