

International Arbitration Alert

Akin Gump
STRAUSS HAUER & FELD LLP

COVID-19: FIDIC and Claims for Additional Time & Money in International Construction Projects

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The increasing and dynamic impact of the novel Coronavirus (COVID-19) is tangible. For example, on January 30, 2020, the World Health Organization declared a “public health emergency of international concern” and in the Peoples Republic of China (PRC) the China Council for the Promotion of International Trade (CCPIT) Commercial Certification Center issued a notice that the CCPIT would issue ‘Force Majeure Certificates’ in respect of COVID-19 for international contracts between PRC entities and foreign parties. Patently, international construction is under strain. Free movement of labor, key personnel and equipment are affected. Claims for additional time and money are inevitable. Fundamentally, such claims are not limited to force majeure. Civil Codes and various standard form contracts may give rise to additional and/or alternative entitlements under orthodox extension of time and disruption provisions, change in law provisions and provisions dealing with variations or change orders. The narrative is simple. Establishing an entitlement is complex.

- 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. In others, for example the Russian Civil Code Article 401(3), relief is limited to the precise obligation that is affected by the force majeure event.
- An array of claims under Fédération Internationale des Ingénieurs-Conseils (FIDIC) contract are possible in respect of COVID-19, including:
 - Force majeure where the “Party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing” under Clause 19.2 of FIDIC Red Book 1999.
 - Extension of time for delay caused by “Unforeseeable shortages in the availability of Employer Supplied Materials, if any caused by epidemic ...” under Clause 8.5 (c) of FIDIC Silver Book 2017 or for delay caused by “Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions” under Clause 8.4 (d) of FIDIC Red Book 1999.

Contact Information

Hamish Lal
Partner
hamish.lal@akingump.com
London
+44 20.7012.9740

Alexander Sergeevich Trukhtanov
Senior Counsel
atrukhtanov@akingump.com
London
+44 20.7012.9600

Josephine Kaiding
Associate
josephine.kaiding@akingump.com
London
+44 20.7661.5356

- Delay or disruption under Clause 8.5 of FIDIC Red Book 1999 where the “Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country” for example by increasing health and safety testing and thus having suffered lost productivity.
- Increase in Contract Price under Clause 13.7 of FIDIC Yellow 1999 where a change in the “Laws of the Country” directly affects the Contractor’s performance.
- Entitlement is contingent on causation: Did COVID-19 really affect design, fabrication, shipping, import, productivity of labor or plant, installation and/or the critical path? If so, how? An obligation to use reasonable endeavors to minimize delay caused by force majeure (as in Clause 19.3 of FIDIC Red Book 1999) will also form part of the legal ‘battleground.’

Establishing Entitlement to Additional Time & Money

COVID-19 may provide an obvious and compelling basis to start a claim whether under a Civil Code or pursuant to express terms of a contract. However, the real test for a contractor will be to show that COVID-19 is the actual cause of some sort of delay, disruption, inefficiency or increased cost. Moreover, a contractor will need to show that it sought to mitigate the effects (commensurate with the statutory or contractual requirements). Engineers, employers and decision-makers will want to interrogate a contractor’s detailed tender assumptions on plant and equipment, labor histograms, planned and actual critical path programs as well as the detailed contemporaneous facts linking precisely COVID-19 with the ostensible effects on the engineering, procurement and/or construction process. On closer examination and on application of legal rigor, the irresistible conclusion may be that COVID-19 may only lead to entitlement in limited matters—for example, in respect of bespoke long lead items being fabricated in regions directly affected by COVID-19 (and where replacement equipment from other vendors is not feasible or practicable); provided, however, that the contractor is not in culpable delay. Establishing entitlement is complex.

Entitlement under Civil Codes

Unsurprisingly, most Civil Codes will ultimately open the door to claims relating to COVID-19, but a contractor’s entitlement revolves around impossibility to perform rather than inefficiency, disruption or the increased cost of performance. In this Alert, we set out several examples to demonstrate this point:

UAE Civil Code Article 273(1) states:

“In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.”

The practical application of the above was considered in the Abu Dhabi Court of Cassation No. 13/2010 dated April 15, 2010 in the following terms:

“This means that rescission by operation of law shall not be applicable unless it is impossible to perform the obligations of the contract specifically by reason of force majeure or unavoidable accident that makes the performance of the obligations absolutely impossible. The burden of proving the impossibility of performing the

obligations of a contract shall be borne by the obligor. Failing to do so, he shall be liable to perform such obligations by way of contractual compensation. Impossibility means that the subject of the obligation loses one of its conditions, which makes the performance thereof impossible to all parties. A causal relationship between the external cause of default and the impossibility of the performance shall be present whenever the external cause of default has occurred during the term of the performance of the contract. An external cause of default is different from a contingent incident, which makes the performance only burdensome.”

PRC Contract Law Article 94 states:

“the parties to a contract may terminate the contract if the purpose of the contract is rendered impossible to achieve due to Force Majeure.”

In theory, a contract may be terminated for an event of force majeure if the event makes it impossible to fulfil the purpose of the contract. Article 117 of the PRC Contract Law explains what is to happen when a contract is not able to be performed due to an event of force majeure. Put simply, the liabilities shall be exempted in part or in whole in light of the effects of the event of force majeure, except as otherwise provided by law, but if the event occurred after one party has already delayed its performance, the liabilities of that party shall not be exempted.

Russian Civil Code

Article 401(3) states:

“Unless otherwise provided by law or contract, a person who has not performed or has unduly performed an obligation in the court of business is liable unless she proves that due performance was impossible by reason of force majeure, that is conditions which are extraordinary and unpreventable in the circumstances. Those circumstances do not include, in particular, breach of obligation by the [contract] debtor’s counterparties, absence of goods in the marked that are necessary for performance, impecuniosity of the [contract] debtor.”

Article 416(1) states:

“An obligation is terminated by impossibility of performance where it arises by reason of a circumstance that came about after the obligation arose and where no party is responsible for that circumstance.”

Entitlement under the FIDIC Forms of Contract

Force Majeure

Force majeure clauses tend to codify the definition of force majeure: the notice requirements; the entitlements to additional time to complete and/or additional money; and the duty to minimize the delay. An example is Clause 19 of the FIDIC Yellow Book 1999¹. Clause 19.1 starts with a general definition:

“In this Clause “Force Majeure” means an exceptional event or circumstance:

- a. which is beyond a Party’s control,
- b. which such Party could not reasonably have provided against before entering into the Contract,

- c. which, having arisen, such Party could not reasonably have avoided or overcome, and
- d. which is not substantially attributable to the other Party.”

Subject to a contractor using “all reasonable endeavors to minimize any delay in the performance of the Contract as a result of Force Majeure” pursuant to Clause 19.3, and subject to proving causation, a contractor may ordinarily have entitlement to additional time and money. In the case of COVID-19 additional costs may not be feasible under the express terms in Clause 19.4, which states:

“If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [*Notice of Force Majeure*], and suffers delay and/or incurs Cost by reason of such Force Majeure, the Contractor 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. if the event or circumstance is of the kind described in sub-paragraphs (i) to (iv) of Sub-Clause 19.1 [*Definition of Force Majeure*] and, in the case of subparagraphs (ii) to (iv), occurs in the Country, payment of any such Cost.

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

Extension of Time for Completion

COVID-19 could give rise to an extension of time or costs for disruption under, for example, Clause 8.4 and/or Clause 8.5 of the FIDIC Red Book 1999². This is especially so if COVID-19 has caused shortages in the availability of labor or “Goods” or if contractor is required to follow certain procedures instigated by a public authority in the “Country.” An example of the latter may be the additional health and safety tests or the mandatory quarantine of certain personnel travelling from certain countries. Naturally, precise facts are key as are the precise requirements of Clause 8.4 (d) and Clause 8.5:

“The Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor’s Claims*] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [*Taking Over of the Works and Sections*] is or will be delayed by any of the following causes:

- a. [...] Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions, or [...]”

“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*].”

Adjustments for Changes in Laws

If a contractor can identify changes in law or regulations arising as a result of COVID-19 which have impacted the work, it may be able to claim additional cost under, for example, Clause 13.6 of the FIDIC Silver Book 2017³ or Clause 13.6 of the FIDIC Emerald Book 2017⁴, which provides:

“Subject to the following provisions of this Sub-Clause, the Contract Price shall be adjusted to take account of any increase or decrease in Cost resulting from a change in:

- a. the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws); [...] made and/or officially published after the Base Date, which affect the Contractor in the performance of obligations under the Contract. In this Sub-Clause “change in Laws” means any of the changes under sub-paragraphs (a), (b), (c) and/or (d) above.

If the Contractor suffers delay and/or incurs an increase in Cost as a result of any change in Laws, the Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims For Payment and/or EOT*] to EOT and/or payment of such Cost.”

Such ‘Change in Law’ clauses are rarely activated. However, given the relatively broad definition of Laws, claims may be feasible if a contractor can also show the direct effect on performance. The definition of Laws in the Silver Book is “Laws means all national (or state or provincial) legislation, statutes, acts, decrees, rules, ordinances, orders, treaties, international law and other laws and regulations and by-laws of any legally constituted public authority.”

¹ Conditions of Contract for Plant & Design-Build (First Ed, 1999) For Electrical & Mech. Plant & For Building & Engineering Works Designed by the Contractor, Published by Fédération Internationale des Ingénieurs-Conseils (FIDIC), (the “Yellow Book”).

² Conditions of Contract for Construction (First Ed. 1999). For Building and Engineering Works designed by the Employer, Published by Fédération Internationale des Ingénieurs-Conseils (FIDIC) (the “Red Book”).

³ Conditions of Contract for EPC Turnkey Projects (Second Edition, 2017), Published by Fédération Internationale des Ingénieurs-Conseils (FIDIC) (the “Silver Book”).

⁴ Conditions of Contract for Underground Works designed by the Contractor according to the reference design by the Employer and the Geotechnical Baseline Report (First Edition, 2017), Published by Fédération Internationale des Ingénieurs-Conseils (FIDIC) (the “Emerald Book”).