

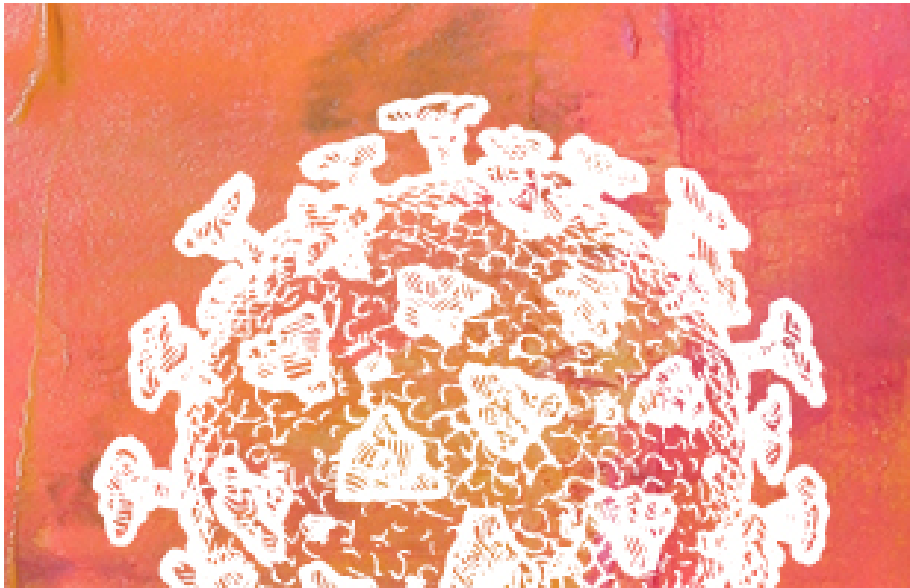
COVID-19 and Construction Contracts: The Risks and Challenges Ahead

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The global COVID-19 pandemic ('COVID-19') has affected practically every aspect of society. The immediate and unforgiving impact that COVID-19 has had on global economies has been well documented throughout the press and has required governments and industry leaders to carefully consider both the immediate and long term impact the pandemic might have with a view to taking strategic, mitigating steps as quickly and effectively as possible.

Needless to say, COVID-19 has created a complex web of risks and challenges for the construction industry, with which employers, contractors and other stakeholders are now having to contend.

In this article we briefly examine some of the key employer and contractor issues in more detail and explore how UAE law and the underlying construction contract can be brought to bear in order to provide some degree of relief to parties trying to navigate this unprecedented period of uncertainty.

Key Issues and Considerations for Employers and Contractors

There are numerous ways in which COVID-19 may impact employers and contractors involved in construction projects. At a basic level, its impact may result in: (i) delays to the completion of projects; and/or (ii) an increase in the cost of completing these projects. Examples of how this might arise include the following:

- the requirement for social distancing might impact not just the number of workers that the contractor is able to have on site at any given time, but will also limit the number of workers that the contractor is

able to transport to and from the site. Coupled with additional requirements for increased health and safety checks (including the testing of workers for COVID-19, temperature monitoring and regular cleaning and sanitisation of work areas and surfaces), such measures are likely to have a significant impact on both the time and cost involved in completing a project;

- due to the now completed UAE National Sterilisation Programme ('Sterilisation Programme'), works which (due to the hot summer weather or for other reasons) were originally programmed by the contractor to be undertaken overnight at a time when the Sterilisation Programme was in effect may have had to be rescheduled to a period during the day when the Sterilisation Programme was not taking place. This may have delayed the progress of such works;
- with many countries in the region and across the globe in total or partial lockdown, supply chains have been severely impacted. The procurement and transport of plant and materials (as well as labour) whether by road, rail, air or marine freight has meant that lead-in times as well as the cost of procuring these resources has increased exponentially, directly impacting both the contract value and the time required to complete a project.

Mitigating your Risk

Given the scale and magnitude of COVID-19, it is critically important that both employers and contractors examine, from an early stage, their respective positions both at law and under the construction contract into which they have entered (as well as, in the case of contractors, examining the third party contracts entered into with sub-contractors and suppliers) in order to determine the scope of each party's rights and obligations during this period, the nature and extent of the relief provided and the procedure for invoking these rights, with a view to mitigating their respective liabilities and risk exposure on projects.

Below we examine further some of the ways in which employers and contractors may go about doing so.

Article 249 of the UAE Civil Code

Article 249 of the UAE Civil Code can provide one form of relief which is unlikely to be contractually addressed. Given that it is a mandatory provision and cannot be contracted out of, it will apply notwithstanding if the construction contract states otherwise. Article 249 provides that:

*"If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contracted obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with heavy loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires and any agreement to the contrary shall be void."*¹

UAE law may therefore potentially intervene to relieve the affected party in certain exceptional circumstances, where its obligations have become particularly onerous or burdensome to perform. The court may reduce any such contractual obligation that has been imposed or otherwise allow the renegotiation of the relevant provision to something more reasonable and capable of performance in the circumstances. This relief is predicated on the aggrieved party submitting a claim before the court, in which it specifically invokes Article 249. However, it should be noted that the UAE courts have generally been reluctant to apply relief under this provision of the UAE Civil Code where it considers it to be an event that occurs frequently, an event which is considered to have been foreseeable or an event which is not considered to be of public concern and thus deemed to apply more within the context of a private contracting relationship.

Force Majeure and Impossibility

The principle of force majeure is a widely recognised legal concept and a common feature in construction contracts all over the world, including within the FIDIC suite of contracts. Force majeure refers to an unforeseeable event or circumstance beyond a party's control which prevents (or renders impossible) the completion of its obligations under the contract. The extent of the relief provided to an affected party is dependent on a number of factors, including notably the drafting of the force majeure provision within the contract. This principle therefore may, as a result of COVID-19, potentially enable either an employer or a contractor to obtain some form of relief from the performance of its obligations under the contract.

By way of example, Sub-Clause 19.1 of the FIDIC Red Book 1999 (one of the most heavily used FIDIC forms of contract in the Middle East) ('FIDIC Red Book') details the general requirements for an event to be considered one of force majeure. It does not limit the parties to an exhaustive list of events but rather to a non-exhaustive list, whilst prescribing a set of requirements that must be satisfied in order for the event or circumstance to be considered force majeure. Sub-Clause 19.1 provides that it must be:

1. an exceptional event or circumstance;
2. that is beyond a party's control;
3. which such party could not reasonably have provided against before entering into the contract;
4. which, having arisen, such party could not reasonably have avoided or overcome; and
5. which is not substantially attributable to either party.

It is arguable that COVID-19 satisfies these requirements and therefore may, in this example, be considered a force majeure event. However, as well as the drafting of the force majeure provision, the timing of a party's entry into the construction contract may determine the extent to which the affected party is able to satisfy item (iii). If the affected party was already aware of COVID-19 and its specific impact on the project and could have reasonably taken steps to provide against this event and mitigate its impact before contracting, this may restrict the affected party's ability to invoke force majeure in this instance.

Where Sub-Clause 19.1 has been satisfied, Sub-Clauses 19.2 and 19.4 of the FIDIC Red Book further stipulate that the party must have consequently been prevented, despite the adoption of mitigation measures, from performing its contractual obligations and, if applicable, must cause the affected party to issue to the other party a notice of force majeure detailing the event or circumstance that has arisen and the obligations that have or will be prevented as a result. By way of example, this might include a contractor being unable to complete works on account of the site being locked down.

However, relief due to force majeure would generally not extend to an employer's payment obligations, which must continue to be met notwithstanding an event of force majeure. Therefore, employers should note that a failure to pay when required (notwithstanding the existence of a force majeure event), risks the contractor being able to assert its right to suspend or potentially terminate the contract.

Relief for force majeure may take whatever form has been agreed between the parties under the contract. Under Sub-Clause 19.4 of the FIDIC Red Book, where the contractor is the affected party, it may include an extension of time for delay where completion of the works is or will be delayed, but the contractor will have no entitlement to costs. A prolonged period of force majeure may, in certain circumstances, render the contract capable of being terminated. This right is conferred under Sub-Clause 19.6 of the FIDIC Red Book where all or a substantial part of the works is prevented for a continuous period of 84 days or for multiple periods totalling 140 days.

Where a construction contract is silent with respect to force majeure, Article 273 of the UAE Civil Code becomes relevant. This provides that, where the performance of all or part of the contract becomes impossible, the entire contract or the relevant obligation to which the impossibility relates, may be rescinded and the parties restored to the position in which they were prior to entering into the contract.

This may be effected through the payment of damages. Alternatively, the courts may demand specific performance (which is the preferred option) or grant an extension of time to enable the affected obligations to be performed. This form of relief is also set out under Sub-Clause 19.7 of the FIDIC Red Book (albeit with a more prescriptive set of requirements for parties to adhere to). Impossibility to perform is however generally considered difficult to prove. Contractors should therefore ensure any such claim is properly substantiated. Employers should query such claims and request that contractors evidence the extent to which an entire contract can really be considered 'impossible' to perform given that only certain elements of the project may have been affected.

Articles 893 and 894 of the UAE Civil Code may also be applied as a result of COVID-19, within the context of a muqawala contract (a contract to make a thing or perform a task such as works). Here, UAE law provides that where an event arises that prevents a contract from being executed either party may request for the contract to be rescinded or terminated. If completion of the works is beyond the contractor's control, it will be entitled to the value of the completed works in addition to the expenses it has incurred up to the value that the employer has derived from the portion of the works that have been completed.

Provided that the construction contract does not state to the contrary, Article 287 may absolve a party from liability to the extent that it is able to prove that the loss incurred under the contract arose for reasons beyond its control, due to force majeure or another unforeseeable event.

Although the UAE Civil Code is silent with respect to the procedural requirements to be adhered to by parties when invoking the above provisions, it would be prudent for parties seeking to rely on Article 273 or Articles 893 and 894 to ensure that timely notice is given to the counterparty in order to avoid falling foul of the overarching duty of good faith set out under Article 246(1) of the UAE Civil Code.

Changes in Legislation

Changes in legislation will potentially have a broad and far reaching impact on the procurement of works and services for construction projects.

In recent weeks a raft of new legislation and Government decisions have been introduced in the UAE as part of measures to combat COVID-19, which include the imposition of fines for those failing to adhere to social-distancing measures and for failing to use personal protective equipment (such as face masks) when in public, as well as restrictions on movement. Although, in many cases, they do not appear to amend existing legislation, they are being imposed as a matter of law and therefore must be strictly adhered to. Therefore, this has the potential to have both cost and time implications for construction projects. How this liability is apportioned between the parties is, in the first instance, dependant on the terms of the relevant change in law provision within the contract. If the contract is silent on the issue this may not necessarily prevent a contractor from submitting a claim for an extension of time and/or additional costs (although the contractor's position will be severely disadvantaged in the absence of an expressly contractual right to relief).

At this stage a great deal remains unknown in terms of how the UAE courts will approach construction disputes arising out of COVID-19. No doubt the legislative, judicial and wider regulatory frameworks within which this legislation is intended to operate will be adapted and gradually evolve in order to accommodate the legal and commercial issues that COVID-19 raises. Employers and contractors should be minded to closely monitor official communications from the UAE authorities (whether online or in the press) in order to ensure they are well placed to address and respond to any new or modified legislative requirements in a timely and efficient manner.

Additional Considerations

There are a number of additional important points employers and contractors should consider as a result of COVID-19. These include the following:

- **Time bars:** Non-adherence to contractual time bars can potentially preclude a party from bringing a claim or otherwise asserting its rights under a contract. These, as well as any requirements to notify within a prescribed timeframe, should therefore be strictly adhered to in order to ensure the affected party does not inadvertently waive its entitlements as a result of a late submission;
- **Third party funding:** Where the development or construction of a project is being funded through external means, COVID-19 may impact each party's ability to continue to meet their financing and repayment obligations. Therefore, the relevant funding agreement should be closely examined to determine whether it provides for any relief as a result of events such as COVID-19. If not, it might be prudent approaching the funder to discuss whether, due to the exceptional nature of this event, a payment holiday or other form of relief may be granted with a view to conserving cash-flow so as to prevent a potential breach of, not only the funding agreement but also (given the knock-on impact it may have), the construction contract. Where additional funding is required this should also be explored internally in order to mitigate its potential impact on the project;
- **Insurances:** Parties should closely examine their respective insurance policies including, but not limited to, the Contractors' All Risks Insurance, Property Insurance, Commercial General Liability Insurance and Professional Indemnity Insurance (as well as any other insurances required under the contract) in order to determine whether these will respond to and provide cover for losses arising due to COVID-19. Certain insurance policies may exclude such cover;
- **Risk assessments:** Employers and contractors should pro-actively engage with each other at the earliest opportunity in order to take pre-emptive steps to agree a way forward with respect to the continuation of works on site, including discussing the viability of undertaking an initial risk assessment of the project given the nature of the risks posed by COVID-19. This might also include subsequently organising regular, periodic risk assessments so as to ensure that the contractor continues to meet any contractual health and safety obligations as well as any legislative and regulatory requirements imposed as a result of COVID-19;
- **Sub-contractors/suppliers:** Contractors should pro-actively engage with their sub-contractors and the wider supply-chain in order to understand and anticipate what impact COVID-19 is having or is likely to have on their ability to satisfy their contractual obligations with a view to managing and mitigating their impact on the project;
- **Document management:** Now, more than ever, parties should ensure they maintain a well-organised (preferably electronic) record of all project documents (whether legal, technical or commercial) as well as a clear, documented paper trail of all correspondence between the parties including, but not limited to, all notifications and claim submissions (including those issued to and from sub-contractors and suppliers) connected to COVID-19, in order to ensure it is well placed to consider and respond to any potential claims or disputes that may arise in the future.

Conclusion

COVID-19 is unlikely to leave many aspects of the construction industry untouched. Employers and contractors must, therefore, ensure they take pre-emptive steps to prepare for and respond to the legal and commercial risks as well as the challenges they might face as a consequence of this unprecedented event. Parties will be vying to mitigate their exposure while also having to contend with the uncertainty of what might follow. As the outbreak and its impact continues to develop, it remains to be seen how this unfolds. One thing that is known for sure, however, is that the lessons learnt from COVID-19 will no doubt continue to inform the procurement process and play an integral part in the development and evolution of

the construction industry for many years to come.

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