

COVID 19: AN INTERNATIONAL CONSTRUCTION PERSPECTIVE – MIDDLE EAST

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THIS IS THE THIRD OF OUR FIVE-PART SERIES COVERING THE ISSUES FACING THE CONSTRUCTION INDUSTRY IN FIVE DIFFERENT JURISDICTIONS ACROSS THE WORLD IN THE FACE OF THE COVID-19 PANDEMIC.

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Jurisdictional Considerations

The legal system of each Gulf state (except for Saudi Arabia) is based on the civil law model with the adoption of a civil code that sets out the applicable laws and regulations. In Saudi Arabia matters are predominately governed by the principles of Islamic Shari'ah law.

In the Gulf states, parties are generally free to contract subject to matters of public policy and mandatory statutory provisions.

Unlike common law systems, there are mandatory overarching duties, most notably the duty of good faith, which applies in the UAE, Bahrain, Kuwait and Qatar.

Although the civil codes in these jurisdictions do not precisely define what is meant by good faith, it is established that the duty of good faith requires parties to not take unfair advantage or exploit a position and to co-operate with each other.

In the context of the impact of COVID-19 on construction disputes, parties will inevitably be looking to assert that COVID-19 is a force majeure event as a means for exonerating themselves from contracts and liabilities.

The precise terms of construction contracts will need to be carefully considered as will any state laws and regulations that have been passed to deal with the crisis. As an example, the Iraqi Government recently declared COVID-19 as a force majeure event for all projects and contracts effective from 20 February 2020. How this is to be interpreted in the context of contracts subject to foreign laws (most notably English law) remains to be seen.

For projects in the UAE, there will inevitably be delays to projects that had been planned for EXPO 2020. As the current expectation is that EXPO in Dubai will happen in 2021/2022, one would expect some degree of flexibility on the part of employers, contractors and lenders.

Force Majeure

For projects in the Middle East, parties will usually provide for events of force majeure in standard form construction contracts, most notably FIDIC.

The express contract terms ought to prevail over relevant statutory provisions in relation to force majeure but inevitably parties will be looking for angles for asserting that COVID-19 is or is not caught by the contractual definition of force majeure. Contracts will therefore require careful scrutiny in the context of their terms and the governing law.

"The fact that performance is more burdensome or costly will not be sufficient for an event to be a force majeure event."

To the extent that a contract does not contain a force majeure provision or does not deal with the consequences of a force majeure event, the provisions of the relevant civil laws or common laws (applicable in any free zones) may be relevant.¹

Like the position under the English common law, the civil codes in the Gulf states do not specifically define what amounts to a force majeure event and each case will be decided on its own facts.²

Jurisprudence in the UAE suggests that for an event to be a force majeure event:

- It must be unforeseeable;
- Its effects must be incapable of prevention; and
- It must render performance absolutely impossible.

The fact that performance is more burdensome or costly will not be sufficient.

It will be for the party asserting a force majeure event to prove that each of these criteria are met.

Clearly, it may be easier to assert force majeure in relation to contracts entered into before COVID-19 became news across the globe. For contracts entered into after the crisis arose, arguments of foreseeability and prevention will inevitably be made.

Suspension

In the face of a pandemic, some construction contracts will be impossible to progress, but parties may not necessarily wish for them to be cancelled or terminated. This will be the case in relation to unfinished EXPO 2020 (now 2021/2022) Dubai projects.

In the absence of an effective contractual suspension provision, Article 247 of the UAE Civil Code could be useful to either an employer or contractor. This provides that "In contracts binding upon both parties, if the mutual obligations are due for performance, each of the parties may refuse to perform his obligation if the other contracting party does not perform that which he is obliged to do."

The actual and specific impact of COVID-19 on contractual performance will however need to be carefully assessed.

Termination

In the absence of an effective contractual termination provision for force majeure or for convenience, Article 273(1) of the UAE Civil Code provides that where performance of a contract becomes impossible as a result of a force majeure event, the contract shall end automatically.

Article 273(2) deals with partial impossibility and provides that if part of a contract is impossible to perform by reason of force majeure, that part of the contract will be terminated. Article 273(2) further provides that in the case of partial impossibility, the party to whom the obligation is owed will have the right to terminate the contract by notice to the other party.

There is also an express provision in the section of the UAE Civil Code, dealing with “Muqawala Contracts”; namely contracts for work, including construction contracts. Article 893 provides that if any cause arises preventing performance then either party may require that the contract is cancelled or terminated.

Subject to the terms of the contract, and in absence of the parties agreeing a termination, it may be that a court order is required. The delays and unrecoverable costs associated with obtaining such an order should not be underestimated.

Compensation

Other provisions in the Civil Codes will be relevant in terms of assessing if a party may be entitled to some form of compensation or other relief as a result of a force majeure event.

Article 249 of the UAE Civil Code provides that if unforeseeable events of a public nature occur, which make performance onerous or impossible, a judge or arbitrator can reduce onerous obligations to a reasonable level such as by increasing the price of the contract or allowing additional time for performance.

Articles 894 and 895 of UAE Civil Code in relation to Muqawala contracts also provide that:

- a contractor is entitled to the value of its works and expenses incurred in performing a contract that is now incapable of performance; and
- a court may order a party to pay compensation where this is custom in the construction industry and a court has the discretion to award compensation to the innocent party injured by the cancellation.

Practical Advice

It is essential for parties to construction contracts to carefully check contract terms and relevant laws in relation to force majeure.

In addition to what we have addressed above, if the construction contract relates to a government project, there may be deadlines specified in the local procurement laws for a contractor to apply for exemptions from penalties and fines for late completion by reason of a force majeure event.³

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Parties should also ensure that they:

- fully understand the terms of contracts (including sub-contracts) and take steps to ensure that those terms are strictly adhered to particularly in terms of giving adequate notice of a force majeure event within any timeframe stipulated in the contract(s);
- seek extensions of time as an alternative, where the contractual terms allow for this;
- make sure that they can satisfy the requirements of a force majeure event under the contract provisions and/or the relevant law before seeking to suspend or terminate contracts (including sub-contracts);
- implement an effective record keeping system (including regular progress reports, supply chain positions and mitigation efforts) so that all documents and communications relevant to the impact of COVID-19 in relation to the affected

project are effectively managed and retained;

- communicate with the other contracting parties to discuss and identify amicable solutions for dealing with the impact of COVID-19;
- carefully consider the consequences of a termination on the other party (could it result in its insolvency?), the duties to funders and other third parties and the rights they may have;
- anticipate calls on performance bonds/guarantees;
- act with integrity and in good faith throughout; and
- check the terms of insurance policies for any coverage in relation to COVID-19.

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[1] Notably the laws applicable in the DIFC and ADGM

[2] There is no case law precedent system in Gulf states

[3] See for example Article 49 of Dubai Law No.6/1997

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