

VIRAL LAW

A blog series on legal issues arising from the *Corona* pandemic

The effect of the *Corona* pandemic on Construction Contracts

by

Savini Tissera
Associate
Attorney-at-Law
LL.B (Warwick)



Commercial and Corporate M & A Division



+94 (0) 114 712 625



arw@nithyapartners.com



www.nithyapartners.com

THE EFFECTS OF THE *CORONA* PANDEMIC ON CONSTRUCTION CONTRACTS¹

The recent outbreak of COVID-19 was declared a pandemic by the World Health Organization on the 11th of March 2020. With over 190 countries having reported cases at the time of writing, the disease, at present, has infected approximately 465,684 people and resulted in over 20,834 deaths, globally. Consequently, it has had a significant impact and a ‘series of shocks’ to the global economy in an unprecedented scale and speed.

What could this mean for ongoing and/or planned projects in the construction industry? The pandemic has impacted the industry in several ways.



Supply Chain

The Construction industry has and will experience a delay in the supply chain due to closure of manufacturing facilities across countries.

The impact was particularly felt with the stoppage of factory outputs and manufacturing facilities in China, the largest supplier of material to the construction industry, globally.

These delays if continued for longer periods than anticipated, could affect lead times, and ultimately delay overall project timelines.



Labour

There are mandatory large scale quarantine procedures imposed globally to minimise the spread of the virus. This prevents workers from reporting to work.

Further, whilst some workers are ill or trapped in shut down villages and are unable to report to work, others are not keen to report due to fear of being infected.

This shortage of labor could potentially result in slow output of work, affecting the critical path and ultimate delay of projects.



Contractual Claims

Delays in completion of projects could result in various contractual claims and increased Project Costs. If timely action is not taken, this could result in damages and losses for late completion.

It is therefore essential that parties review their contracts carefully to understand what contractual rights and obligations exist in the prevailing circumstances, especially with regard to timing and costs associated therewith.

A checklist of key provisions that could potentially be triggered in construction contracts based on the commonly used FIDIC Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer - Red Book 1990 (standard form) and ICTAD/SBD/02 (standard form) contracts are highlighted below.

¹ The content of this article is intended for informational purposes only and does not constitute legal advice in any manner or form.

Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, i.e. Red Book (1999)

Clause No.	Description	Action to be Taken
<p>8.4</p> <p>Extension of Time for Completion</p>	<p>The Contractor is entitled, subject to Sub Clause 20.1 (Contractor’s Claims), an Extension of Time in the event Completion is delayed for purposes of Sub Clause 10.1 (Taking over of the Works and Sections) by causes listed in Clause 8.4. This Clause 8.4 includes the event of:</p> <p><i>“(c) unforeseeable shortage in the availability of personnel or Goods caused by epidemic or governmental actions.”</i></p>	<p>A Contractor who considers himself to be entitled to an extension of Time for Completion for reasons in Clause 8.4, must give timely notice of the same to the Engineer in accordance with Sub Clause 20.1.</p> <p>(See below for provisions relating to Clause 20.1).</p>
<p>20.1</p> <p>Contractor’s Claims</p>	<p>If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment <i>under any Clause of the said Conditions</i>, the Contractor is required to give notice to the Engineer describing the event or circumstance giving rise to the claim.</p> <p>The notice must be given <i>as soon as practicable and no later than 28 days after the Contractor became aware, or should have become aware, of the event of circumstance.</i></p> <p>The Clause requires that the Contractor submits any other notices which are required by the Contract, <i>and supporting particulars for the Claim, all as relevant to such event or circumstance.</i></p> <p><i>Within 42 days after the Contractor became aware (or should have become aware)</i> 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 must send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of</p>	<p>Contractors must ensure that they provide the Engineer with notice of their inability to complete work due to prevailing global conditions arisen as a result of the pandemic:</p> <ul style="list-style-type: none"> - within 28 days after the Contractor became aware, or should have become aware of the event / circumstance; and - a fully detailed claim within 42 days after the Contractor became aware (or should have become aware); and - given the continuing nature of the pandemic, the Contractor must also ensure that interim claims

	<p>the claim and the extension of the time and/or additional payment claimed.</p> <p>The Clause requires that, if the event or circumstance giving rise to the claim has a continuing effect:</p> <p>(a) to consider the fully detailed claim submitted as required above as an interim;</p> <p>(b) the Contractor to send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and other details that the Engineer may reasonably require; and</p> <p>(c) the Contractor to send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or such other period proposed by the Contractor and approved by the Engineer.</p>	<p>at monthly intervals are sent to the Engineer setting out the details of the accumulated delay and/or amount claimed and further particulars as reasonably required by the Engineer.</p> <p>It is also essential that, as required under the said Clause, the Contractor keeps all such contemporary records as may be necessary to substantiate any claim, either on Site or at another location acceptable to the Engineer.</p>
<p>17.3 Employer's Risks</p>	<p>Paragraph (h) of Clause 17.3 provides that 'Employer's Risks' includes <i>'any operation of the forces which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventive precautions.'</i></p>	<p>Clause 17.4 (See below) sets out the consequences of the occurrence of an event that is described as an Employer's Risk and the requirements on the part of the Contractor in such an event.</p>
<p>17.4 Consequences of Employer's Risks</p>	<p>If and to the extent that any of the risks listed in Clause 17.3 results in loss or damage to the Works, Goods or Contractor's Documents, the Contractor must promptly give notice to the Engineer and must further rectify this loss or damage to the extent required by the Engineer.</p> <p>The Clause further provides that if the Contractor suffers a delay and or incurs Cost from rectifying this loss or damage, the Contractor must give a further notice to the Engineer and will be entitled, subject to Sub Clause 20.1 (Contractor's Claims referred to above) to,</p>	<p>The Contractor is entitled to an extension of time under Clause 8.4 (Extension of Time for Completion), for an event falling within the Employer's Risks (See Clause 17.3), as a result of which the Contractor has suffered a delay or incurred Costs in rectifying the loss or damage.</p>

	<p>“(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);”</p>	<p><u>Notices</u> The Contractor must ensure that the notices for the Extension of Time are sent in accordance with Clause 20.1.</p>
<p>19.1 Force Majeure</p>	<p>A ‘Force Majeure’ event under this Clause, is defined to include an <i>exceptional event or circumstance</i>:</p> <ul style="list-style-type: none"> (a) <i>which is beyond a Party’s control;</i> (b) <i>which such Party could not reasonably have provided against before entering into the Contract;</i> (c) <i>which, having arisen, such Party could not reasonably have avoided or overcome, and</i> (d) <i>which is not substantially attributable to the other Party.</i> <p>The Clause further provides a non-exclusive list of events that may amount to events of Force Majeure. However, pandemics do not form a part of the same.</p> <p>The World Health Organization has, in its official statements, identified COVID 19 as an infectious disease caused by a newly discovered coronavirus, with no specific vaccines or treatments available at present.</p> <p>Further, the rapid outbreak of the virus, now declared a pandemic, has infected a large population in over 190 countries globally (at the time of writing), and resulted in many extreme and unprecedented actions to be taken by Governments, including the closure of national borders. This has prevented the transportation of supplies and travelling of persons, which are all essential to the timely completion of construction projects.</p> <p>These events, if applicable to a Contractor, may therefore fall within the definition of an exceptional event that is beyond the control of the Contractor, which the Contractor could not have reasonably</p>	<p>Clause 19.2 requires notice to be provided of the occurrence of a Force Majeure event (See below). The Contractors must ensure that they fall within the purview of this Clause prior to engaging in claims under a Force Majeure Clause. They must gather and store as much information as possible to substantiate their Claim, when needed in the future.</p> <p>The Contractor must bear in mind that it has an obligation at all times to use all reasonable endeavors to minimize any delay in the performance of the Contract as a result of Force Majeure (Clause 19.3).</p>

	<p>expected, and which having arisen, the Contractor could not have reasonably avoided.</p>	
<p>19.2</p> <p>Notice of Force Majeure</p>	<p>If the Contractor is prevented from performing any of his obligations under the Contract by the occurrence of a Force Majeure event, then the Contractor must give the Employer notice of the event or circumstances constituting the Force Majeure. The Contractor must also specify the obligations, the performance of which has or will be prevented as a result thereof.</p> <p><i>The notice must be given 14 days after the Contractor became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure.</i></p>	<p>The Contractor is required to provide 14 days' notice after the Contractor became aware or should have become aware of the occurrence of a Force Majeure event.</p> <p>Having given notice, the Contractor will be excused from performance of such obligations, as long as the Force Majeure event prevents the Contractor from performing them.</p>
<p>19.4</p> <p>Consequences of Force Majeure</p>	<p>If the Contractor is prevented from performing any of its 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 will be entitled, subject to Sub-Clause 20.1 [Contractor's Claims discussed above] to:</p> <p>(a) <i>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 discussed above]; and</i></p> <p>(b) <i>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.</i></p> <p>As highlighted in this Clause, the Parties must note that the recent pandemic, being an event that does not form a part of the list of examples of Force Majeure events listed in Clause 19.1, does not entitle</p>	<p>If the Contractor falls within an '<i>exceptional events or circumstance</i>' specified as a Force Majeure above, the Contractor must:</p> <p>(a) provide notice of the occurrence of a Force Majeure event within 14 days of occurrence thereof (Clause 19.2); and</p> <p>(b) provide notice under Clause 8.4 requiring an Extension of Time for Completion. Such notice must comply with requirements set out in Clause 20.1 discussed above.</p>

	<p>the Contractor to a claim for payment of Costs. Therefore, the Contractor can only require an Extension of Time in the present circumstance.</p>	
<p>19.6</p> <p>Optional Termination, Payment and Release</p>	<p>If the execution of substantially all the Works in progress <i>is prevented for a continuous period of 84 days by reason of Force Majeure</i> of which notice has been given under Sub-Clause 19.2 (Notice of Force Majeure), or <i>for multiple periods which total more than 140 days due to the same notified Force Majeure</i>, then either Party may give to the other Party a notice of termination of the Contract.</p> <p>In this event, the termination will take effect 7 days after the notice is given, and the Contractor is required to proceed in accordance with Sub-Clause 16.3 (Cessation of Work and Removal of Contractor's Equipment).</p>	<p>In the event of a Force Majeure, the Parties have the ability, where considered necessary, to rely on this Clause to terminate the Contract.</p>

Other Clauses

<p>13.7</p> <p>Adjustment for Changes in Legislation</p>	<p>The Contract Price can be adjusted to take account of any increase or decrease in Cost resulting from a change in Laws of the Country (including the introduction of new laws and repeal or modification of existing Laws) or in the judicial or official governmental interpretation of Laws, made after the Base Date, which affect the Contractor in the performance of obligations under the Contract.</p> <p>The Contractor who suffers (or will suffer) a delay and/or include additional Cost as a result, must give notice to the Engineer and will be entitled subject to Clause 20.1 to:</p> <p>(a) an extension of time for such delay, if completion is or will be delay under Clause 8.4 (Extension of Time for Completion); and</p> <p>(b) payment of any such Cost, which must be included in the Contract Price.</p>	<p>If the Contractor can identify and show that changes in law or regulations imposed as a result of the pandemic has impacted its work and resulted in delays, the Contractor may:</p> <ul style="list-style-type: none"> - request for an extension of time under Clause 8.4; and - require payment of such additional cost incurred as a result thereof.
--	---	---

OTHER CONTRACTS

Similar clauses to those highlighted above are present in the FIDIC Red Book (2017 Version) and ICTAD Standard Bidding Document Procurement of Works – Major Works (ICTAD/SBD/02), both of which are contracts commonly used (in Sri Lanka), subject to certain variations to the provisions in FIDIC Red Book (1999 Version), particularly in relation time limits applicable to notice requirements thereunder.

	Clause	Description
FIDIC Red Book (2017)	8.5	Extension of Time for Completion
	20.1 and 20.2	Claims and Claims for Payment and/or Extension of Time
	17.2	Liability for Care of the Works
	18.1	Exceptional Events (similar to that of Force Majeure in the 1999 version)
	18.2 and 18.3	Notice of an Exceptional Event; and Duty to minimize delay
	18.4	Consequence of an Exceptional Event
	Clause 18.5	Optional Termination
	Other Clauses	Clause 13.6- Adjustments for Changes in Laws
ICTAD/ SBD/ 02 (2007)	8.4	Extension of Time for Completion
	8.5	Delays Caused by Authorities
	19.1	Contractor's Claims In this Contract, an 84 day period is provided for the Contractor to send a fully detailed claim with supporting particulars (as opposed to the 42 day period provided in the FIDIC Red Book (1999)).
	17.3	Employer's Risks
	17.4	Consequences of Employer's Risks
	20.1	Force Majeure
	20.2	Notice of Force Majeure
	20.3	Consequences of Force Majeure
	20.6	Optional Termination, Payment and Release
	Other Clauses	Clause 13.6: Adjustment for Changes in Legislation.

CHECK LIST

Check your contract



- Examine your Construction Contracts to determine whether you are entitled to act under the provisions of your specific contract since parties may have amended or excluded the standard form contract.

Communicate and ensure timely Notification



- Ensure timely communications and notifications are sent to the Parties as contractually required. Non compliance with these obligations puts you at a risk of losing your entitlements under the contract.
- Contractors must follow a similar procedure for delays in relation to sub contractors and gather as much information as necessary for record keeping purposes and for support of future claims.

Maintain data and documents



- Maintain records diligently to provide an accurate account of the events that prevented you from complying with your obligations under the Contract. This is critical as it would allow a proper analysis of events and timelines if disputed.

Mitigate Loss and Delay



- Ensure that losses and delays are mitigated where possible and that records of such actions be kept.