

Compatibility of FIDIC Change in Law Clause with Mandatory Provisions of Kuwait Law

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Introduction

Since the outbreak of Covid-19, the pandemic has had a significant impact on the global construction industry. That impact has been felt in the GCC, in particular, because of the extent of construction and infrastructure activity throughout the region and the implementation of unprecedented restrictions and precautionary measures by the regional authorities to combat the spread of the virus

In the GCC, despite the fact that many economies are carefully getting back to normal, a majority of contractors and subcontractors continue to be disrupted by the pandemic and are still constrained by various protective measures imposed by the relevant authorities. These measures include, but are not limited to, the introduction of new laws,

decrees, ordinances and various decisions to combat the spread of COVID-19. These authorities have, for example, imposed curfews, lockdowns, quarantine, social distancing, required the reduction in the size of the workforce on site and the closing of airports and borders etc.

As a result of this experience, many contractors have had to review their entitlements under the forms of contracts to understand the legal impact of Covid-19. Specifically, many contractors have questioned whether the disruption resulting from the pandemic is a compensatable or non-compensatable event. Additionally, a substantial amount of variation claims have been submitted to employers due to losses incurred by contractors, both in terms of time and money.

Such claims have often relied on the grounds that the measures imposed by the authorities represented a "change in law". Typically, a construction contract will include a provision which entitles the main contractor and/or subcontractor to claim time and cost damages from their employers where a change in law has been introduced. Usually this is a change which could not have been anticipated by any of the parties at the time of concluding the agreement and has resulted in the contractor or subcontractor incurring unpredicted delay and additional cost due to the introduction of a new law.

Change in Law under FIDIC Standard Forms of Contracts

The FIDIC standard forms of contract are widely used in construction and infrastructure projects in the GCC. The FIDIC forms follow a usual position that a change in law is a risk that is carried by the employer (e.g. see clause 13.7 of the Red Book).

This article considers what would be the position under Kuwait law in the absence of provisions similar to those in the FIDIC standard forms and, if such a clause was included, how would it be interpreted given recent case law.

Change in Law under Kuwait Law

Statutory Provisions on Change in Law

Like most civil law systems in the region, Kuwait law does not explicitly provide for a contractor's right to claim a variation or to claim compensation from the employer where a new law is introduced

The Kuwaiti Civil Code No. 67 of 1980 ("**Kuwait Civil Code**") provides at Article 679:

"The increase or decrease to the costs of the work shall have no effect on the extent of the obligations stipulated in the contract without prejudice to the provisions of Article 198"

Therefore, the Kuwait Civil Code does not generally permit contractors to claim a variation if the costs of performing the contract increase during the term of the contract. However, Article 198 referred to in Article 679 may provide a possible remedy. Article 198 states -

"Where after and before completion of performance of the contract, general extraordinary circumstances arose which could not have been foreseen on the execution thereof, and which rendered the performance of the obligation arising therefrom oppressive, if not impossible, to the debtor such as will threaten him with a heavy loss, the judge may, after weighing the interests of both parties, reduce the oppressive obligation to a reasonable degree either by narrowing its extent or by awarding a balancing increase; any agreement otherwise shall be null."

The court's assessment of the elements of Article 198 is highly subjective and will rest on the Court's interpretation of the facts and the contractual provisions.

Contractual Change in Law Provision

Kuwait law recognizes the principle of "parties' autonomy" which makes the contract the law of its contractual parties as per Article 196. This provides:

"A contract is the law of the contracting parties and neither party thereto may separately rescind it or amend its stipulations except to the extent of the limits allowed by the agreement or where the law provides otherwise."

Moreover, the Kuwait Civil Code further obliges the contracting parties as per Article 193/1 to adhere to the express and clear terms of the contract. It even goes further and restricts the judiciary's ability to deviate from contractual provisions. Where provisions are clearly expressed the court is not allowed to try and interpret them to ascertain the real intention of the parties.

Therefore, it could be validly argued that, whilst Kuwait law does not generally entitle a contractor to claim costs resulting from a change in law, Kuwaiti law may uphold the parties' agreement to compensation/variation if a change in law clause is expressly included in the contract. This could be the case, even where Article 679 appears to prevent this.

In this regard, the Kuwait Court of Cassation upheld this analysis of a contractor's right to claim compensation/variation, if a new law was introduced after the base date of the contract if this was clearly

agreed in the contract. The Kuwait Court of Cassation decided in judgment no. 1184 of 2006 that the employer was to compensate the contractor for the unexpected implementation of a new ministerial decree, because of the inclusion of a change in law clause. The decree had raised fuel consumption fees as well as health insurance fees, all of which were unexpectedly brought into force during the performance of the contract. In the judgment, the Kuwait Court of Cassation decided that because the contract determines the law of the parties, then it should be considered as a private law between the parties. As a result, the contractual provisions should be the sole basis for establishing the rights and obligations of each party to the contract.

The Court added that whilst the parties had agreed in the contract that the employer would compensate the contractor for any increase in costs, which might occur due to the introduction of a law or a ministerial decision, the parties were still to adhere to the contractual terms.

Conclusion

There is no clear provision under the Kuwait Civil Code which entitles a contractor to claim time and money in a case of a change in law. Therefore, the parties are encouraged to include a change in law clause in their contracts to cover any such unforeseeable changes in law that may impact the contractor's performance of its obligations under the contract. Such a clause is likely to be upheld as consistent with basic principles of the Kuwait Civil Code regarding the parties' right to agree their own contract.

On this basis then, it can be concluded that the usual FIDIC form of change in law clause would be likely to be upheld in Kuwait.

For further information, please contact [Andrew Symms](#) or [Ahmed Amin](#).