

Force majeure under FIDIC in Iraq

Justin Ede - Senior Counsel - Arbitration / Mediation / Construction and Infrastructure
- Dubai International Financial Centre

July – August 2014

They will be keenly studying their contracts and checking the force majeure provisions that they agreed in less disturbed times.

Force Majeure provisions in FIDIC contracts

Numerous projects in Iraq incorporate as the applicable conditions of contract, the General Conditions published by FIDIC in their Yellow and Silver Books (“the standard forms”). Clause 19 of the General Conditions addresses force majeure. It is not unusual for Employers to amend this clause at the drafting stage. Contracts that we have recently reviewed have, by way of example, narrowed the definition of force majeure, excluded any right to payment of costs incurred due to a force majeure event or made very difficult the ability of a contractor to terminate the contract due to an extended force majeure event.

Whilst the precise terms of each force majeure clause therefore requires careful scrutiny, important points of principle can be drawn from the force majeure clause in the standard form. This article does so on the basis of English law, which is frequently stated in the Appendix to Tender to be the governing law, particularly on larger projects in Iraq.

Clause 19.1 of the FIDIC Yellow and Silver Books defines force majeure as:

“an exceptional event or circumstance:

- which is beyond a Party’s control,
- which such Party could not have reasonably provided against before entering into the Contract,
- which, having arisen, such Party could not have reasonably provided against before entering into the Contract,
- which, having arisen, such Party could not reasonably have avoided or overcome, and
- which is not substantially attributable to the other Party.”

Clause 19.1 then provides a non-exhaustive list of the kind of events or circumstances that might amount to Force Majeure. These include:

1. war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
2. rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,
3. riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors”...

Sub-clause 19.2 deals with notice. It provides that:

“if a party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the party became aware or should have become aware of the relevant event or circumstance constituting Force Majeure.

The party shall, having given notice, be excused performance of such obligations for so long as such Force Majeure prevents it from performing them."

Clause 19.4 addresses the consequences of force majeure. If a Contractor is prevented from performing its obligations under contract due to force majeure, it will be entitled (subject to complying with the claims procedure in clause 20.1) to an extension of time and payment of its costs. The Engineer is charged with agreeing or determining those matters.

Pursuant to Clause 19.6, if execution of substantially all the works is prevented for a continuous period of 84 days (or for multiple periods that total more than 140 days) by reason of force majeure, then either party can give a notice of termination, to take effect 7 days later, at which stage, the Engineer will again determine the value of work done, to include specified costs involved in withdrawing its plant, staff and labour from the site.

Invoking force majeure clause

There seems little doubt that parties to numerous contracts in Iraq will be able to demonstrate the existence of a force majeure event within the definition of the force majeure in Clause 19.1, on the basis that the aggression shown by ISIS in seeking to establish an Islamic State within Iraq comprises one or more of "war", "hostilities", "terrorism" "invasion" and "act of foreign enemies".

The next step, which is a key one in these circumstances, is to establish whether the Contractor has been "prevented" from performing any of his obligations pursuant to Clause 19.2.

Clause 19.2 refers to a party being "prevented", not to it being "hindered" or "delayed" or "subjected to increased cost". In Benjamin 's Sale of Goods (8th Ed 2011), the leading text on these matters, it was explained (at para 8-092) that '[a party which] seeks to invoke the protection of a clause which states that he is to be relieved or liability if he is "prevented" from carrying out his obligations under the contract or is "unable" to do so, he must show that performance has become physically or legally impossible, and not merely more difficult or unprofitable'. This was cited with approval in *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills* [2011] EWHC 2028.

In the leading case of *Tennants (Lancashire) Ltd v CS Wilson & Co* [1917] AC 495 (at p510), Lord Loreburn observed that "the argument that a man can be excused from performance of his contract when it becomes "commercially impossible" seems to me to be a dangerous contention which ought not to be admitted unless the parties plainly contracted to that effect."

Accordingly, English law focuses on physical or legal impossibility in performance as being the basic test for whether a party has been "prevented" and discourages a party from asserting prevention due just to increased financial cost.

Issues may arise where a party is concerned that conditions at or outside the site are too dangerous to allow its staff or labour to continue to work on a project. Do those conditions constitute legal or physical impossibility? Another situation which may arise is where a contractor is unable to undertake work on its critical path, due perhaps to lack of access into or out of the site, but is able to continue with some limited non-critical activities. Before making a decision to cease work, a party should gather as much information as possible relating to the underlying facts that it intends to rely on, including precise information about performance of critical and non-critical activities, reports by security advisors and/or information published by government organisations.

Pursuant to clause 19.1(a) - (e) above, the Contractor will also have to demonstrate that the force majeure event was one which the party could not reasonably have provided against and which, once it had occurred, could not be avoided or overcome. This is unlikely to be an issue for a force majeure triggered by the actions of ISIS.

Giving Notice

Having identified that a force majeure event has taken place and that the conditions above can be satisfied, it is important that the notice provisions are closely followed.

Under the standard form, notice is to be given within 14 days of the date when the party became aware of the event or the date when it should have become aware of that event. The notice should be delivered in accordance with the requirements of Clause 1.3 of the Conditions and ideally should refer to it being a notice under Clause 19.2.

Available Relief

The relief that will be sought by the party asserting force majeure under the standard form is an extension of time, coupled with payment of its costs reasonably incurred, including overheads but not profit.

Clause 19.6 sets out the conditions to be established before notice of termination of the contract can be given. An important condition here is that it is the execution of “substantially all the Works” that has to be prevented for 84 days continuously, or multiple periods totaling more than 140 days. Termination is of course an extreme remedy in any commercial contract and it should be understood that the English Courts place the burden of proof very much upon the party asserting the force majeure to demonstrate prevention of substantially all the Works for the period in question.

In all cases, the small print of the force majeure clause should be reviewed carefully in accordance with the applicable law of the contract. For assistance in interpreting a force majeure clause and/or in planning a strategy in relation to a possible force majeure event, do please contact us for further assistance.