COVID-19, or “Coronavirus”, has officially been declared a ‘pandemic’ by the World Health Organisation and we are now beginning to see the real time impacts that are being caused to construction projects in the Middle East. In these difficult times we consider how parties can best manage these ongoing disruptions under their contracts.

Despite the proactive measures implemented by governments in the Middle East to lessen the virus’ impact and spread, parts of the Middle East are now being affected and construction could be one of the sectors hit hardest by Coronavirus.

The official advice is for anybody who has travelled to an affected country, or who may be displaying symptoms, to self-quarantine. This may not impact too severely on office workers, who can in many instances work from home (sometimes more effectively than if they were in the office). For the vast majority of those involved in construction operations, however, working at home is simply not an option.

If you participate in any capacity in construction projects, particularly if your operations cross national boundaries, the chances are that you will soon begin to feel the fallout – if you haven’t already done so. Even if you are not directly affected, your suppliers and subcontractors are likely to be, and this will inevitably impact your operations.

Your principal obligation will be ensuring the safety of your employees: no matter what the project, it is essential to not put personnel in harm’s way. Unfortunately, ensuring employee safety may only contribute to disrupting project performance. Any disruption will, most likely, only be covered by insurance to a limited extent. All of this gives fertile ground for disputes.

Read Your Contract

The starting point for your rights and obligations, should you find yourself affected by Coronavirus, will be your contract. We set out below some basic contract issues that you should bear in mind.

1. **Operate the Contract!**
   - All construction contracts contain programme obligations (e.g. Sub-Clause 8.3 of the 1999 FIDIC Red Book). Check your contract carefully to see whether any disruption requires you to submit a revised programme, or otherwise notify your client that the programme may not be met.
   - Does your contract obligate you to give early warnings of delays and cost overruns (e.g. the second last paragraph of Sub-Clause 8.3 of the 1999 FIDIC Red Book)? If so, you must do so promptly. If you later seek an extension of time or payment of additional cost (see below), this could become very important.
   - Does your contract require regular progress reports (e.g. Sub-Clause 4.21 of the 1999 FIDIC Red Book)? If so, you should clearly set out all impacts that the disease has had on the project.

2. **Can you make a Claim?**

Most construction contracts require you to make claims for extensions of time or additional cost within a certain period of becoming aware of the circumstances giving rise to them. If you fail to do so, you may well lose the right to make a claim at all (e.g. Sub-Clause 21.1 of the 1999 FIDIC Red Book).

   - Check whether disease, pandemic and the like are a basis under your contract for you to claim an extension of time or additional cost. If so,
ensures that you make a claim within the time limit.

- Coronavirus may not be an Employer’s Risk under the unamended FIDIC 1999 suite (see Sub-Clause 17.3). Check for any amendments your contract makes to the standard form that may be helpful.

- Don’t fall into the trap of simply making a claim and then ‘forgetting about it’. Very often you will be required to provide more detailed information as a follow-up, and periodic updates subsequently (e.g. Sub-Clause 20.1 of the 1999 FIDIC Red Book). Ensure that you do so.

3. Is it Force Majeure?

If disease isn’t an Employer’s Risk, it may nevertheless constitute force majeure. If it does, you might obtain an extension of time and relief from liquidated damages. However, again, you must often notify your client within a certain period of time (e.g. Sub-Clause 19.2 of the 1999 FIDIC Red Book).

- Check carefully what is and isn’t an event of force majeure under your contract. If Coronavirus might be an event of force majeure, ensure that you give notice to your client, within the appropriate time period, providing them with all contractually required information.

- In particular, check any amendments your contract makes to the standard form: on behalf of a contractor, we recently negotiated a FIDIC Yellow Book contract for a project in sub-Saharan Africa providing “any outbreak of illness of epidemic nature” as an event of force majeure.

- Check also what your contract says about events of force majeure that affect your subcontractors, and whether these interlink with the definition of force majeure under your contract (see Sub-Clause 19.5 of the 1999 FIDIC Red Book).

4. Impossibility / Frustration / Prevention?

Can you argue that either the effects of Coronavirus itself or the effects of government action aimed at combating it (such as mandatory quarantines) have prevented or frustrated the parties’ performance of your contract, or otherwise have made performance impossible? If you can neither make a claim nor classify Coronavirus as an event of force majeure, this might release you from further performance.

- Delays might be due to actions of the authorities (see Sub-Clause 8.5 of the 1999 FIDIC Red Book).

- You might be able to seek release from performance under the law on the basis that it is impossible or unlawful to perform your obligations (see Sub-Clause 19.7 of the FIDIC Red Book).

- Generally, while the common law doctrines of prevention and frustration will not apply, relief may be available at law under provisions of the relevant civil code, or where there is no applicable civil code (such as in Saudi Arabia), pursuant to the laws of Islamic Sharia. However, relying on these provisions for relief will need to be considered carefully, as generally parties are held to the terms of the contracts that they freely enter into, even if those contracts contain onerous provisions. We recommend you speak with your in-house counsel or external lawyers if there are provisions of the various civil codes on which you seek to rely as a result of any issues arising due to this event.

Check Your Insurances

If your operations are impacted by Coronavirus, you may have in place insurance that responds to at least some of your losses. Business interruption insurance policies in particular may cover disruption caused both by the disease itself and by Government responses to it, such as enforced quarantines.

Such policies generally require the occurrence of “damage” as a precondition to triggering cover. Whether the presence of Coronavirus constitutes “damage” within the ambit of your policies is a highly technical question. It will be important to consider the terms of your insurances carefully, and also to review any exclusions that may be relevant.

In any event, if you do have in place any policies that may respond to losses due to Coronavirus, it is important that
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You notify your insurers promptly. If you do not do so then, again, you may lose your right to a payout. Once you have notified, consider the scope of your cover: it is likely that insurers will cover only some of the losses that you have incurred.

More Generally

It’s important to remember that you won’t be the only company affected. Your clients, and their other contractors and consultants, will be in the same boat. The overwhelming priority will be to ‘get on with the project’ as safely, efficiently and cost-effectively as possible, despite the disruption.

If all parties can agree a sensible way forward, so much the better (and it’s important to ensure that any agreement thus reached is documented in a legally binding manner). However, you must ensure that your position is protected in the meantime.

If you have any queries in relation to the above, or any concerns in relation to the effects on your construction projects of Coronavirus and issues arising out of it, please contact the author of this article.

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