Coronavirus: Force Majeure Issues for Construction Projects

Since being declared to be a Public Health Emergency of International Concern by the World Health Organisation on 30 January 2020, the coronavirus disease known as COVID-19 has spread to over 30 countries (as at the date of this alert). In addition to its tragic impact on public health, the spread of COVID-19 has led to significant and increasing negative impacts on commercial operations in China and entities doing business with Chinese companies. Some examples were set out in our alert on 18 February 2020.

We are now also being contacted by clients who are experiencing the impact of the virus and steps taken by various authorities to slow its spread on construction projects inside and outside China – which is the largest construction market in the world, a leading supplier of many construction materials used in projects around the world, and home to several construction contractors involved in substantial building projects in many countries – as well as supply chains involving China. It is likely that such difficulties will only increase, and that construction projects around the world will be faced with issues such as:

- ships being unable to dock at Chinese ports for delivery or receipt of materials or goods;
- Chinese firms refusing to accept imported materials on the basis that the domestic operations for which they were intended are suspended or are not at fully capacity;
- workers intended to be deployed on projects overseas are unable to leave their home provinces or are denied entry to the countries in which they were to be deployed; and
- disruption to supply chains and delivery schedules more generally.

As noted in our earlier alert, it is expected that businesses affected directly or indirectly by the consequences of the spread of COVID-19 will consider the application of force majeure.

Ultimately, whether force majeure applies in any particular situation will depend upon the legal system governing the parties' relationship, the terms of their contract and the specific factual circumstances. From a practical perspective, it may also be complicated in connection with operations involving multiple parties, multiple jurisdictions and multiple contracts containing different terms.

This alert provides an overview of:

- the concept of force majeure and how it applies in certain jurisdictions;
- the treatment of force majeure in the most commonly used standard form contract in the construction industry, namely the FIDIC Silver Book (for EPC/turnkey projects); and
- whether the spread of COVID-19 is likely to give rise to relief under the relevant provisions of the FIDIC Silver Book.

I. Force majeure

Force majeure (which literally translates to "greater force") is a civil law concept. In countries with a codified legal system, the civil code will generally provide that a party to a contract will not be considered to be in breach of contract, and the performance of its contractual obligations will be suspended, if and to the extent that it has been prevented from carrying out those obligations by virtue of an event which was unforeseeable, is not attributable to any of the parties and was unavoidable.

The equivalent provisions of the Chinese General Principles of Civil Law and Contract Law (articles 117 and 118) were set out in our earlier alert. Article 117 provides that, "If a contract cannot be fulfilled due to force majeure, the obligations may be exempted in whole or in part depending on the impact of the force

majeure … Force majeure as used herein means objective situations which cannot be foreseen, avoided or overcome." Article 118 then provides that a "party that is unable to fulfill the contract due to force majeure shall notify the other party in time in order to reduce losses possibly inflicted to the other party, and shall provide evidence thereof within a reasonable period of time."

In many countries in the Middle East, the relevant provisions of the civil codes tend to be drafted in less precise terms. For example, various provisions of the Qatari Civil Code, such as article 256, refer to a party being relieved from liability if the cause of its non-performance of its obligations was an "extraneous cause beyond [its] control". These provisions do not incorporate the unforeseeable and unavoidable requirements found in many other legal systems.

By contrast with civil law jurisdictions and jurisdictions with a civil law influence, force majeure is generally not part of the legal system in common law jurisdictions, but only applies where it is specifically provided for in a contract. Even then, "force majeure" is not a term of art (that is, it does not have a standard and universal meaning). In a contract governed by English law, the scope of a force majeure clause and the relief which it provides to a party affected by an external event will always depend upon the terms of the contract, the circumstances in which the contract was executed and the relevant facts.

Having said that, most building contracts (even in civil law jurisdictions) have reasonably detailed definitions of what will amount to a force majeure event. Although the precise terms may vary from one contract to another, the general framework of the force majeure provisions in most construction contracts is similar. Accordingly, the remainder of this alert considers the force majeure provision of the most commonly used standard form construction contract, namely the FIDIC Silver Book.

II. Force majeure under the FIDIC Silver Book

Force majeure is addressed in clause 19 of the first edition of the FIDIC Silver Book published in 1999. In the second edition, which was published in 2017, the term "force majeure" has been replaced with "exceptional event" and the relevant provision is now clause 18, although the substance of the provision remains largely unchanged. However, as the first edition of the FIDIC Silver Book remains in wide use, this article refers to clause 19 of the first edition and retains the term "force majeure".

Clause 19.1 contains the definition of "Force Majeure" and has two parts: a definition of what the term covers, and some examples of what it includes.

The definition of "Force Majeure" then consists of four criteria, all of which must be satisfied for an event or circumstance to amount to Force Majeure:

i. an exceptional event or circumstances beyond the affected party's control has occurred;
ii. the affected party could not reasonably have provided against the event or circumstance before entering into the contract;
iii. the same party also could not reasonably have avoided or overcome the event or circumstance once it arose; and
iv. the event or circumstance is not substantially the result of an act or omission by the counterparty.

Clause 19.1 then goes on to give some examples of events or circumstances which may constitute Force Majeure (if the above conditions are also satisfied), although none of them include epidemics or anything similar.

III. Application of the FIDIC Silver Book force majeure provisions to COVID-19

It is readily apparent how the spread of COVID-19 could be argued to amount to Force Majeure under clause 19.1:

i. it was outside the affected party's control;
ii. that party could not reasonably have provided against it before entering into the contract (even if the risk of an epidemic could be said to be known in light of other epidemics in the past which have affected international commerce, it would be difficult for any party to a construction contract to have taken any measures to prevent the spread of COVID-19 before entering into the contract);
iii. the affected party also could not reasonably have avoided or overcome the spread of the coronavirus – that speaks for itself; and
iv. clearly, no counterparty could be blamed for the virus.

However, it may be less clear whether the spread of COVID-19 would give the affected party relief under the FIDIC Silver Book, even if it amounted to Force Majeure. Under clause 19.2, the affected party is only excused from a failure to perform its contractual obligations if and to the extent it is or will be prevented from performing those obligations due to Force Majeure (and it gives all notices required under the contract). It would therefore always be necessary to consider whether the spread of COVID-19 prevented a contractor from performing its obligations. In many circumstances, the answer may be that it did not, particularly where it was something else, albeit connected with the spread of COVID-19, which has had that effect, such as restrictions on the movement of people and prohibitions on the docking of cargo ships originating from a country affected by the coronavirus. Whether the FIDIC Silver Book requires the Force Majeure to be the sole and direct cause of the affected party's inability to perform its contractual obligations or whether an indirect cause (such as the spread of the coronavirus leading to the imposition of restrictions affecting people's movement) is sufficient is an open question. (Such indirect causes may also fall within the express allocation of risks between the parties found elsewhere in the contract, such as provisions regarding changes in law.)

Of course, it may be possible to identify the allegedly exception event or circumstance in another way with a view to achieving a different outcome. For example, one might seek to argue that the imposition of lockdowns constitutes Force Majeure. This may satisfy the definition of "Force Majeure" in clause 19.1, although it still may not help in connection with clause 19.2, which (again) requires that the Force Majeure has prevented the affected party from performing some of its contractual obligations. This is a much higher standard than making the contractual obligations more time-consuming, more costly or otherwise more difficult to perform. To return to the hypothetical example of a refusal to accept delivery of construction materials because a project is effectively on hold during a period of lockdown, it might be argued that the lockdowns have not prevented the acceptance of the materials or payment for them (payment obligations also generally being excluded from the force majeure provisions of the FIDIC Silver Book by virtue of the last paragraph of clause 19.2).

Other questions could arise in other scenarios. For example, if a contractor is unable to deploy workers to a worksite because of lockdowns, has the contractor been prevented from carrying out its contractual obligations, or has it simply been prevented from performing the contract in the manner it intended (e.g. by utilising labour from a particular region)? The latter may not be sufficient if the contractor has available to it an alternative method of fulfilling its contractual obligations (e.g. by employing labour from another region).

Even if a contractor has been prevented from performing its contractual obligations as a result of Force Majeure, the scope of the contractual relief to which it is entitled must also be considered. The general rule established by clause 19.4 of the FIDIC Silver Book is that the relief available to the affected party following Force Majeure is limited to an extension of the time for performing the affected obligations (corresponding to

the period of time for which it is unable to perform those obligations), and no more. It is not a cancellation of those obligations, an opportunity to rewrite them or other relief from a difficult contract. It also does not involve compensation for the affected party for any additional costs which it may occur, save in certain circumstances described in clause 19.4(b) which have to do with the examples of Force Majeure given in clause 19.1 and are not relevant to this alert. (If a Force Majeure continues for a period of time, a termination right may arise under clause 19.6, but this is also outside the scope of this alert, not least because it is hoped that the effects of COVID-19 will not be so serious or long-lasting as to force construction projects into such situations.)

Finally, the force majeure provisions of the FIDIC Silver Book may give rise to other questions in practice, such as whether the requirement in clause 19.2 for the affected party to give notice of the Force Majeure within 14 days is a prerequisite to relief, and whether either party has a claim against the other if it fails to "use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure" under clause 19.3.

The notice requirement is potentially a difficult one for parties which consider that they are affected by Force Majeure for an additional reason. A notice under clause 19.2 is, in substance, a notice that a party will not be complying with some of its contractual obligations. If the event relied upon turns out not to amount to Force Majeure under clause 19.1, that party has effectively admitted that they are or will be in breach of contract. In extreme circumstances, where the obligations referred to in the notice go to the heart of the contract and the party receiving the notice does not believe that Force Majeure has occurred, the article 19.2 notice could amount to an anticipatory breach of contract which, under English common law, might give the receiving party the right to terminate the contract for default.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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