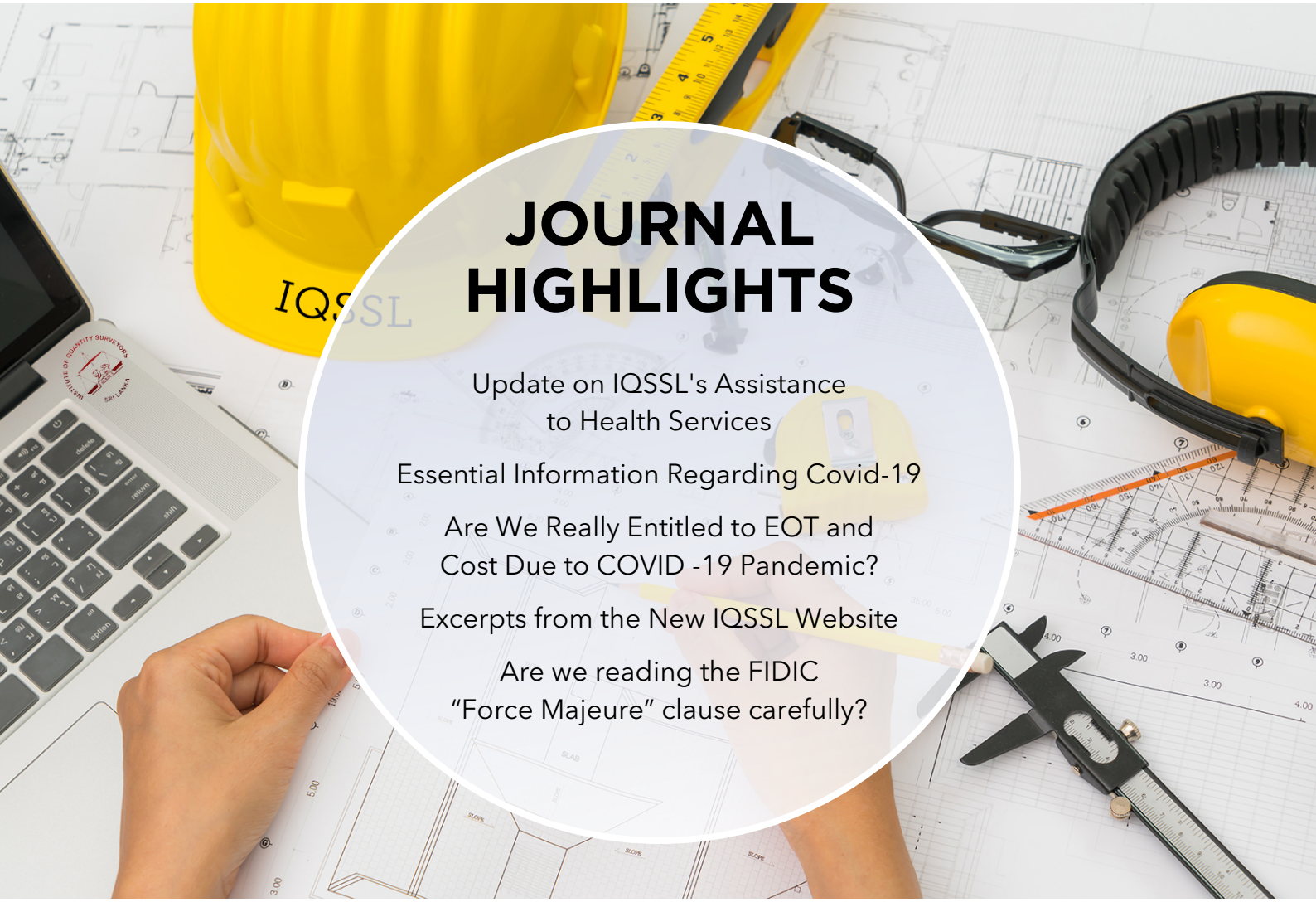
FOCUS

Quarterly E-journal of
The Institute of Quantity Surveyors, Sri Lanka
Volume 10: Issue - 02, July 2020



JOURNAL HIGHLIGHTS

Update on IQSSL's Assistance to Health Services

Essential Information Regarding Covid-19

Are We Really Entitled to EOT and Cost Due to COVID -19 Pandemic?

Excerpts from the New IQSSL Website

Are we reading the FIDIC "Force Majeure" clause carefully?

Published by:
Institute of Quantity Surveyors Sri Lanka (IQSSL)

Update on IQSSL's Assistance to Health Services in the Hour of Need

We humbly inform our valued members and donors that with your generous contributions received thus far, IQSSL has decided to assist in refurbishing a Staff Quarters at the Infectious Diseases Hospital (IDH), as a tribute to the untiring efforts of those health sector warriors who had been instrumental in successfully managing the COVID-19 pandemic in Sri Lanka. IQSSL is currently liaising with IDH management to donate the required materials for the refurbishment, which will be carried out by the Sri Lanka Army.

We will keep you updated on future developments. We thank you and once again highly appreciate your valuable contributions.

Essential Information Regarding Covid-19

Presented herein are key segments of the guidelines published by the Ministry of Urban Development, Water Supply and Housing Facilities regarding "administering a construction site during a COVID-19 outbreak":

- Stakeholders of the construction Industry should strictly ensure the practice of preventive measures introduced in this guideline to ascertain the prevention of the spread of COVID-19 in construction site.
- As a prerequisite to the opening of a site after the closure of construction sites due to COVID-19 lockdown, each site must be prepared and inspected to ascertain that necessary health and safety precautions are in effect.
- Cleansing the sites, material and machines form a very important part when attempting to achieve the desired hygienic conditions in construction sites.

In addition, presented subsequently are official and approved guidelines as published by the Epidemiology Unit of the Ministry of Health and Indigenous Medical Services of Sri Lanka as well as the World Health Organisation (WHO). This information has been last updated during the months of May, June, and July 2020.

How to manage COVID-19 risk when organizing meetings & events

BEFORE the meeting or event,
Consider whether a face-to-face meeting or event is needed. Could it be replaced by a Teleconference or online event?

If a meeting is essential to be held,

- Minimize the number of attendees
- Do not shake hands with other participants, instead say 'Ayubowan'
- Pre-order sufficient supplies and materials, including tissues and hand sanitizer for all participants. Have surgical masks available to offer anyone who develops respiratory symptoms.
- Maintain a distance of 1m between participants
- Follow all the hygienic measures outlined above

Be aware of who is more at risk

Most persons infected with the virus develop mild symptoms and recover without any complications. Those with reduced immunity and people suffering from conditions such as diabetes, heart, liver and lung disease are more at risk. The risk also increases with advancing age and people over 40 years seem more vulnerable.

Overseas travel

Be updated on areas where COVID 19 is currently spreading if you or anyone in your organization wish to travel abroad. This information can be accessed at, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports/. Assess the benefits and risks related to planned international travel based on this latest update.

International travel to areas where COVID-19 is spreading should be avoided for employees at higher risk of serious illness (e.g. older employees and those with medical conditions such as diabetes, heart and lung disease).

Advise employees who have returned from an area where COVID-19 is spreading to monitor themselves for symptoms for 14 days and take their temperature twice a day. If they develop even a mild cough or low-grade fever (i.e. a temperature of 37.3 C or more) instruct to seek care at the nearest government hospital immediately.

Adapted from, Getting your workplace ready for COVID-19 https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?sfvrsn=359a81e7_6

COVID-19

Are We Really Entitled to EOT and Cost Due to COVID -19 Pandemic?

Article by Uditha Tharanga

THE OUTBREAK OF ("CORONAVIRUS") COVID-19 IS INCREASINGLY AND ADVERSELY AFFECTING BOTH THE EMPLOYERS AND THE CONTRACTORS WHO ARE MOST LIKELY FACING COMPLETE SHUTDOWNS OF SITE OPERATIONS OR UNEXPECTED DELAYS IN THE SUPPLY OF RESOURCES.

THE WORDING "FORCE MAJEURE" MAY NOT BE EXPLICITLY DEFINED IN ALL CONTRACTS. IN A COMMON-LAW JURISDICTION, WHETHER A CERTAIN EVENT QUALIFIES AS A FORCE MAJEURE EVENT DEPENDS ON WHAT HAS BEEN AGREED IN THE CONTRACT.

Introduction

The outbreak of ("Coronavirus") COVID-19 is increasingly and adversely affecting both the employers and the contractors who are most likely facing complete shutdowns of site operations or unexpected delays in the supply of resources. It is not unlikely to see in the future that many of the construction sites would be closed for all operations on the grounds of health and safety. The obvious questions from a contractor's end will be about his entitlement to extension of time and related costs. The obvious questions from an employer's end will be as to who shall bear the risk of the pandemic. The answer depends on the contract and the governing law. Perhaps, you may not find any provision related to a current pandemic in your contract. It is not very uncommon that people come for advice on a contract that has no provision for EOT at all. This article, therefore, examines the entitlement of both the Contractor and the Employer in most of those situations, but particularly in light of standard and un-amended clauses of the FIDIC (1999)[1] Red Book, the FIDIC 1987[2] Red Book, and the UAE Law.

Recently, I have seen many posts and articles being shared on the internet classifying pandemic as both a Force Majeure event and an Employer's risk event under the FIDIC 1999 editions stating that the Contractor is entitled to both cost and time.

Some people use this approach under the FIDIC 1987 form of contract as well. Shortly, we will examine why this approach is not correct.

Position under English Law and UAE Law

The wording "Force Majeure" may not be explicitly defined in all contracts. In a common-law jurisdiction, whether a certain event qualifies as a Force Majeure event depends on what has been agreed in the contract. Anything that does not fall within that definition under the contract will not be a Force Majeure under the English Law, unlike the civil law systems. In such occasions, for the parties who seek excuse for non- performance, the equivalent remedy under the English Law would be claims under frustration which requires higher bar and, if succeeded, would result in termination of the contract. In UAE, the doctrine of force majeure is dealt within Article 273 of the UAE Civil Code[3] which states that:

- *In contracts binding on both parties, if force majeure supervenes which makes the performance of the contract impossible, the corresponding obligation shall cease, and the contract shall be automatically cancelled.*
- *In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.*

What are the Tests of Force Majeure?

To be a force majeure it must be an exceptional event or circumstance. The term "exceptional" shall be construed in regards to the frequency of occurrence, the duration of the project, and are of larger than usual in extent. The present situation is no doubt an exceptional considering the widespread, threatening nature and history of occurrence.

The Effect of the COVID-19 is widespread and threatening

It is not, however, sufficient to show that the Force Majeure event has merely made the performance more onerous or costly, the provision demands that performance shall be impossible. Importantly, the provision does not contain a definition as to what constitutes a "force majeure".

It is not, however, sufficient to show that the Force Majeure event has merely made the performance more onerous or costly, the provision demands that performance shall be impossible. Importantly, the provision does not contain a definition as to what constitutes a "force majeure". Under the UAE law, therefore, the determination of whether the circumstances have occurred that qualify as Force Majeure which release the contractor from performance is entirely a matter for the Court of Merits to decide1. This means that, the local court will have a wide discretion to determine whether the Coronavirus is considered a valid reason for the contractors to delay the work on sites. No cases have yet been filed in regard to the new Coronavirus and jurisprudence may be expected over the coming years in relation to the Court's decision if the current event is a Force Majeure issue. There are, however, other mandatory provisions of the UAE law that the contractors and the employers may rely on for their respective entitlements in absence of provisions in the contracts. The Article 249 of the UAE Civil Code permits a judge or an arbitrator to vary contractual obligations to a "reasonable level" in the event of exceptional circumstances.

"If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interest of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void"

The wording "public nature" in this provision creates uncertainty about the qualifying circumstances for the exercise of the discretion provided by the provision. Some may argue that the element of state intervention is required to qualify for public nature which is apparently valid. Apart from above, there are several other provisions that the contractors may rely under the UAE Law.

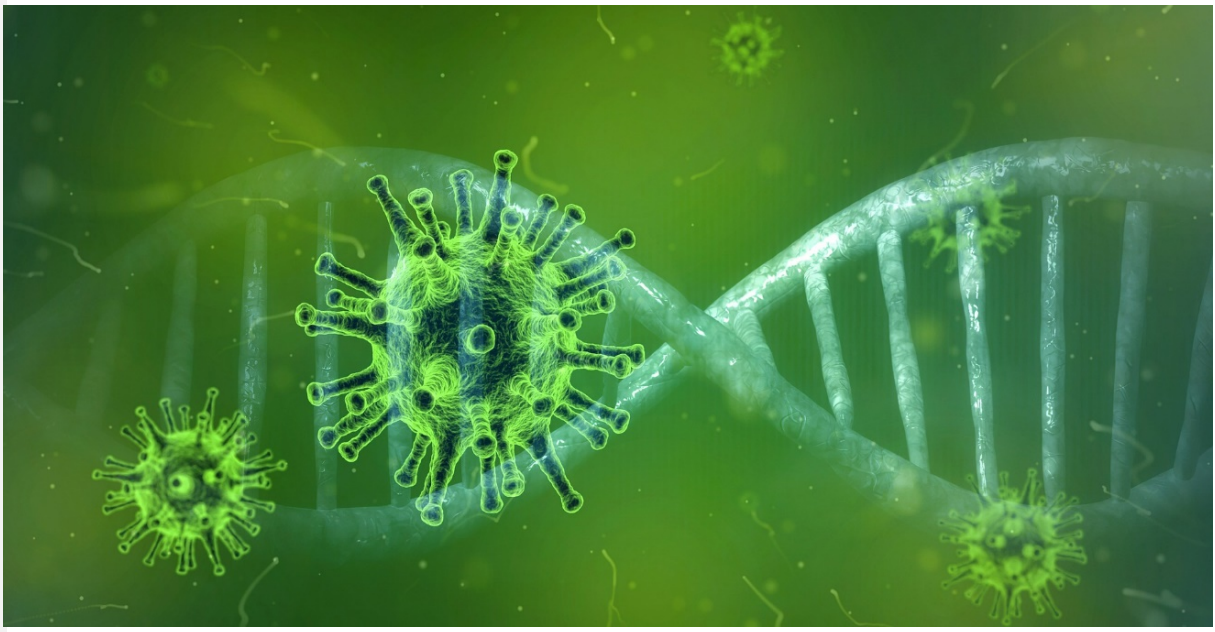
Article (287)
"In the absence of a provision in the law or an agreement to the contrary, a person is not liable for reparation if he proves that the prejudice resulted from a cause beyond his control such as a heavenly blight, unforeseen circumstances, force majeure, and the fault of others or of the victim.

The difference between the effects of the above two Articles is that the application of Article 273 results in termination of the obligation while the application of Article 249 permits contractual obligation to be modified. The Article 287 provides a safeguard against claims from the other party in Connection with such event.

Claims under Sub-Clause 8.4 and 17.3 of Standard FIDIC 1999

Considering the provisions of un-amended the FIDIC 1999 Red Book, Sub-Clause 17.3 [Employer's Risks] outlining Employer's Risks, states at paragraph (h) that,

"(h) Any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions"



FORSEEABILITY

Many legal systems stem the requirement of foreseeability to qualify for the legal definition of Force Majeure.

Ex: Article 249 of UAE Civil Code provides If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the.....

Such an event gives rise to claims under Sub-Clause 17.4 [Consequences of Employer's Risks]

I have observed practitioners use this sub-clause to claim EOT and Cost interpreting the current pandemic as "operations of forces of nature". However, there are two reasons why such approach is arguable in relates to the current situation. The wording "forces of nature" stands basically for forces such as electromagnetic force, wind force, gravitational force, etc. Can the current pandemic be classified as a force of nature? Apparently, the drafter of the clause had intended to address such forces which could cause damage to the Works. Such interpretation disqualify the CODIV-19 pandemic as an Employer's Risk event.

Secondly, the clause refers to the Cost of rectifying loss or damage to the Works. Note that the Sub-clause states *"If and to the extent that any of the risks listed in Sub-Clause 17.3 above results in loss or damage to the Works, Goods or Contractor's Documents" and "If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage*". The wording *"this loss or damage*" refers to the damage to the Works and the term "Works" is defined in the FIDIC 1999 Red Book.

The word "*epidemic*" is used once in the standard form of contract, in Sub-Clause 8.4. Contractors operating based on standard terms may rely on Sub-Clause 8.4 [Extension of Time for Completion] to justify time claims resulted from the consequences of Coronavirus. Sub-Clause 8.4 provides at paragraph (d) for

(d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions

If the Contractor considers himself to be entitled to an extension of the Time for Completion, the Contractor shall give notice to the Engineer in accordance with Sub-Clause 20.1 [Contractor's Claims]. Note that the word "epidemic" is used instead of the widely used term "pandemic'. The epidemic address a wide variety of disease and exceptional events that include pandemics as well.

Claims for relief under Sub-Clauses 8.4 are to be brought under Sub-Clause 20.1 in the usual manner. This Sub-Clause stipulates that if the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of the FIDIC Red Book conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim.

Considering the actions taken, Laws enacted by the state government to counter the adverse effect of the pandemic situation, the Contractor may rely on the below clause in order to claim EOT and Costs. Sub-clause 13.7 [Adjustments for Changes in Legislation] states that *"If the Contractor suffers (or will suffer) delay and/or incurs (or will incur) additional Cost as a result of these changes in the Laws or in such interpretations, made after the Base Date, the Contractor shall give notice to the Engineer and shall be entitled to EOT and Costs"*

The definition of the Law is set out under clause 1.1.6.5 as "Laws" means all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority and the "Country" is the country in which the site is located where the permanent work to be executed. The Sub-Clause requires a change in the Law of the Country.

Force Majeure Notice

Notice shall only be given if the party is prevented from performing any of its obligations, so if in the particular case, the circumstances merely make it more difficult for the Party to perform its obligations cannot constitute Force Majeure.

References

1 FIDIC Red Book (1999) – First edition, Conditions of Contract for Construction

2 Works of Civil Engineering Construction 4th Ed 1987 Red Book

3 UAE Federal Law No 05 of 1958 the Civil Transaction Law

If there is a change in the law of the Country aimed at countering the effect of Coronavirus such as restrictions on work timing, transport restrictions, or VISA bans, that will be good grounds to claim EOT and Costs. However, the effect of the delays in deliveries due to restrictions of the countries of origin from where the materials are imported shall not qualify under this clause. However, the ''Change in Law'' claims are rarely successful and may be difficult to prove. Claims may only be successful if a contractor can also show the direct effect of such a change on the performance.

Force Majeure

There are other provisions intended to treat a claim for ''Force Majeure'' under Clause 19. An un-amended FIDIC Red Book has both general provisions to provide what constitutes ''Force Majeure'' in Sub-Clause 19.1 (a) to (d) followed by a non-exclusive list of examples of Force Majeure in (i) to (v).

In this Clause, "Force Majeure" means an exceptional event or circumstance:

(a) Which is beyond a Party's control,

(b) Which such Party could not reasonably have provided against before entering into the Contract,

(c) Which, having arisen, such Party could not reasonably have avoided or overcome, and

(d) Which is not substantially attributable to the other Party.

Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:

The pandemic event qualifies all the above four criteria and can now be classified as a Force Majeure event without a doubt although not listed under (i) to (v) events of the above Sub-Clause. The detail analysis of the clause and how pandemic satisfy the above tests will be included in my next article. There is a particular notice regime and provisions for advising the Employer/Engineer of ''Force Majeure''. These are set out in Sub-Clause 19.2. The mechanism for claims for additional time, losses and expenses are to be found in Sub-Clause 19.4 and are not specifically dealt within this note. Notice under Sub-clause 19.2 shall be given to the other Party – the "Employer" or the "Contractor" - but not to the Engineer. The notice shall also specify the obligation, for which the performance is prevented

Under FIDIC 1987
Extension of Time for Completion 44.1

Similar to what is discussed above under FIDIC 1999 Red Book, Sub-Clause 20.4 [Employer's risks] of FIDIC 1987 Red Book is intended to address the events that can cause damage to the Works. Therefore, for EOT entitlement, Contractors can rely on clause 44.1 (e)

In the event of
(e) Other special circumstances which may occur, other than through a default of or breach of contract by the Contractor or for which he is responsible,

However, Sub-Clause 44.2 provides that notice shall be issued within 28 days after the event has first arisen. Thereafter interim particulars shall be submitted in 28 days' intervals and the final particulars are to submitted not less than within 28 days from the end of the effect resulting from the event pursuant to Sub-Clause 44.3.

It is not uncommon to observe practitioners argue under that Sub-Clause 53.1 entitles the Contractor to claims cost for pandemic by interpreting the word "*Otherwise*" as giving the right to claim for any event whether stipulated in the Contract or not. This is not correct as on the one hand Sub-Clause does not provide any entitlement to additional time or cost and it is merely intended to govern the issuance of notices. Also the word "*Otherwise*" is intended to cover breach of Contract, Legal provisions and Law of Tort.

Notice of Claims 53.1

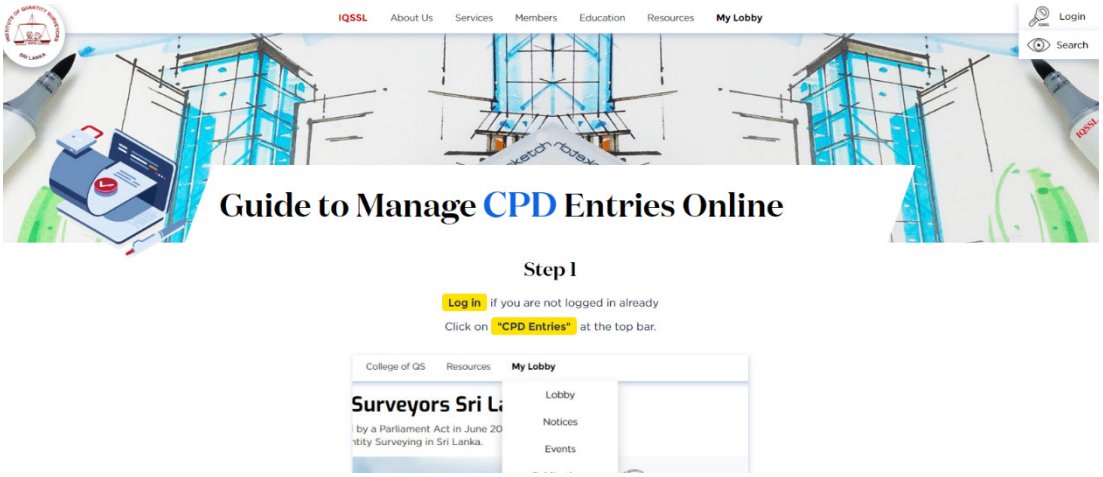
"Notwithstanding any other provision of the Contract, if the Contractor intends to claim any additional payment pursuant to any Clause of these Conditions or otherwise, he shall give notice of his intention to the Engineer, with a copy to the Employer, within 28 days after the event giving rise to the claim has first arisen".

Uditha Tharanga
BSc (Hons) QS, LLM (Const. Law & Arbitration), MRICS, MAIQS, FCIArb
Uditha Tharanga is Senior Contracts and Claims Engineer at [BHC] Bu Haleeba Holding Group

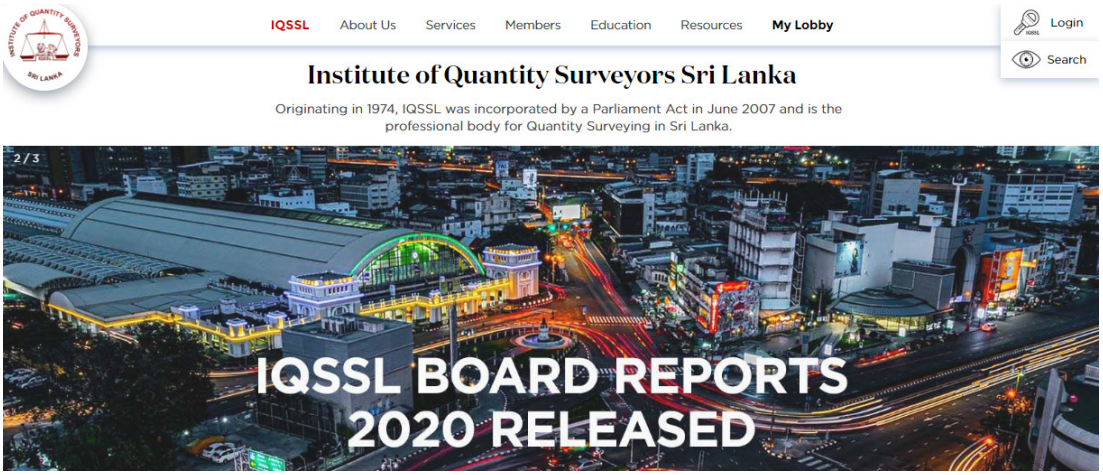
Contact Details
udtharangaw@gmail.com
+971543555207

Excerpts from the New IQSSL Website

A quick guide on how to add, modify, verify, and access the CPD entries and events of IQSSL members via the new website application.



View important reports with one click (including IQSSL Board reports).



Information regarding the academic framework of IQSSL and the College of QS can be viewed along with additional related details by any visitor, including any aspiring QS student.

MANY PEOPLE ADDRESS THE PRESENT SITUATION AS THE "FORCE MAJEURE" EVENT AND SOME OPPOSING THE SAME NOT HAVING A FULL UNDERSTANDING OF WHAT CONSTITUTES A "FORCE MAJEURE" UNDER THEIR RESPECTIVE CONTRACTS.

THE USE OF THE TERM "FORCE MAJEURE" IS QUITE PROBLEMATIC IN FIDIC 1999 AS MANY CIVIL LAW JURISDICTIONS USE THE SAME TERM WITH DIFFERENT TESTS (PARTICULARLY IN THE LAWS GOVERNING CIVIL MATTERS).

COMMENTARY OF SUB-CLAUSE 19.1 IN LIGHT OF THE PANDEMIC CIRCUMSTANCES

Undeniably, the current effect of the COVID-19 pandemic has become challenging and the construction industry has been adversely affected in many ways for which we had not planned. The employers, developers, builders, and the employees are all facing substantial problems during the times of the pandemic. Contractors are seeking reliefs and entitlements under the terms of the respective contracts.

It is not uncommon to see many practitioners address the present situation as a "Force Majeure" event while some others oppose the same owing to not having full understanding as to what constitutes a "Force Majeure" under their respective contracts. As many of the projects, particularly in the Middle East, are being delivered under the FIDIC standard forms of contract, it is worthwhile discussing the Force Majeure clause of FIDIC conditions of contract in detail. I have previously written an article concerning COVID-19 in light of the UAE Law and the FIDIC forms of contract from which you might benefit by reading alongside this.

This article, therefore, examines the Force Majeure [clause 19] provision contained in FIDIC (1999) Redbook, but particularly in light of the standard and un-amended clauses and the UAE Law. The term "Force Majeure" was first introduced in the 1999 edition of the FIDIC Redbook and previously similar events and circumstances had been categorized as the Employer's risks and special risks under different Contractual mechanisms. The use of the term "Force Majeure" is quite problematic (CAN WE USE A DIFFERENT TERM PLS- FOR EXAMPLE: "COULD LEAD TO DIFFICULTIES..".) in FIDIC (1999) red book as many civil law jurisdictions use the same term with different tests (particularly in the laws governing civil matters). The FIDIC definition of "Force Majeure" therefore has to be read independently of those laws as there are different tests to be satisfied under the Law and the Contract. However, on all occasions, the Force Majeure under the Contract shall not levy more onerous obligations towards the Contractor than what is imposed under mandatory laws of the jurisdictions. Otherwise, it would give rise to conflicts.

For an event or circumstances to become a force majeure event under FIDIC (1999) Redbook, there are certain tests to be satisfied.

First, it must be an "exceptional event or circumstance".

Second, "(a) the event or circumstance must be 'beyond a Party's control'."- WHY THIS STATEMENT STARTING WITH A SUB LETTER (a)? WHY NOT THE ABOVE STATEMENT?

Third, "(b) which such Party could not reasonably have provided against before entering into the Contract."

Fourth, "(c) Which, having arisen, such Party could not reasonably have avoided or overcome".

Fifth, "(d) which is not substantially attributable to the other Party".

What are the Tests of Force Majeure

To be a force majeure it must be an exceptional event or circumstance. The term "exceptional" shall be construed in regard to the frequency of occurrence, the duration of the project, and are of larger than usual in extent. The present situation is no doubt an exceptional considering the widespread, threatening nature and history of occurrence.

The Effect of the COVID-19 is widespread and threatening

Spreading the virus in the country or the state, neighborhoods, adjacent areas and even the Employer's staff getting infected are out of the Control of the Contractor. If the state government cease all the ongoing construction activities, cease trade and import exports, issued movement restrictions these are obviously beyond the control of the contractors.

These are not alternatives and all of them shall be satisfied before an event or circumstance is considered a Force Majeure. There are certain other tests to be satisfied for entitlement or relief but the purpose of which is not to define a Force Majeure event.

On the one hand, "*party shall be prevented from performing any of its obligations*"

On the other hand, "*Notice shall be given" as stated in 19.2*".

Each of these tests is seemingly drafted broadly with room for argument for either party. This we will examine shortly. A clever lawyer may find it is easy to argue using the rules of legal interpretation.

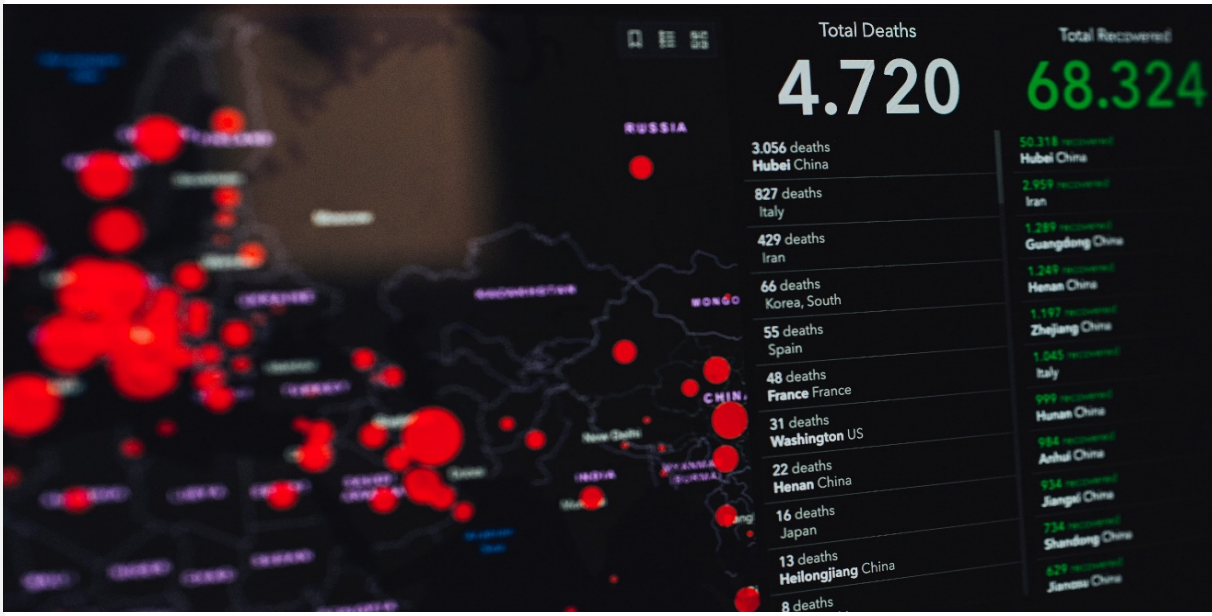
In order to qualify as Force Majeure, it must be an exceptional event or circumstance. The term "exceptional" shall be construed in regard to the frequency of occurrence, the duration of the project, and to the extent that its effect is greater than the usual. The present situation is undoubtedly exceptional considering the widespread, threatening nature and the history of occurrence. The careful attention is to be given to the difference between an "*event"* and the "*circumstances"*. A circumstance is a state of affairs or a condition connected with an event, physical conditions for example, and the climatic conditions would in many cases be a circumstance rather than an event, although they are dealt under different sub-clauses of FIDIC (1999)[1] Redbook. Similarly, the COVID - 19 pandemic can also be described as a circumstance and the first test of "*exceptional circumstances*", therefore, satisfies.

In this particular statement, the "beyond Control" refers to the event or circumstance,

consequences. Although you could ask workers to wear masks, gloves, helmets, and even the full bodysuits and prevent themselves from getting infected and spreading, the virus itself is beyond your control. Spreading the virus in the country or the state, neighborhoods, adjacent areas and even the Employer's staff getting infected are out of the control of the Contractor. If the state government cease all the ongoing construction activities, cease trade and import exports, issues movement restrictions, these are obviously beyond the control of the contractors. Unlike the later tests, the Party is unlikely to fail this test unless the event or circumstance is one with which it has some connection.

The third test is "(b) *which such Party could not reasonably have provided against before entering into the Contract".*

One could never reasonably have expected to provide against something which might occur in future unless he/she could first anticipate it. A party shall, therefore, anticipate the event or circumstance and is required to provide against them under the Contract and provided measures shall be reasonable (please check grammar). However, the wording of this test is somewhat problematic due some reasons: The test here is not the same as the test of foreseeability which usually goes hand in hand with Force Majeure. The term "unforeseeable" as defined in sub-clause 1.1.6.8 – "*not reasonably foreseeable and against which adequate preventive precautions could not reasonably be taken by an experienced contractor by the date for submission of the Tender*". Many legal systems necessitate the requirement of "un-foreseeability" to qualify for the legal definition of Force Majeure (i.e. *Article 249 of UAE Civil Code*[2] *provides If exceptional circumstances of a public nature which could not have been foreseen occur as a result of*



FORSEEABILITY

Many legal systems stem the requirement of foreseeability to qualify for the legal definition of Force Majeure.

Ex: Article 249 of UAE Civil Code provides If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the.....

An obligation to use reasonable endeavors to achieve the aim probably only requires a party to take one reasonable course, not all of them.1 Also, a party who is required to act under this is not required to sacrifice its own commercial interests.

foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the...). However, there is no requirement of un-foreseeability under sub-clause 19.1 and the above criterion (b) is only part of the foreseeability test. Still, it is possible that the Contractor could not have provided against a foreseeable event or circumstance simply because the Contract does not address such events or simply the Contractor did not exercise his experience, expert foresight to anticipate the circumstances.

With regard to the present pandemic situation, some argue that the Contractor should have allowed for such epidemics given the wording of the sub-clause 6.7 says "the *Contractor shall ensure that suitable arrangements are made for all necessary welfare and hygiene requirements and the prevention of epidemics"*. But such arguments are unlikely to survive presuming that at the time of occurrence, it is beyond the control and the Party could not have reasonably avoided or overcome it.

Fourth test – "c) which, having arisen, such Party could not reasonably have avoided or overcome".

Again, it is the event or circumstance which should not be capable of being avoided or overcome which is difficult in all the cases. What could possibly have been meant by the drafter is overcoming the effect of the event and continuing the performance. Otherwise, an event or circumstance, one which is particularly beyond the control of a party, could not be avoided or overcome. The Party shall only require to take reasonable measures in avoiding or overcoming the effect. The term "*reasonably*" shall mean that the measures taken should be justifiable considering the cost and benefit of such measures

This is similar to taking '*reasonable endeavors*' to avoid loss. An obligation to use reasonable endeavors to achieve the aim probably only requires a party to take one reasonable course, not all of them.3 Also, a party who is required to act under this is not required to sacrifice its own commercial interests.4

With regard to the present situation, it can be argued that the continuing of work while avoiding the effect is impossible as keeping the planned performance will itself lead to increase the adverse effect of spreading the virus.

Lastly, "(d) which is not substantially attributable to the other Party".

This is the easiest one to establish as the events of such exceptional nature are usually not attributable to any of the parties. The wording "substantially" stresses the requirement of being related to a larger extent. The present pandemic situation is not substantially attributable to any party.

After the above five tests, the sub-clause goes on to provide a list of events and circumstance that may qualify as Force Majeure so long as the above tests are satisfied. The list is not expansive nor is it exclusive and it shall be construed as *Ejusdem Generis* and is a specification of examples and the interpreter should construe the list to include other aspects of a similar type as the clause says "may include but is not limited to". The list also provides what could not qualify as "Force Majeure" although the above tests are satisfied.

19.2 Notice of Force Majeure

As stated above, there are certain other tests to be satisfied for entitlement/and relief. Sub-clause 19.2 provides the circumstances in which a notice can be served. Although the above five tests

Force Majeure Notice

Notice shall only be given if the party is prevented from performing any of its obligations, so if in the particular case, the circumstances merely make it more difficult for the Party to perform its obligations cannot constitute Force Majeure.

tests define the Force Majeure event, without the notice, no such Force Majeure event will give rise to contractual entitlement or relief.

"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"

First, notice shall only be given if the party is prevented from performing any of its obligations which makes it clear that a party has no right to claim unless, at the time of notice is given, the party is or will be prevented from performing its obligations. Therefore, if, in the particular case, the circumstances merely make it more difficult for the party to perform its obligations, it cannot constitute Force Majeure. The word "prevented" requires a higher bar than other terms like "delayed" or "hindered". However, careful attention is to be given to the wording "any obligations" as the term obligation is not defined in the Contract. The term "any obligation" will have a broad meaning. For instance, it can be the timely completion under sub-clause 8.2 [Time of Completion] or the obligation under sub-clause 8.3 [Programme] for the Contractor to proceed in accordance with the program which makes the wording "prevented from performing any obligation" similar to any other delay affecting the progress of work. The present pandemic circumstance, therefore, qualifies for the entitlement under sub-clause 19.4.

The notice shall set out the obligation of which the performance is prevented. This is therefore not the same as a typical notice to be given under sub-clause 20.1. Besides, unlike sub-clause 20.1, sub-clause 19.4 does not provide what happens if the Contractor failed to give the notice within 14 days.

However, when reading together with sub-clause 19.4, it is clear that the Contractor's entitlement is subjected to compliance with the sub-clause 20.1. The requirement of the notice under sub-clause 20.1 is broader than the specific notice under sub-clause 19.2. Therefore, once the notice is issued under sub-clause 19.2 it is sufficient to include the reference to sub-clause 20.1 in the same notice to secure the Contractor's entitlement under sub-clause 19.4.

References

[1] FIDIC Red Book (1999) – First edition, Conditions of Contract for Construction
[2] UAE Federal Law No 05 of 1958 the Civil Transaction Law
3 Rhodia v. Huntsman [2007] EWHC 292 (Comm)
4 Yewbelle Ltd v London Green Developments Ltd & Anor [2007] EWCA Civ 475

Uditha Tharanga
BSc (Hons) QS, LLM (Const. Law & Arbitration), MRICS, MAIQS, FCIArb
Uditha Tharanga is Senior Contracts and Claims Engineer at [BHC] Bu Haleeba Holding Group

Membership Subscription

Dear Members

If you haven't paid the subscription yet, please make arrangement to pay as soon as possible.

Our established payment methods are as follows;

1. **Direct Deposits**
   Account Name : INSTITUTE OF QUANTITY SURVEYORS SRI LANKA.
   Bank Name & Branch : Commercial Bank – Borella.
   Bank A/C No. : 1208409001

2. **Bank Draft / TT**
   Account Name : INSTITUTE OF QUANTITY SURVEYORS SRI LANKA.
   Swift Code : CCEYLKLX
   Bank Address : Commercial Bank of Ceylon PLC.
   # 21, Bristol Street Colombo -01.
   Sri Lanka.

3. **Credit Card** : At the IQSSL Office or by filling the detachable slip below, Visa and Master card only

4. **Cash** : At the IQSSL Office

Please send the original bank deposited slip to the Institute by registered post in order to update our records. If you have any further queries, please do not hesitate to contact Ms Piyumi on +94112595570 or e mail iqssl@sltnet.lk

With well wishes,
Institute of Quantity Surveyors, Sri Lanka

Hony. Treasurer

Please Return This Part with your payment

CREDIT CARD / CHEQUE PAYMENT SLIP

CHEQUE ☐ **VISA** ☐ **MASTER** ☐ **Cheque #** ______________ **Cheque Date** ____/____/____

CREDIT CARD DETAILS

Name as appeared in the Card

Card No. **Expiry Date** mm yyyy

Amount SLR US$

CONTACT DETAILS

Telephone: 1. 2. **Email Address:**

I hereby authorize the use of my credit card to debit the amount mentioned above:

CARD HOLDER's SIGNATURE **DATE**

Change of Address:

Mail to: INSTITUTE OF QUANTITY SURVEYORS SRI LANKA
The Professional Centre,
2nd Floor, No.275/75, Prof. Stanley Wijesundara Mawatha
Colombo 07.
E-mail : Scan the form and e-mail to: iqssl@sltnet.lk

* **Note: CVV #,** is the three (03) digits, printed on back of the Credit