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Has the coronavirus affected the Middle East's construction sector?

The outbreak of the coronavirus (Covid-19) was first reported on 31 December 2019 from Wuhan, China. The World Health Organization have reported over 43,000 confirmed cases globally, 42,000 of those in China, with 1,000 fatalities. For many, the impact of the coronavirus has been devastating, and the consequential impact of this terrible virus has had far reaching implications.

The purpose of this article is to explore the impact of the coronavirus on businesses, and in particular, the Middle East construction industry. This article will discuss the potential of the coronavirus being treated as a force majeure event.

From HKA's own perspective, as a business, it has mobilised its crisis management team and implemented certain safety measures to manage the risk of virus spread and ensure the well-being of its regional staff.

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The impact of the coronavirus within the Middle East cannot be underestimated. In particular, we can see our Chinese contractor clients working extremely hard to navigate the impact of this virus and minimise the impact on projects they are delivering. But despite these efforts, the impact on work force and supply chain continues to be detrimental to progress on site. Many construction professionals and site workers were on vacation in China celebrating Chinese new year when the outbreak occurred. As a precaution, mainland China implemented certain safety measures prohibiting outbound travel, meaning these workers are unable to return to the region and continue work.

The global supply chain has also been severely disrupted. Logistics have been impacted and factory output reduced. It has meant material and equipment suppliers have been unable to meet their obligations. This in turn has adversely impacted progress on construction sites and has resulted in delays. However, with little sign of an immediate cure to the coronavirus, there remains a significant risk of further delays and cost overruns.

Clause 19.1 of the FIDIC 1999 Red Book defines force majeure as an *‘exceptional event or circumstance’* which:

1. is beyond the control of a party;
2. could not reasonably have been provided against before entering into the Contract;
3. could not reasonably have been avoided or overcome; and
4. which is not attributable to the other party.

The contract goes on to set out various events that may be considered as force majeure. However, it is not prescriptive, and an event that is not set out within the list may, provided that it satisfies the aforementioned

conditions, be considered as a force majeure. An epidemic outbreak is not expressly listed within the contract. It is important that if a party considers an event to be a force majeure then it serves notice, in accordance with sub-clause 19.2 of the contract. The notice obligations impose a time bar and sets out various requirements that must be fulfilled. It is essential that a notice is issued in the correct form, so it is always recommended to obtain



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legal advice in this regard. It is critical to ensure the notice is correct. Failure here may have far reaching consequences for the contractor.

It is important that a party to a contract implements measures to ensure that the impact of the force majeure event is properly managed. Sub-clause 19.3 of the contract specifically requires each party to use all *“reasonable endeavours”* to minimise any delay in the performance of the contract.

Sub-clause 19.4 confirms that if a contractor is prevented from performing its obligations as a result of a force majeure event and suffers delay and/or incurs additional cost, then it is entitled to claim an extension of time and cost.

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The cost entitlement [Sub-clause 19.4(b)] specifically refers to the list of events set out in Sub-clause 19.1 and crucially requires that the ‘*event or circumstance*’ must have occurred ‘*in the Country*’. With respect to the coronavirus, and from a Middle East perspective, it is open to dispute if it actually occurred ‘*in the Country*’. The contractor would also have to consider whether or not the epidemic is now a pandemic. These are all areas which require careful consideration when constructing a force majeure notice.

As the claim must be made in accordance with Sub-clause 20.1, it is important the contractor meets the time periods set out therein and keeps sufficient records to demonstrate the losses for which it seeks compensation.

This will not be straightforward, so robust measures including but not limited to the below will assist with the claim preparation:

1. progress reports should be properly updated and P6 programme updates carefully prepared to report the delay;
2. labour records should be accurately prepared in the event of manpower being reduced due to availability;
3. supply chain records should be obtained and regularly updated. This will include correspondence with suppliers; and
4. cost records should demonstrate additional costs incurred, both direct and indirect, as a result of the force majeure.

The success of any claim generally comes down to the accuracy and availability of project records that the contractor is able to provide to support the assertions which it makes as part of its claim. A robust strategy is paramount. At the moment, it is difficult to predict when the impact of the coronavirus will cease. Taking the contract remedies one step further, the right to terminate, and the conditions associated with the same, are set out at Sub-clause 19.6.

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Over the years I have seen many force majeure clauses amended. Various non-standard form contracts used within the region, along with the standard Saudi Public Works Contract and Kuwait MPW contract have to be carefully reviewed when establishing the force majeure strategy. This has to be done now as the impact of the coronavirus remains unknown.