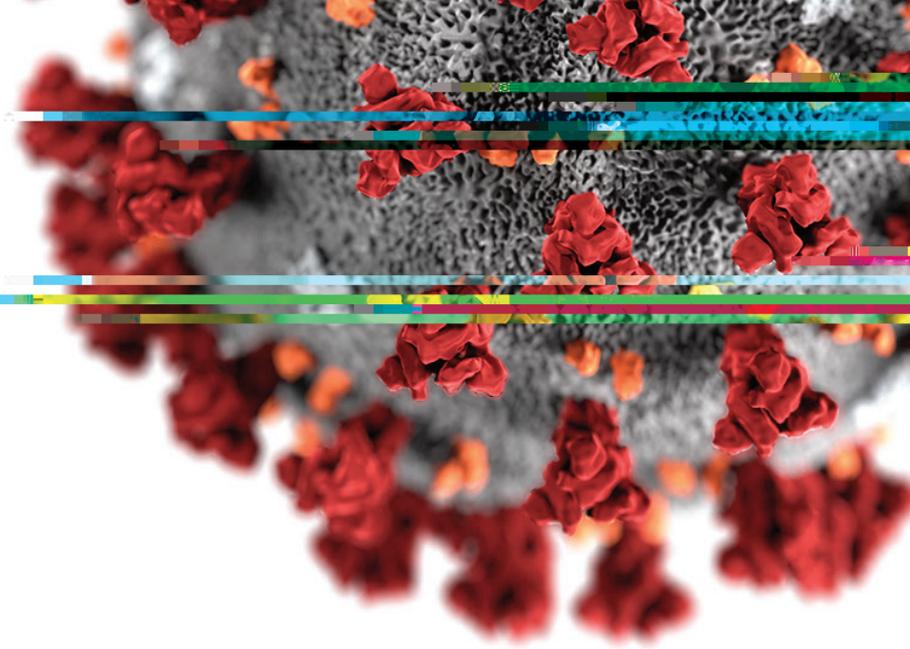


Covid 19 And The Fidic Sub-clause 19 On Force Majeure In Construction Contracts



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Uganda has not been spared by the adverse effects of the Covid 19 virus. The restrictions on travel and work took effect in March through April 2020. However, some construction companies from China with projects in Uganda have been affected by the Covid19 pandemic since December 2019. China is now Uganda's largest source of foreign direct investment. According to the Chinese Ministry of Commerce, Uganda ranks third as a destination for FDI from China. China has advanced loans to Uganda for its infrastructure projects such as the US \$ 350,000,000 loan from the Exim Bank of China to partly finance the US \$ 476,000,000 construction of the Kampala Entebbe Express way. Uganda National Roads Authority (UNRA) was allocated a budget of over US \$ 4.2 Billion for the financial year 2019/2020. Several infrastructure projects in Uganda are likely to be affected by the current Covid19 virus such as the Kibuye-Busega-Mpigi Expressway worth Ug. Shs. 547 Billion, the Kampala Flyover project worth Ug. Shs. 295 billion, the Kampala Northern Bypass worth Euro 150m. Most of the complex infrastructure projects in the World and in Uganda worth more than US \$ 10m are governed by the FIDIC Conditions of Contract, published by the International Federation of Consulting Engineers.

What is Force Majeure?

Sub-Clause 19 of the FIDIC Conditions of Contract for Construction (For Building and Engineering Works Designed by the Employer), 1999 contains the force majeure clause which is likely to be invoked by contractors following the outbreak of the Covid 19 virus in Uganda. A force majeure clause is a provision in a contract that relieves the affected party from performing their contractual obligations when circumstances beyond their control arise that make performance of the contract impossible. In certain jurisdictions, a force majeure clause is referred to as an act of God and it includes events such as earthquakes, floods, war, an epidemic and government orders or directives.

The FIDIC Conditions of Contract, 1999 define force majeure to mean an exceptional event or circumstance which is beyond a party's control, which such party could not have anticipated before entering into such a contract, which having arisen, such party could not have reasonably avoided or overcome and which is not substantially attributable to the other party.

A party to a contract who wishes to rely on a force majeure clause must send out a written notice to the other party indicating the event or circumstance under which it has been given. It is only a party who is likely to be prevented from performing the contract who qualifies to give the notice.

Is the Covid 19 Virus a Force Majeure Event?

Yes, it is. The Covid 19 pandemic is a circumstance which was not contemplated by any of the parties at the time of entering the construction contracts. It is exceptional, beyond any one's control and cannot be attributed to any of the parties to a contract. Because of the Covid 19 virus, the Minister of Health invoked powers under the Public Health Act (Cap. 281) and issued rules under statutory instruments aimed at combating the spread of the Covid19 virus. The rules prohibit the entry into Uganda of some people, restrict public gatherings and movement of people within Uganda. Most of the foreign contractors in Uganda require their personnel to travel to Uganda which is now outlawed and the workers on site cannot move or congregate at the construction sites. These orders by Government make the implementation of construction projects impossible and therefore the Covid 19 virus and rules by the Government of Uganda are a force majeure event and or circumstance.

What are the Consequences of Force Majeure?

- The Contractor is entitled to claim for extension of time for completion of the contract and costs provided he has issued the requisite written notice of force majeure. Therefore, the issuance of a notice under Sub-Clause 19 of FIDIC is a condition precedent to any claim for money and extension of time. However, in case the event or circumstance is outside the Country where the works are being executed, the Contractor would only be entitled to extension of time but not costs. The current situation in Uganda is that the Covid19 pandemic is within the Country and its effects are being felt countrywide, therefore contractors in Uganda would be entitled to both extension of time and costs.
 - The Employer may terminate the contract because of force majeure, and they would not be liable for breach of contract.
 - The Employer or Contractor may terminate the contract if the execution of substantially all the works is prevented for a continuous period of 84 days because of force majeure.
 - The Employer or Contractor may terminate the contract if the execution of substantially all the works is prevented for various periods totaling to more than 140 days.
 - In some cases, the Contractor is entitled to payment following the termination of the contract. Such payment is to be determined by the Engineer or the Contract Administrator.
 - Following the termination of the contract, the contractor should stop all works on site save for such works which are necessary for the safety of personnel or protection of property. The Contractor should hand over to the Employer all the documents, plant and materials for which he has been paid and remove all his property from site.
 - The result of termination under force majeure is that upon fulfillment of all the conditions precedent, both the employer and the contractor are released from further performance of their obligations under the contract.
 - In some cases, the force majeure event might only affect a part of the contractual obligations, without impacting the rest and force majeure may in that case, apply partially leaving the remaining obligations intact. On that basis, the contract would not be terminated as a whole, the affected party would still be obliged to perform their part of the bargain that was not affected by the force majeure.
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Conclusion.

In most cases, while there may be enough grounds for taking the legal route, commercial considerations may take precedence and are the better choice. Termination of the contract, most often than not, does not make business sense since it sometimes affects third parties and the general population. The Government of Uganda received from the European Union a grant of Euro 40m and borrowed Euro 7.2m from the European Investment Bank for the construction of Phase 2 of the Northern Bypass. It is in the best interest of Ugandans, the funding agencies, UNRA and the contractor that the project is completed and handed over. In case of termination of the contract, the contractor would lose any profit they would have made had they performed the contract to its end. The best option for both parties is to engage in negotiations towards resuming the performance of the contract as soon as possible and in case of any monetary compensation it can be agreed upon and the mode of payment stipulated under an addendum to the contract.



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