



Mitigating Legal Risks in Construction Project Contracts: The Importance and the Applicability of Force Majeure Clauses

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Abstract

Contracts in the construction industry are structured in a manner that splits the risks between different contracting parties; hence risk allocations within the contract affect the price and operation. As most Construction Contracts are long-term contracts, therefore, it is essential to consider having provisions to mitigate foreseeable and unforeseeable risks which may reduce the positive economic prospects and gains, if not, properly evaluated, managed and considered under the contract. For those reasons and many others, the *Force Majeure* (FM) or the act of God clauses are included in almost all construction project contracts.

This paper will provide an analysis of the FM clause in the Public Works Authority (PWA) General Conditions of Contracts (GCOC) for 2018 in terms of the meaning of FM, a list of examples, and the consequences of invoking the FM clause and others. Moreover, the FM clause in PWA GCOC 2018 will be compared with other drafts of the FM clause in other forms of contracts that are used internationally, such as the International Federation of Consulting Engineers General Conditions of (FIDIC) Red Book, 1999 and 2017, and others. This comparison was conducted by taking into consideration scholarly opinions and existing literature on the topic. Finally, the paper addresses the gaps in the existing PWA GCOC FM clause and the applicability of the FM clause in cases such as COVID-19 and then recommends some amendments that could be considered in future contracts.

Keywords: Force Majeure; Contraction; Contracts; General Conditions; FIDIC; COVID-19 Pandemic

1 Introduction

Every construction project is unique and has special requirements to fit its purpose, hence project challenges and risks are also unique and sometimes unforeseen. For those reasons and many others, contracts in this industry are structured in a manner that splits the risks between different contracting parties; hence risk allocations within the construction contracts affect the price and operation.

As most construction contracts are middle to long-term contracts, therefore, it is essential to consider having provisions to mitigate the risks that are foreseeable or not foreseeable. If not properly evaluated and managed, these risks may reduce the positive economic prospects and gains, as poor management of projects risk and uncertainties lead to project failure (Arcadis, 2019). Over the past few years, severe disruption to supply chains due to COVID and others, some activities on projects are impossible to deliver on time, raising all sorts of contractual challenges and therefore, putting all parties in a critical stage during project delivery. For those reasons and many others, the FM or the act of God clauses are provided for in almost all construction contracts.

This paper aims to analyze the gaps in existing GCOC in PWAFM clause that makes it challenging to deal with the situation of health disasters such as COVID-19 or similar unforeseen risks where

performance is not prevented but rather became more expensive and difficult, by comparing it with other forms of contract that are used internationally. Lately, it has become essential to review the FM clauses in construction contracts as we live in a dynamic world with a lot of changes and risks that are new and unforeseen. Moreover, the actual language of the FM clause will be crucial for determining contracting parties' rights and responsibilities in such cases, courts will interpret the FM clause very narrowly.

The paper will start with a literature review and then analyze the existing FM clause in GCOC 2018 in PWA and compare it with the FM clause in other forms of contract. Then, the article provides recommendations that address the gaps in the clause to be considered in future contracts. For this purpose, the paper is divided into four sections as follows, (1) Literature Review, (2) Analysis and Discussion, (3) Recommendation, and (4) Conclusion.

2 Literature Review

This section will provide an overview of the scholarly opinion of FM clauses in construction contracts. At first, this will be for FIDIC, and afterward it will be followed by other forms of Contracts. In addition, an overview of model clause proposed by scholars is also included.

2.1 FIDIC Red Book FM Clause

The FM clause 19 in FIDIC Red Book, 1999 have defined the conditions that have to be satisfied for an event to be considered as a *Force Majeure* event; those conditions are (1) the event has to be beyond the party's control, (2) the party could not have provided against the event before going into contract, (3) the event could not be avoided or overcome, and (4) the event is not attributable to either party. Moreover, the (19.1) sub-clause has listed some examples of *Force Majeure* events.

However, under FIDIC 2017, the term "Exceptional Event" instead of "*Force Majeure*" has been used, and the same four conditions are to be met and are stated under clause (18). Sub clause (18.2) emphasizes on the notice requirement to trigger an exceptional event clause by the affected party. Sub clause (18.3) discusses the duty to mitigate delay and sub clauses (18.4), (18.5) & (18.6) address the consequences of exceptional event occurrence, such as notice to terminate and conditions of release from performance under the law.

In, both FIDIC Red Book 1999 & 2017, the list of events that would constitute *Force Majeure*/exceptional events is not limited to the stated events provided under sub-clauses (19.1) and (18.1) respectively, where the epidemic was not listed. However, the word "epidemic" appears in clause (8.5) of FIDIC 2017, which states that the contractor shall be entitled to a time extension, if unexpected shortages in the supply of personnel or materials result from epidemics or governmental actions (Hansen, 2020).

2.2 FM Clause in other Forms of Contracts

A comparative study, for contract administration guidelines to deal with the FM clauses and other provisions, has been conducted to compare the standard bidding documents for procurement of works (SBDW) used in World Bank (WB) Contracts and FIDIC conditions of contract for construction issued in 1987 and 1999. According to (Fawzy *et al.*, 2012) both forms of general conditions of construction have dealt with the consequences of the FM and the difference between *Force Majeure* and employer's risks, differently. It has been found that for the definition of FM event, both contracts are merely identical, except that for the SBDW in WB Contracts, a statement was added with the examples listed to be considered as FM events. The statement was "sabotage by persons other than

the Contractor's Personnel," and this sentence is relevant to stating the difference between *Force Majeure* and risks that are attributed to one party. Moreover, when looking at the consequences of FM event, FIDIC entitled the contractor to payment and extension of time if the contractor suffered cost and delay in fulfilling his obligation under the contract as a result of such an event subject to raising a notice. In this regard, the WB Contract differs from FIDIC in that and the WB Contract specified the payment of the such cost to be "including the costs of rectifying or replacing the Works and Goods damaged or destructed by *Force Majeure*, to the extent they are not indemnified through the insurance policy referred to in Sub-Clause (18.2) [Insurance for Works and Contractor's Equipment]" which entails that the risk of such events has been transferred to the insurer (Fawzy *et al.*, 2012).

2.3 Proposal of Different Drafts of FM Clause

Due to the limitation of the existing drafts of the *Force Majeure* scholars, Shafik *et al.*, (2016) have proposed an FM clause applicable to contracts governed by civil or common law. When looking into the definition of FM the author found that some contracts provide specific definitions and others refer to a specific law for the needed definition. For those Shafik (2016) suggests that the drafter of such clause should take care when referring to the definition to the governing law to avoid doubts caused by vague formulations. Moreover, it was suggested the clause to list events should be considered FM and those events can be classified into basic groups such as natural, political, incidental, and accidental events. In addition, the clause entails the necessary procedure to invoke *Force Majeure* which includes notice to FM and submission of evidence of the event. With regard to the consequences of the FM event the proposed clause by scholars (Shafik *et al.*, 2016) first emphasizes the non performing party's duty to overcome and mitigate the event effects as much as possible. Then, the clause details the consequences of FM such as suspension, an extension of time, or termination.

2.4 FM Clause and Civil Codes

It is essential to highlight that the decision regarding an event as FM is determined in addition to the contract by the governing law of the contract. A study Ezeldin (2018) has addressed the application of FIDIC 1999 contracts under the Egyptian Civil Code (ECC). The ECC Article 373 sets two conditions for an event to be considered as *Force Majeure*, therefore, relieving the party affected from performance. Those conditions are (1) fulfilling the obligation becomes impossible because of an alien reason; (2) the debtor (the affected party) shall have no control over the alien reason.

In Qatar, article 188 of the Qatar Civil Code, the *Force Majeure* concept is recognized as is described in case of the impossibility of performance then the contract would be automatically terminated. Article 171 considers cases whereby the performance is possible but cause losses to the party performing it and court will consider decreasing the losses to a reasonable limit. Moreover, article 172 emphasis that in any cases the execution of the contract must be in accordance to the contract provisions that was agreed of between the contracting parties.

3 Analysis and Discussion

This section will present an overview of the *Force Majeure* Clause in Public Works Authority General Conditions of Contract. Then, a discussion as to what extent this clause is similar to and different from the *Force Majeure* Clause in other contracts used internationally. Finally, a discussion to what extent this clause could be used for claiming Relief of Cost and Relief of Delay as a result of COVID-19.

3.1 Overview of PWA GCOC 2018 FM Clause in Light of FIDIC FM Clause

In Public Works Authority (PWA), there are many forms of general conditions of contracts (GCOC) to suit different types of projects that PWA entered with contractors, consultants, suppliers, and many others. This section provides an overview of the FM clause that is used in multiple forms of contracts such as building and engineering and design and build contracts which are the most used GCOC.

3.1.1 Meaning of *Force Majeure* Event

In GCOC, Clause (14) covers the FM Sub-Clause (14.1) and describes the meaning of FM event, stating that it is an ‘exceptional event or circumstance which prevents a party from performing its obligations under the Contract’. Then the Sub-Clause continues to provide the conditions by which the event will be regarded as *Force Majeure*, those conditions are as followed:

- a) which is beyond the control of the affected party; and
- b) which the affected party, despite all reasonable efforts, could not have provided against before entering into the contract; and
- c) which could not have been prevented, overcome or remedied in whole or in part by the exercise by the affected party of reasonable skill, care and diligence to a standard as would be exercised by a party in the same position as the party affected but excluding such event that could be prevented but for either party's breach of its obligations under the contract.’

Furthermore, Clause (14.1.2) provides a list of events that would be regarded as FM Events and includes war, hostilities, rebellion, terrorism, revolution, riot, commotion, disorder, natural catastrophes, loss or damage to goods arising during transportation, and many others. The Clause starts by stating that ‘A *Force Majeure* Event shall include any of the following events or circumstances’ before providing examples that limit the events that would be regarded as FM events to those listed in the Clause.

Similar to FIDIC 1999, the GCOC in PWA highlighted that the event shall be unforeseen, unavoidable, and uncontrollable and that the event is caused by other than Contractor’s Personnel.

3.1.2 Notice of *Force Majeure* Event

Sub-Clause (14.2) emphasizes the requirement of triggering an FM clause to ‘give notice to the other Party and the Engineer of the event or circumstances constituting the Force Majeure event and shall specify the obligations, the performance of which is or will be prevented.’ The notice shall be given within five working days. Moreover, sub-clause (14.2.4) required the affected party to provide the Engineer with periodic reports on the status of the Force Majeure Event and the efforts to avoid or mitigate the impact. FIDIC has notice of requirement as well.

3.1.3 Notice of Cessation of *Force Majeure* Event

Sub-Clause (14.3) highlights that the affected party shall give notice within 5 days to the Engineer on the cessation of the FM event or its effect and the resumption of performance and obligations under the contract.

3.1.4 No Relief from Payment Obligations

In all circumstances, the occurrence of a *Force Majeure* event shall not relieve any party from payment as described under Sub-Clause (14.4).

3.1.5 Duty to Mitigate

All parties shall work on minimizing any disruption or delay in the performances as a result of FM event and resume full performance of its obligations as soon as practicable as per Sub-Clause (14.5).

3.1.6 Consequences of *Force Majeure* Event

In the occurrence of FM event as described in Sub-Clause (14.1), ‘Sub-clause (19.1) [Contractor’s Claims] and Sub-clause (14.2) [Notice of *Force Majeure* Event]’ the contractor shall be entitled to bring a claim for (a) Relief for Delay, (b) Relief for Cost resulted from measures taken by the contractor as a result of FM event, and (c) Relief for Cost resulted from an instruction by the engineer to undertake remedial measures.

However, the Relief for Cost resulting from measures taken by the contractor as a result of the FM event under Sub-Clause(14.6.1) (b) is subject to ‘the Contractor having notified the Engineer of the measures being undertaken within twenty-four (24) hours after initiation of those measures and complying with any instructions of the engineer following such notice’.

3.1.7 Sub-Contractor *Force Majeure* Event

Sub-Clause (14.7.1) highlight that in cases of ‘*Force Majeure* Event on terms additional to or broader than those specified in Sub-clause (14.1) [Meaning of *Force Majeure* Event]’ such events shall not excuse the contractor's non-performance or entitle it to any relief under Clause (14). Sub-Clause (14.7.1) indirectly emphasized the importance of limiting the meaning of FM events to those specified under Sub-Clause (14.1) and that PWA will not take the risk of FM events beyond the signed contract with the contractor of sub-contractors.

3.1.8 Optional Termination, Payment, and Release

Sub-Clause (14.8) highlights that in cases of work prevented because of *Force Majeure* event for more than 63 continuous days or multiple periods of more than 100 days in a year, then either party may give the other party a notice to terminate the contract and the termination shall take effect seven days after the notice. Moreover, Sub-Clause (14.8.2) specifies the requirement related to the submission of final accounts by the contractor within 28 days after the termination and that the authority will only be required to pay the contractor the cost set out in the sub-clause.

3.2 Comparison between GCOC 2018 and FIDIC Red Book FM Clause

Similarities:

- Both clauses have similar conditions that are considered pre-requisite for an event to be regarded as an FM event, except that FIDIC 1999, has added a fourth condition that is not substantially attributed to the other party.
- Both clauses do not specify epidemic and pandemic as an example of an event that could be regarded as an FM event.
- Both highlight that FM event shall not suspend any payment performance under Sub-Clause (19.2) and (14.4) of FIDIC 1999 and GCOC, respectively.
- Sub-Contractor FM Event under GCOC Sub-Clause (14.7) is identical to the one provided under FIDIC 1999 Sub-Clause (19.5).

Differences:

- FIDIC 1999 under Sub-Clause (19.2) required the FM event to be an event that prevented the affected party from performing ‘any’ of its obligations, whereas under GCOC the word ‘any’ was not part of the FM definition, which emphasized that the standard of triggering FM, under GCOC is stricter.
- Unlike the GCOC, which provides a specific list of examples of an event that would be regarded as FM event, FIDIC 1999 started the list of examples by using the phrase 'may include, but not limited to', which indicates that it is a non-exhaustive list. However, the cost entitlement resulting from the FM event under FIDIC 1999 Sub-Clause (19.4) is limited to the list of events provided under Sub-Clause (19.1).

3.3 Applicability of GCOC FM Clause in Case of a Pandemic

On 12 Mar 20, the World Health Organization declared COVID-19 a global Pandemic; this declaration was followed by international travel restrictions and lockdown measures taken by countries to stop the spread of the virus. Those measures have invaded the world and significantly affected contracts and agreements between individuals, companies, and countries. Therefore, there is a significant effect on dealings between the parties and, consequently, on the laws adjudicating cases arising from COVID-19. Whether COVID-19 is considered an FM event or not, it does affect the performance of obligations under many construction contracts fully or partially.

To some extent, construction projects have been isolated from the immediate consequences of the lockdown and COVID-19. Although the laws and circulars that had been issued have effected all day-to-day work and the whole supply chain, exemptions were specifically made to the construction sites in order to be able to meet the deadlines, especially considering the vital delivery of projects that were critical for the host of the world biggest event that is the FIFA 2022 world cup.

To determine whether COVID-19 is an FM event, one needs to scrutinize the contract and the underlying facts that led the affected party to the required relief of obligation. That is because the existence of the COVID-19 event does not automatically mean that the parties are being delayed and the work costs more than planned. The wording of the FM clause and the evidence around the event is crucial when deciding whether an event amount should be considered FM. Therefore, careful thought must be given as to whether a FM event has arisen in exploring the wording of the clause. For instance, according to FIDIC 1999 Clause (19.2) eventual circumstance of an event must have prevented the party from performing an obligation to be rendered as *Force Majeure*. Moreover, deciding whether an event amount to an FM event or not is, in fact, a question of whether the obligation is still capable of being performed as opposed to it becoming more costly and time-consuming to be performed as per the definition of FM under GCOC Sub Clause (19.1) and (19.2).

It is important to highlight that Clause 14.1.2 in GCOC starts by stating that ‘A *Force Majeure* event shall include any of the following events or circumstances’ before providing the list of examples. The use of ‘shall include’ can be interpreted in a manner that limits the use of the FM Clause to the listed example only, and the listed examples do not include Epidemic and Pandemic which could mean the consequences of COVID-19 cannot be claimed under FM Clause in GCOC used in PWA.

4 Recommendation

The effectiveness of using a *Force Majeure* provision depends heavily on how it is drafted (Hansen, 2020). For this reason, this section will provide some insights or propose multiple insights and some amendments which could be adopted to encounter events such as the Pandemic.

4.1 The Difficulty in Performance.

The application of the impossibility test to the specific event shall be addressed amongst all the conditions outlined in FM Clause. COVID-19 is more likely to be classified as a disruption as it does not necessarily prevent performance but makes it more difficult and costly. Moreover, it is important to consider that the event has affected the performance temporarily for a specific period which does not last forever, even though it was unforeseeable when this would happen.

The limitation in the existing GCOC is relevant because it considers events that not only prevent performance but also make the performance difficult or cost more than it should be.

4.2 Options Available for New Drafts

There is not a single FM clause that applies to all circumstances and agreements. Still, when it comes to formulating a *Force Majeure* Clause, the parties have a choice between two options: (1) an explicit list of occurrences with a cross-reference to a term that defines *Force Majeure* should be included in an FM Clause, or (2) in addition to the already existing *Force Majeure* occurrences, the parties might want to think about including a standalone Pandemic provision Zin *et al.*, (2021). Regardless of the choice parties decided to adopt, it is essential to draft provisions related to the risk of an unforeseen event, such as the Pandemic, that may not necessarily lead to the impossibility of performance but rather a frustration of the contract to leave no room for ambiguity.

4.3 Procedural Provisions Do Matter

The failure of contracting parties to understand and comply with contractual obligations has emerged as the leading cause of construction disputes. According to Arcadis (2017) the Middle East construction contractor continues to fail to comply with the notice and procedural provisions in the contract; therefore, claim quality is not up to date to ensure an early and fair resolution. Consequently, the FM Clause needs to include provisions that specify the procedure that the party has to follow in any event that amounts to FM. Moreover, it is important for the FM Clause to be holistic and address all aspects of FM events from occurrence to closure. Most importantly, the relief of delay and cost in case of FM event occurrence must be specified and detailed.

4.4 Relief of Time and Relief of Cost

It is very important for FM clause to address the type of relief available, either cost or time or both cost and time, for the affected party as a result of the occurrence of FM event. This is mainly to consider the different nature of FM events as some entitle the affected party only relief of time only and not relief of costs.

4.5 Beyond the FM Clause

In cases where the FM does not cover events like the Pandemic, using other provisions in the contract to request Relief of Delay and Cost resulting from an FM event can be an alternative. Therefore, it will be a wise decision from both parties to reconsider the other provisions to cover the effect of the

event on obligations. For instance, under FIDIC 1999, if COVID-19 consequences were not considered under Clause (19) [*Force Majeure*] it could be considered under other provisions such as Clause (8.4) [Extension of Time, (d) Epidemic or governmental actions] as COVID could be considered as Epidemic and all the lockdown and its consequences could be considered as governmental actions. Moreover, Clause (13.7) [Change of Law] as, governments put restrictions on the movement of people, materials, and many other things and put it in the form of laws, regulations, and circulars. In addition, Clause (13.8) [Changes of Costs], Clause (19.7) [Impossibility], or others could also be adopted for the same, notwithstanding those other theories of impracticality or frustration that might relieve a party from obligations under the contract.

5 Conclusion

We live in a world that has many universal risks which are unforeseen and unavoidable. If construction contracts are silent on such risks, this will create vagueness. To avoid protracted and expensive disputes to resolve the issues on their projects, contracting parties must concentrate on their ability to successfully navigate through turbulent times as the construction industry in the region continues to grow throughout 2022 (Arcadis, 2022). Tighter programs, more complex projects, price inflation, and the supply chain crisis are just a few factors that will undoubtedly make this the case. To address such challenges with certainty contracting parties should consider adopting any of the earlier recommendations that cover situations like the Pandemic. Therefore, it is recommended to have provisions covering risks similar to FM events but not necessarily preventing the performance outcome that would result from the performance of the obligation being much more expensive and the completion of the obligation being delayed. For that, it will be wise to rethink the GCOC to consider future issues and to make those anticipated unforeseen risks well thought of in the contract in terms of their scope, procedural matter relevant to the risk, and the consequences because of the risk occurrence.

Doing so will clear the vagueness if, such risk actually occurs, and for that, this paper proposes rethinking the risk allocation and management in PWA GCOC to account for the future. Keeping in mind that, according to Arcadis (2022), as a result of COVID the number of disputes in the market will rise in 2022 as business owners and contractors re-engage coming out of COVID. Finally, it should be noted that neither the conclusions nor the assertions made in this paper are meant to be interpreted as legal advice. Instead, it provides an initial proposal to be taken further and rethink in the future.

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