FIDIC Changes in Legislation and Covid-19: Compelled by Law or Just Doing Your Job?

Written by Gabriel Mulero Clas

Up until the spring of 2020, a FIDIC 1999 Sub-Clause 13.7 [*Adjustments for Changes in Legislation*][1] claim was just one of many issues to be resolved, for example, in a delay and disruption claim or a Cost claim. However, the focus it receives in the context of Covid-19 is drastically different.

Many in the industry are using the changes in legislation provision to seek financial compensation in a situation that would otherwise potentially only attract an extension of time.[2] Awarding Cost for Covid-19 events regardless of the circumstances may seem to some (Contractors mostly, though there are Employers and Engineers who agree) like the appropriate thing to do, but whether it is correct according to the Contract is a different question.

What causes the Covid-19 measures?

It used to be that a Country would make a new law (for whatever reason) and a Contractor would claim that the new law was made after the Base Date and increased Cost and/or somehow caused delay to the Works. For example, a new tax would be applied to the purchase of materials[3] or new restrictions would be placed on their transportation. The Contractor would have priced the works based, amongst other things, on the laws as they were before the Base Date and the FIDIC forms assign the risk of increases in that price caused by changes in legislation to the Employer. Accordingly, the Contractor would notify a Sub-Clause 13.7[4] claim and the story would then carry on as prescribed in that Sub-Clause and in Clause 20.[5]

Insofar as the mechanics are concerned, the application of the provision has not changed much with the pandemic. However, the complexity of the event or circumstance has amplified: in countries around the world, measures at various levels of government are being implemented in response to the pandemic. The impact of such measures can be quite

Gabriel Mulero Clas
Senior Associate (Puerto Rican Qualified)
T +44 (0)20 3755 5729
M +44 (0)7546 695 433
gabriel.muleroclas@howardkennedy.com

[1] Partially reworded in FIDIC 2017 to [Adjustments for Changes in Laws] and renumbered to Sub-Clause 13.6.

[2] In the context of FIDIC 1999/2017, this may potentially be Sub-Clause 8.4/8.5 [*Extension of Time for Completion*], Sub-Clause 8.5/8.6 [*Delays Caused by Authorities*], and Sub-Clause 19.4 (a)/18.4 (a) [*Consequences of Force Majeure/an Exceptional Event*].

[3] See National Highways Authority of India v Som Datt Builders-NCC-NEC (JV), Delhi High Court, Case No. OMP No. 40/2011 (25 April 2014), see https://indiankanoon.org/doc/92242211/ (accessed 24 August 2021) and National Highways Authority of India v M/S JSC Centrodorstroy, Supreme Court of India, Civil Appeal No. 2530 of 2016 (18 April 2016), see https://indiankanoon.org/doc/121392918/ (accessed 24 August 2021).

[4] Or Sub-Clause 13.6 under FIDIC 2017

[5] Court cases and arbitral awards about Sub-Clause 13.7 are scarce and there are very few commentators that delve into the Sub-Clause to any depth, such as: Ellis Baker et al, FIDIC Contracts: Law and Practice, ¶ 2.160-2.163 at pp 74-75 and ¶ 4.95-4.103 at pp 169-70; George Rosenberg and Andrew Tweeddale, 'Clause 13', FIDIC 1999 Books Clause Commentaries (2016), pp 24-26, see https://www.corbett.co.uk/knowledge-hub-fidic-1999-book-clause-commentaries/ (accessed 24 August 2021); and George Rosenberg, 'Clause 13 Variations and Adjustments', FIDIC 2017 A Practical Legal Guide (2020), pp 340–42.

dramatic and at least some of the measures are of the type that Contractors have, would have or should have applied anyway. With this, a question that arises when examining the validity of a Sub-Clause 13.7[6] claim is: what about causation?

Those who understand that if Covid-19 is left unchecked, it can wreak havoc, also understand that wearing a face mask, socially distancing, getting tested and quarantining are necessary measures that prevent infection. Companies will (or at least should) in many cases apply such measures in their organisations regardless of whether the law compels it. At the same time that governments were getting to grips with lockdowns, companies around the world dusted off their contingency plans and put to the test the very same measures with which we are all now very familiar.

In fact, contracts, such as the FIDIC forms, already impose obligations on the Contractor regarding the protection of its workforce that may apply to the pandemic.[7] At times, measures were implemented even before governments made them wide-ranging. In this scenario, would Sub-Clause 13.7[8] apply to a new law that requires certain measures against Covid-19? The answer to this question depends on the interpretation given to the Sub-Clause.

If a Contractor understands that a Covid-19 outbreak on Site will cause personnel to fall ill or to be fearful of coming to work, then that Contractor should implement the measures needed to protect its workforce if it wants to avoid any delay and disruption caused by lack of personnel. For example, it should purchase masks for its employees, install sanitising stations or checkpoints, implement social distancing, etc. In such a scenario, the cause of the increased Cost and/or delay and disruption that results from the implementation of such measures is Covid-19, it would appear. That Contractor may potentially be able to claim an extension of time (though not additional payment) under Sub-Clause 19.4(a) [*Consequences of Force Majeure*].[9]

What came first, the virus or the law?

Would a law compelling the Contractor to purchase those masks, install those sanitising stations or checkpoints, implement social distancing, etc. change that causal link? From one point of view, arguably not.

Sub-Clause 13.7[10] applies to increases and decreases in Cost resulting from a change in legislation which affects the Contractor in its performance of its obligations under the Contract. A Sub-Clause 13.7[11] claim is only available where the Contractor suffers (or will suffer) delay and/or loss as a result of changes in legislation.

In the scenario above, the Contractor would implement the necessary measures regardless of whether a new law requiring them comes into force. Also, had the coronavirus not emerged, the new law would have never existed. That is, the two events are not independent from each other because the pandemic caused the relevant new law to come into force. Therefore, insofar as a new law compels the Contractor to do something that the Contractor would have done regardless (of the coming into force of such new law and of the legal implications of non-compliance), then such new law, it may be argued, does not cause the increases in Cost and/or delay that result from the implemented measures.

In other words, the new law fails the "*but for*" test. This test is used to determine the cause of a loss as a matter of fact. In the context of this article, the test is: would the loss or delay have happened but for the occurrence of an act or event? Put another way: if the act or event had not occurred, would the loss or delay have been suffered? As such, if the loss or delay hinge on the act or event (e.g., the new law), it passes the test in that the act or event is a proven cause in fact of the loss or delay. However, if the loss or delay would have been suffered even without the act or event (such as in the scenario above), it fails the test. Therefore, under the interpretation above, Sub-Clause 13.7[12] would not apply.

[6] Or Sub-Clause 13.6 under FIDIC 2017

[7] For example, FIDIC 1999 and 2017 include: Sub-Clause 4.1 [*Contractor's General Obligations*], Sub-Clause 4.8 [*Safety Procedures*] in 1999 or [*Health and Safety Obligations*] in 2017, Sub-Clause 6.4 [*Labour Laws*] and Sub-Clause 6.7 [*Health and Safety*] in 1999 or [*Health and Safety of Personnel*] in 2017. Also, applicable provisions may also be found in other documents of the Contract.

[8] Or Sub-Clause 13.6 under FIDIC 2017.

[9] Or Sub-Clause 18.4 (a) [Consequences of an Exceptional Event] under FIDIC 2017.

[10] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[11] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[12] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

As a result, the Contractor would not be able to claim time and money via Sub-Clause 13.7[13] but may perhaps still be entitled to time, for example, under Sub-Clause 19.4(a).[14] In the scenario above, Covid-19 would pass the "*but for*" test. Therefore, subject to meeting all other requirements for a Sub-Clause 19.4(a)[15] claim,[16] if the Contractor can prove that it has suffered delay by reason of a Covid-19 event or circumstance, it should be entitled to an extension of time.

Perhaps a different scenario would put this into more perspective. If a Contractor were building a pier in the Caribbean and a hurricane was imminent, would it wait for the government to tell everyone to seek shelter before closing operations and sending everyone home? Of course not. That would be irresponsible. Some may argue that this situation is different because most Caribbean countries have had laws for decades that allow them to order businesses to close down if a hurricane is imminent and therefore Sub-Clause 13.7[17] would never apply. However, the relevant question for the purposes of this analogy is not whether a law is new. As mentioned before, the issue is causation and, in that sense, the hurricane scenario is no different from the pandemic scenario.

Also consider the scenario where a Contractor purchases surgical masks to protect its personnel on Site from Covid-19 and they are used before the legislature of the Country makes a new law that requires the use of masks. In this situation, the masks are purchased and used before the law comes into force. Therefore, the Cost incurred in the purchase of such masks could not be said to have resulted from the change in legislation.

However, once the law comes into force, questions arise:

(a) Would the Cost of the masks purchased before the law coming into force but used thereafter be covered by Sub-Clause 13.7?[18]

(b) Would the Cost of more masks purchased after the law coming into force be covered by Sub-Clause 13.7?[19]

According to the interpretation presented above, it may be arguable that, in either case, the cause of the purchase and use of the masks does not change insofar as Covid-19 continues to be a threat in the eyes of the Contractor. In fact, the Contractor's purchase of the masks prior to the enactment of the new law may indicate that the Contractor would continue purchasing the masks regardless of the existence of a new law requiring them.

To make matters more complex, the legislature of a Country may have different views on what constitutes appropriate measures. It may pass new laws that go beyond what a Contractor considers necessary. For example, the new law may require the masks to be type KN95 but the Contractor intended to purchase the less expensive surgical masks. According to the interpretation presented above, in such a scenario, the Contractor may have an arguable case under Sub-Clause 13.7[20] but, it is suggested, only to the extent of the difference in Cost between the KN95 masks and the cheaper masks, not for the entire Cost of the KN95 masks. That is, the increase in Cost that results from purchasing the KN95 masks would arguably be caused by the new law and the Contractor may be able to claim the difference in Cost between the two types of masks.

Is causation really the issue?

In contrast, there is a more liberal interpretation of Sub-Clause 13.7[21] that may allow a claim in the scenarios explored above. A DAB/DAAB or arbitral tribunal may be sympathetic to a Contractor who argues that the effect of the words "*resulting from*", "*which affect*" and "*as a result* of" in Sub-Clause 13.7[22] is that they simply give the claiming Party a contractual peg on which to hang its claim regardless of the existence of an alternative causal link.

[13] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[14] Or Sub-Clause 18.4 (a) under FIDIC 2017.

[15] Or Sub-Clause 18.4 (a) under FIDIC 2017.

[16] Such as, for example, (1) proving that the Covid-19 event or circumstance is a Force Majeure event or circumstance under FIDIC 1999 or an Exceptional Event under FIDIC 2017, (2) proving that the Covid-19 event or circumstance prevented the Contractor from performing its obligations under the Contract, and (3) submitting the required notices.

[17] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[18] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[19] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[20] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[21] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[22] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017.

According to this argument, the implementation of Covid-19 measures by the Contractor results from the pandemic itself, but also from the new law. That is, Covid-19 and any new laws that result from it would each be considered effective causes. As such, it would be argued, Sub-Clause 13.7[23] would apply to all of the Cost increases and/or delay caused by the implementation of the measures required in the new law.

Pre-existing obligations trump the claim

Many countries already had laws that required Parties to address the pandemic in one way or another. According to the World Health Organization ("WHO"), the last influenza pandemic happened in 2009-2010[24] and epidemics that affect entire regions are ever more frequent, faster and wider-reaching.[25] Countries that have had to deal with such issues may have already had laws to address an event such as the coronavirus.[26] Parties, Engineers, DABs/DAABs and arbitral tribunals must take such laws into consideration when assessing whether a change in legislation under Sub-Clause 13.7[27] has actually occurred.

As mentioned above, the FIDIC 1999 and 2017 forms also contain provisions that may arguably be applicable to the question of whether a Contractor had a pre-existing obligation with respect to the pandemic, for example, Sub-Clause 4.1 [*Contractor's General Obligations*], Sub-Clause 4.8 [*Safety Procedures*] in 1999 or [*Health and Safety Obligations*] in 2017, Sub-Clause 6.4 [*Labour Laws*] and Sub-Clause 6.7 [*Health and Safety*] in 1999 or [*Health and Safety of Personnel*] in 2017. Applicable provisions may also be found in other documents of the Contract.

Where a law or a Contract obligation already exists that requires the Contractor to implement the types of measures that a new Covid-19 law provides, there may be an argument that the new law did not in fact change the law and/or that it does not actually affect the performance of obligations under the Contract. In such cases, Sub-Clause 13.7[28] may be inapplicable.

In conclusion, who bears the risk?

Whether a Contractor is entitled to Cost under Sub-Clause 13.7[29] in Covid-19 scenarios will depend on many issues, including the presence of pre-existing obligations and the interpretation given to whether the complexities in the causal link are relevant to its application.

However, at the end of the day, what really matters is not why a Contractor or an Employer take care of the health and safety of the personnel on Site during the pandemic, but that they do so quickly and effectively insofar as they possibly can to avoid the worst of the effects of the virus on the people who come to work. Questions of who is at risk for any Cost and delay suffered are to be dealt with when time allows (though within the timeframes in Clause 20 and other relevant Clauses).

When that time arrives, Parties, Engineers, DABs/DAABs and arbitral tribunals should give serious thought to the particular facts of each claim and how they relate to questions of causation, risk and pre-existing obligations in light of the relevant Contract provisions and the law, old and new.

Please get in touch at gabriel.muleroclas@howardkennedy.com with your thoughts or to discuss any concern

[23] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[24] WHO, 'Pandemic influenza', see https://www.euro.who.int/en/health-topics/communicable-diseases/influenza/pandemic-influenza (accessed 24 August 2021) ("*The most recent pandemic occurred in 2009 and was caused by an influenza A (H1N1) virus*.");

[25] WHO, 'Managing epidemics: Key facts about major deadly diseases', Geneva (2018), p 9, download from https://www.who.int/publications/i/item/managing-epidemics-key-facts-about-major-deadly-diseases (accessed 24 August 2021) ("*Epidemics of infectious diseases are occurring more often, and spreading faster and further than ever, in many different regions of the world*.").

[26] WHO, 'Pandemic influenza', see https://www.euro.who.int/en/healthtopics/communicable-diseases/influenza/pandemic-influenza (accessed 24 August 2021) ("*For this reason, countries develop multi-sectoral preparedness plans describing their strategies and operational plans for responding to a pandemic*."); WHO, 'Past pandemics', see https://www.euro.who.int /en/health-topics/communicable-diseases/influenza/pandemic-influenza/past-pandemics (accessed 24 August 2021) ("*It was the first pandemic for which many Member States had developed comprehensive pandemic plans describing the public health measures to be taken, aimed at reducing illness and fatalities*.").

[27] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[28] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017

[29] Or Sub-Clause 13.6 (a) & (b) under FIDIC 2017