

Force Majeure and the escalation of US-Iran tensions

The recent high profile attacks in Iraq, and their potential ramifications, will be monitored especially closely by parties currently engaged in construction and infrastructure projects in the region

Following the airstrike in Iraq on 3 January 2020 which killed General Qasem Soleimani, the commander of the Iran Revolutionary Guards Corps and Abu Mahdi Al Muhandis, the deputy commander of Iraq's Popular Mobilisation Forces, the fear of reprisals and increased political instability will be of particular concern to parties involved in construction projects in Iraq and the Middle East.

As a starting point, it is important for companies currently working on projects in the region to undertake a comprehensive review of the applicable contracts, paying close attention to the relevant force majeure provisions.

Force Majeure under FIDIC

Many construction and infrastructure contracts in the region will have incorporated the general conditions of the contracts published by FIDIC, the most recent being the FIDIC Rainbow Suite of Contracts 2017 (the "FIDIC contracts").

Under the FIDIC contracts, the force majeure clause has been rebranded as an "exceptional event", although the definition is largely the same as under the previous 1999 suite of contracts.

An "Exceptional Event" is defined at Clause 18.1 of the FIDIC contracts as an event or circumstance which:

- (i) is beyond a Party's control;
- (ii) the Party could not reasonably have provided against before entering into the Contract;
- (iii) having arisen, such Party could not reasonably have avoided or overcome; and
- (iv) is not substantially attributable to the other Party.

Clause 18.1 then provides further guidance as to the types of force majeure circumstances which would constitute an exceptional event as follows:

An Exceptional Event may comprise but is not limited to any of the following events or

circumstances provided that conditions (i) to (iv) above are satisfied:

- (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
- (b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- (c) riot, commotion or disorder by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (d) strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (e) encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; or
- (f) natural catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon.

In the event of further attacks in Iraq and the Middle East, it is likely that parties to contracts will be able to demonstrate the existence of an "exceptional event" within the definition of Clause 18.1 and Clause 18.1(a), which makes specific reference to war and hostilities.

Invoking Force Majeure

Whilst a party may be able to establish a force majeure event has occurred, in order to claim relief under the FIDIC contracts it is necessary to show that an affected party has been "prevented from performing its obligations" due to an exceptional event. The FIDIC contracts do not provide a definition of "prevention", which is therefore usually interpreted in accordance with the contract's governing law.

If all of the elements of force majeure are proven, relief available to an affected party may include an extension of time, payment of costs reasonably incurred and, in the event that the execution of substantially all of the works are rendered impossible for a prolonged period of time, the termination of the contract.

Conclusion

Should the recent airstrikes lead to further hostilities and/or outbreaks of war in the Middle East, it is vitally important for parties conducting business in the region to have a full understanding of the force majeure provisions contained under contract.

The provisions contained under the FIDIC contracts are not straightforward and establishing a force majeure event requires careful consideration of the contractual requirements. As such, before a party considers invoking a force majeure clause in its contract, it is crucial to identify the following:

- The exact scope of the force majeure clause, particularly if the parties made any amendments at the draft stage, such as narrowing the definition of force majeure or have excluded the right to remedies, including the right to terminate the contract;
- The notice provisions governing force majeure events. For example, under the FIDIC contracts, an affected party must give notice to the other party of the occurrence of an exceptional event within 14 days of being

aware of such event and must specify the obligations it is unable to perform; and

- Evidence which an affected party will rely on in order to show that the force majeure event had prevented the party from performing any of its obligations under the contract including internal reports, expert advice, witness statements and government notices.

The Stephenson Harwood team have extensive experience advising clients conducting business in Iraq and the Middle East and are ideally placed to advise on the implications of recent events. For more information please contact James Willn, Nicholas Sharratt or Michael Hartley.



James Willn

Partner

T: +971 4 407 3922 | E: james.willn@shlegal.com



Nicholas Sharratt

Partner

T: +971 4 407 3908 | E: nicholas.sharratt@shlegal.com



Michael Hartley

Senior Associate

T: +971 4 407 3925 | E: Michael.hartley@shlegal.com