

The impact of COVID-19 on projects in Algeria

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Measures imposed by the Algerian Government

On 30 January 2020, the World Health Organisation declared COVID-19 an international public health emergency¹. The first case of COVID-19 in Algeria was confirmed on 25 February 2020 and beginning in March 2020, the Algerian government introduced a series of measures to prevent and control the spread of the virus. These measures included prohibitions of meetings of more than two people, the suspension of international passenger flights and closure of land borders, curfews, and directives confining 50% of the public workforce at home.

Executive Decree N 20-69 of 21 March 2020 issued by the Algerian government introduced measures to prevent and combat the spread of COVID-19. A Presidential Order dated 15 April 2020 extended public procurement regulations on force majeure from 21 March 2020 onwards.

Curfews in certain provinces and international travel restrictions are still in place, although some easing of measures in relation to the opening of businesses and public transport in cities has occurred since 7 June 2020.

Force majeure and hardship under Algerian law

The Presidential Order of 15 April 2020 retrospectively classed COVID-19 as a force majeure event from 21 March 2020 onwards.

As opposed to other civil law jurisdictions, parties under Algerian law can expressly agree that force majeure does not apply to their contract. Should a party agree expressly in the contract to bear such risk, it cannot subsequently claim force majeure under Article 127 of the Algerian Civil Code (discussed below) and would therefore bear any losses that it consequently suffers. This, however, would not prevent it from claiming compensation under the hardship provisions of the Civil Code (Articles 107 and 561).

Standard form contracts often allow a contractor to claim an extension of time as a result of force majeure but many do not automatically allow for compensation. Force majeure is therefore usually a remedy which only allows for an extension of time. The same applies to claims made under Article 127 of the Civil Code below. Claims for cost must be made under Articles 107 and 561 of the Civil Code and in accordance with specific laws and provisions relating to contracts for public works where applicable.

1. <https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>

Where a construction contract contains an express force majeure clause, it will be enforced. If, however, a contract does not contain an express force majeure provision or an express assumption of risk in that regard, then an affected party may be able to rely on force majeure provisions provided under the Algerian Civil Code. The relevant provision in the Algerian Civil Code is described in Article 127, which states as follows:

“Unless legal or contractual provisions provide otherwise, there will be no obligation to repair the damage for the one who proves that the damage resulted from a cause which is not attributable to him, such as force majeure, the fault of the victim or of a third party”.

The Civil Code does not define a force majeure event, however, it would be safe to assume based on the interpretation by French Courts of similar provisions², that any such event must be one that is extraordinary, beyond the control of the parties and external (independent of the voluntary actions of the parties). To qualify as force majeure, the event does not have to be the pandemic or virus itself. Contractors are usually unable to continue their works because of the impact of new laws and lockdown measures introduced by national and local governments in response to the virus, rather than as a direct result of the virus itself. Measures introduced by local and national governments or public authorities may also alternatively entitle a contractor to claim additional costs as a variation under the contract because of a change in law, or alternatively, under Articles 107 and 561 below.

Where performance of the works has become more difficult, rather than impossible, or where the contract does not provide for compensation, a contractor may be able to rely on Article 107 of the Civil Code, which states:

“The contract has to be performed pursuant to its content and in good faith”.

“It binds the contracting party not only to its content but also to all that the law, custom and equity consider as a necessary sequel thereof, in accordance with the nature of the obligation”.

“However, if as a result of exceptional and unforeseeable events of a general character, the performance of the obligations, although not impossible becomes more onerous to the extent that the debtor is likely to suffer an exorbitant loss, the judge may, having assessed the relevant circumstances and the interests of the parties, reduce to a reasonable extent the obligations which have become excessive. Any clause to the contrary will be considered as null and void”.

Article 107 refers to “exceptional and unforeseeable events” which make the performance of the contract disproportionately onerous to perform, rather than impossible. A judge is permitted to reduce the obligations to a reasonable extent where it can be shown that exceptional and unforeseeable events such as the impact of COVID-19 will lead to a debtor suffering an exorbitant loss.

2. [The Algerian Civil Code is based on the Napoleonic Code](#)

Article 561 of the Civil Code further states as follows:

“When, as a result of exceptional events of a general character, which were not foreseeable at the time of the contract, the economic balance between the respective obligations of the owner and the contractor is disrupted so that the financial basis of the contract disappears, the judge may decide an increase of the contract price or the termination of the contract”.

This provision also allows a judge to increase the contract price or terminate the contract if exceptional and unforeseeable events disrupt the economic balance of the parties such that the financial basis of the contract no longer applies. Hardship will not normally trigger termination; however, a judge may mitigate the economic imbalance by adjusting the contract price. This provision may be useful in circumstances where the contract does not allow for compensation for force majeure claims, or in conjunction with Article 127 where there is no force majeure clause in the contract.

In the first instance, parties should attempt to reach agreement in good faith in relation to any extension of time and/or variations due. If the contract is with a public body, then contractors must be aware that the value of any variations should not exceed the limits provided by the Code of Public Contracts (2016).

Liquidated Damages

The provisions of Article 147 of Presidential Decree N 15-247 dated 16 September 2015 (“Public Procurement Code”), regulating public contracts and public service delegations are applicable to all contracts with public authorities (as extended by the Presidential Order dated 15 April 2020).

Article 147 describes financial penalties applicable to contractors for delay. It states that in case of force majeure, deadlines are suspended and delays do not give rise to delay damages to the extent and within the limits of the “*ordre d’arrêt*” (stop order) and the “*ordre de reprise des services*” (restart order) issued by the contracting authority. The waiver for financial penalties gives rise to an administrative certificate. From the date of publication of Executive Decree N 20-69 of 21 March 2020 relating to measures to prevent and combat the spread of COVID-19, contractual penalties such as liquidated damages will not be applied to public contracts.

Making a claim

Contractors must issue all notices required by their contracts on time and in the correct form for any extensions of time and variations sought. They must also ensure that detailed records of any additional costs incurred as a result of the impact of COVID-19 and/or measures imposed by the government or local authorities are kept to properly substantiate a claim. These costs should be recorded on a weekly basis and updated as necessary for as long as the disruption continues. If the parties cannot come to an appropriate agreement, then they will need to resolve any dispute in accordance with the dispute resolution provisions of their contract.

Where relevant, it may also be prudent to issue notices under the Civil Code provisions described above that provide details of any claim for additional costs incurred and extra activities performed in an attempt to complete the works. If the contract is one for public works, the contractor should also request relief from the contracting authority under Article 147 of the Public Procurement Code.

Should the decree cease but the prevention event(s) continue, contractors should send another notice specifying the ongoing issue(s) and how they affect the works to be performed.

Conclusion

As part of its measures to mitigate the effects of COVID-19 on public and private construction companies, the Ministry of Finance is responsible for urgently releasing payment and notifying various contracting authorities of any necessary re-evaluations for the payment of claims under public contracts.

The recent easing of restrictions in Algeria has unfortunately led to a spike in cases, which in turn has led to the reintroduction of localised lockdown measures in certain provinces. Going forward, it is likely that the Algerian government will continue to reimpose restrictions in areas where infections rise and that consequently, contractors will continue to face uncertainty for the foreseeable future. In these difficult times, it is of paramount importance that contractors continue to submit relevant notices and claims on time and in accordance with their contracts, as well as notices under the Civil Code where appropriate.