

Covid-19 and FIDIC contracts – what protections and entitlements?

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Covid-19 has had huge consequences around the world and unfortunately this looks set to continue. In this article we consider the protection and entitlements (for Force Majeure and otherwise) which may be available to parties under FIDIC contracts for the pandemic and its consequences. We focus on the 1999 forms but briefly consider differences in the 2017 forms. We also consider the role that applicable laws may play and what parties should be aware of going forward.

Force Majeure under FIDIC 1999

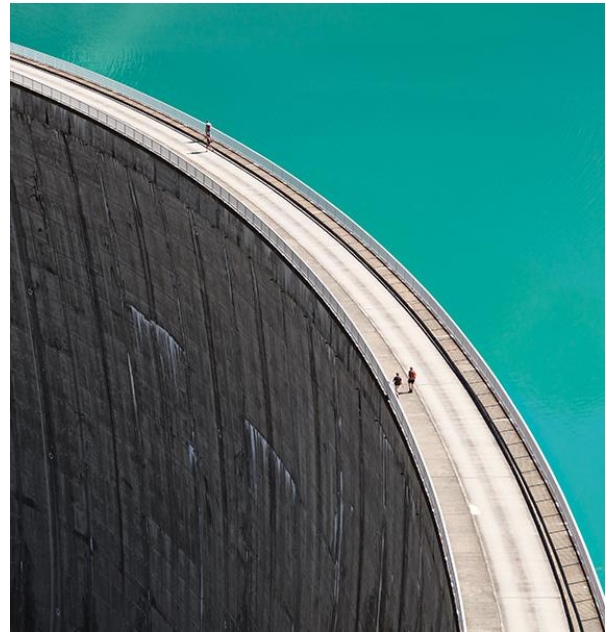
Under the FIDIC 1999 forms of contract, if either Party is prevented from performance of its obligations by Force Majeure ('FM') then, subject to giving notice, it may be excused performance of those obligations. The Contractor may also be entitled to an extension of time and Cost.

Definition of FM

Clause 19.1 contains a definition of FM. It is 'an exceptional event or circumstance (a) which is beyond a Party's control, (b) which such Party could not reasonably have provided against before entering into the Contract, (c) which, having arisen, such Party could not reasonably have avoided or overcome, and (d) which is not substantially attributable to the other Party.' For the definition to be met, these five criteria ('exceptional' plus the criteria (a) to (d)) must be satisfied.

Clause 19.1(i) to (v) contains a list of example events or circumstances which, if they otherwise satisfy the definition, could constitute FM. If an event does not appear on the list, this does not mean that it may not otherwise satisfy the definition. The list does not include 'epidemic' or 'pandemic' but it is likely that the Covid-19 pandemic and many of its consequences will otherwise satisfy the definition of FM.¹

¹ That said, there is an argument that the pandemic itself (as opposed to its consequences) is not 'exceptional' because pandemic flus have occurred before.



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Protection that may be available to the Employer for FM

If the Employer is prevented from performing any of its obligations by FM it may, subject to giving notice, be excused performance of these obligations.

The key Employer obligation that might be prevented because of Covid-19 and its consequences is the obligation to give the Contractor access to and possession of the Site (clause 2.1). This prevention may occur, for example, where governments have imposed Site closures to prevent spread of the virus.² Other obligations that might be prevented include the provision of free issue materials or Employer's Equipment, the obtaining of licences or approvals, co-operation and the obligations which the Engineer has under the Contract. If the Engineer or its personnel are unable to supervise the Works, progress will come to a halt.

If an Employer is prevented from performing any of its obligations by FM and wishes to be excused performance, it should give notice under clause 19.2. This notice should specify the event or circumstances constituting the FM and the obligations whose

² Scotland, for example



performance is or will be prevented. It should be given within 14 days after the Employer became aware, or should have become aware, of the relevant event or circumstance constituting FM.

As a result of giving the clause 19.2 notice, the Employer is excused performance of the prevented obligations for as long as the FM prevents it from performing them. However, performance by the Employer of its payment obligations is not excused.

In principle, the Employer should give notice under clause 19.2 to prevent its non-performance being a breach of contract. However, this notice will constitute an admission and an assertion by the Employer that it is prevented from performing an obligation that otherwise it should be performing. Therefore, the Employer should only give this notice if it is certain that the FM is preventing it from performing its obligations in an important way.

The Employer should be aware that once FM has been notified under clause 19.2, the door is open to a potential termination of the Contract under clause 19.6. This provides that either Party may terminate the Contract if the execution of substantially all the Works in progress is prevented for a continuous period of 84 days, or for multiple periods which total more than 140 days, by reason of FM in respect of which a clause 19.2 notice has been given. It is possible that some Contractors will take this opportunity to terminate the Contract if, for example, prior to Covid-19 the Contract had become loss-making.

If the Employer gives notice under clause 19.2, it is required under clause 19.3 to use all reasonable endeavours to minimise delay in the performance of the Contract as a result of the FM and to give notice to the Contractor when it ceases to be affected by the FM.

Protection that may be available to the Contractor for FM

Just like the Employer, if the Contractor is prevented from performing any of its obligations by FM it may, subject to giving notice, be excused performance of these obligations.

Key Contractor obligations which may be prevented because of Covid-19 and its consequences include the

Contractor's obligation to proceed with the Works with due expedition and without delay (clause 8.1) and to complete the Works within the Time for Completion (clause 8.2). In some countries where lockdowns are imposed, the Contractor's Personnel may be prevented from travel to and work at the Site and Goods may be prevented from reaching Site.

If a Contractor is prevented from performing any of its obligations by FM and wishes to be excused performance it should, like the Employer, give notice under clause 19.2.

As mentioned above, this notice opens the door for a potential termination under clause 19.6. Also, like the Employer, the Contractor is required under clause 19.3 to minimise delay and to give notice when it ceases to be affected by the FM.

Extension of time and Cost for FM

Under clause 19.4(a), if the Contractor is prevented from performing obligations by FM for which it has given notice under clause 19.2, and suffers delay by reason of the notified by FM it may, subject to giving notice under clause 20.1, be entitled to an extension of time.

Similarly, under clause 19.4(b), if the Contractor is prevented from performing obligations by FM for which it has given notice under clause 19.2, and incurs Cost by reason of the notified FM it may, subject to giving notice under clause 20.1, be entitled to payment of this Cost. This entitlement only arises if the FM is an event or circumstance of the kind listed in clauses 19.1(i) to (iv) and, for some of these events, only if they occur in the 'Country'.³

The events listed in clauses 19.1(i) to (iv) can loosely be described as 'man-made' (war, rebellion, riot, etc) although some (ionising radiation for example) are not necessarily 'man-made'. 'Natural catastrophes' (which appear in clause 19.1(v)) are not compensated with Cost. Parties signing up to FIDIC contracts must be aware of this risk allocation.

Covid-19 does not fall within the events listed in clauses 19.1(i) to (iv) since epidemic, or pandemic, do not feature. If anything, Covid-19 would most likely be categorised as a 'natural catastrophe', for which Cost is not compensated.

³ 'Country' is defined as the country in which the Site, or most of it, is located where the Permanent Works are to be executed.



Accordingly, it seems that the Contractor will only be entitled to Cost for Covid-19 if the consequences of the pandemic fall within the limited circumstances listed in clauses 19.1(i) to (iv). So, for example, if a consequence of the pandemic is the assumption of military power⁴ to enforce a lockdown, or riots⁵ in case of dire shortage of food or medicine, the Contractor may be entitled to Cost. Contractors may try to argue that a lockdown equates to 'lockout'⁶ although, as this appears by 'strike', it was presumably intended to refer to labour conflict and (it is suggested) the list would need to be given a broad interpretation for this argument to succeed.

The limited circumstances in which Cost is compensated may seem 'unfair' to the Contractor in the context of Covid-19. Some DABs or arbitral tribunals may, in due course, sympathise with the Contractor's position and may feel encouraged to do so by guidance issued by some governments.⁷ However, what may be 'fair' in a given situation may not reflect the parties' pre-agreed allocation of risk and may raise difficult questions about the perspective from which 'fairness' is to be judged.

Other provisions in FIDIC 1999

The Contractor may be entitled to time or money in respect of Covid-19 and its consequences under other provisions, even where there is no FM, or in addition to FM. Entitlement is always subject to giving notice under clause 20.1.

These clauses are:

Clause 8.4 (FIDIC 1999 Red and Yellow Books). Under this clause, the Contractor may be entitled to an extension of time if it is or will be delayed by Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions. There is no equivalent provision in the FIDIC 1999 Silver Book. 'Unforeseeable'

⁴ 'Military ... power' is listed in clause 19.1(ii). The English version of the FIDIC forms refers to 'military or usurped power' whereas the Spanish version refers to 'usurpación del poder o asunción militar de éste' which roughly translates as 'usurpation of power or military assumption of power' and the French version refers to 'putsch militaire ou usurpation de pouvoir' which roughly translates as 'military putsch or usurpation of power'. So, whereas the English version covers a military or other coup d'état as well as the use of military power by the incumbent government, the Spanish and French versions do not seem to allow for the latter.

⁵ 'Riot' is listed in clause 19.1(iii).

⁶ 'Lockout' is listed in clause 19.1(iii).

means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender. Although Covid-19 is classed by the WHO as a pandemic this, it is suggested, is analogous here to an epidemic. The pandemic, or governmental actions in respect of Covid-19 including the implementation of measures to try to stop the virus spreading, are likely to cause Unforeseeable shortages in personnel or Goods.

Clause 8.5. Under this clause, the Contractor may be entitled to an extension of time where it has diligently followed procedures laid down by public authorities in the Country, but those authorities delay or disrupt the Contractor's works and this delay or disruption was Unforeseeable. This may apply to action taken by the government or authorities in the Country in respect of Covid-19 which delays or disrupts the Contractor, for example, imposing a lockdown.

Clause 13.7.⁸ Under this clause, the Contractor may be entitled to an extension of time or Cost if the Contractor suffers delay or incurs Cost as a result of changes in the 'Laws of the Country' or changes to the interpretation of those Laws. 'Laws' is widely defined. In some countries, measures to deal with Covid-19 have been introduced under existing Laws or those existing Laws have not been interpreted any differently than before. In these cases, clause 13.7 may not apply. In other countries, new Laws have been introduced to deal with Covid-19, so clause 13.7 may apply.

FIDIC 2017

Exceptional Events

In the 2017 forms, FIDIC abandons the term 'Force Majeure', possibly because it has a defined meaning in some civil law systems, and instead uses the term 'Exceptional Events', which are dealt with in clause 18. As a result, the requirement for the event or

⁷ For example, on 7 May 2020 the UK government published nonstatutory guidance to parties to contracts impacted by the Covid-19 emergency entitled 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency'. At paragraph 15, this 'strongly encourages', among other things, 'responsible and fair behaviour' in relation to 'requesting, and allowing, extensions, substitute or alternative performance and compensation, including compensation for increased cost or additional performance.'

⁸ Arguably clause 13.7 requires notice to be given under that clause as well as a clause 20.1 notice.



circumstance to be 'exceptional' no longer features in the definition. Strikes and lockouts are separated from the 'riot' item in the list of events in clause 18.1. As in the 1999 forms, the events on this list may give entitlement to Cost except for the last item which is still 'natural catastrophes'. In the 2017 forms, if the Exceptional Event has a continuing effect, the affected Party must give notice under clause 18.2 describing the effect every 28 days after giving the first notice.

Advance warning

Clause 8.4 contains a new requirement for a Party or the Engineer to give advance warning about 'any known or probable future events or circumstances' which may adversely affect (essentially) the outcome of the Works. This obligation to give advance notice will likely occur before the moment from which time starts running for the clause 18.2 notice of an Exceptional Event.

Unforeseeable shortages

Clause 8.5 (Red and Yellow Books) gives the Contractor entitlement to an extension of time in case of Unforeseeable shortages in the availability of personnel or Goods or Employer-Supplied Materials caused by epidemic or governmental actions. In the Silver Book, the equivalent entitlement only arises in case of an Unforeseeable shortage of Employer-Supplied Materials.

Applicable Laws

Parties should keep in mind that, in addition to the Contract, the applicable Laws may give protection in respect of Covid-19 and its consequences or may give the Contractor entitlement to time or cost. In some jurisdictions, legislation has been enacted specifically to give parties relief from the consequences of non-performance of contracts because of the pandemic.⁹ In other jurisdictions, governments have declared that the pandemic is a force majeure event for all contracts.¹⁰ Parties to FIDIC contracts should ensure that they are informed of such measures and should be aware of potential conflicts between this sort of legislation or decree and the provisions of their contracts which may otherwise apply.

Evolving situation

The consequences of Covid-19 are constantly evolving. Some countries remain in full lockdown while others are slowly easing out of lockdown. Further lockdowns remain a possibility in case of future spikes of the virus.

It is possible that some FIDIC contracts will be terminated because of continued prevention (clause 19.6) or that parties may be discharged from further performance because of impossibility (clause 19.7). As lockdowns ease, parties may no longer be prevented from performing their obligations but, instead, the Works may be more costly, delayed, or less efficient, especially where supply chains are involved. Claims for delay, disruption and additional cost as a result of the pandemic therefore seem likely. It is important that parties maintain full and accurate records of prevention, delays and disruption that may have been caused as a result of the pandemic.

Parties may be trying to cooperate and to act as responsibly and fairly as they can in the current conditions. This may be required by law in some jurisdictions, for example, those that require parties to act in good faith. In other jurisdictions, governments may intervene to introduce measures requiring cooperation where the pandemic is concerned or they may issue guidance notes to encourage this.¹¹

Conclusion

Although applicable Laws or government interventions as a result of Covid-19 may affect FIDIC contracts throughout the world, in many cases the parties' strict contractual rights and obligations, which reflect their earlier decisions regarding risk allocation, are likely to remain in place. It is therefore important that parties undertake careful periodic reviews of their contracts in light of the evolving Covid-19 situation to ensure that they are fully aware of these rights and obligations and that they continue to give appropriate notices to protect their positions.

⁹ For example, in Singapore the 'COVID-19 (Temporary Measures) Act 2020'.

¹⁰ For example, in Iraq

¹¹ For example, the UK government's publication referred to above entitled 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency.'

