FIDIC 1999 Books – Commentary on Clause 15

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Summary

Clause 15 deals with Termination by the Employer.

Sub-Clause 15.1 deals with a Notice to Correct. This permits the Engineer to issue a Notice to the Contractor about a failure to carry out any obligation under the Contract. The Engineer can require that the Contractor make good the failure and remedy it within a specified reasonable time.

Sub-Clause 15.2 deals with Termination by the Employer. There are six grounds specified. In most cases the Employer may give 14 days' notice if it intends to terminate the contract; however, where the Contractor has become bankrupt or insolvent etc. under Sub-Clause 15.2(e) or gives a bribe, gift, inducement, or reward etc. under Sub-Clause 15.2(f) then the Employer may by notice terminate immediately. The Contractor must then leave the Site and deliver any required Goods, all Contractor's Documents and other design documents made by or for him to the Engineer.

Sub-Clause 15.3 deals with valuation at the date of Termination. When termination has taken effect the Engineer is required to determine the value of the Works, Goods and Contractor's Documents, and any other sums due to the Contractor for work executed in accordance with the Contract.

Sub-Clause 15.4 deals with Payment after Termination. Once termination under Sub-Clause 15.2 [*Termination by Employer*] has taken effect, then the Employer may:

- proceed in accordance with Sub-Clause 2.5;
- withhold further payments to the Contractor; and
- recover from the contractor any losses and damages incurred by the Employer and the extra costs of completing the Works.

Sub-Clause 15.5 deals with the Employer's Entitlement to Terminate. This is a termination at will provision that allows the Employer to terminate the Contract by giving 28 days' notice, so long as the Employer does not intend to have the Works executed by himself or another contractor. In the event that termination occurs under this Sub-Clause then the Contractor is paid under Sub-Clause 19.6 [*Optional Termination, Payment, and Release*].

Origin of clause

The Notice to Correct provisions as well as the Employer's Entitlement to Terminate are new to the FIDIC Red Book 1999. The termination and payment provisions on termination in Clause 15 of FIDIC 1999 had its origins in the 4th Edition Red Book Clause 63.

Cross-references

Reference to Clause 15 is found in the following clauses:

- Sub-Clause 4.2 [*Performance Security*]
- Sub-Clause 4.4 [*Subcontractors*]
- Sub-Clause 8.7 [*Delay Damages*]
- Sub-Clause 16.3 [*Cessation of Work and Removal of Contractor's Equipment*]

Clause 15.1 Notice to Correct

Some terminations are possible even if the Employer has not given a notice to correct under Sub-Clause 15.1. (See Sub-Clause 15.2 below); however, the notice to correct procedure may open a way to termination

on grounds which might not normally be thought to justify termination.

This Sub-Clause is new to the present edition and represents a substantial change from the previous situation. Previously it was only a persistent or flagrant failure to meet obligations that could lead to a termination following notice to comply with obligations. Now mere failure to comply may lead directly to termination. The Contractor will need to treat any notice given under Sub-Clause 15.1 very seriously.

Notable features of this Sub-Clause are as follows:

1. it applies if the Contractor fails to carry out any obligation under the Contract;
2. the notice is to make good the failure and to remedy it;
3. *de minimis* and insignificant breaches; and
4. the Contractor must be given a reasonable time for the making good and remedy of the failure.

1. It applies if the Contractor fails to carry out any obligation under the Contract.

This is as broad as such a provision can be. On its face it would appear that the obligation need not be an important or material obligation and there is no time limitation. It would seem that it is possible for the Engineer to give a notice in respect of a failure which occurred months or years earlier and which then had, and still has, no significant impact on the Contract's operation. However recent case law has suggested that a Notice to Correct must relate to a more than insignificant contractual failure and it would not be possible to give a Notice to Correct if, by the time the notice is given, the obligation the Contractor has failed to carry out can no longer be remedied or has been remedied.

There are many examples of where a Contractor might fail to carry out an obligation which can no longer be remedied or has been remedied. For example under Sub-Clause 4.18 the Contractor is required, amongst other things, to ensure that emissions do not exceed values indicated in the specification. The Contractor might have allowed emissions early in the Contract contrary to this requirement but has remedied the situation later on. Nonetheless an emission is an emission – once it has been emitted it has been emitted, so the default remains forever. The Contractor will therefore have failed to carry out its obligation at that time, even though it is now too late to do anything about it. Obviously if the illegal emissions continue, a Notice to Correct could apply to future emissions.

It is also suggested that where what may be described as an obligation is in fact a pre-condition (for example the notice requirements without which a claim under Clause 20.1 will fail, or the requirements for an application for payment under Clause 14.3 without which the Employer is not obliged to pay for Work done), this cannot be the basis of a Notice to Correct. These are pre-conditions, of which a failure to obey may prejudice the Contractor's position, but are not strictly obligations under the Contract.

However some obligations which are not pre-conditions and might otherwise be difficult to enforce, such as the obligation to provide particulars of claim under Sub-Clause 20.1 after the initial notice, may be the subject of a Notice to Correct.

The Contract includes dozens of obligations on the Contractor's part, any one of which (subject to the above reservations) could form the basis of a Notice to Correct. The following is a list of all the obligations which might form the basis of a Notice to Correct. Some of these obligations may seem insignificant or trivial. However once a Notice to Correct has been given, the basis of any termination which might follow will not be the initial breach, but the failure to correct.

Clause	Obligation	Comment
1.7 Assignment	Not to assign the whole or any part of the Contract or any benefit in or under the Contract without the prior agreement of the other Party. (There is an exception to allow assignment of the right to any moneys due to a bank or financial institution).	
1.8 Care and Supply of Documents	Contractor to supply 6 copies of each Contractor Document.	
	Contractor to keep on Site copy of Contract, publications named in Specification, Contractor's Documents, Drawings, Variations, and other communications.	
	Employer's Personnel to be given access to such document.	
	Contractor to give notice to Employer of any defect in	

Clause	Obligation	Comment
	documents of a technical nature.	
1.9 Delayed Drawings or Instructions	Contractor to give notice to the Engineer whenever the Works are likely to be delayed or disrupted if any necessary drawing or instruction is not issued within a particular reasonable time.	
1.11 Contractor's use of Employer's Documents	Contractor not to copy, use communicate Employer's Documents to third parties except as necessary for the Contract.	
1.12 Confidential Details	Contractor to disclose confidential and other information as the Engineer may reasonably require in order to verify its compliance with the Contract.	This right may be very valuable to the Employer or Engineer when dealing with claims or disputes. The Contractor may prefer the Engineer or Employer not to see this information, but the Engineer or Employer can use the Notice to Correct procedure to insist on compliance.
1.13 Compliance with Laws	Contractor shall in performing the Contract comply with applicable Laws.	
1.13(b)	Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals.	
1.14 (b) Joint and Several Liability	If Contractor is a joint venture or consortium or other grouping they shall notify Employer of their leader.	
	The leader shall have authority to bind the Contractor.	
1.14(c)	If Contractor is a joint venture, consortium, or other grouping it shall not alter its composition or legal status without prior	

Clause	Obligation	Comment
	consent of the Employer.	
3.3 Instructions of Engineer	Contractor shall comply with instructions given by the Engineer or delegated assistant on any matter related to the Contract	
4.1 Contractor's General Obligations	Design to the extent specified in the Contract.	
	Execute the Works in accordance with the Contract and the Engineer's Instructions.	
	Complete the Works in accordance with the Contract and the Engineer's Instructions.	
	Provide the Plant specified in the Contract.	
	Provide the Contractor's Documents specified in the Contract.	
	Provide all Contractor's Personnel required in and for the design, execution, completion and remedying of defects.	
	Provide all Goods required in and for the design, execution, completion and remedying of defects.	
	Provide all consumables required in and for the design, execution, completion and remedying of defects.	
	Provide all other things and services required in and for the design, execution, completion and remedying of defects.	
	Contractor is responsible for the adequacy of all Site operations.	
	Contractor is responsible for the stability of all Site operations.	
	Contractor is responsible for the safety of all Site operations.	
	Contractor is responsible for the adequacy of all methods of construction.	
	Contractor is responsible for the stability of all methods of construction.	

Clause	Obligation	Comment
	Contractor is responsible for the safety of all methods of construction.	
	Contractor is responsible for all Contractor's Documents.	
	Contractor is responsible for Temporary Works.	
	Contractor is responsible for such design of each item of Plant as is required for the item to be in accordance with the Contract.	
	Contractor is responsible for such design of each item of Materials as is required for the item to be in accordance with the Contract.	
	Contractor shall, whenever required by the Engineer, submit details of the arrangements which the Contractor proposes to adopt for the execution of the Works.	
	Contractor shall, whenever required by the Engineer, submit details of the methods which the Contractor proposes to adopt for the execution of the Works.	
	Contractor shall not make significant alteration to arrangements or methods which it proposes to adopt for the execution of the Works without having previously notified this to the Engineer.	
4.1(a)	If the Contract specifies that the Contractor shall design any part of the Permanent Works, then the Contractor shall submit to the Engineer the required Contractor's documents in accordance with the Contract procedures.	
4.1(b)	The Contractor's Documents shall be in accordance with the Specification.	
	The Contractor's Documents shall be in accordance with the Drawings.	
	The Contractor's Documents shall be in the language of the Contract.	
	The Contractor's Documents	

Clause	Obligation	Comment
	shall include additional information required by the Engineer to add to the Drawings for co-ordination of each Party's designs.	
4.1(c)	Any part designed by the Contractor shall when the Works are completed be fit for purpose.	
4.1(d)	Prior to Tests on Completion Contractor shall submit "as-built" documents and operation and maintenance manuals which are both in accordance with the Specification and in sufficient detail for the Employer to operate, maintain, dismantle, reassemble adjust and repair this part of the Works.	
4.2 Performance Security	Separate provision (not necessary to consider as subject to notice to correct).	
4.3 Contractor's Representative	Contractor to appoint Contractor's Representative.	
	Contractor to give Contractor's Representative all authority necessary to act on the Contractor's behalf under the Contract.	
	Contractor shall provide full particulars of Contractor's Representative.	
	Contractor shall provide full particulars of new Contractor's Representative if original is not approved or fails to act.	
	Contractor shall not revoke appointment of Contractor's Representative or appoint new one without Engineer's consent.	
	The whole time of the Contractor's Representative shall be given to directing the Contractor's performance of the Contract.	Very easy to be breached.
	A suitable person to replace Contractor's Representative in his absence subject to Engineer's consent and with notice to the Engineer.	
	The Contractor's Representative shall be fluent in the language of	

Clause	Obligation	Comment
	the Contract.	
4.4 Subcontractors	The Contractor shall not subcontract the whole of the Works.	
4.4(b)	The Engineer's prior consent shall be obtained for proposed Subcontractor's not named in the Contract.	
4.4(c)	Contractor shall give Engineer at least 28 days' notice of the intended date of commencement of each Subcontractor's work.	
	Contractor shall give Engineer notice of commencement of each Subcontractor's work on the Site.	
	Each Subcontract shall include provisions which would entitle the Employer to require the Subcontract to be assigned to the Employer.	
4.6 Cooperation	The Contractor shall, as specified in the Contract, allow appropriate opportunities (including use of Contractor's Equipment, Temporary Works, or access arrangements) for carrying out work to the Employer's Personnel.	
	The Contractor shall, as specified in the Contract, allow appropriate opportunities for carrying out work(including use of Contractor's Equipment, Temporary Works, or access arrangements) to any other Contractors employed by the Employer.	
	The Contractor shall, as specified in the Contract, allow appropriate opportunities (including use of Contractor's Equipment, Temporary Works, or access arrangements) for carrying out work to the personnel of any legally constituted public authorities.	
	If the Employer is required to give the Contractor access in accordance with Contractor's Documents the Contractor shall submit such documents to the Engineer in accordance with the	

Clause	Obligation	Comment
	Specification.	
4.7 Setting Out	The Contractor shall set out the Works in relation to the original points lines and levels of reference specified or notified.	
	The Contractor shall be responsible for the correct positioning of all parts of the Works.	
	The Contractor shall be responsible for the rectification or any error in the positions, levels, dimensions, or alignment of the Works.	
4.8(a) Safety Procedures	The Contractor shall comply with all applicable safety regulations.	
4.8(b)	The Contractor shall comply with all applicable safety regulations.	
4.8(c)	The Contractor shall use reasonable efforts to keep the Site and Works clear of unnecessary obstruction so as to avoid danger.	
4.8(d)	Provide fencing, lighting, guarding, and watching of the Works.	
4.8(e)	Provide any Temporary Works which may be necessary for the use and protection of the public.	
4.9 Quality Assurance	The Contractor shall institute a quality assurance system in accordance with the Contract.	
	Details of all procedures and compliance documents shall be submitted to the Engineer before each design and execution stage.	
	All documents shall show Contractor's approval.	
4.12 Unforeseeable Physical Conditions	Contractor to give notice where he encounters adverse physical conditions which he considers to have been Unforeseeable.	
	Contractor to continue executing the Works after encountering physical conditions.	
	Contractor shall comply with instructions of Engineer relevant to Unforeseeable physical conditions.	

Clause	Obligation	Comment
4.13 Rights of Way and Facilities	The Contractor shall obtain any additional facilities outside the Site which he may require for the purpose of the Works.	
	The Contractor shall bear all costs and charges for special and/or temporary rights-of-way.	
4.14 Avoidance of Interference	Contractor shall not interfere unnecessarily or improperly with the convenience of the public.	
	Contractor shall not interfere unnecessarily or improperly with access to and use and occupation of all roads and footpaths.	
4.15 Access Route	The Contractor shall use reasonable efforts to prevent any road or bridge from being damaged by the Contractor's traffic or the Contractor's Personnel.	
	The Contractor shall be responsible for any maintenance which may be required for his use of access routes.	
	The Contractor shall provide all necessary signs or directions along access routes.	
	The Contractor shall obtain any permission required from relevant authorities for use of access, signs, or directions.	
4.16 Transport of Goods	Contractor shall give Engineer not less than 21 days' notice of the date on which any Plant or a major item of other Goods will be delivered to the Site.	
4.17 Contractor's Equipment	Contractor's Equipment on Site shall be used exclusively for execution of the Works.	This is an interpretation of the Clause which in fact says: *Contractor's Equipment shall be deemed to be exclusively intended for execution of the Works.*
	Contractor shall not remove from the Site any major items of the Contractor's Equipment without	

Clause	Obligation	Comment
	the consent of the Engineer.	
4.18 Protection of the Environment	Contractor shall take all reasonable steps to protect the environment both on and off the Site	
	Contractor shall take all reasonable steps to limit damage and nuisance to people and property resulting from pollution, noise, and other results of his operations.	
	Contractor shall ensure that emissions, surface discharges and effluent from the Contractor's activities shall not exceed the values indicated in the Specifications.	
	Contractor shall ensure that emissions, surface discharges and effluent from the Contractor's activities shall not exceed the values prescribed by Applicable Laws.	
4.19 Electricity, Water, and Gas	Contractor shall provide any apparatus necessary for his use of electricity water and gas and for measuring the quantities used.	
4.20 Employer's Equipment and Free-Issue Material	The free issue materials shall come under the care custody and control of the Contractor.	
4.21 Progress Reports	Unless otherwise provided monthly progress reports shall be submitted by the Contractor to the Engineer in six copies.	
	Each report shall be submitted within 7 days of the last day of the period to which it relates.	
	Each report shall include: (a) charts and detailed descriptions of progress, including each stage of design (if any), Contractor's Documents, procurement, manufacture, delivery to Site, construction, erection, and testing; and including these stages for work by each nominated Subcontractor (as defined in Clause 5 [*Nominated*	

Clause	Obligation	Comment
	Subcontractors]); (b) photographs showing the status of manufacture and of progress on the Site; (c) for the manufacture of each main item of Plant and Materials, the name of the manufacturer, manufacture location, percentage progress, and the actual or expected dates of: (i) commencement of manufacture, (ii) Contractor's inspections, (iii) tests, and (iv) shipment and arrival at the Site; (d) the details described in Sub-Clause 6.10 [*Records of Contractor's Personnel and Equipment*]; (e) copies of quality assurance documents, test results and certificates of Materials; (f) list of notices given under Sub-Clause 2.5 [*Employer's Claims*] and notices given under Sub-Clause 20.1 [*Contractor's Claims*]; (g) safety statistics, including details of any hazardous incidents and activities relating to environmental aspects and public relations; and (h) comparisons of actual and planned progress, with details of any events or circumstances which may jeopardise the completion in accordance with the Contract, and the measures being (or to be) adopted to overcome delays.	
4.22 Security of the Site	Contractor shall keep unauthorised persons off the Site.	
4.23 Contractor's Operations on Site	Contractor shall confine operations to Site and additional agreed areas.	
	Contractor shall take all necessary precautions to keep Contractor's Equipment and Contractor's Personnel within the Site and additional agreed areas.	
	Contractor shall take all necessary precautions to keep Contractor's Equipment and Contractor's Personnel off adjacent land.	
	Contractor shall keep Site free from unnecessary obstruction Contractor shall store or dispose of Contractor's Equipment or surplus materials	
	Contractor shall clear away from and remove from the Site any wreckage, rubbish and Temporary Works no longer required.	
4.24 Fossils	All fossils, coins, articles of value or antiquity and structures and other remains or items of geological or archaeological interest found on Site shall be placed under due care and authority of the Employer.	
	On finding any such items Contractor shall promptly notify Engineer.	
5.3 Payments to Nominated Sub-Contractor's	Contractor shall pay to the Nominated Subcontractor the amounts which the Engineer certifies.	
5.4 Evidence of Payments	If Engineer requests Contractor to supply evidence that Nominated Subcontractor has received all amounts due, Contractor shall submit this evidence or provide evidence that the Contractor has the right to withhold the amounts and the Subcontractor has been so notified.	
6.2 Rates of Wages and Conditions of Labour	Contractor shall pay rates and observe conditions of labour which are not lower than those established for the trade or industry where the work is carried out.	

Clause	Obligation	Comment
	If no rates established Contractor shall pay rates and observe conditions of labour which are not lower than the general level of wages and conditions observed locally by employers whose trade or industry is similar to that of the Contractor.	
6.3 Persons in the Service of the Employer	Contractor shall not recruit or attempt to recruit staff and labour from amongst the Employer's Personnel.	
6.4 Labour Laws	Contractor shall comply with all relevant labour laws including employment, health, safety, welfare, immigration, and emigration in relation to own and Subcontractor employees.	
	Contractor shall require employees and subcontractor employees to obey all applicable laws including safety laws.	
6.5 Working Hours	No work on Site on local holidays or outside working hours in Appendix to Tender unless otherwise stated in Contract, agreed, or emergency.	
6.6 Facilities for Staff and Labour	Contractor to provide and maintain all necessary accommodation and welfare facilities for own staff and as specified for Employer's Personnel.	
	Contractor shall not permit personnel to live within structures forming part of the Permanent Works	
6.7 Health and Safety	Contractor shall at all times take all reasonable precautions to maintain the health and safety of Contractor's Personnel.	
	Contractor shall ensure medical staff, first aid facilities, sick bay, and ambulance services available at all times.	
	Contractor shall ensure that suitable arrangements are made for all necessary welfare and hygiene requirements and the prevention of epidemics.	
	Contractor shall Appoint qualified and empowered	

Clause	Obligation	Comment
	accident prevention officer.	
	Contractor shall send details of all accidents to Engineer as soon as practicable.	
	Contractor shall maintain records and make reports regarding health, safety and welfare of persons and damage to property as required by the Engineer.	
6.8 Contractor's Superintendence	Contractor shall provide all necessary superintendence to plan, arrange, direct manage, inspect, and test the Work.	
	Superintendence personnel shall have good knowledge of language of the contract and of the operations to be carried out for the safe and satisfactory execution of the Works.	
6.9 Contractor's Personnel	Shall be appropriately qualified skilled and experienced.	
	If required by Engineer will remove any person who persists in misconduct or lack of care; carries out duties incompetently or negligently; fails to conform with Contract; persists in conduct prejudicial to safety, health or the protection of the environment.	
	Contractor will replace person removed.	
6.10 Records of Contractor's Personnel and Equipment	Contractor shall monthly submit to Engineer records of personnel and equipment.	
6.11 Disorderly Conduct	Contractor shall take reasonable precautions to prevent unlawful, riotous, or disorderly conduct by its personnel and to preserve peace and the protection of persons and property on and near the Site.	
7.1 Manner of Execution	Manufacture of Plant, production and manufacture of Materials and execution of the Works to be in manner required by Contract.	
	Manufacture of Plant, production and manufacture of Materials and execution of the Works to be in a proper workman like and	

Clause	Obligation	Comment
	careful manner.	
	Manufacture of Plant, production and manufacture of Materials and execution of the Works to be with properly equipped facilities and non-hazardous Materials.	
7.3 Inspection	Contractor to give Employer's Personnel full access and protection.	
	Contractor to give notice before work is covered up.	
	If Contractor has not given such notice he shall, at request, uncover to allow inspection.	
7.4 Testing	Contractor to provide all necessary equipment and staff.	
	Contractor shall agree time and place of testing with Engineer.	
	Contractor shall promptly forward results to Engineer.	
7.5 Rejection	If the Engineer rejects anything, the Contractor shall properly make good the defect.	
7.6 Remedial Work	Even if Work not rejected, Engineer could require that it be repaired.	
8.1 Commencement of Works	Contractor shall commence the Works as soon as reasonably practicable after the Commencement Date.	
	Contractor will proceed with the Works with due expedition and without delay.	
8.2 Time for Completion	Contractor to complete the whole of the Works and each Section within the Time for Completion.	
8.3 Programme	Contractor shall submit a detailed time programme within 28 days after notice of Commencement.	
	Contractor shall submit a revised programme whenever the previous programme is inconsistent with actual progress or with Contractor's obligations.	
	Content of the Programme will include the following:	

Clause	Obligation	Comment
	(a) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design (if any), Contractor's Documents, procurement, manufacture of Plant, delivery to Site, construction, erection, and testing, (b) each of these stages for work by each nominated Subcontractor (as defined in Clause 5 [*Nominated Subcontractors*]), (c) the sequence and timing of inspections and tests specified in the Contract, and (d) a supporting report which includes: (i) a general description of the methods which the Contractor intends to adopt, and of the major stages, in the execution of the Works, and (ii) details showing the Contractor's reasonable estimate of the number of each class of Contractor's Personnel and of each type of Contractor's Equipment, required on the Site for each major stage.	
	Unless the Engineer so orders the Contractor shall proceed in accordance with the programme.	
	Contractor shall promptly give notice to the Engineer of specific probable future events or circumstances which may adversely affect the work.	
	Contractor shall promptly give notice to the Engineer of specific probable future events or circumstances which may increase the Contract Price.	

Clause	Obligation	Comment
	Contractor shall promptly give notice to the Engineer of specific probable future events or circumstances which may delay the execution of the Works.	
	Contractor will at the Engineer's request submit an estimate of the anticipated effect of the future event or circumstances or a Variation proposal.	
	Contractor shall submit a revised programme if the Engineer gives notice that a programme fails to comply with the Contract or to be consistent with actual and the Contractor's stated intentions.	
8.6 Rate of Progress	Where progress will not achieve Time for Completion or is behind programme, Engineer may instruct Contractor to submit revised programme and method statement to expedite progress and complete within time.	
	Contractor shall adopt revised methods.	
8.8 Suspension of Work	If so instructed by the Engineer, the Contractor shall suspend progress on all or part of the Works.	
	Where work is suspended on instructions of Engineer the Contractor shall protect store and secure the Works.	
9.1 Tests on Completion: Contractor's Obligations	Various obligations not dealt with here as unlikely to be relevant to termination.	
10 Employer's Taking Over	Various obligations not dealt with here as unlikely to be relevant to termination.	
11 Defects Liability	Various obligations not dealt with here as unlikely to be relevant to termination.	
12.1 Works to be Measured	Contractor's representative shall, on notice from the Engineer, assist in making the measurement and supply any particulars requested.	
	Contractor shall attend to examine and agree records.	
	If Contractor does not agree shall give notice of respect in which records are asserted to be inaccurate.	
13.1 Right to Vary	Contractor shall execute and be bound by each Variation unless it promptly gives notice that it cannot readily obtain the Goods required for the Variation.	
	Contractor shall not make any alteration and/or modification of the Permanent Works unless and until the Engineer instructs or approves a Variation.	
13.3 Variation Procedure	If Engineer requests a variation proposal Contractor shall respond as soon as practicable.	
	If Contractor can comply the following details shall be included: Description of work to be performed and a programme Proposed modification to the programme Proposal for evaluation of the Variation.	
	Contractor must acknowledge receipt of Variation.	
13.5 Provisional Sums	Contractor shall when required produce quotations, invoices, vouchers and accounts or receipts.	
13.6 Daywork	Contractor shall when required produce quotations, invoices, vouchers and accounts or receipts.	
	Contractor shall deliver accurate statements daily including names of Personnel, details of Equipment and Temporary Works and quantities and types of Plant and Materials used. After agreement the Contractor will submit priced statements of these resources.	
14.1 Contract Price		
14.1(b) Pay Taxes	Contractor shall pay all taxes, duties and fees required to be paid by him.	
14.1(d)	Contractor shall submit within 28 days of Commencement Date a proposed breakdown of each	

Clause	Obligation	Comment
	lump sum price.	
17.2 Contractor's Care of the Works	Contractor will take full responsibility for the care of the Works and Goods during carrying out of the Works except as per Employer's risks.	
	During this period the Contractor will rectify loss or damage	
17.4 Consequences of Employer's Risk	If any loss or damage occurs as a result of Employer's risk the Contractor shall promptly give notice to the Employer.	
	If any loss or damage occurs as a result of Employer's risk the Contractor shall rectify this loss or damage to the extent required by the Engineer.	
18 Insurance	Contractor shall obtain insurance for matters which it is required to insure, maintain that insurance, and not do anything which might prevent the insurance being enforceable.	
20.1 Contractor's Claims	Contractor shall keep such contemporary records as may be necessary to substantiate any claim and shall permit the Engineer to inspect such records.	
	Within 42 days after the Contractor became aware (or should have become aware) of the event or circumstance giving rise to the Claim, or within an agreed extended period, the Contractor shall provide a fully detailed claim.	
	Subsequently the Contractor shall send further interim claims at monthly intervals including such further particulars as the Engineer requires.	
	The final claim shall be submitted within 28 days of the end of the effects resulting from the event or circumstances or as agreed.	
20.4 and 20.7 DAB decision	Unless the Contractor gives a notice of dissatisfaction within 28 days the decision is final and binding.	
20.5 Amicable Settlement	Where a notice of dissatisfaction has been given both parties shall attempt to settle the dispute amicably.	

2. The notice is to make good the failure and to remedy it.

"*Make good*" is obviously intended to mean something other than "*remedy*". In the context this must mean that to "*make good*" is to undo the bad effects caused by the failure and "*remedy*" is to bring things back to the state they would have been without the failure to carry out the obligations.

Similar language is used in England in leasing agreements where a tenant is required on leaving to remedy and make good any damage he has caused while a tenant. If, for example he has cut a hole in a wall to make a door he needs to remove the door, and refill the hole ("*remedy*") and make it as good as it was when he first occupied the premises ("*make good*").

In the emission example above this would mean somehow reversing the bad effects of the emissions as well as stopping further wrongful emissions.

The language used is not 'to make good and/or to remedy', but "*make good and to remedy*". Either the Sub-Clause means that the Engineer is allowed to require the Contractor to do the impossible, and then to allow the Employer to terminate if he does not, or it is only intended to allow a notice to be given where it is possible both to make good and to remedy the defect. Thus no notice should be possible unless the obligation is one that can (in theory) both be made good and remedied. In the emission example, the consequences of the emission might be capable of being made good but it is too late to ask for remedy. Therefore no notice under Sub-Clause 15.1 can be given.

To take a different example from the emission example above, under Sub-Clause 1.3, the Contractor is required in performing the Contract, to comply with all applicable laws. In the common situation where the Contractor is only temporarily based in the country where the Works are being carried out, many Contractors, unfamiliar with the local environment may find themselves in breach of one regulation or another. Say, for example, the Contractor does not register for VAT when this is its obligation under local law, this is something which is capable of "*remedy*" (by late registration) and also of "*mak*[ing] *good*" (late

registration undoes the harm which was done in the first place).

However, there are situations where it is possible to remedy but not make good. It is an obligation of the Contractor under Sub-Clause 6.7 "*at all times to take all reasonable precautions to maintain the health and safety of all the Contractor's Personnel*." If, as a result of its failure to take all reasonable precautions, a worker is killed, it is too late to make good the default but it may not be too late to remedy the breach – by introducing appropriate or additional precautions. Arguably no notice could be given because the breach was not capable of making good and remedying.

The FIDIC guide itself overlooks the reference to both "*make good*" and "*remedy*" – it refers only to "*remedy*" and gives the following advice about the way in which the notice should be given: -

The notice of remedy should:

- state that it is given under this sub-clause;
- describe the nature of the Contractor's failure;
- specify a reasonable time within which the Contractor is to remedy the failure.

3. *De minimis* and insignificant breaches.

In the case of *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[1] the court had to consider whether Sub-Clause 15.1 could be used for any type of breach, irrespective of how insignificant it was. Despite the fact that there are no restrictions on the types of obligation that Sub-Clause 15.1 will apply to, and the nature of the breaches, the court concluded not every breach of an obligation was subject to Sub-Clause 15.1. Akenhead J stated:

> "Clause 15.1 relates only to more than insignificant contractual failures by the Contractor. It could be a health and safety failure, bad work, serious delay on aspects of the work or the like. It will need to be established as a failure to comply with the Contract. Something may have not yet become a failure; for instance the delivery to site of the wrong type of cement may not become a failure until the cement is or is about to be used."

[1] [2014] EWHC 1028 [318].

A *de minimis* failure to comply with the Contract will therefore not entitle an Engineer to issue a Sub-Clause 15.1 notice. Akenhead J. in *Obrascon*[2] then proceeded to state:

> "It follows that, in construing both Clauses 15.1 and 15.2 of the Contract, a commercially sensible construction is required.[3] The parties cannot sensibly have thought (objectively) that a trivial contractual failure in itself could lead to contractual termination. Thus, there being one day's culpable delay on a 730 day contract or 1m² of defective paintwork out of 10,000m² good paintwork would not, if reasonable and sensible commercial persons had anything to do with it, justify termination even if the Contractor does not comply with a Clause 15.1 notice. What is trivial and what is significant or serious will depend on the facts."

The editors of *Hudson's Building and Engineering Contracts* (12th edn.) support this position and state at para 8.056:

> "Termination clauses occasionally allow termination on the ground of "any breach" or "any default". Although in principle, parties may agree whatever they wish, the courts will generally be reluctant to read such wording literally. "Default" will be read as meaning a default relevant to the contract, and the courts will treat matters which are not a breach of contract as excluded from the meaning of default. "Any breach" will be held to refer only to important breaches, to exclude minor breaches, and to include only such breaches as are of substantial importance."

[2] *Ibid* at [321].

[3] See also *Mannai Investment Co Ltd v Eagle Star Assurance Company Ltd* [1997] UKHL 19.

4. The Contractor must be given a reasonable time for the making good and remedy of the failure.

What time is reasonable must depend on the nature of the default. An Employer giving notice cannot afford to take the risk that the time given is not reasonable – if a DAB or Arbitral Tribunal were later to find that the time given was not reasonable the entire termination process would fail. So the wise Employer will be not only reasonable but generous in the time it gives the Contractor to make good and remedy.

The reasonable time will depend upon how long it will realistically take to make good and remedy the failure. This may sometimes be a very long time. If for example the failure consisted of using inferior materials within a building or structure, the making good might require substantial demolition and therefore a very substantial time. A failure on the part of the Contractor to provide a programme or updated programme required under Clause 8.3 might *reasonably* only require 2-3 weeks – assuming the Contractor had the software and the staff to do it and had been making the necessary preparations. But in many situations this is unrealistic. The Employer is unlikely to have got to the point of giving notice unless the Contractor is having the greatest difficulty preparing its programmes. So what is a reasonable time? The time it would take a normal Contractor to comply with sub-Clause 8.3 or the time it would take a Contractor with the defects of the specific Contractor party to this Contract to prepare it. The Sub-Clause gives no guidance and either argument might be valid in some circumstances. The wise Employer, however impatient by this stage will give what it judges to be more than enough time.

In *Obrascon,*[4] Akenhead J. stated as follows:

> "The specified time for compliance with the Clause 15.1 notice must be reasonable in all the circumstances prevailing at the time of the notice. Thus, if 90% of the workforce had gone down with cholera at that time, the period given for compliance would need reasonably to take that into account, even if that problem was the Contractor's risk. It may well be relevant to take into account whether the Clause 15.1 notice is coming out of the blue or if the subject matter has been raised before and the Contractor has chosen to ignore what it has been told. What is reasonable is fact sensitive."[5]

In the appeal in *Obrascon,*[6] the Court of Appeal held that there was no challenge to the correctness of the analysis undertaken by Akenhead J.

The FIDIC Guide gives the following advice:

> "If the Time for Completion expired before the notice is issued but the Works have not been completed and the notice requires the Contractor to make good this failure and to complete the Works within a specified time, it may be desirable for the notice to state that it is given without prejudice to the Employer's rights under the Contract or otherwise. If the notice does not mention this matter, it may be construed as indicating that the Employer is waiving his entitlement to delay damages in respect of the period up to the expiry of the "specified reasonable time". Sub-Clause 8.7 does not mention this aspect, so as to avoid any effect on the applicability of Clause 15."

15.2 Termination by Employer

The Sub-Clause provides multiple ways for the Employer to terminate the Contractor. Some of these are easier to apply than others and, since it is almost inevitable that an Employer's termination will be contested in arbitration, the Employer needs to approach the possibility of termination with the greatest of care.

Almost invariably, Employers will only consider termination where the contract has encountered multiple problems. In such a situation it is more than likely that the Contractor will also be looking for ways to exercise its right to terminate. Thus it is common for both Parties to serve notices of termination very quickly after one another.

[4] [2014] EWHC 1028 [318].

[5] See also *Shawton Engineering Ltd v. DFP International Ltd* [2005] EWHC Civ 1359 [69].

[6] [2015] EWCA Civ 712 (09 July 2015) [114].

If the Employer, in its notice of termination, relies on a ground which may have only occurred in circumstances where the Contractor also has the right to terminate, the subsequent dispute will be about who had the right to terminate and the risks are high that the Employer's termination will be regarded as invalid in the face of the Contractor's legitimate rights to behave as it has.

A very common example is where the Employer exercises its right relying on Clause 15.2 ground (a) – alleging that the Contractor has abandoned the Works or otherwise plainly demonstrated the intention not to continue performance of his obligations under the Contract or ground (c), failing without reasonable excuse to proceed with the Works in accordance with Clause 8. The Employer will undoubtedly be able to point to very serious performance failures on the part of the Contractor – if not the Employer would certainly not have relied on this ground to terminate. However the Contractor will have his own reasons for abandoning the Works or slowing to the extent that the Employer thinks he is about to abandon. Whether he is at fault or not, he will certainly have some arguments to explain why he has been so treated that he cannot go on. The Employer will have decided (or have been advised by the Engineer) that these reasons are unsupportable, but that is not to say they will not gain some sympathy from an arbitral tribunal. Battle will be joined on the basis of these conflicting views of why the Contractor was not performing and the outcome will be far from certain.

To avoid this situation, the Employer is far better advised to try to identify grounds for termination which do not depend on who may have been at fault in the lead-up to the termination. If there are serious concerns about the Contractor's manner of carrying out its obligations under the Contract, there should be the basis for a series of notices to correct under Clause 15.1. If the Contractor is really under-performing it will not be able to make good and remedy within a reasonable time, and there should be several clear grounds for termination.

Whichever ground is chosen, the best advice is to be very well prepared. The Contractor will know things the Employer does not know and the process of arbitration will mean that the facts will be examined in a degree of detail which never occurs in the normal administration of a contract.

Dealing with specific grounds in Clause 15.2 in detail

15.2(a): fails to comply with Sub-Clause 4.2 [Performance Security] or with a notice under Sub-Clause 15.1 [Notice to Correct].

The failure to comply with Sub-Clause 4.2 [*Performance Security*] speaks for itself.

The requirements relating to a Sub-Clause 15.1 notice to correct are set out above. An Employer cannot rely on a notice to correct which has been wrongly given by the Engineer in order to terminate the contract. In *ICS (Grenada) Ltd v NH International (Caribbean) Ltd*[7] the arbitrator had found that instructions given by the Engineer had been wrongly given as the defective work was not as a result of defective workmanship or design for which the contractor was responsible. The arbitrator concluded that the termination under Clause 63.1 of FIDIC's 4th edn. was unjustified since it was based on the legitimacy of the said instructions. The High Court of Trinidad and Tobago agreed with this finding by the arbitrator.[8]

15.2(b): abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract.

"Abandons" is a word which was itself abandoned in the previous edition of the FIDIC contract, though it had been used before in earlier editions. The expression used in the 4th Edition was "*repudiate the Contract*" and the legal effect of *"abandon or plainly demonstrate the intention not to continue performance of his obligations"* is probably intended to have the same meaning.

However, the word "*abandon*" has its own problems. In a situation where the Contractor's work has slowed to a crawl, or where he is doing no on-going work but is continuing security on the Site it may be arguable that he has not actually abandoned the Works. Unless the Contractor has disappeared from the Site without any pretence at all of continuing the work, an Employer who wants to rely on this ground may be better served by identifying more specific grounds in addition to the abandonment ground.

Similarly, the phrase "*plainly demonstrates the intention not to continue performance of his obligations*" may sometimes be unarguable, but if the

[7] HCA No. Cv. 1541 of 2002.

[8] *Ibid* at page 19 of 33.

acts which, in the Employer's view, demonstrate such intention occur in the midst of a dispute in which the Contractor is alleging some serious breaches of contract on the part of the Employer or some difficult external problem such as Unforeseeable Physical Conditions, the Employer will be best advised to look for other more specific grounds on which to found a termination.[9] What may seem a "*plain demonstration"* in the midst of an acrimonious dispute may not seem so plain once all the facts have been carefully assembled by the Contractor for a DAB hearing or for arbitration.

There are a number of situations where, without actually abandoning the Works a Contractor can be said to have demonstrated its intention not to continue to perform its obligations – some examples are as follows:

- **The Contractor indicates that it will only continue the Works if the Employer immediately meets claims which the Engineer or Employer has avoided addressing.**

  This is a common situation where the relationship has become difficult. The Contractor may have made an application for an extension of time which the Engineer is delaying determining. There will often be arguments about whether the Contractor has provided adequate grounds for the extension. The Contractor, in frustration, advances some basis on which it believes it has the right to terminate and threatens to give notice of termination unless the extension of time is granted. Unless it is absolutely clear that the Contractor's basis of termination is entirely invalid it would be dangerous here for the Employer to terminate on the grounds of a demonstrated intention on the part of the Contractor not to perform its obligations.

- **The Contractor claims unforeseeable physical conditions - probably under Clause 4.12 – and then slows work to a crawl saying that he will resume once a decision to issue a variation order is made.**

  The Contractor has no right to stop working while awaiting a variation order, but the Employer will find it hard (though not impossible) to show that the Contractor has abandoned the works or demonstrated his intention not to continue to perform his obligations. If the Employer wants to terminate, he should rely not only on Clause 15.2(b) but also on as many other grounds as he can identify.

  It would be dangerous also to assume that Clause 15.2(b) is exactly equivalent to its predecessor, "*repudiation*", because there can be a repudiation where a party demonstrates its intention not to perform substantially all its obligations; or where what it shows it intends not to perform is the substance of the Contract. Clause 15(2)(b) is written in much more general terms, and it is difficult to read it as meaning anything other than requiring that the Contractor has demonstrated that it intends to not to perform any of its remaining obligations in their entirety.

Where the contract is made under English Law, the right to terminate on the basis of repudiation will continue to exist despite the lack of reference to it in the Contract. This opens up broader grounds for termination. For example, a Contractor who makes its continuation of its obligations contingent on the Employer doing something which it is not contractually obliged to do could also, at law, be said to have repudiated the Contract. This is a complex area of the law and the Employer ought to take legal advice because it is possible for the effect of a repudiation to be lost because the Employer has subsequently 'affirmed' the Contract by allowing it to continue.

15.2(c)(i): without reasonable excuse fails to proceed with the Works in accordance with Clause 8.

Clause 8 contains many obligations to proceed so this ground provides considerable opportunity for the Employer to give notice; however, the failure must be critical to the Works. The equivalent termination power under the previous edition only allowed the Employer to terminate where the Contractor failed to expedite the Works after being required to do so. This provision is very favourable to the Employer and potentially dangerous to the Contractor.

The term *"proceed"* in Clause 8 means more than merely to 'move ahead'. For example Sub-Clause 8.3 begins by describing what is in a programme. A programme under Clause 8 includes a great deal more than merely the dates on which various activities have to be performed. It includes for example resourcing, sequencing, and methods. The Sub-Clause then requires the Contractor to *"proceed"* in accordance with the programme. In the context "*proceed*" in Clause 8 must mean 'act' or 'meet obligations under'.

[9] See *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[2014] EWHC 1028 [360].

The following are the requirements to *proceed* under Clause 8. The particular obligations are dealt with in more detail in this author's article on Clause 8.

Sub-Clause	Obligations to "*proceed*" included in the Sub-Clause
8.1	Commence as soon as practicable.
8.2	Complete the Works and each Section within the Time for Completion.
	Proceed with due expedition and without delay throughout the contract.
8.3	Obligation to proceed in accordance with the programme i.e. (a) Neither faster nor slower than currently programmed; (b) in the order set out in the programme; (c) to follow the methods set out in the programme; (d) to use the Contractor's Personnel and Contractor's Equipment as set out in the programme; (e) to follow similar obligations in respect of any revised programme.
8.6	Obligations to follow revised methods proposed in response to an instruction by the Engineer to expedite progress including increasing working hours and increasing personnel.
8.7	Obligation to pay delay damages.
8.8	Obligation to protect, store and secure the suspended works against any deterioration loss or damage.
8.12	Obligation to make good any deterioration or defect in or loss of the Works or Plant or Materials, which has occurred during the suspension.

However, as stated above, the failure must be critical to the progress of the Works in order for the Employer to terminate under this provision. As stated by the Court of Appeal in *Obrascon Huarte Lain SA v HM Attorney General for Gibraltar*[10]:

> "The obligation under clause 8 of the FIDIC Conditions to "proceed with the works with due expedition and without delay" is not directed to every task on the contractor's to-do list. It is principally directed to activities which are or may become critical. See the reasoning of Stuart-Smith J in *Sabic UK Petrochemicals Ltd (formerly Huntsman Petrochemicals (UK) LTD) v Punj Lloyd Ltd (a company incorporated in India)* [2013] EWHC 2916 (TCC); [2014] BLR 43 in particular at [166]."

[10] [2015] EWCA Civ 712 (09 July 2015) [132].

15.2(c)(ii): without reasonable excuse fails to comply with a notice issued under Clause 7.5 (Rejection), Sub-Clause 7.6 (Remedial Work) within 28 days after receiving it.

This is an odd provision because it allows termination if the compliance is not carried out within 28 days whereas both Sub-Clause 7.5 and Sub-Clause 7.6 do not include time limits. Sub-Clause 7.5 requires that the defective work be made good *"promptly"* and Sub-Clause 7.6 requires that the remedial work be done within a *"reasonable time"*. What may be prompt or a "*reasonable time"* must depend on how difficult the making good or remedy will be in the particular situation. To make sense of this conflict, the words *"without reasonable excuse"* will have to be read so as to mean that the time limit of 28 days will have to be extended to a time consistent with the obligations under the two Sub-Clauses. This makes the Sub-Clause difficult to operate. It would be unwise to assume that 28 days is definitely enough, and Employers should allow considerable leeway for the Contractor before terminating on this basis.

15.2(d): Subcontracts the whole of the Works or assigns the Contract without the required agreement.

Although it is common for Contractors to subcontract substantial parts of the Works, and it is also common for Contractors to subcontract more than they originally indicated they would subcontract when they were awarded the Contract, this is not enough to bring the clause into effect. It is also improbable that the Contractor will subcontract the whole of the Works – Since the term "*Works"* means both the Permanent and the Temporary Works (Clauses 1.1.5.4, 1.1.5.7 and 1.1.5.8) and it is arguable that this includes all the elements of the project including the supervision, provision of materials etc, it is also improbable that the Contractor will assign the whole of the Works. This is

certainly what Clauses 12 and 13 assume (see discussion under Clauses 1.1.5.4, 1.1.5.7 and 1.1.5.8).

If the Employer is concerned that the Contractor has subcontracted more than he had agreed, and wishes to terminate on this basis, it is safer to give a notice to correct (i.e. to require the Contractor to cancel the subcontract arrangement) under Clause 15.1 rather than to take the risk that there may be some elements of the Works which in some technical sense have not been sub-contracted.

The right to terminate if the Contractor assigns the Contract without the Employer's Consent reflects the fact that this would be a breach of Clause 1.7. If an assignment prohibited under Clause 1.7 is only partial, the remedy for the Employer would be the issuing of a notice to correct under Clause 15.1, asking that the assignment be reversed.

15.2(e): becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

This is a situation in which the Employer's decision to terminate may be one of necessity rather than choice, because to continue the Contract could involve the Employer spending money which it is not able to recover. This will depend, however, on the financial guarantees which the Contractor has been required to put in place and on the law in the country where the Works are being carried out (the law applying here will not be the law chosen by the parties, but that of the country in which the Works are being carried out).

If, for example, the Contractor is seriously in delay and is already liable for delay damages, the Employer will normally wish to off-set these against payments otherwise due to the Contractor. However where the Contractor is bankrupt, amounts due from the Employer to the Contractor will still be payable but amounts payable by the Contractor to the Employer will only be payable proportionally with other debts of the Contractor or (if other debts have priority) possibly not at all. Depending on the underlying legal system, retention money may not be able to be used for the usual purpose of meeting the costs of defects. This situation may be moderated if there is a performance, retention or parent company guarantee.

It is possible that the Contractor's lenders, vendors, or other creditors will have the right to seize the Contractor's Equipment or even Plant and Material which has not already been incorporated into the Works. Subcontractors may have a right of direct claim against the Employer. Under some legal systems a clause like this may be unenforceable.

This clause is very comprehensive, ranging from informal insolvency to formal insolvency (liquidation etc). Thus, in England, it might include any failure to pay an undisputed debt within 21 days of service of a Statutory Demand, and may also include a Contractor whose balance sheet discloses an excess of liabilities over assets (Section 123 of the *Insolvency Act 1986*). The clause is probably wide enough to cover any kind of insolvency under English law but may not be so under other legal systems.

The Employer faced with a Contractor in financial difficulties must obtain local legal advice as quickly as possible in order to see whether termination is necessary or possible to protect its position.

Under the previous editions a voluntary liquidation for the purpose of amalgamation or reconstruction did not entitle the Employer to terminate. This exemption does not now apply, so a Contractor considering such a voluntary liquidation, perhaps as part of a corporate restructuring or for reasons other than financial difficulties, must explain the situation in advance to the Employer and agree that the Employer will not use the opportunity to terminate. In return, the Employer needs to ensure that all guarantees and bonds remain valid despite the change to the legal personality of the Contractor.

15.2(f): Giving or Offering Bribes, gifts, gratuities, commissions or other thing of value

This is an extraordinarily wide provision and, although no one will doubt its moral value in principle, the Contractor is not in a position entirely to prevent himself breaching it.

The Contractor can be terminated if any of the following people offer bribes:

Party whose giving of bribes can lead to Contract Termination	**Comment**		**Degree of Control**
Contractor	Includes any person with authority to act on behalf of		Complete.

Party whose giving of bribes can lead to Contract Termination	Comment		Degree of Control
	the Contractor such as its managers or directors.		
Contractor's Personnel	Contractor's Representative.		Complete.
	All personnel whom the Contractor utilises on Site.	The term *utilise* is wider than "employ" so would include any supplier or self-employed tradesman as well. However if the person is not utilised on the *Site* at the time he offers the bribe he will not then implicate the Contractor.	May be minimal.
	Staff, labour, and other employees of each Subcontractor.	This includes anyone capable of representing the Subcontractor staff both on and off Site because *Subcontractor* is mentioned separately in Clause 15.2(f).	Probably minimal.
	Any other personnel assisting the Contractor in the execution of the Works.	This may extend to people who are not even under the Contractor's control. However, if the person is not utilised on the *Site* at the time he offers the bribe he will not then implicate the Contractor.	Variable.
agents	The term agent includes anyone actually appointed to represent the Contractor or (at least under English law) anyone who appears to be so appointed.		Variable.

Despite this wide reach the Sub-Clause is not carefully thought through as it includes employees of Subcontractors on Site, but only those with power to represent the Subcontractor when off-Site. It does not cover Contractor employees off-Site unless they are executives or agents, and does not refer to suppliers off-Site.

Despite these gaps, Contractors need to be extremely vigilant to ensure that no bribes are offered by anyone acting or purporting to act on their behalf, and to make sure that these obligations are passed down to sub-contractors. It would be very easy for a Contractor to find itself facing the risk of termination.

Despite the poor drafting of the Clause, Employers who wish to exercise their right to terminate need to be particularly careful to make sure that the offeror of the bribe is covered by the Clause.

Process of Termination

If one of the above events or circumstances exists, the Employer may give notice of termination. In the case of (a) to (d), this must be at least 14 days and in the case of (e) or (f) must be immediate. Once the 14 days' notice has been given then the Employer should wait for the 14 days to elapse before expelling the Contractor from Site. In *Final Award in Case 10892*[11]

[11] ICC International Court of Arbitration Bulletin (2008) Vol. 19 No. 2, page 91.

the Employer failed to wait the 14 days before entering onto the Site. The arbitral tribunal, considering a similar provision under Clause 63 of FIDIC's 4th Edn, held that the failure to wait was a violation of Clause 63.1(e). On appeal to the High Court of Trinidad and Tobago, the court inferred that this failure to wait the 14 days may have been a breach of Clause 63.1(e) but might not have resulted in the termination being wrongful.[12]

Nothing within this Sub-Clause precludes the Employer giving the Contractor a prior warning of his intention to terminate, and this may be a wise course because, once notice is given, while the Contract may be revived by mutual agreement, this may be contrary to the procurement law or the requirement of funding agencies. Once the Contract has been terminated, any 'revived' contract, may be regarded by the procurement law or the agencies as a new contract, and (even if it is on the same terms as the old) may require a new tendering process before it can be awarded.

There is no specific format required for the notice but the Employer needs to take care that the notice precisely follows the requirements of the Contract. There is some legal authority, at least under English law, that requirements of termination provisions must be meticulously observed, although another authority suggests that all that is essential is that the intention to act under the Clause is clearly conveyed to the other Party. In *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar*[13] Akenhead J. considered this issue and stated:

> "courts in the past have been slow to regard non-compliance with certain termination formalities including service at the "wrong" address as ineffective, provided that the notice has actually been served on responsible officers of the recipient."

Akenhead J. then proceeded to set out a number of principles relating to termination:

> "(a) Termination of the parties' relationship under the terms of such contracts is a serious step. There needs to be substantive compliance with the contractual provisions to achieve an effective contractual termination.
>
> (b) Generally, where notice has to be given to effect termination, it needs to be in sufficiently clear terms to communicate to the recipient clearly the decision to exercise the contractual right to terminate.
>
> (c) It is a matter of contractual interpretation, first, as to what the requirements for the notice are and, secondly, whether each and every specific requirement is an indispensable condition compliance without which the termination cannot be effective. That interpretation needs to be tempered by reference to commercial common sense.
> (d) In the Contract in this case, neither Clause 1.3 nor Clause 15.2 use words such as would give rise to any condition precedent or making the giving of notice served only at OHL's Madrid office a pre-condition to an effective termination. Of course, key elements of the notice procedure involve securing that OHL is actually served with a written notice and receives the notice and it being clear and unambiguous that the notice is one being served under Clause 15.2, namely that 14 days' notice of termination is being given by GOG to OHL, such as to enable it to expel the Contractor from the Site.
>
> (e) The primary purpose of Clause 1.3 is to provide an arrangement whereby notices, certificates and other communications are effectively dispatched to and received by OHL. The primary purpose of a Clause 15.2 termination notice is to ensure that OHL is made aware that its continued employment on the project is to be at an end.

[12] HCA No. Cv. 1541 of 2002.

[13] [2014] EWHC 1028 [368].

> (f) In my judgment, the service of a Clause 15.2 notice at the Madrid office of OHL as such is not an indispensable requirement either of Clause 15.2 or Clause 1.3. Provided that service of a written Clause 15.2 notice is actually effected on OHL personnel at a sufficiently senior level, then that would be sufficient service to be effective."

In other jurisdictions, such as New Zealand, the courts have held that termination clauses must be complied with to the letter if they are to be relied upon.[14] The fact that even within one legal system the Courts may deal with two similar clauses in different ways illustrates the need for the party giving the notice to take great care to make certain that the full period required by the contract is given.

There is a requirement within Clause 15.2 that the Contractor use his best efforts to comply with any reasonable instruction for assignment of any subcontract included in the termination notice and the protection of life or property or for the safety of the Works. This seems to suggest that such requirements will only be enforceable if included in the notice of termination.

The Effect of Termination

Once the notice has expired, the Contract is terminated, and the Employer may expel the Contractor from the Site. Although the language seems to suggest that the 'Contract' itself has been terminated, what in fact is cancelled are the rights of the Contractor to continue working under the Contract and to be remunerated for that. The remainder of the Clause explains what will happen following the termination. This is made clear by the following sentence – *"The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise."* Subsequent clauses then set out the Contractor's continuing obligations and the Employer's rights.

As mentioned above, any requirement that the Contractor arrange assignment of sub-contracts or make arrangements for safety needs to be included in the notice of termination. Only following termination can the Employer give notice of the release of the Contractor's Equipment and Temporary Works. The Contractor has the obligation to take possession of the Equipment and Temporary Works.

In so far as it relates to Contractor's Equipment, this provision makes sense, but the Employer may be placed in a very difficult provision because of the requirement regarding Temporary Works. It is likely that some of these will be required in order to protect the Works until they can be resumed by another Contractor. Thus, the Employer will effectively be obliged to return only those parts of the Temporary Works which are not needed, and may therefore be forced to put itself in breach of Contract.[15] The consequences (if any) of this breach will have to be dealt with in subsequent proceedings. The Employer can partly protect himself in this situation by making use of the right at the time of the termination notice to give instructions for the protection of life, property, or safety, and making one such instruction an instruction to leave relevant Temporary Works in place.

The final sentence provides that if the Contractor has failed to make a payment due to the Employer, any items which would otherwise have to be returned may be sold to recover the amount owed. This would enable undisputed determinations of the DAB to be recovered. However other claims do not become due for payment until the Employer has claimed under Clause 2.5 and the Engineer has given a determination. Thus items may not be sold to cover such claims (however well founded) and there is no provision for them to be held in the meantime. If the Contractor is bankrupt, the right to sell may have the effect of giving the Employer a first charge over the value of these items, thus avoiding them being seized and sold for the benefit of other creditors. The precise position will depend on the law of the country in which the Works are being carried out (not on the law of the Contract).

15.3 Valuation at Date of Termination

This provision is self-explanatory. Once the Notice of Termination under Sub-Clause 15.2 has taken effect, the Engineer proceeds, as soon as practicable, in accordance with Sub-Clause 3.5 [*Determinations*] to agree to determine the value of the Works, Goods and Documents and any other sum for work executed in accordance with the Contract.

[14] *Brown and Doherty v Whangarei County Council* [1988] 1 NZLR 33.

[15] Employers should amend this provision in Contracts at time of tender.

As soon as practicable

Under English law there is a difference between doing something "*as soon as practicable*" and doing something 'as soon as reasonably practicable'. The second is more elastic and the former indicates that what is required is to be done as soon as possible having regard to the facts. In *JE v Secretary of State for the Home Department*[16] the English Court of Appeal stated that:

> "'as soon as practicable'… does not mean immediately. It envisages that both parties will require a reasonable time in which to consider their position."

In accordance with Sub-Clause 3.5 [Determinations]

The Engineer is required to consult with each Party in an endeavour to reach agreement and, if agreement is not reached, then make a "*fair determination*" in accordance with the Contract. The Engineer is not entitled to do anything that breaches the term of the Contract. Nael Bunni suggests[17] that a fair determination should follow the dictionary definition of *"just, unbiased, equitable in accordance with the rules"*. Bunni also refers to the case of *Semco Salvage Marine Pte Ltd v Lancer Navigation Ltd,*[18] where it was suggested that fair would mean fair to both parties.

Under English law the position is that a party who is appointed to carry out decision making functions; e.g. determining or certifying the value of works is:

> "Required to act in a manner which has variously been described as independent, impartial, fair and honest. These concepts are overlapping but not synonymous. They connote that the decision-maker must use his professional skills and his best endeavours to reach the right decision, as opposed to a decision which favours the interests of the employer."[19]

The value of the Works … and any other sums due to the Contractor in accordance with the Contract

It is unclear how the Engineer values the works executed and, in particular, where various activities in the Specification have been rolled up into one item in the Bill of Quantities. For example, on a railway project there may be a single BoQ item for the laying of ballast for the track, the laying of the track and the compacting, levelling, and tamping of the track. If the Contractor has placed 20 km of ballast and then laid the track on top but has not started the compacting, levelling, and tamping is he to be paid nothing? In these circumstances how is the Engineer to determine the "*value of the Works*"? If the Engineer uses the Bill of Quantities to assess the value of the works then he would award nothing. Alternatively, the Engineer could value these works using Cost, but this could leave the Employer out of pocket in the event that the Contractor has under tendered. In our opinion as the Engineer is required to value the Works "*in accordance with the Contract.*" Therefore, in the above scenario, the Engineer should give a nil value to the works which had not been completed.

15.4 Payment after Termination

Once the notice under Sub-Clause 15.2 has taken effect then the employer may:

a) proceed in accordance with Sub-Clause 2.5;

b) withhold further payments to the Contractor until the costs of execution, completion and remedying of defects and other costs incurred by the Employer have been established; and

c) recover from the Contractor losses and damages incurred by the Employer and any costs of completing the Works.

The Contractor's main exposure will be to the cost of completion of the Work – a cost likely to be substantially more than it itself would have received for doing the same work.

Sub-Clause 15.4 is potentially confusing. In *FIDIC Contracts: Law and Practice*,[20] this confusion was identified.

[16] [2014] EWCA Civ 192 [11].

[17] Bunni N., *The FIDIC Forms of Contract* (1991) Blackwell Publishing at page 524.

[18] [1997] UKHL 2; [1997] 2 WLR 298; [1997] 1 Lloyds Rep.

[19] *Scheldebouw BV v St. James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 [34]; see also *Costain Ltd v Bechtel Ltd* [2005] EWHC 1018 (TCC); and *SGL Carbon Fibres Ltd v RBG Ltd* [2012] ScotCS CSOH_19.

[20] Ellis Baker et al., *FIDIC Contracts: Law and Practice, Section 8.222, p. 453.*

> "The word "may" here is potentially confusing because it could suggest that compliance with the requirement set out in Sub-Clause 2.5 (...) is optional (...). Furthermore, the Employer's rights to withhold further payment and to recover losses and damages from the Contractor under Sub-Clause 15.4 (b) and (c) respectively are not expressly stated to be subject to Sub-Clause 2.5 (...). In this way, there is a potential conflict between these provisions and those of Sub-Clause 2.5 (...), in particular in relation to the Employer's right of set-off (...). It is, however, suggested that, reading the Conditions as a whole, the most pragmatic interpretation of these provisions is that, on termination under Sub-Clause 15.2, the Employer's obligation to pay is generally suspended, but that his entitlement to claim any losses and damages is nevertheless still intended to be subject to Sub-Clause 2.5 (...). However, it would seem that the Employer does not have to submit particulars or substantiate the claim until the losses and damages incurred have been established.[21]

The confusion was considered in *Partial Award in Case 15956*.[22] In this case the contract was terminated by the Employer and the Works re-let. The Employer made a claim for the costs of completion without first submitting a claim under Sub-Clause 2.5 and then 20.4. The Contractor challenged the jurisdiction of the arbitral tribunal to deal with these losses. The Employer relied upon Sub-Clause 15.4(c) which gave the Employer an option to claim damages directly.

The arbitral tribunal considered what was termed as the Seppala test.[23] The Seppala test provides that the Employer must first make a claim, then refer it to the Engineer, and then to the DAB, prior to commencing arbitration, "*unless the Employer can demonstrate that the counterclaim was effectively included in a dispute which had already been referred to the DAB for decision under Clause 20 and which is already in arbitration*." In this case the termination of the Contract had already been referred to the DAB. The arbitral tribunal concluded that as the issue of termination had been referred to and dealt with by the DAB, a subsequent referral of the costs resulting from that termination was not necessary. The arbitral tribunal stated:

> "In the instant matter, the Employer seeks to submit directly to arbitration a claim for the extra costs of completing the Works subsequently to and as a result of termination by the Employer whilst the DAB has already considered and ruled on the appropriateness of such termination. The Arbitral Tribunal finds that the two situations are very similar, to the point that, for all practical purposes, they should have identical consequences… the Arbitral Tribunal finds that Claimant was entitled to submit the Disputed Claims directly to arbitration without first notifying such claims and then following the pre-arbitral procedures laid down in the Contract."

The above case does not, however, deal specifically with the issue of whether a Sub-Clause 2.5 notice is required if the Seppala test has not been met; although the inference from the arbitral tribunal is that a Sub-Clause 2.5 notice would be required and that an Employer could not go straight to arbitration without first having a decision of the Engineer and then the DAB. This conclusion seems also to be supported by the Privy Council in *NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)*.[24] However, the contradiction between Sub-Clauses 15.4(a) and 15.4(c) was not specifically considered by the Privy Council in that case.

15.5 Employer's Option to Terminate

This Sub-Clause gives the Employer the right to terminate at any time for convenience. This can be seen as a serious risk for the Contractor and a great

[21] Brian W. Totterdill, *FIDIC Users' Guide, A Practical Guide to the 1999 Red and Yellow Books*, Thomas Telford, p. 260 makes a similar point.

[22] ICC Dispute Resolution Bulletin 2015 No 1, at p.44.

[23] Christopher R. Seppala, "The Arbitration Clause in FIDIC Contracts for Major Works", ICLR 2005, p. 4 at 7.

[24] [2015] UKPC 37.

benefit for the Employer. However, where the Employer is a public body, this may simply reflect the legal position in many jurisdictions that, with proper payment of compensation, a government always has the right to terminate contracts which are administrative in nature.

However, in recognition of the serious risks involved for the Contractor, the Sub-Clause places several limitations on the exercise of the power by the Employer as follows:

- The Employer is required to return the Performance Security before exercising the power;
- The Employer is not entitled to terminate the Contract under this Sub-Clause in order to execute the Works itself or to arrange for the Works to be executed by another contractor;
- The termination is treated in the same way as a termination for Force Majeure – i.e. the Contractor will be paid in full for work done, for materials ordered for its costs of demobilisation and for other costs it incurs as a result of the termination; and
- In contrast to a termination for cause, the Contractor will not be liable to pay for the costs of termination.

Terminating under 15.2 and 15.5

> "We hereby give you notice of termination under Sub-Clause 15.2 for the following reason(s). As an alternative and without prejudice to our notice under Sub-Clause 15.2 we also hereby give notice of termination under Sub-Clause 15.5.'

It will, however, be difficult for the Employer to make this effective. Firstly, it will have to equalise the periods of notice – the notice under Sub-Clause 15.2 will have to be extended to 28 days from the normal minimum of 14, and it is not clear whether the Contract permits this. Secondly it will be required to return the Performance Security – something it is unlikely to want to do if it believes the Contractor has been seriously in breach. It is not clear how the Sub-Clause will apply in any event if the Performance Security has already been called and cannot be returned. Thirdly, the procedure following a termination under Sub-Clause 15.5 is different from that under Sub-Clause 15.2. The procedure under Sub-Clause 15.5 is the same as that when the Contractor exercises its right to terminate.

Finally, and most importantly, the Employer's rights to continue are quite different when it terminates under Sub-Clause 15.5, compared with when it terminates under Sub-Clause 15.2. The difference, as set out clearly in Sub-Clause 15.5, is that the Employer cannot use its power to terminate under Sub-Clause 15.5 in order to execute the Works itself or to arrange for the Works to be executed by another Contractor. If the reason the Employer wished to terminate the Works is in fact for cause, it is unlikely that the Employer will not wish to continue with the Works, and the use of Sub-Clause 15.5 will preclude it from doing so unless it is prepared to breach the contract.

Even in the situation where the Employer's primary reason for terminating is that it does not, for the moment, wish to continue with the Works, the restriction on its rights opens up considerable potential problems.

The most likely reason that an Employer will have for wishing to terminate under Sub-Clause 15.5 will be that it has run out of money. This may be because the works have proved to be more difficult than expected so that there have been variations or other cost overruns. It may be that there has been unexpectedly high inflation so that the price adjustments to which the Contractor is entitled have drained the Employer's coffers. Or it may just be that other calls on the Employer's resources have made it impossible or undesirable to continue at least for the moment.

Sub-Clause 15.5 forbids the Employer terminating *in order to* execute the Works himself or through another contractor. If the termination is genuinely for financial reasons this would not seem to prevent the Employer terminating, even if it has in mind the possibility of continuing the works later when its financial position improves.

The Employer cannot terminate with the intention of having the Works continued by someone it considers better or cheaper.

Another situation is that where the Employer finds that the project as originally conceived does not meet present day needs. It may need time to reconsider. It could alter it by issuing variation orders but this would require the Contractor to put present work on hold for a while (at the Employer's expense) and might be an expensive way to carry out the continued Works because the Contractor will be in a good bargaining position. Thus, it prefers to terminate the present Contract, review its options, and continue later.

Arguably such a course of action is permitted under the Sub-Clause because the motivation is not to execute the same Works but something different.

An Employer may terminate under Sub-Clause 15.5 in the event that it is unsure whether it could terminate under Sub-Clause 15.2. However, this option is only realistic if the Employer does not intend to finish the Works or intends to substantially re-design the Works. An Employer is not precluded from issuing a Sub-Clause 2.5 [*Employer's Claims*] for losses sustained even if it has given notice under Sub-Clause 15.5. However, it may be extremely difficult to claim for poor performance in circumstances where the Works are abruptly cancelled and when only part of the Works have been completed. In *Jacobs UK Ltd v Skidmore Owings & Merrill LLP*[25] the court stated:

> "Likewise, it is difficult to pinpoint loss due to non- or poor performance of services when the provision of those services is abruptly cancelled part way through their performance. In both instances, the only demonstrable loss may be the extra manhours worked by the defendant carrying out further estimation exercises that should not have needed to be redone, or the additional costs of other consultants engaged. But since extra hours and/or additional consultant's costs will have been caused by the termination anyway, those that flow from the alleged breaches must be separately identified to have any prospect of being recovered."

There will be considerable room for argument about whether the Employer properly exercised its powers under this Sub-Clause. There are a number of interesting possible scenarios:

1. The Contractor knows that the Employer has terminated in order to complete the works more cheaply using another Contractor.

In this case the Employer is clearly in breach. The Contractor would not be obliged to cease work and would have the right to challenge the decision through the Engineer, DAB, and arbitration. This is not an attractive proposition because, throughout this period the Contractor has the option of working for an Employer who has made it clear it is not going to pay and, if it does stop work, later losing and finding that it has tied up its resources for a long period with no right of compensation. In these circumstances, the Contractor probably has no choice but to accept the inevitable, issue a counter termination notice under Sub-Clause 16.2 and remove itself from the Site. Sub-Clause 16.4(c) gives the Contractor the right to damages for loss of profit and other losses (including consequential losses) suffered as result.

2. The Employer is unclear what it intends to do about the remainder of the Works. However, months or years later it hires another contractor and continues the Works.

The Contractor's loss is loss of profit and loss of opportunity. In a typical scenario the Contractor will only have discovered the Employer's real intention when the new contractor starts work. It may be arguable that the original purported termination by the Employer was ineffective, as it was not entitled to terminate in order to continue the Works through another contractor. The Contractor can argue that the Contract has remained alive in the meantime despite the attempt by the Employer to terminate it and can commence proceedings even at this late stage to terminate and claim loss of profit.

3. The Employer's financial difficulties were genuine and it abandons any attempt to continue the Works for some years. Eventually it finds itself able to continue and, using a new contractor, moves on from where it previously gave up.

It is unlikely the Contractor has a claim. At the time it made use of its rights under Sub-Clause 15.5, the Employer was terminating for financial reasons, not in order to continue the works with another contractor.

4. The Employer continues the same project but after a substantial re-design.

Arguably these are not the same "*Works*", and the Employer is not in breach.

Thus a Contractor who is not completely sure that the Employer has no intention of continuing the Works will be strongly advised to issue its own notice of termination before it leaves the Site – thus at least opening the door to a possible loss of profit claim.

There is one circumstance under which the Employer might seek to terminate under Sub-Clause 15.5. This is the circumstance where the Contractor has good reason to terminate and is planning to do so, but the

[25] [2008] EWHC 2847 [71].

Employer has no basis for termination under Sub-Clause 15.2. If the Contractor succeeds in terminating it will be entitled to loss of profit under Sub-Clause 16.4, but if the Employer exercises its right to terminate (but not in order to have another Contractor continue the works) it will not have to pay loss of profit. An interesting termination race would then ensue. Under Sub-Clause 15.5, the Contract will terminate 28 days after the notice or the return of the performance guarantee, whichever is the later. Under Sub-Clause 16.2, the contract will terminate after 14 days. If the Contractor gets his notice in within 14 days of the Employer's notice he may save the situation but the Contract is by no means clear.

In *TSG Building Services PLC v South Anglia Housing Ltd*[26] the English High Court was faced with this situation. In this case there was a clause which provided that the parties should work together in "*the spirit of trust, fairness and co-operation...within the scope of their agreed roles, expertise and responsibilities...and in all matters governed by the Contract they shall act reasonably*" (Clause 1.1). It was argued that this clause prevented one party from terminating at convenience in an unreasonable way. The judge held that the provision of "*reasonableness*" did not apply to the termination at convenience clause.

The court concluded that either party could terminate for any or no reason. The clause provided an "*unconditional and unqualified right*" meaning that termination under the contract was properly effected by South Anglia with no compensation payable to TSG Building Services. The court also found that Clause 1.1 should be interpreted narrowly to apply only to matters within the context of that clause so that good faith did not extend to the whole contract. In countries where there is an express statutory requirement of good faith, it may still be possible to run an argument that an Employer faced with termination for default cannot terminate at convenience to avoid paying to the contractor additional losses.

Please get in touch at victoria.tyson@howardkennedy.com with your thoughts or to discuss any concerns.

[26] [2013] EWH 1151 (TCC).