

## FIDIC 2017: Clause 15 - Termination by Employer

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### The main changes in Clause 15 are the new grounds for termination

- Non-compliance with a final and binding Engineer's Determination (Sub-Clause 15.2.1(a)(ii)) and a binding or final and binding DAAB decision (Sub-Clause 15.2.1(a)(iii)) to the extent that such failure constitutes a "*material breach*" of the Employer's obligations under the Contract.
- Maxing out the Delay Damages (Sub-Clause 15.2.1(c)). There is no requirement for the Delay Damages to have been actually deducted. It is not clear what the position would be if the Contractor claims an EOT and it is granted by the DAAB or arbitrator after termination so that the Delay Damages are reduced below the cap. Would the termination then be unlawful?

### Notice to Correct

Further important changes concern Sub-Clause 15.1 [*Notice to Correct*]. Sub-Clause 15.1 is designed to give the Contractor an opportunity and a right to correct its previous and identified contractual failure. Under the FIDIC 1999 edition, it was generally understood that the Engineer would give a Notice to Correct which specified what was wrong, how to fix it, and a time within which to fix it. Most arguments arose as to the specified time to fix it. The new wording envisages a Notice to Correct specifying what is wrong, the relevant contract clause, and a time within which to fix it. How to fix the problem is now firmly in the Contractor's domain. Therefore, most arguments are likely to arise over the Engineer/Employer's objections to what the Contractor proposes to do to fix the problem in the time.

Mr Justice Akenhead's words in *Obrascon Huarte Lain SA -v- Her Majesty's Attorney General for Gibraltar*<sup>1</sup> may have also prompted this change. Mr Justice Akenhead took the view that under the FIDIC 1999 the specified time for compliance within the Notice to Correct must be reasonable in all the circumstances prevailing at the time of the notice. He gave the example that if 90% of the workforce had gone down

<sup>1</sup> *Obrascon Huarte Lain SA -v- Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC).



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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. He emphasised that what is reasonable would be fact-sensitive.<sup>2</sup> So, while it is logical for the Contractor to specify what he knows he can do, it is likely that in practice much time will be spent arguing whether it is good enough.

Non-compliance with a Notice to Correct entitles the Employer to give Notice of intention to terminate, provided now that such failure constitutes a "*material breach*" of the Contractor's obligations under the Contract (Sub-Clause 15.2.1(a)(i)). What constitutes a "*material breach*" is likely to be the subject of many disputes. So, while a failure by the Contractor to carry out "*any obligation*" under the Contract may lead to a Notice to Correct, it is the failure to comply with the Notice to Correct itself, where such non-compliance constitutes a material breach, which entitles the Employer to terminate. Logically, it would make no sense for non-compliance with the Notice to Correct to be a material breach if the original breach which gave rise to the Notice to Correct was not a material breach although this is not spelled out in the drafting.

<sup>2</sup> See, for example, *Shawton Engineering Ltd v. DGP International Ltd* [2005] EWCA Civ 1359 [69].



This "*material breach*" wording may have been prompted in part by Mr Justice Akenhead's words in *Obrascon*.<sup>3</sup> Mr Justice Akenhead took the commercially sensible view that Sub-Clause 15.1 of the FIDIC 1999 related only to more than insignificant contractual failures by the Contractor, such as a health and safety failure, bad work or serious delay on aspects of the work. This, he said, would need to be established as an actual failure to comply with the Contract, rather than something that may have not yet become a failure. Thus, trivial contractual failures would not lead to contractual termination. Mr Justice Akenhead supported his view with reference to various authorities.<sup>4</sup> He emphasised that what is trivial and what is significant or serious will depend on the facts, and gave the example that 1 day's culpable delay on a 730 day contract or 1m<sup>2</sup> of defective paintwork out of 10,000m<sup>2</sup> of good paintwork would not, if reasonable and sensible commercial persons had anything to do with it, justify termination even if the Contractor did not comply with the Sub-Clause 15.1 notice.

Sub-Clause 15.2.2 [*Termination*] then gives the Contractor 14 days within which to remedy the matter(s) described in the Notice of intention to terminate the Contract under Sub-Clause 15.2.1.<sup>5</sup> Effectively, this gives the Contractor an extra 14 days within which to comply with the Notice to Correct. After the 14 days have expired, the Employer may then give a second Notice to the Contractor to immediately terminate the Contract.

## Termination for Employer's Convenience

Another significant change is the Employer's entitlement to terminate the Contract under Sub-Clause 15.5 [*Termination for Employer's Convenience*] in order to execute the Works himself or to arrange the Works to be executed by another contractor. The most likely reason the Employer will have for wishing to terminate for convenience will be that:

<sup>3</sup> *Obrascon Huarte Lain SA -v- Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028.

<sup>4</sup> *Lord Diplock in Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201D; Hudson's Building and Engineering Contracts (Twelfth Edition) at paragraph 8.056; Lord Steyn in *Mannai Investment Co Ltd v Eagle Star Assurance Company Ltd* [1997] UKHL 19.

<sup>5</sup> Except that the Employer may terminate immediately if the Contractor subcontract or assigns without agreement under sub-paragraph (f), becomes bankrupt or insolvent etc. under sub-paragraph (g), or engages in corrupt etc. practices under sub-paragraph (h). (Sub-Clause 15.2.2 [*Termination*]).

- (i) the market has changed;
- (ii) it no longer needs the project;
- (iii) it has run out of money;
- (iv) it has found a cheaper contractor; or
- (v) where it does not wish to argue his entitlement to terminate for cause.

Under Sub-Clause 15.6 [*Valuation after Termination for Employer's Convenience*], the Contractor must submit detailed supporting particulars of the value of the work done and the amount of any "*loss of profit or other losses and damages*" suffered by the Contractor as a result of Sub-Clause 15.5 [*Termination for Employer's Convenience*]. The Engineer must then agree or determine the amount and then issue a Payment Certificate for the amount agreed or determined. The wording "*other losses and damages*" is vague and may have different meanings in different jurisdictions. It is perhaps less vague if read against Sub-Clause 1.15 [*Limitation of Liability*].

Sub-Clause 15.7 [*Payment after Termination for Employer's Convenience*] is carved out from Sub-Clause 1.15 [*Limitation of Liability*] which states that:

'neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage...other than under: ...(c) Sub-Clause 15.7 [*Payment after Termination for Employer's Convenience*]'.

This may make termination for convenience too expensive to be regularly operated in practice. Liability for "*loss of profit or other losses and damages*" is capped at the sum stated in the Contract Data or, if no such sum is stated, the Accepted Contract Amount.

The Employer may not execute any part of the Works or arrange (any part of) the Works to be executed by any other entities until the Contractor has been paid the amount due under Sub-Clause 15.6 [*Valuation after Termination for Employer's Convenience*]. This sum must be paid within 112 days (16 weeks) after the Engineer receives the Contractor's submission (Sub-Clause 15.7 [*Payment after Termination for Employer's Convenience*]).

Would the Contractor be entitled to any financing charges as a result of delayed payment by the



Employer? Financing charges apply only in respect of a failure to pay under Sub-Clause 14.7 [*Payment*]. Sub-Clause 14.7 refers to IPCs (an Interim Payment Certificate defined as one issued under Sub-Clause 14.6) and FPCs (a Final Payment Certificate defined as one issued under Sub-Clause 14.13). There is no express reference to a Payment Certificate issued under Sub-Clause 15.6. Perhaps the Sub-Clause 15.6 Payment Certificate is intended to be classed as an IPC or FPC issued under Sub-Clause 14 by way of its definition? It is not immediately clear.

## Other changes to note include:

- The additional wording in Sub-Clause 1.16 [*Contract Termination*] which seeks to avoid arguments in some countries that termination can only take place with the approval of the courts. It states:

'Subject to any mandatory requirements under the governing law of the Contract, termination of the Contract under any Sub-Clause of these Conditions shall require no action of whatsoever kind by either Party other than as stated in the Sub-Clause'.

- The ground for termination in Sub-Clause 15.2.1(g) [*Notice*] regarding bankruptcy and insolvency etc. has been widened, for example, with reference to winding-up and dissolution. The wording is identical to that under Sub-Clause 16.2.1(f) [*Notice*], except in relation to joint ventures.
- The new unincorporated joint venture provisions at Sub-Clause 15.2.1(g) [*Notice*].
- The ground for termination in Sub-Clause 15.2.1(h) where the Contractor has engaged in corrupt, fraudulent, collusive, or coercive practice at any time in relation to the Works or to the Contract. The wording is more precise than that relating to the granting of inducements or rewards etc. in the FIDIC 1999 editions. In the FIDIC 1999 editions, the Employer was entitled to terminate if the Contractor gave or offered an inducement or reward etc. but there was no reciprocal arrangement. This has been resolved with identical wording in Sub-Clause 16.2.1(j).
- Clarification that termination requires two Notices, not just one except that the Employer may terminate immediately if the Contractor subcontract or assigns without agreement under

sub-paragraph (f), becomes bankrupt or insolvent etc. under sub-paragraph (g), or engages in corrupt etc. practices under sub-paragraph (h): Sub-Clause 15.2.2 [*Termination*].

- Clarification that remedying the default within 14 days removes the right to terminate: Sub-Clause 15.2.2 [*Termination*]. It is a cure period. However, there appears no way for the Contractor to remedy the event of reaching the maximum amount of Delay Damages. The most a Contractor might do in the time available is to submit an application for an EOT.
- After termination, the Contractor must "*comply immediately with any reasonable instruction included in a Notice given by the Employer under this Sub-Clause (i) for the assignment of any subcontract, and (ii) the protection of life or property or for the safety of the Works*": Sub-Clause 15.2.3(a). In the FIDIC 1999 editions, the Contractor was only required to use "*his best efforts to comply with any reasonable instruction included in the notice*". In the FIDIC 2017 editions, it must do so without qualification and must do so immediately.

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