

## COVID-19 AND THE FIDIC CONTRACTS

On 7 May 2020 the UK Government Cabinet Office published "*Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency*"<sup>1</sup>. The Government recognises that Covid-19 may make it more difficult or impossible for parties to perform their contractual obligations:

*"It is recognised that parties to some contracts may find it difficult or impossible to perform those contracts in accordance with their agreed terms as a result of the impact of Covid-19 – including through illness in the workforce, the effects of restrictions on movement of people and goods, revised ways of working necessary to protect health and safety, the closure of businesses or the reduction in a party's financial resources available to make payments otherwise due under the contractual arrangements."*

The Government recognises that the present circumstances are "*unprecedented and exceptional*". It calls on parties to act "*responsibly and fairly*" in the application and enforcement of contracts where performance has been affected by Covid-19 and asks parties to be mindful of the national interest in preserving the construction industry which will be a key driver in the recovery.

The guidance is non-binding. Even with an employer being ready to act in a spirit of cooperation, it poses the question of whether a contractor whose performance has been affected by Covid-19 would be entitled to relief under a "responsible and fair" application of a typical EPC contract, such as the models published by the International Federation of Consulting Engineers (FIDIC).

The question is relevant for projects in the UK and anywhere else the FIDIC model is used.

### **Covid-19: Force Majeure or Exceptional Event**

The concept of *force majeure* has been replaced in the FIDIC 2017 models<sup>2</sup> by "*Exceptional Event*" (Sub-Clause 18.1 [*Exceptional Events*]). The conditions to be satisfied remain substantially the same as in the 1999 suite<sup>3</sup>. The event or circumstance must be one which "(i) is beyond a Party's control; (ii) the Party could not reasonably have provided against before entering into the Contract; (iii) having arisen, such Party could not reasonably have avoided or overcome, and (iv) is not substantially attributable to the other Party".

It should be noted that sub-paragraph (ii) does not require the event to be "unforeseeable", a criteria which is required for *force majeure* under many civil code systems of law. But it does have to be an event which the party could not reasonably have provided against, for example by adding a contingency into the contract price or time schedule, or by taking out insurance. Sub-paragraph (iii) will require a party to take reasonable precautions. For example, in *2 Entertain Video and Others v Sony DADC Europe* [2020], it was held that although Sony could

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<sup>1</sup> <https://www.gov.uk/government/publications/guidance-on-responsible-contractual-behaviour-in-the-performance-and-enforcement-of-contracts-impacted-by-the-covid-19-emergency> 7 May 2020

<sup>2</sup> FIDIC Construction Contract 2nd Ed (2017 Red Book); Plant and Design-Build Contract 2nd Ed (2017 Yellow Book); EPC/Turnkey Contract 2nd Ed (2017 Silver Book)

<sup>3</sup> FIDIC Construction Contract 1st Ed (1999 Red Book); Plant and Design-Build Contract 1st Ed (1999 Yellow Book); EPC/Turnkey Contract 1st Ed (1999 Silver Book)

not have prevented riots from occurring, it could and should have had in place security systems which would have prevented the break-in and damage to its warehouse.

It is likely that the Covid-19 pandemic would satisfy these conditions (i) to (iv).

FIDIC Sub-Clause 18.1 goes on to cite a list of events which may constitute an Exceptional Event provided the preceding conditions are satisfied. The list includes familiar events such as war, rebellion, riot, strike (not limited to the Contractor's Personnel) and natural catastrophes.

The list does not expressly include "epidemic" and the absence of the term is striking by comparison to other models, for example the ICC model clause of 2020<sup>4</sup>.

Nevertheless, since the list is non-exhaustive, Covid-19 can still constitute an Exceptional Event (or *force majeure* in the 1999 version).

In fact, historically, "epidemic" has never been expressly included by FIDIC in its list of *force majeure* events or Employer's Risks in previous model forms, e.g. the 1999 suite or 1987 versions<sup>5</sup>. We are aware of cases where Contractors using those models have accordingly amended the definition in order to cover epidemic expressly, usually with no objection from the Employer. In other cases, the parties may have assumed that epidemic was covered as being analogous to a natural catastrophe.

Interestingly, the 1999 FIDIC Red and Yellow books for the first time included an express right for the Contractor to obtain an extension of the Time for Completion (under Sub-Clause 8.4(d) [*Extension of Time for Completion*]) in the event of "*Unforeseeable shortages in the availability of personnel or Goods (or Employer-Supplied Materials, if any) caused by epidemic or governmental actions*". The same clause is included in the 2017 versions under Sub-Clause 8.5(b) [*Extension of Time for Completion*].

On the one hand, this clause is helpful for the Contractor under the Red and Yellow books in that it gives an express right to an extension of time for shortages of personnel or Goods caused by epidemic. That would clearly cover the Covid-19 pandemic. A Contractor using the Red or Yellow Books and affected by Covid-19 in the current circumstances would, therefore, most naturally seek an extension of time under Sub-Clause 8.5(b) without needing to rely on Exceptional Events under Clause 18.

On the other hand, the Silver Book does not include such a clause, either in the 1999 version nor in the 2017 version<sup>6</sup>. A Contractor using the Silver Book would, therefore, have to argue that epidemic was *force majeure* under Sub-Clause 19 (1999 version) or an Exceptional Event under Sub-Clause 18 (2017 version). Users of the Silver Books in future might consider amending the list of events to cover epidemic expressly.

Otherwise, the Contractor will no doubt invite an Employer to act in the spirit of the UK Government guidance and accept that Covid-19 can be a case of *force majeure* or Exceptional Event, because it satisfies the conditions of the first paragraph of the clause and notwithstanding its absence from the list in the second paragraph.

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<sup>4</sup> <https://iccwbo.org/publication/icc-force-majeure-and-hardship-clauses/>

<sup>5</sup> Works of Civil Engineering Construction 4th Ed (1987 Red Book); Electrical and Mechanical Works 3rd Ed (1987 Yellow Book)

<sup>6</sup> In the 2017 Silver Book, a new Sub-Clause 8.5(c) allows an extension of time if there is a shortage caused by epidemic in the availability of Employer Supplied Materials (only). It would not protect the Contractor in the event of a shortage in the availability of its own personnel or Goods caused by epidemic.

## Prevention and Notice

Under Sub-Clause 18.2 [*Notice of an Exceptional Event*], a "*If a Party is or will be prevented from performing any obligations ... then the affected Party shall give a Notice ... Thereafter, the affected Party shall be excused performance of the prevented obligations...*".

There are several points to note.

The Party must actually be prevented from performing at least some of its obligations. It is not enough that performance might simply have become more difficult or expensive. However, it is not necessary that the event has made performance of the entire contract impossible. If the event has affected only part of the Contractor's obligations, it may be excused performance of those obligations, even though performance may continue in all other respects.

The prevention may be physical or legal. In the case of Covid-19, it may be rare for Contractors to be prevented from performing by the virus itself, for example, by personnel falling sick. In many cases, Contractors will be impacted less directly, for example by:

- (i) legal restrictions put in place in response to the Covid-19 outbreak, either by the government in the country where the Site is located or by governments elsewhere, for example limiting travel or requiring the repatriation of personnel;
- (ii) personnel deciding not to come to work for fear of catching the virus, whether following government guidelines or not;
- (iii) personnel being unable to travel to the Site because of transport disruption;
- (iv) an inability to access the main Site or sub-contractor's premises because of lack of security personnel.

The Contractor should nevertheless be entitled to relief in such circumstances, provided that it can show that the prevention was real and that Covid-19 was the root cause.

The date of notice given by the Contractor to the Employer will be critical. Clause 18.2 requires notice to be given within 14 days after the affected party "*became aware, or should have become aware*," of the event. A Contractor which is not properly monitoring its performance (or that of its subcontractors, for example) may find that time has started to run even before it was actually aware of the event or its effects.

If notice is given within the 14 day period, the Contractor will be entitled to relief from the date when the event actually started to prevent performance. If notice is given after the expiry of 14 days, the Contractor is still entitled to relief but only from the date of the notice. Note that under Sub-Clause 20.2 [*Claims For Payment and/or EOT*], if notice is not given within 28 days, the Contractor will lose entitlement to relief altogether.

These clauses have been considered by courts and Tribunals in the past and Parties can expect them to be enforceable. They can lead to harsh results.

In a dispute, the burden of proof will be on the Party affected (most likely the Contractor). It is crucial that the Contractor gather contemporaneous evidence of (i) the event; (ii) the date it first had knowledge of the event; (iii) the way in which it has affected performance; (iv) the efforts the Contractor has made to work around the difficulties, find alternative suppliers etc.

## Consequences

If the Contractor suffers delay, and providing it is able to demonstrate that Covid-19 is the cause, then it should, under Sub-Clause 18.4 [*Consequences of an Exception Event*] be entitled to an extension of the Time for Completion.

The same principles will apply as for other delay events. The Contractor will have to show that Covid-19 has caused a delay to the critical path of the project. Again, contemporaneous records and an up-to-date time schedule will be important.

It is hard to see how Covid-19 could qualify as an Exceptional Event giving rise to an entitlement to an increase in the Contract Price under Sub-Clause 18.4. An increase in the Contract Price is only available for events "*of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 [Exceptional Events]*" (i.e. war, rebellion, riot, strike or encountering munitions of war, etc.). A natural epidemic would not usually be expected to qualify. However, the situation might be different if the epidemic were discovered to have a more sinister origin.

Under Sub-Clause 18, the most likely result might therefore be that the Contractor should be entitled to an extension of time but would have to bear its own additional costs incurred, for example, in managing disruptions to its supply chain; extra-shifts; PPE; social distancing on Site.

If the Contractor suffers significant increased cost as a result of Covid-19 it will need to look to other clauses of the FIDIC model for relief. Under Sub-Clause 13.6 [*Adjustments for Changes in Laws*], the Contractor has the right to an increase in the Contract Price (by way of Variation) if it incurs an increase in Cost as a result of a change in law (including the introduction of new laws). Laws are defined to include any legislation (at any level), decree or regulation of any legally constituted public authority and the new laws passed by many countries in reaction to the Covid-19 pandemic would be covered. A question may remain as to how to deal with additional costs generated by the need to comply with new guidelines issued by the government which might not be directly legally binding but which a contractor would be expected to implement as part of its duty to provide a safe working environment for its personnel.

Importantly, this Sub-Clause 13.6 only applies to changes in the laws of the country where the Site is located. The clause does not apply to Costs arising out of changes in law in other countries, for example, the contractor's home country in an international context.

## Termination

Termination is unlikely to be the option of choice for either party in a Covid-19 context. However, the possibility exists.

Where performance is prevented by an Exceptional Event for a long period (84 consecutive days), either party would be entitled to terminate the Contract on 7 days' notice under Sub-Clause 18.5 [*Optional Termination*]. Under Sub-Clause 18.6 [*Release from Performance under the Law*], if a legal restriction is imposed - even outside the country of the Site - which would make it impossible or unlawful for the Contractor to continue performance of the Contract, then either party may elect to treat the Contract as discharged. In such circumstances, the Contract would terminate and the Employer would pay the Contractor for work done to date, and Costs incurred, but no loss of profit.

## Conclusion

The first wave of Covid-19 has had a dramatic effect on construction projects everywhere. The UK Government is right to call on parties to be reasonable and proportionate in the application of their contracts.

*"Responsible and fair behaviour is strongly encouraged in performing and enforcing contracts where there has been a material impact from Covid-19. This includes being reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest."*

Parties will have learned lessons about how the terms of their contract, FIDIC or other, face up to these circumstances. Parties will also be assessing how best those terms may be adapted for a possible second wave.

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CONTACT

RUPERT REECE

reece@gide.com

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