FIDIC Terms in the Context of COVID-19

I. Introduction

Projects around the globe are undeniably suffering impacts caused by the COVID-19 pandemic. Those include decreased available labour force due to illness and travel restrictions, prohibitions on site access, material and equipment transport and customs disruptions and - perhaps most worryingly - insolvency risk in respect of key Contractors and suppliers. However, the full effect of COVID-19 on projects, particularly economic, is unlikely to be experienced for many, many months. While governments around the world are working busily to identify ways in which to assist business entities of all kinds, the effects of COVID-19 and the actions taken by Employers and Contractors will be felt through the construction industry for years.

Employers, Contractors, subcontractors and suppliers are quickly turning to their contracts to search for assistance – not just for the purposes of checking whether current circumstances are captured by force majeure provisions – but in respect of other routes that may assist them in retaining their supply chains and protecting them from potential further exposure. While there may be hope, on both sides, for some form of renegotiation of terms to avoid collapse of parties and projects, formal notices are already flooding in to Employers. There is, unsurprisingly, some confusion about what provisions of construction contracts will bite in the circumstances.

This article focuses on the operation and application of relevant FIDIC terms in light of COVID-19, specifically. However, the principles raised in this context are capable of broader application for reasons that will be apparent. While the 1999 suite of FIDIC terms were amended in 2017, the 1999 Edition remains widely used and will govern many projects impacted by COVID-19. In addition, the terms of relevant provisions (for example those related to changes in laws, and extensions of time) are substantively similar across each of the 1999 and 2017 Red, Yellow and Silver Books. Differences of note have been identified in this article where relevant.

Given the widespread nature of the pandemic and its international impact on key aspects of works and businesses, there will in many cases be some entitlement to relief. However, parties must examine the terms of the contracts themselves, not only in order to identify provisions that might form the basis of any substantive entitlement, but also to ensure compliance with contractual requirements regarding timely notification. Moreover, the necessary threshold in respect of the *causative* impact of COVID-19 cannot be overlooked. COVID-19 will not serve as a panacea for Contractors already plagued by poor performance and delays. In addition, while Contractors' performance may more often be impacted by COVID-19, that will not always be the case and Employers too need to consider whether their own obligations to Contractors are impacted such that notice needs to be given to the Contractor.

II. A Word on Governing Law

Any contract must be analysed in the context of its governing law. In particular, many civil law jurisdictions benefit from codified entitlements as regards force majeure, and in particular, excusing a party from performance more generally where that performance becomes "impossible".

It is not the purpose of this article to provide an overview of international laws on the topics of force majeure, frustration / impossibility, rights to termination or how those vary. As a general rule, all jurisdictions of which the authors have experience in large part allow parties to agree risk allocation for key matters as between themselves, including regarding force majeure.

The starting point will always be the terms of the contract themselves, overlaid with such rules of interpretation and / or additional statutory entitlements (or prohibitions, as the case may be) provided for under the governing law.

III. Do not make assumptions about what provisions are relevant - a number of provisions in FIDIC Contracts may be pertinent

It is never advisable to consider a term of any contract in isolation. That is certainly so in respect of determining possible contractual routes to relief (or otherwise) in respect of COVID-19 under FIDIC.

Many parties will, understandably, first look to their force majeure provisions for the solution. In most notices that we have seen to date, Contractors are indeed relying upon force majeure. That is likely to be for many reasons. In a contractual setting, force majeure is naturally the first thing that comes to mind when a significant event outside of a party's control arises. In addition, force majeure provides (in principle and if valid) an Employer or Contractor (as the case may be) immediate relief from compliance with their obligations – putting aside any more substantive claims for compensation that might also be made.

However, force majeure is not the end of the analysis under FIDIC terms (or indeed any other contract). One must carefully look at and consider:

(a) Under which clauses / heads the "event" (or possibly, other action or impact consequent on the original event) may fall;

(b) What notification requirements are in place. Must the notice be submitted within 14 days of the event? If the notice has not been submitted on time, is relief entirely excluded, or does relief simply commence from the date of the notice once served? Are updates required at certain defined intervals, or as and when the impacts change?

(c) What information has to be included in any notice? What is the identifiable impact on performance? A blanket prohibition on access to site of course has an obvious impact. However, in many instances the analysis will be more complicated. Do not assume that a simple letter referring to a list of possible matters impacted by COVID-19 (e.g. "flights & accommodation of workers"), without more, will suffice;

(d) What is being done, and what can reasonably be done, to mitigate the impact said to be suffered as a result of COVID-19?

Parties would be well advised to think more closely about whether the "event" alleged to impact performance of a particular obligation, is in fact a force majeure, or whether it is, for example, a *change in laws*. In other words, there may (depending upon the scenario) be an important distinction

between the event (i) in the form of the pandemic itself and its impacts (i.e. illness); versus for example (ii) changes in local statutes, decrees or regulations that result from the pandemic.

This is not to suggest that parties are prevented from issuing more than one notice over time under more than one provision. Indeed, it may be advisable to do so. As more and more directives and prohibitions are issued by governments around the world, and the nature of the impacts to construction projects is identified on a more refined basis, it is likely that several notices over time will be issued and received, often pursuant to different contractual provisions.

IV. Force Majeure / Exceptional Events under FIDIC

The 1999 FIDIC (Red, Silver and Yellow) Books refer to "Force Majeure" (Cl. 19). The 2017 editions have moved away from that term, now referring to "Exceptional Events" (Cl. 18). The terms of those provisions regarding risk allocation are otherwise substantively the same.

Under FIDIC (1999), Sub-Clause 19.1 defines "Force Majeure" as "an exceptional event or circumstance":[1]

"*(a) which is beyond a Party's control;*

(b) which such Party could not reasonably have provided against ***before entering into the Contract****;*

(c) which, having arisen, such Party could not ***reasonably have avoided or overcome****, and*

(d) which is not substantially attributable to the other Party." (emphasis added)

Again, there may be an interesting question as to what constitutes the "event" as matters develop. If the "event" is COVID-19 itself, the direct impact of that is reduced workforce due to illness. However, the question becomes more complicated when one moves into the arena of subsequent government guidance or indeed necessary consequent health and safety considerations.

Note that the definition of Force Majeure above does not require that the event or circumstance be "unforeseeable". It requires only that it could not have been provided against *before entering the Contract* or not otherwise be reasonably avoided or overcome. Accordingly, arguments by Employers that some form of epidemic might always be foreseeable or provided for simply because there are historic instances of epidemics, is likely to have limited sway, particularly given the sheer geographic and physical impact of COVID-19.

Likewise, Employers might argue that as matters regarding COVID-19 develop, and further "events" occur (insofar as those events might otherwise fall within the definition of Force Majeure) those become increasingly foreseeable and are more capable of being mitigated. That argument may have relevance in certain instances, depending upon the prevailing factual circumstances. However, if a party's workforce is either decreased in size due to illness and / or self-isolation, then unless an alternative labour source is available immediately, that will inevitably cause some ongoing disruption. Precisely quantifying and identifying the extent of that impact – and whether that event is in fact the

[1] Sub-Clause 18.1 (2017).

cause of delays to completion or an increase in cost such as to entitle the Contractor to relief, are different questions.

Sub-Clause 19.1 also includes a non-exhaustive list of events or circumstances that might constitute Force Majeure, stating that they "*may include, but* [are] *not limited to*" exceptional events or circumstances "*of the kind listed below*", as long as they meet the four requirements in Sub-Clause 19.1(a) to (d) above:

"*(i) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*

(ii) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,

(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors,

(iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity, and

(v) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity."

A pandemic is arguably *not* an event of the kind listed at (i) to (v) above. Note that the 2017 Edition removed the language "*of the kind listed below*".[2] However, given the express proviso that this list is non-exhaustive, that removal is likely to be immaterial in considering whether an event constitutes a Force Majeure or Exceptional Event under FIDIC terms.

Of itself, it seems that the COVID-19 pandemic does satisfy the four fundamental requirements of Force Majeure / Exceptional Events.

A. Force Majeure Notice Requirements: Not to be Ignored

A party impacted by a Force Majeure must give a notice to the Employer if it "*is or will be* ***prevented*** *from performing* ***any of its obligations*** *under the Contract*" (Sub-Clause 19.2 (1999)).[3] (emphasis added)

Under FIDIC (1999), that notice "*shall*" be given within 14 days after the affected party became aware (or should have become aware) of the relevant Force Majeure event or circumstance. Where that notice has been given, the affected party will then be excused from performance of the affected obligations until the impact ceases.

Under FIDIC (2017), "Notice" is now a defined term, and must be issued in accordance with requirements of Clause 1.3. That provision does not contain guidance about what the Notice is substantively required to contain (that is provided for in specific clauses requiring notice). However, it does require, in particular, that a "Notice" be identified as such. Accordingly, there is likely to be less opportunity under FIDIC (2017) for parties to later trawl through correspondence identifying any

[2] For completeness, the 2017 Edition also included a new event/circumstance (not relevant to current circumstances) being *"strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors"*.

[3] Sub-Clause 18.2 (2017).

letters in relation to the particular subject and attempt to rely upon those as properly constituting a "Notice".

The 2017 Edition was also amended to make it clear that relief was still available where the Notice was served outside of this 14 day period *"[i]f this Notice is received by the other Party after this period of 14 days, the affected Party shall be excused performance of the prevented obligations only from the date on which this Notice is received by the other Party."* The 1999 Edition, while not containing this express language, does not (unlike Clause 20, for example) expressly state that submission of a Notice within 14 days is a precondition to relief saying that "*[t]he Party shall, having given notice, be excused performance of such obligations for so long as such prevents it from performing them*". However, on its face, the requirement to issue the notice within 14 days under FIDIC (1999) is a mandatory one.

It goes without saying that it is advisable to issue a notice as soon as a potential Force Majeure event arises. Equally however, vague notices that fail to identify any tangible impact (e.g. such as "as you know, movement of labour forces are likely to be impacted") are not particularly helpful and more liable to challenge. One can see from the nature of many of the notices already being issued, that these have been prepared on a hurried basis, while parties try to grapple with every aspect of the works being affected. It is not unusual (in any case, but particularly at this time) to see notices that group every possible impact into a vague pool of works, and without any real assessment of what obligations, in fact, are prevented from being performed.

FIDIC terms require that the notice "*shall **specify the obligations**, the performance of which is or will be prevented (the 'prevented obligations' in this clause).*"[4] That obviously presents some difficulty in circumstances where genuinely, the full impact may not yet be known. It is again prudent to be more inclusive than less, and to at least attempt to identify in a meaningful way what aspects of the Works are affected.

If applicable, Force Majeure should be notified even where the obligations being affected are not primary or critical drivers of the Works. A Force Majeure can of course be partial and affect only specific aspects of performance – not only those causative of critical delay. Whether those are critical drivers or not may not be fully assessed until the Works have been completed.

In addition, FIDIC (2017) also requires an affected party to give further Notices every 28 days after giving the first Notice if the Exceptional Event has a continuing effect. (Notice must also be given when the party is no longer affected). This obviously needs to be complied with in order to avoid any later argument that the entitlement to rely upon the Exceptional Event has expired.[5] Even absent this express requirement, regular updating of the position is good practice, not least because as identified above, the extent of obligations impacted needs to be kept under constant review so that appropriate Notice can be given. These additional Notices are an opportunity to provide further particulars of the Force Majeure event, and the specific works being impacted, especially where those particulars were not included in earlier Notices.

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[4] Sub-Clause 19.2 (1999); 18.2 (2017).

[5] Note that Sub-Clause 18.3 (2017) does also provide that if the other Party considers the Event has ceased, the other party "may give" a Notice to the affected Party stating that the other Party considers that the affected Party's performance is no longer prevented by the Exceptional Event, with reasons. It is not clear, however, that an Employer would be *obliged* to issue such a notice where a contractor has simply failed to update its position in accordance with Notice requirements.

Extent of Entitlement Where There is a Force Majeure / Exceptional Event

A Force Majeure event does not necessarily entitle a Contractor to Cost under FIDIC. Often, the only relief will be for an extension of time (***EOT***). Sub-Clause 19.4 of FIDIC (1999) provides that:[6]

"*If the Contractor is* ***prevented from performing any of his obligations*** *under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [*Notice of Force Majeure*], and* ***suffers delay and/or incurs Cost*** *by reason of such Force Majeure, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:*

*(a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and*

(b) ***if the event or circumstance is of the kind described in sub-paragraphs (i) to (iv)*** *of Sub-Clause 19.1 [*Definition of Force Majeure*] and,* ***in the case of subparagraphs (ii) to (iv)****, occurs* ***in the Country****, payment of any such Cost.*" (emphasis added)

As noted above, pandemics / epidemics are arguably not "of the kind" of event listed at Sub-Clause 19.1(i) to (iv). Nor indeed are government actions, decrees, legislative changes etc. Those matters are therefore not likely to attract entitlement to Cost under the FIDIC Force Majeure provisions.

No doubt Contractors (if relying on Force Majeure / Exceptional Events) will argue that COVID-19 is an event "of the kind" listed in Article 19.1(i) to (iv), simply by reason of the fact that those events are by their nature very significant, unexpected and fundamentally not attributable to a wrongdoing of any party. However, if that were correct, arguably *any* Force Majeure event falling within the requirements of Sub-Clause 19.1 would attract relief by way of EOT and Cost, where that is clearly not what was intended by the drafting. Sub-Clause 19.4 is clear in referring to items of the kind in Sub-Clause 19.1 (i) to (iv) only. It deliberately does not include item (v) (natural catastrophes), which in any event is arguably the item on that list most comparable to COVID-19.

In addition and in any event, entitlement to Cost in respect of events such as rebellion / terrorism; war; strikes, riots (i.e. Sub-Clause 19.1(ii) to (iv)) only arises where that event occurs *in Country*.

Where a Contactor wishes to make a claim for entitlement to (most likely only) EOT, that remains subject to the claims procedure provided for under Clause 20 (FIDIC 1999 and 2017). That contains its own Notice requirements (separate and additional to those under the Force Majeure clause discussed above). The significance of Clause 20 is dealt with further below.

Causation – has the event *really* "prevented" performance (and to what extent)?

FIDIC requires that the event "prevent" performance of the obligations said to be affected.

[6] Sub-Clause 18.4 (2017).

That is a high threshold, but does not of itself answer the enquiry that must be made to determine whether the requisite causal connection between the event and the "prevented" performance exists. The nature and scope of that enquiry is also likely to be jurisdiction specific.

There is a dearth of case law on FIDIC terms specifically under English law on this question. At a more general level regarding force majeure however, there has been considerable discussion of whether an affected party has to prove that the event of force majeure is *the operative cause* of the impediment. Or alternatively, whether it may be enough for the event merely to have contributed substantially to the occurrence of the event, such that while it is among the *concurrent* causes, the non-performance might have occurred without it. Commentators have traditionally considered the latter to be the default position in the absence of words to the contrary,[7] but recent case law casts doubt on this.[8]

In *Classic Maritime*[9] (not a case related to FIDIC terms), the relevant clause provided that a party would not be liable for loss and damage "*resulting from*" events tantamount to force majeure "*always provided that any such events directly affect the performance of either party...*" Among other things, agreeing with the conclusion of the Trial Judge, the Court stated that a "*reasonable and realistic businessman 'would see the broad common sense of saying that if, but for the dam burst, [the charterer] would not have performed its obligations, its failure to perform cannot fairly be said to have 'resulted from' the dam burst and the dam burst cannot fairly be said to have 'directly affected' the performance of [the charterer's] obligations".*

The fact that performance must be "prevented" under FIDIC does suggest that the event must have on its own been sufficient to "prevent" performance and arguably that the Contractor must demonstrate that it would have been willing and able to perform the contract "but for" the event. For example, where a Contractor was already considerably behind schedule due to fundamental inefficiencies and poor planning, query to what extent it can reasonably maintain whether and to what extent it was in fact "prevented" by the event from completing the Works by the Time for Completion.[10] The position will obviously differ depending upon the nature of the obligation said to be prevented from being performed, the "event" and the other prevailing circumstances regarding performance of those obligations.

In reality, these are likely to be detailed enquiries later made by a Judge or Tribunal attempting to disentangle the impacts of the event versus other, pre-existing or concurrent Contractor failures. Engineers, Employers and decision-makers will no doubt wish to review and interrogate (for example) the Contractor's tender assumptions, programme, planned working processes (in particular where

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7 *Bremer Handelsgesell-schaft v Vanden Avenne* [1978] 2 Lloyd's Report 109; *Bremer Handelsgesellschaft v Westzucker* [1981] 2 Lloyd's Reports 130. See also Chitty on Contracts, 33rd Ed. 15-156. The level of causal proximity required may turn on whether the clause is drafted so as to operate as an exemption clause, relieving a party from the consequences of breach, or whether it prevents a breach from occurring in the first place (the approach adopted in many standard form construction contracts). Arguably, on the latter approach, there is no need to show that the event is the sole operative cause of prevention. As always, the position will ultimately depend on a detailed investigation of the specific terms of the clause and the commercial context in which it operates.

8 *Classic Maritime Inc v Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102.

9 *Ibid.*

10 Also keeping in mind that an EOT is granted to a contractor "*if and to the extent*" that completion will be delayed Sub-Clause 8.4 (1999); 8.5 (2017). Note that as below, Sub-Clause 8.5 of FIDIC (2017) also specifically mentions the scenario of concurrent delays.

certain works may be carried out off-site, such as design). COVID-19 may in fact ultimately lead to entitlement in only limited matters.

For these reasons, and given the complexity of particularly large scale international construction projects, the question of causation in this setting can be far more difficult to grapple with than in other scenarios. These are not simple commercial arrangements where, for example, one specific service has to be provided, or where one product or set of materials / equipment are to be delivered. Construction projects have numerous workfronts, some of which will be in country, some outside, many of which will to some extent proceed in parallel; and many of which are liable to be delayed and disrupted by matters that have no relation to COVID-19.

Bearing in mind that these matters will be judged with hindsight, parties seeking to rely upon provisions should keep (as should always be the case in respect of construction projects) detailed contemporaneous records of steps taken to investigate and consider alternative means of performance; and precisely the impacts being experienced.

Mitigation

Under both FIDIC 1999 and 2017, each Party is at all times obliged to use "*all reasonable endeavours to minimise any delay in the performance of the Contract*".[11] To the extent obligations are not prevented by the event, they must be complied with – this too is an important point when it comes to causation regarding Contractor's claims.[12]

What satisfies "all reasonable endeavours" is dependent on the circumstances and the governing law. As with causation, this is likely to be the subject of considerable debate between parties. However, certainly under English law, "all reasonable endeavours" is a high threshold. At its simplest, all reasonable endeavours has been regarded as lying on the spectrum between "reasonable" and "best" endeavours, the latter being a particularly onerous standard. While not an absolute obligation, "best" endeavours requires an obligor to take all reasonable steps or all those steps in his power which a prudent and determined man acting in his own interest.[13] This can involve the obligor sacrificing its own commercial interest.

However "all reasonable endeavours" has on occasions been treated as tantamount to an obligation to use best endeavours. On the subject of whether all reasonable endeavours would require a party to sacrifice its *commercial interests* to achieve the goal, in *CPC Group Ltd v Qatari Diar Real Estate Investment Company*[14] the judge, having reviewed previous case law, stated: "*It seems… that the obligation to use "all reasonable endeavours" does not always require the obligor to sacrifice his commercial interests*". That comment on its face is not particularly instructive, but the extent to which a party must sacrifice its own commercial interests will depend upon the circumstances of the contract. It would not include an obligation to utterly disregard the party's own interest, or require action that would lead to certain financial ruin.

Mitigation is a question of degree, and a difficult one in this unchartered territory. Other existing express contractual obligations must also be taken account of in this context. It is not

[11] Sub-Clause 19.3 (1999); 18.3 (2017).
[12] This is expressly provided for in FIDIC (2017) at Sub-Clause 18.2.
[13] *IBM United Kingdom Ltd v Rockware Glass Ltd* [1980] FSR 335.
[14] [2010] EWHC 1535 (Ch).

suggested that contractual specifications or standards be thrown out the window in the name of mitigation. Or that Employers automatically must accept performance which results in a quality of work far and away from that contracted and being paid for. Or indeed that Contractors should automatically be expected to invest, at their potential financial peril, significant sums undertaking works in a different manner and using entirely different suppliers than anticipated.

FIDIC requires that Employers also minimise the delay in performance of the Contract. In any event, where genuine impact as a result of COVID-19 is ongoing, Employers are unlikely to simply refer Contractors to their existing obligations and wait for the possible collapse of suppliers and projects. Employers should actively consider whether there may be, for example, approvals that might reasonably be given to undertake work in different ways to that anticipated, or provide approvals to use alternative suppliers to those provided for in the contract.

In light of COVID-19, there will almost certainly be circumstances that simply cannot be mitigated (or at least not substantially so). However, particularly in the current climate, Employers are much more likely to see arguments that Contractors cannot and should not be obliged to "mitigate" where that would involve additional financial outlay – where parties are already likely to be in a far more precarious financial position.

V. Changes in Laws

At the time of publication, governments around the world have already implemented emergency measures to combat the pandemic. These include border closures, travel restrictions and partial and complete "lock-downs".

Change in Laws provisions are one of the rarer instances of contractual relief. Nonetheless, if a Contractor can identify changes in Laws or regulations arising as a result of COVID-19 which have impacted the work, it may be able to claim not only time but additional Cost under, for example, Clause 13.7 of FIDIC (1999).[15]

FIDIC (1999) allows for contract adjustment resulting from a "*change in the Laws of the Country (including the introduction of new Laws and the repeal or modification of existing Laws); or in the judicial or official governmental interpretation or implementation of such Laws*".[16]

Importantly, Sub-Clause 13.7 provides relief where there is a change to (or interpretation / implementation of) of the Laws *of the Country* i.e. the jurisdiction in which the site is located. That is, these are not the laws of some other jurisdiction in which movement of labour is affected, or from which the project is awaiting delivery of a major component. In an international project, the Contractor is obviously likely to be affected by activities in several *other* countries aside from the country where the Works are actually being undertaken. Manufacture may be taking place off shore and materials and labour may be being procured elsewhere. Therefore, in current circumstances, the operation of this provision may be far more limited than a Contractor would hope (subject to the fact

[15] Sub-Clause 13.6 (2017).
[16] The list as to what constitutes Change in Laws in FIDIC (2017) is lengthier, but for relevant purposes includes the same matters as in (1999).

that measures are of course increasingly being adopted across nations such that, in any event, laws in "the Country" may well be causative of delays and increased Cost).

The FIDIC suite has a wide definition of "Laws" which include "*all national (or state or provincial) legislation, statutes, ordinances and other laws, orders…and regulations and by-laws of any legally constituted public authority*".[17]

Again however, the application of this provision must be considered in the context of the legal framework in the relevant country. In certain countries, directives or decrees may simply be issued pursuant to existing legislation; whereas in others, entirely new legislation is being enacted. In the UK for example, new legislation such as the *Coronavirus Act 2020* was passed on 25 March 2020 which grants the Secretary of State the power to restrict movement or persons in premises, , whilst the "lock-down" has been implemented through new regulations under the existing powers in the *Public Health (Control of Diseases) Act 1984*.

Where a new directive or guidance is issued pursuant to legislation that already exists, it ought be considered whether that might instead constitute official "*interpretation or implementation"* of Laws.

In addition, a distinction may be drawn between mandatory restrictions versus recommendations or guidance. Non-binding travel, hygiene and social advice given by government entities is unlikely to be considered a change in Laws (unless, as above, it might be argued to constitute a matter of interpretation or implementation of Laws, or relate to licences and permits (under FIDIC (2017) if the direction goes so far as to encroach on those formal permissions).

Note that:

(a) Where the Contractor suffers delay or incurs an increase in Cost "as a result of" a change in Laws, they will be entitled to both an EOT and payment of Cost. Again, that claim is subject to the provisions of Clause 20.

In addition, under FIDIC (2017) where any adjustment *to the execution of the Works* becomes necessary as a result of a change in Laws, the Contractor must "promptly give a notice to the Engineer" (alternatively, a Notice can be issued by the Engineer). The Engineer may instruct, or request a proposal for, a *Variation* under Sub-Clause 13.3 (1999).[18]

[17] Sub-clause 1.1.6.5 of FIDIC(1999). The definition in FIDIC(2017) sub-clause 1.1.43, is wider still.
[18] Notices under the Silver book are given to / from the Employer.

VI. Extensions of time

A. Extensions of Time

Sub-Clause 8.4 (1999) of the Yellow and Red Books[19] entitles a Contractor to request an extension of time if completion of the Works is or will be delayed by "***Unforeseeable*** *shortages* ***in the availability of personnel or Goods*** *caused by epidemic or governmental actions*".[20]

Any claim under this provision is again subject to the requirements of Clause 20.

Unlike the provisions discussed above, the Contractor's relief under this provision is dependent on the shortages being "Unforeseeable", a term expressly defined under FIDIC. That is, a matter that is not reasonably foreseeable by an experienced Contractor by the date of submission of the tender (FIDIC 1999) or by the Base Date (28 days before the date for submission of the Tender) (FIDIC 2017). It is likely that at least in some circumstances, the impact of COVID-19 under this provision will have been "Unforeseeable".

While an "epidemic" as referenced in Sub-Clause 8.4 is not the same as a "pandemic", it seems likely that (particularly given a pandemic is of greater geographic spread than an epidemic) COVID-19 would be treated as falling within the terms of this provision. In addition, the phrase "governmental actions" is reasonably broad and has obvious relevance (though the question of whether that would include something that constitutes mere guidance, as opposed to formal instruments or directives, is perhaps debatable).

Further, as with all EOT claims, this impact must be one that *delays* completion of the Works. Accordingly, such a claim will require a detailed delay analysis in the usual way as to what events were or were not causative of delay.

FIDIC (2017) also provides that where delays which are the Employer's responsibility are concurrent with those that are the Contractor's responsibility, the Contractor's entitlement to an EOT is to be assessed as provided by the Special Provisions or otherwise, "*as appropriate taking due regard of all relevant circumstances*".

Therefore, particularly where there is true concurrency, the actual approach will be determined by the words (particularly if amended / supplemented) and law of the contract. For example, the second edition of the Society of Construction Law Protocol (which is referenced by FIDIC in the Special Provisions) defines concurrent delay (Core Principle 10 as follows):

"10. Concurrent delay – effect on entitlement to EOT

True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion

[19] Sub-Clause 8.5 (2017), Red, Yellow and Silver Books. The 1999 Silver Book does not contain a similar provision.
[20] "Goods" under FIDIC terms is defined to include Contractor's Equipment, Materials, Plant and Temporary Works.

(i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due."

The Protocol goes on to say at paragraph 10.2 that:

"Where concurrent delay has been established, the Contractor should be entitled to an EOT for the Employer Delay to Completion … The Contractor Delay should not reduce the amount of EOT due to the Contractor as a result of the Employer Delay."

B. Delays Caused By Authorities

In addition, entitlement may possibly also arise if the Contractor is required to follow certain procedures instigated by a public authority in the "Country." Sub-Clause 8.5 (1999)[21] provides that:

"*If the following conditions apply, namely:*

(a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,

(b) these authorities delay or disrupt the Contractor's work, and

(c) the delay or disruption was Unforeseeable,

then this delay or disruption will be considered as a cause of delay under subparagraph (b) of Sub-Clause 8.4 [Extension of Time for Completion]."

Again, the delay must be, amongst other requirements, "Unforeseeable". This provision may be applied to governmental or other public bodies' decisions or measures taken against the COVID-19 outbreak that delay the Contractor (e.g., suspension of work, bans on large gatherings, mandatory quarantine).

While this provision on its face may be attractively broad, again, there are a number of issues arising:

(a) the relevant authority must be based in the country in which the site / Permanent Works is located.

(b) This provision appears to be directed not at local authority guidelines or directives regarding matters of the kind which constitute Force Majeure or similar, but instead, practical requirements and procedures set down by, for example, utilities and land planning / licensing authorities. That tends to be confirmed by the fact that this provision was slightly amended in 2017 to add reference to "private utility entities" to (a) above.

(c) There may be some debate over what constitutes "procedures laid down by" those authorities for the purposes of this provision.

[21] Sub-Clause 8.6 (2017). The Silver Book (1999) includes the definition of "Unreasonable" in the text of the Sub-Clause 8.5 itself, with the same practical effect.

In any event this provision does not provide relief on a standalone basis. It is expressly provided that such delay or disruption will fall within Sub-Clause 8.4(b) for the purposes of entitlement to time. In practical terms its operation as regards the relief it provides is therefore similar to that of Force Majeure and other EOTs.

While this povision refers to delay "or disruption" to the Contractor's work, it is tolerably clear that, as an extension of time falling within Sub-Clause 8.4, the impact must constitute a delay to completion for the purposes of Sub-Clause 10.1. Mere disruption to progress as distinct from delay to the completion date would not be sufficient to warrant and extension of Time for Completion.

VII. Termination Rights: a Prolonged Force Majeure / Exceptional Event

Under FIDIC, *either* Party may terminate the Contract *"[i]f the execution of substantially all the Works in progress is prevented*" due to the event for a continuous period of 84 days or for multiple periods that total more than 140 days.[22]

However that termination right only arises where execution of "*substantially* ***all the Works in progress***", is *prevented* by reason of a Force Majeure / Exceptional Event. The right therefore will not arise where the Works are suffering general disruption that renders those more inefficient, nor where progress of some aspect (even a key one) is delayed due to shortage of labour or inability to receive materials or equipment.

It goes without saying that, where Employers are concerned about projects coming to a standstill not only due to practical implications of COVID-19 but a termination of the contract, the time for the running of Force Majeure must be carefully monitored.

It would be prudent, where a prolonged Force Majeure event is anticipated, to commence potential discussions regarding renegotiation of at least some contractual terms (including waiver of termination rights) in exchange for other potential relaxations or extensions to contractual requirements.

These termination rights ought not be viewed as an opportunity for Contractors to attempt to hold Employers to ransom. Savvy Employers have detailed records and have undertaken close review of day to day events on site though their own Project teams. Even where an Employer considers there to be a genuine potential Force Majeure, they will usually be well placed to identify to the Contractor all of the reasons why that did not prevent performance of the particular obligation (certainly not to the extent alleged), due to pre-existing ongoing failures on the part of the Contractor. Contractors should take note that Employers too during this period will closely be considering their own rights under these contracts (of termination and otherwise), to protect their own financial exposure in particular where they consider the Contractor is already liable to them for substantial amounts of money arising out of other breaches of contract.

Upon termination in this scenario, the Contractor will be paid for all work it has done, including Plant, Materials, removing Temporary Works and Contractor's Equipment, and the cost of repatriation of the Contractor's staff and labour. The Contractor cannot recover profit on the balance

[22] Sub-Clause 19.6 (1999); 18.5 (2017).

of incomplete work, and the Employer cannot recover the cost of procuring a replacement Contractor to undertake the incomplete work.

VIII. Frustration and Impossibility

Clause 19.7 of FIDIC (1999)[23] provides an express right to exit the contract in the event of impossibility: i.e. *"if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it* ***impossible*** *or* ***unlawful*** *for either or both Parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance the Parties shall be discharged from further performance"* (emphasis added).

This is similar to the doctrine in many common and civil law countries of frustration and / or impossibility.

Notably:

(a) This provision has application in circumstances beyond Force Majeure Events. It covers any event that might render it impossible to carry out the Works.

(b) It does not, on its face, import a requirement that the matter could have been mitigated or made provision against – however – if an event truly renders performance "impossible" by its nature it will not be capable of mitigation.

(c) While the provision does not refer to the "whole" of the Works becoming impossible or unlawful to perform, the provision speaks about impossibility that entitles a discharge of the contract (and dictates that payment will be in accordance with Sub-Clause 19.6 (Optional Termination)).

(d) The clause refers to "impossibility" (or unlawfulness). Necessarily, that cannot be a scenario where, for example, a party would suffer severe economic hardship completing the Works, or where the Works have simply become more difficult (even extremely so).

Subject of course to governing law, this provision does nonetheless import a very high threshold before a party could submit that they are entitled to be discharged from performance.

IX. Suspension as an Alternative?

Sub-Clause 8.8 of FIDIC (1999) does provide the Employer an ability to suspend progress or part or all of the Works, at any time it wishes to do so.[24] Where the Contractor suffers delay or incurs cost from the suspension, or from resuming the Work when instructed to do so, the Contractor will be entitled to an EOT and Cost (Sub-Clause 8.9). Under the 2017 Edition, this is now Cost *plus* Profit.

However, as with the risk of termination for prolonged Force Majeure, this too has consequences for the Employer. Employers are actively considering this course where the impact of

[23] Sub-Clause 18.7 (2017).
[24] Sub-Clause 8.9 (2017).

COVID-19 is so pervasive that it is essentially stopping all substantive works – given the risk of termination for prolonged Force Majeure.

Where the suspension has continued for more than 84 days, the Contractor may give a notice to the engineer under Sub-Clause 8.11 (1999)[25] requesting permission to proceed. If the Engineer / Employer does not within 28 days give notice to resume work, the Contractor may either agree a further extension of the suspension period with the Engineer, or in absence of such agreement, treat this suspension as an omission of that part of the Works. Where the prolonged suspension affects the *whole* of the Works, the Contractor may issue a Notice of termination.

Note that there is no obligation upon the Contractor to agree a further period of suspension. Accordingly, as with termination, the onus is on the parties to commence discussions as early as early as possible to avoid this outcome.

X. Termination Rights: Insolvency

Considering a right to terminate for party insolvency is obviously a significant and material step. Most Employers will not wish their projects to reach a point where this is necessary. However, Contractors and subcontractors will inevitably suffer economic hardship over coming months – in particular where companies were already financially vulnerable.

Given that it may take parties some time to experience the full economic effects of COVID-19, there is obviously an interface between the time at which this right may arise, as against rights to terminate due to either a prolonged suspension or a prolonged Force Majeure.

Sub-Clause 15.2(e) (1999) allows the Employer to terminate the contract where the Contractor "*becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with 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*".[26] The Employer can terminate immediately in these circumstances without any notice of intention to do so.

Under FIDIC (2017), where these matters apply to a member of a *joint venture*, termination rights on the part of the Employer will also arise (Sub-Clause 15.2.1(i) and (ii)). In instances of other material breach justifying termination, it is open to the other joint venture members to promptly confirm that they will perform all obligations upon the joint venture under the Contract, in order to avoid a termination. However, (i) given the lack of requirement for any notice period in the event of termination for insolvency; and (ii) depending on the speed of development of a party's financial standing, joint venture members (and Contractors) again need to proactively monitor the position.

Terms such as "insolvent" are not defined under FIDIC. Accordingly there may be instances where the question is one of degree and the point at which the rights arises needs to carefully be assessed. Generally speaking, this provision does appear to be aimed at instances where events approaching formal insolvency proceedings have occurred. It must also be kept in mind that this is a question to also be considered through the lens of the jurisdiction in which the relevant party is

[25] Sub-Clause 8.12 (2017).
[26] Sub-Clause 15.2.1(g) (2017): the description of the right to terminate is slightly different in terms to (1999), but substantively similar.

resident, and whose company rules governing their position as solvent or otherwise operate. These are not easy questions, however they are worth early consideration.

XI. The Advance Warning Provision of FIDIC (2017)

This new Sub-Clause (8.4) is designed to ensure that issues which *may* adversely impact the Works, are identified early, with a view to resolving the matter promptly and quickly without the situation developing into anything more serious. Again, it might be expected that those operating under FIDIC 2017 forms, will expect to see many more of these in coming weeks and months.

There is no reference in this sub-clause to formal claims Notices under Sub-Clause 20.2 given the underlying purpose here is simply to identify issues. Claims are separate matters.

A question may arise as to whether, if a party fails to act under this provision, parties would have been in a better position to resolve the problem had warning been provided earlier.[27] If so, should a Contractor only be granted an EOT and/or be paid for the consequences of the dealing with the event in question that would have been incurred had a warning been given. There is otherwise no express sanction in FIDIC (2017) for a failure to provide advance warning.

XII. Claims and Compliance with Clause 20 – Ensuring a Notice of Claim is Properly Issued Within Time

Both parties should be aware that Clause 20 contains timing requirements that, if not complied with, will certainly under some governing laws (including English law),[28] constitute a valid and enforceable *bar* against any claim.

As identified above, Force Majeure / Exceptional Event, and EOT claims are subject to additional compliance with Clause 20. Notifications under Clause 20 do not replace those under other specific provisions.

There are some differences between the claim provisions in FIDIC 1999 versus 2017. The 1999 Edition required that where the Contractor considered it had an entitlement to relief, it must issue a notice, within 28 days of when the Contractor did or should have become aware of the circumstance giving rise to the Claim. Sub-Clause 20.1 provides no detailed guidance as to what should be in that notice, however generally speaking, it must be assumed that the notice should contain the best information the Contractor is reasonably able to provide.[29]

Sub-Clause 20.1 (1999) is clear that if that notice is not submitted, the time for completion will not be extended, nor will additional payment be made.

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[27] The clause requires only that the advice is given "in advance of" the event. How far in advance is not specified.
[28] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems (No. 2)* [2007] EWHC 447 (TCC).
[29] *Ibid.* See also *Obrascon Huarte Lain SA v Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) in relation to Sub-Clause 20.1: "*..one should construe it as permitting any claim provided that it is made by notice in writing to the Engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the Contract or in connection with it. It must be recognizable as a "claim"."*

Further, within 42 days of the event giving rise to the claim, the Contractor must under Sub-Clause 20.1 issue a fully detailed claim with all particulars, to be updated on monthly intervals; with a final claim to be issued 28 days after the effect of the event giving rise to the claim have ceased.

Generally speaking, Clause 20 is clearer and more prescriptive in the 2017 Edition. As a result however, it provides a greater number of hurdles at which a Claim (as defined in the 2017 Edition) may become barred.

Either party that considers it has a claim against the other must issue a "Notice of Claim" (Sub-Clause 20.2.1) (i.e. this provision is reciprocal) again within 28 days of when the party did or should have become aware of the event said to give rise to the claim. Accordingly, among other things parties should ensure that the "notice" is entitled "Notice of Claim". Again, this Notice is a condition precedent to any entitlement. However, if the Engineer considers a party has failed to give Notice of the Claim in time, it must notify the claiming Party accordingly within 14 days (with reasons), or the Notice will be deemed a valid Notice (Sub-Clause 20.2.2), subject to the other Party's disagreement.[30]

In addition, the claiming Party must (Sub-Clause 20.2.4), within 84 days after becoming aware of the event, submit a "fully detailed Claim", which is in turn explained within that Sub-Clause as including, among other things, contemporary records and additional supporting particulars of the amount of additional payment and/or EOT claimed. Again if that is not done, the Notice of Claim will be deemed lapsed, of which the Engineer must give Notice.[31]

Again, while identifying the impacts of COVID-19 may be considered difficult, these provisions must be complied with to avoid exclusion of recovery for EOT and Cost elements.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

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30 In the case of the Silver Book, the Notice of failure to submit a valid Claim under Sub-Clause 20.2.2 is given by the other Party.

31 Again, if the Engineer fails to do so, the Notice of Claim shall be deemed a valid Notice, subject to the other Party's disagreement. In the case of the Silver Book, the Employer's Representative must give notice of failure to submit a "fully detailed Claim" under Sub-Clause 20.2.4.