

Exceptional Events & Force Majeure under FIDIC Contracts

الظروف الطارئة و القوة القاهرة و متى تتحقق
بموجب عقود فيديك FIDIC

مؤتمر الكويت الرابع لعقود فيديك
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م. تحسين صالح

1



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Introduction: Exceptional Events in FIDIC 1987 RB and some local Conditions of Contract

- In some of the local Conditions of Contracts which are in use in our countries the Clauses / Sub-Clauses that deal with Exceptional events/ risks are Clause 65 and Sub-Clause 20.2 or 20.4 depending on the re-numbering of the clauses.
- In the Conditions of Contract issued by the Ministry of Public Works in Kuwait Clause 65 [*Special Risks*] and by Ashghal in Qatar also, Clause 65 [*Special Risks*] are used to address the Exceptional Events, Exceptional Risks and/or Force Majeure.



Introduction: Exceptional Events in FIDIC 1987 RB and some local Conditions of Contract

- Such local Conditions of Contract were derived from the FIDIC 1987 4th edition Red Book.
 - Clause 65 [*Special Risks*], &
 - Sub-Clause 20.4 [*Employer's Risks*]
- Both define when the Contractor is released from liability in consequence of any of the special risks.
- But the Contractor cannot directly under these Conditions terminate the Contract if the execution becomes impossible.



3

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Tahseen Saleh

Introduction: Exceptional Events in FIDIC 1987 RB and some local Conditions of Contract

- Termination of Contract is addressed only under Sub-Clause 65.6 [*Outbreak of War*],
- The Employer shall be entitled to terminate the Contract, and
- The Contractor shall continue to use his best endeavors to complete the Works. !!!!!!!

- *What if the execution of the Works became impossible due to reasons other than the outbreak of war?*
- *What if the Employer did not give the notice to terminate the Works in the case of outbreak of war? or in the case the execution of the Works became impossible?*

Employer's Risks in FIDIC 1987 RB

- The Special Risks under Clause 65 are addressed in Sub-Clause 65.2 [*Special Risks*] are:
 - (a) the risks defined under paragraphs (a), (c), (d), and (e) of Sub-Clause 20.4, and
 - (b) the risks defined under paragraph (b) of Sub-Clause 20.4 insofar as these relate to the country in which the Works are to be executed.

- Sub-Clause 20.4 [Employer's Risks] which lists 8 categories or types of risks 5 of which are considered to be Special Risks.

- The five special risks or exceptional events are addressed in Sub-Clause 65.2 as seen above.

5



Employer's Risks in FIDIC 1987 RB S/C 20.4

- The Employer's risks are:
 - (a) war, hostilities (whether the war be declared or not), invasion, act of foreign enemies;
 - (b) rebellion, revolution, insurrection, or military or usurped power, or civil war insofar as it relates to the country in which the Works are located or countries through which plant must be transported;
 - (c) ionising, radiation, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste, from the combustion of nuclear fuel, radio-active toxic explosive or other hazardous properties of any explosive, nuclear assembly or nuclear component thereof;
 - (d) Pressure waves caused by aircrafts travelling at sonic or supersonic speed;

Employer's Risks in FIDIC 1987 RB

- The Employer's risks are (Cont'd):
 - e) Riot, commotion, or disorder, unless solely restricted to employees of the Contractor or his subcontractors and arising from the conduct of the Works,
 - f) Loss or damage due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the Contract.
 - g) Loss or damage to the extent that is due to the design of the Works, other than any part of the design provided by the Contractor or for which the contractor is responsible, and
 - h) any operation of the forces of nature against which an experienced Contractor could not reasonably have been expected to take precautions.

7



FIDIC 1999

Clause 19 [*Force Majeure*]

- 1.1.6.4 states that “Force Majeure” is defined in Clause 19 [*Force Majeure*]
- Sub-Clause 19.1 provides for the definition and conditions of Force Majeure:
- In this Clause “Force Majeure” means an exceptional event or circumstance:
 - i. which is beyond a Party’s control;
 - ii. which such Party could not reasonably have provided against before entering into the Contract;
 - iii. which having arisen, such Party could not reasonably have avoided or overcome; and
 - iv. which is not substantially attributable to the other Party.



FIDIC 2017

Clause 18 [*Exceptional Events*]

- The definition under S/C 1.1.{37, 37, 33} “Exceptional Event” means an event or circumstances as defined in Sub-Clause 18.1 [*Exceptional Events*]
- Under S/C 18.1: “Exceptional Event” is means an event or circumstance 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.

So the event or circumstance must be “exceptional” not merely unusual



[*Exceptional Events*] vs. [*Force Majeure*]

- the title and definition “Force Majeure” was only used in the 1999 suite of Contracts.
- this definition is now changed to “Exceptional Event” in the 2017 suite of Contracts.
- the phrase “Exceptional Event” can apply to the different possibilities of such events including the “Force Majeure” which is only one possibility.

[*Exceptional Events*] vs. [*Force Majeure*]

- the Exceptional Events or circumstances that could eventuate and prevent one Party from performing any (one, more, or all) of its obligations in items (i) to (v) in Sub-Clause 19.1 of the 1999 edition and items (a) to (f) in the 2017 edition.
- If the performance of one or more but not all of the obligations is prevented as a result of the Exceptional Event, then the is not a Force Majeure.
- Force Majeure applies only when all the obligations are prevented.

FIDIC 1999 S/C 19.1 & 2017 S/C 18.1 *[Exceptional Events]*

- An Exceptional Events may comprise but not limited to any of the following events or circumstances provided that the Conditions (i) to (vi) above are satisfied. (Slide # 9)
- (i) (a) war, hostilities, (whether war is declared or not), invasion, act of foreign enemies,
 - (ii) (b) rebellion, revolution, insurrection, military or usurped power, or civil war,
 - (iii) (c) riot, commotion, disorder, **strike or lockout** by persons other than the Contractor's Personnel and other employees of the Contractor and his Subcontractors,
 - (d) **strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and his Subcontractors,**

FIDIC 1999 S/C 19.1 & 2017 S/C 18.1 *[Exceptional Events]*

- An Exceptional Events may comprise but not limited to any of the following events or circumstances provided that the Conditions (i) to (vi) above are satisfied. (Slide # 9)
 - (vi) (e) encountering munitions of war, explosive materials, ionizing 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 or
 - (v) (f) natural catastrophes such as earthquakes, tsunami, volcanic activity, hurricane or typhoon.

FIDIC 1999 S/C 19.1 & 2017 S/C 18.1 *[Exceptional Events]*

- The Exceptional Events listed in **S/C 19.1 of the 1999** edition & **S/C 18.1 of the 2017** editions are similar to those addressed in S/C 65.2 of the 1987 Red book 4th edition,
- the item of **Pressure waves caused by aircrafts travelling at sonic or supersonic speed**, is not used in both **1999 & 2017** editions. { *why?* }
- The natural catastrophes is considered as an Exceptional Event in both **1999 & 2017** editions. It was not considered as such in the 1987 Red Book 4th edition.

FIDIC 1999 S/C 19.1 & 2017 S/C 18.1 *[Exceptional Events]*

- “exceptionally adverse climatic conditions” is excluded from the definition of what constitutes an Exceptional Event.
- this means that there is no right for either Party to suspend the Works in the case of an event of “exceptionally adverse climatic conditions”
- if this type of event has the effect of delaying completion and taking-over of the Works or Section, the Contractor shall be entitled to EOT under subparagraph (c) of S/C 8.5 *[Extension of Time]*.

FIDIC 1999 S/C 19.1 & 2017 S/C 18.1 *[Exceptional Events]*

- From the previous slides, to have an exceptional risk six criteria have to be met.
 1. That the event is an Exceptional Events or circumstances,
 2. The four criteria (i) to (vi) above are satisfied **S/C 18.1** of the FIDIC 2017 suite. (Slide # 9)
 3. And one Party (or both) is prevented or could be prevented from performing any (one, more, or all) of its obligations.

FIDIC 1999 S/C 19.2 & 2017 S/C 18.2

[Notice of an Exceptional Events] wording of 2017 edition

- If a Party is or will be prevented from performing any obligations under the Contract due to an Exceptional Event (the “affected Party” in this Sub-Clause), then the affected Party shall give a Notice to the Other Party of such an Exceptional Event,
- shall specify the obligations, the performance of which will be prevented (the ‘prevented obligations in this Clause.
- This Notice shall be given within 14 days after the affected Party became aware, or should have become aware, of the Exceptional Event.

FIDIC 1999 S/C 19.2 & 2017 S/C 18.2

[Notice of an Exceptional Events] wording of 2017 edition

- The affected Party shall then be excused performance the prevented obligations from the date such performance is prevented by the Exceptional Event.
- If the Notice is received by the other Party after the 14 days period, the affected Party shall then be excused performance the prevented obligations only from the date on which this Notice is received by the other Party.
- Thereafter, the affected Party shall be excused performance the prevented obligations for so long as such Exceptional Event prevents him from performing them.

FIDIC 1999 S/C 19.2 & 2017 S/C 18.2

[Notice of an Exceptional Events] wording of 2017 edition

- Other than performance of the prevented obligations, the affected Party shall not be excused performance of all other obligations under the Contract..
- The obligations of either Party to make payments due to the other Party under the Contract shall not be excused by an Exceptional Event .

FIDIC

[Notice of an Exceptional Events] wording of 2017 edition

- If the Exceptional Event has a continuing effect, the affected Party shall give further Notices describing the effect every 28 days after giving the first Notice under Sub-Clause 18.2 [*Notice of an Exceptional Event*].
 - This paragraph is placed in Sub-Clause 18.3 [*Duty to minimize Delay*].
 - The Notice to be given @ 28 days intervals, while the interim claims are to be submitted on monthly basis under Sub-Clause 20.2.6 [*Claims of continuing effect*], paragraph (c).

FIDIC 1999 S/C 19.3 & 2017 S/C 18.3 *[Duty to Minimize Delay]* wording of 2017 edition

- Each Party shall at all Times use reasonable endeavors to minimize and delay in the performance of the Contract.
- The affected Party shall **immediately** give a Notice to the other Party when he ceases to be affected by the Exceptional Event.
- If the affected Party fails to do so, 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.

FIDIC 1999 S/C 19.4 & 2017 S/C 18.4

[Consequences of an Exceptional Events] wording of 2017 edition

- If the Contractor is the affected Party and suffers delay and / or incurs Cost by reason of the Exceptional Event of which he/she gave a Notice under the relevant Sub-Clause 18.2 [*Notice of an Exceptional Event*], the Contractor shall be entitled subject to Sub-Clause 20.2 [*Claims for Payment and/or EOT*] to:
 - (a) EOT, and/or
 - (b) if the Exceptional Event is of the kind described in sub-paragraphs (a) to (e) of Sub-Clause 18.1 [Exceptional Events] and, in the case of sub-paragraphs (b) to (e) of that Sub-Clause, occurs in the Country of payment of such Cost. (slides #s 12&13)

FIDIC 1999 S/C 19.4 & 2017 S/C 18.4

[Consequences of an Exceptional Events] wording of 2017 edition

- Accordingly, the Contractor to be entitled for an EOT and/or additional payment under Clause 18 [*Exceptional Events*]:
 - A Notice under the relevant Sub-Clause 18.2 [*Notice of an Exceptional Event*] shall be given, and
 - Being subject to Sub-Clause 20.2 [*Claims for Payment and/or EOT*], another Notice under Sub-Clause 20.2.1 [*Notice of Claim*] shall be also given.
 - The Exceptional Events other than war, hostilities, (whether war is declared or not), invasion, act of foreign enemies shall be in the Country of payment to be a basis Claim.

FIDIC 1999 S/C 19.4 & 2017 S/C 18.4

[Consequences of an Exceptional Events] wording of 2017 edition

- *What if the Exceptional Event in the case of sub-paragraphs (b) to (e) of Sub-Clause 18.1 [Exceptional Event] occur in the Country of carrying out the Works? Or the Country of manufacturing certain plant and/or materials for the Works?*

FIDIC 1999 S/C 19.5 & 2017 S/C 18.5 *[Optional Termination]* wording of 2017 edition

- If the execution of substantially all the Works in progress is prevented for:
- a continuous period of 84 days by reason of an Exceptional Event of which a Notice has been given under Sub-Clause 18.2 [Notice of an Exceptional Event], or
 - for multiple periods which total more than 140 days due to the same Exceptional Event,
- then either Party may give to the other Party a Notice of Termination of the Contract.

FIDIC 1999 S/C 19.5 & 2017 S/C 18.5 *[Optional Termination]* wording of 2017 edition

- The Termination date shall be the date 7 days after the Notice is received by the other Party.
- The Contractor shall proceed in accordance with Sub-Clause 16.3 [*Contractor's Obligations After Termination*].
- The Contractor shall submit detailed supporting particulars of the value of the work done
- The Engineer shall proceed in accordance with Sub-Clause 3.7 [Agreement or Determination] to agree or determine the value of done ...
- The Engineer shall issue a Payment Certificate in accordance with Sub-Clause 14.6 [Issue of IPC], for the amount so agreed or determined without the need for the Contractor to submit a Statement.

FIDIC 1999 S/C 19.5 & 2017 S/C 18.5 *[Optional Termination]* wording of 2017 edition

Compensation

- Manmade Exceptional Events, entitles the Contractor for Time and Cost compensations, while Exceptional Events resulting from the forces of nature entitles the Contractor for extension of time only should he/she had suffered the same.

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[*Summary*]

- Force Majeure title has been replaced by the title Exceptional Event
- The Exceptional Events or Circumstances may prevent one Party from performing one or more of his obligations (Emergency Conditions) or all its obligations (Force Majeure).
- A Notice within 14 days must be given in case the six criteria are met.
- other Notice(s) in case of continuing Exceptional Event shall be given every 28 days.
- A Notice by the affected Party shall be given immediately that he/she ceased to be affected by the Exceptional Event once this event is finished.

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[*Summary*]

- Either Party shall be entitled to terminate the Contract if the Exceptional Event is:
 - Affecting all the Works;
 - Lasting for a continuous period of 84 days;
 - Lasting for 140 days in multiple periods for the same Exceptional Event.
- Manmade Exceptional Events entitle the Contractor for both Time and Cost (reasonable expenses without profit).

FIDIC [Advice]

- When preparing the Exceptional Event Clause under the Particular Conditions, the Employer is advised to abide by the recommended FIDIC Golden Principles as described in part 2 of the 2017 suite of Contracts {Guidance} – Particular Conditions Part B – Special Provisions, and in particular:
 - GP3: The Particular Conditions must not change the balance of risk/reward allocation provided in the General Conditions.

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٨-١٠ مايو ٢٠١٨

• **THANK YOU**

- Tahseen Saleh
- tahseen@olamanagement.com
- +974 5522 6500
- +974 7726 5000