CONTRACTUAL CONSIDERATIONS UNDER FIDIC CONTRACTS WHEN A FORCE MAJEURE EVENT (1999 CONTRACTS) OR EXCEPTIONAL EVENT (2017 CONTRACTS) OCCURS IN THE COUNTRY OF THE CONTRACT

Preamble: The Covid 19 pandemic will affect all countries and hence all construction projects worldwide.

In most cases the Governments in the countries where the disease occurs have issued instructions to all citizens to withdraw from normal activities and stay housebound under varying restrictions. Most industries unless critical to the fight to overcome the disease have been instructed by Governments to either undertake work by their employees from home or cease work.

Some countries are allowing construction work to proceed but requiring the workforce to comply with “social distancing”, which is very difficult to comply with and certainly means restructuring the way the work is executed.

Under these exceptional circumstances the Parties to the FIDIC Contract, the Employer and the Contractor should review their contractual position under the Contract. This will also apply to the Engineer under his service Contract with the Employer.

Whilst the first obligation of the Parties and the Engineer will be to protected the health and welfare of their employees they are also have a duty to protect the project as best possible.

This paper investigates the contractual requirements and options that relate to the Parties and the Engineer based upon the 1999 edition of the FIDIC General Conditions of Contract for Construction (Red Book) and for Plant & Design-Build (Yellow Book).

It should be noted in the 2017 FIDIC Contracts the term “Force Majeure” (Clause 19) does not exist and the term “Exceptional Events” (Clause 18) is used in its place with very similar text.

At this stage, as the great majority of FIDIC Contracts will be being undertaken under the 1999 editions, we shall concentrate on these Contracts.

Finally, whilst construction Sites may be closed down the representatives of the Parties and the Engineer should be able through modern technology to perform their contractual duties under the Contract, especially as all FIDIC communications are to be in writing.

Under the Plant & Design Build Contract, if only at the design stage then this work may continue, albeit in a more restructured environment.
1. FORCE MAJEURE - CLAUSE 19 UNDER 1999 FIDIC CONTRACT

Under Sub-Clause 19.1 (Definition of Force Majeure) it states the following

“In this Clause “Force Majeure” means an exceptional event or circumstance:

(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”

All these four criteria are to be met for the event or circumstance to be considered under Clause 19 as “Force Majeure”

The pandemic of Covid-19 would appear to be under the above requirements to be a Force Majeure circumstance, although a pandemic is not listed under the kind of events or circumstances as relevant under this Clause but the list is not exclusive to listed items.

2. IMMEDIATE CONTRACTUAL ACTIONS REQUIRED BY EITHER OF THE PARTIES and ENGINEER UNDER FORCE MAJEURE CONDITIONS

The relevant FIDIC Sub-Clause is 19.2 (Notice of Force Majeure).

This states:

“If a Party is or will be prevented from performing any of its obligations under the Contract by Force Majeure, then it shall give notice to the other Party of the event or circumstances constituting the Force Majeure and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance constituting Force Majeure”

ACTION’S No. A

A 1: If either Party consider that a Force Majeure event of circumstance has occurred due to Covid 19 then they must advise the other Party by a notice which should be in compliance with Sub-Clause 1.3 and copied to the Engineer.

A 2: Either Party is required to give the notice within 14 days of either Party becoming aware or should have become aware of the event or circumstance causing Force Majeure

Notes:

a) Assuming the notice relates to a Government decree restriction personnel movement, then the date of the Force Majeure event would appear be the date of the decree even if the Party was aware of the existence of the Covid 19 before the date of the decree. Sub-Clause 13.7 (Adjustments for Changes in Legislation) would also appear to apply to this situation.
b) What if neither Party issues a notice within 14 days of the decree does this invalidate a Force Majeure situation? The Contract is silent on non-compliance under this Sub-Clause and it maybe for the Parties to mutually agree when the Force Majeure event/Circumstance became effective.

c) Surprisingly there is no requirement for the Engineer to be involved under Sub-Clause 19.2, such as confirming whether a Force Majeure event is valid or whether a notice is in time. We would recommend that the Engineer (as he is deemed to represent the Employer under Sub-Clause 3.1 (a)) should ensure the Employer gives a timely notice to the Contractor that a Force Majeure situation exists. There are subsequent actions for the Engineer including those noted below

**ACTION’S No. B**

1 B: Under the notice the Party should “specify the obligations, the performance of which is or will be prevented”.

2 B: The Force Majeure shall NOT apply to either Party making payments to the other Party under the Contract

Note:
Once the notice is received by the other Party then the Party shall “be excused performance of such obligations for so long as such Force Majeure prevents it from performing them”

3. FOLLOW UP ACTIONS IN RESPECT TO FORCE MAJEURE EVENT/CIRCUMSTANCE

Under Sub Clause 19.3 (Duty to Minimise Delay) it states

“Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of Force Majeure”

**Note:**
The Contract allows for a unilateral decision by the Party declaring the Force Majeure to declare when it ceases

**ACTION’S No. C:**

C 1: Consideration may be given by the Employer for the Engineer to apply Sub-Clause 8.8 (Suspension of Works) subject to obtaining legal advice as to suitability under the prevailing circumstances

This may have the benefit of putting a contractual time structure around the Force Majeure event.

C 2: The Contractor under a suspension instruction is required to “protect, store and secure such part of the Works against any deterioration, loss or damage” but this may also be instructed by the Engineer under Sub-Clause 3.3 and 13.1

C 3: The Contractor at the same time should notify the Engineer under Sub-Clause 20.1 that he will claim under Sub-Clause 19.4 (Consequences of Force Majeure) and other relevant Sub-Clauses such as 13.7 and if a suspension instructed, Sub-Clause 8.9
4. FURTHER ISSUES TO BE CONSIDERED BY BOTH PARTIES AND THE ENGINEER

With such a major event with most probably the Works suspended and the Site being made secure but not operational, then a range of issues need to be addressed by the Parties and the Engineer which may include the following:

5. COMMUNICATIONS

The Parties identify in writing who represents them in correspondence under Sub-Clause 1.3 with alternatives in case of sickness or leave. Also recommend they should identify

a) which other key personnel will be involved during the suspension period
b) which key personnel will be authorised and available to give and receive instructions on Site

6. MEETINGS

FIDIC do not refer to meetings except in the 2017 Contracts, but recommend the Parties and the Engineer establish conference video conferencing or similar as a priority. A programme of meetings on a regular basis may be established to review all relevant matters. Records should be kept by the Engineer and agreed by the Parties

7. REQUIREMENTS OF THE LAW

Recommend the Parties independently or jointly seek clarity from appropriate legal personnel as to the requirements under the law of the project’s country and determine any conflicts to those under the FIDIC Contract in respect to a Force Majeure event.

8. STATUS OF THE WORKS – PHYSICALLY

Recommend the Engineer and Contractor review the status of the Works and the Engineer, if it is safe/healthy so to do, instructs any requirements to safe guard the Works during the suspension period E.G maintain pumping if required for sub surface works, security measures, maintenance of offices, receipt of Goods in transit etc. Suggest to use of Dayworks to meet the Contractor’s Costs

Review items purchased but not yet delivered to Site to see how best actioned

9. STATUS OF THE WORKS – VALUATION

Recommend the Engineer in conjunction with the Contractor measures the Works up to the date of the Force Majeure event or suspension instruction, whichever is the later. Videos of the Works may be taken, dated and agreed by Engineer and Contractor

Recommend the Contractor submits a Statement to the Engineer for an IPC to reflect the Work valuation. If the IPC value is below the “minimum amount” of an IPC the Engineer is entitled to still certify it and the Employer to pay, which will help the adverse cash flow situation the Contractor will be experiencing
10. CONTRACTOR’S KEY PERSONNEL

Depending on location and situation of project, it may be in the interests of the Employer as well as the Contractor to retain certain key personnel so they are available on the recommencement of the Works. This may involve a joint funding arrangement. This may avoid arguments over subsequent claim costs from the Contractor.

11. CONTRACTOR’S EQUIPMENT

Recommend as with item 10, the items of Contractor’s equipment on the Site are assessed by the Contractor and Engineer and where ever possible number reduced to that which will be relevant on recommencement of the Works and that which would be available at short notice.

12. CONTRACTOR’S CLAIMS

a) The Contractor under Sub-Clause 20.1 must keep contemporary records of all resources for which he is claiming and present these to the Engineer. Under the Contract the Engineer only has to “monitor” these but recommend they are checked and agreed by the authorised representatives of the Engineer and Contractor, as a true record of the facts.

b) The Claim under Force Majeure or suspension instruction by the Engineer if it extends beyond one month should have the detailed claim submitted monthly for the Engineer to assess.

c) The Engineer in assessing the claim is required under Sub-Clause 20.1 to include in each IPC “such amounts for any claim as have been reasonably substantiated”.

This should be in the interests of both Parties as the Contractor will require funds to keep his resources available to promptly recommence the Works when the Force Majeure event ceases.

d) Recommend historic claims not resolved should be assessed and resolution sought.

13. PROGRAMME

The Contractor is required to update his programme when it is inconsistent with actual progress. Both Parties under Sub-clause 19.3 have to try to minimise the delay to the Works. This may involve possible redesign or changing the sequence of work activities.

a) Recommend the Parties and the Engineer work together to see how best to complete the Works once recommencement occurs.

b) The Contractor should be entitled to an extension of Time for Completion (EoT) under Sub-Clause 19.4. It is also noted that under Sub-Clause 8.4 (d) an EoT is applicable if a delay is “caused by epidemic or governmental actions”, so there should be no disagreement between the Parties as to the justification for an EoT.

c) Recommend the Contractor registers a notice to claim in accordance with Sub-Clause 8.4 (Extension of Time) as well as Sub-Clause 19.4, 13.7 and Sub-Clause 8.9 if the Works are suspended.
14. INSURANCE REQUIREMENTS

FIDIC require the Contractor unless stated otherwise to be the insuring Party on behalf of both Parties.

a) Sub-Clause 18.2 (Insurance for Works and Contractor’s Equipment)
   (i) Recommend the insuring Party advises the insurer of the status of the Works due to the Force Majeure situation caused by the Covid 19 pandemic and advise of the status of the Works and the actions being taken by the Parties on a regular basis.
   (ii) The Parties may engage suitably qualified personnel to determine what loss or damage (if any) will covered by the insurance policy
   (iii) Under Sub-Clause 18.2 (c) it states that the policy “shall cover all loss and damage from any cause not listed in Sub-Clause 17.3 (Employer’s Risks).” Under Sub-Clause 17.3 a pandemic or similar is not mentioned

b) Other insurances as required under Sub-Clauses 18.3 and 18.4 should be maintained by the insuring Party

15. PROJECT FINANCE

The Employer may be required to reassess the anticipated final Contract Price and may ask his Engineer to estimate this and various options with respect to changes in quantities and quality. The Contractor will require reassurance under Sub-Clause 2.4 that adequate funds will be available to meet the final Contract Price

If an external funder is involved then Employer to appraise him of the situation

16. DISPUTE ADJUDICATION BOARD (DAB) – FULL TERM

The Parties may terminate the DAB under Clause 7 of the DAB Agreement by giving 42 days’ notice

It may be more prudent to request that the DAB member/s waive their monthly fee until the works are recommenced or when a dispute is declared by either Party

ECV CONTACTS

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Parties to a FIDIC 199 Contract must make their own decisions in respect of the Covid 19 pandemic.