

# Clause 19

## Summary

**Clause 19 deals with two distinct events: (1) Force Majeure; and (2) release from performance under the law. Force Majeure is often narrowly defined under the laws of many countries; however, within the FIDIC 1999 forms of contract it has a much broader meaning. The terminology used by FIDIC has therefore sometimes been criticized as being misleading.**

## Origin of clause

The phrase ‘force majeure’ is new to FIDIC 1999. In the FIDIC 4<sup>th</sup> edition there was reference to Special Risks at clause 65 which then cross-referred to Employer Risks at clause 20.4.

## Cross-references

Reference to Clause 19 is found in the following clauses:-

- Sub-Clause 1.1.6.4 Definitions – Force majeure;
- Sub-Clause 14.2 Advance Payment;
- Sub-Clause 15.5 Employer’s Entitlement to Termination;
- Sub-Clause 16.3 Cessation of Work and Removal of Contractor’s Equipment; and
- Sub-Clause 16.4 Payment of Termination.

## Clause 19.1 Definition of Force Majeure

The term “Force Majeure” was not used in the previous editions of the FIDIC contracts. Similar circumstances were treated as Employer’s Risks and Special Risks and the contractual consequences were not identical to the current edition. The use of the term “Force Majeure” is not essential and is a little misleading. What is Force Majeure for the purposes of Clause 19 is only what is set out in Clause 19 itself.

In order for an event to meet the definition of Force Majeure it must be an *exceptional event or circumstance*. Thus an event or circumstance, which otherwise meets the requirements of Sub-Clause 19.1, may not be Force Majeure if it is not exceptional. On the other hand something which is not an *event* but which exists even perhaps for a long

time– i.e. is a *circumstance* - may give rise to Force Majeure. Particularly in this sense Force Majeure as defined in the Contract is not the same as Force Majeure under those legal systems which recognise the concept as part of the underlying law. These systems define Force Majeure merely as an event – the concept of it being possibly a *circumstance* is not part of the normal concept of Force Majeure. Furthermore the traditional definitions require unforeseeability – a requirement which is absent from Sub-Clause 19.1.

For example the definition under the Quebec Civil Code (Article 1470) is as follows:

*“Force Majeure is an unforeseeable and irresistible event, including external causes with the same characteristics.”*

Under German Law the German Supreme Court has described Force Majeure (Höhere Gewalt) as

*“an extraordinary event which affects the business from the outside, which is unforeseeable, which cannot be prevented even by applying the utmost care without endangering the economic success of the enterprise, and which also has not to be taken into account and to be put-up with by the Contractor due to its frequent occurrence.”<sup>1</sup>*

However the FIDIC definition is very close to that provided under “Principles of International Contracts” published in 1994 by the International Institute for the Unification of private law (UNIDROIT) (Article 7.1.7)

*Non performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*

The term *circumstance* gives rise to some interesting issues. It reflects part of the meaning of impediment under the UNIDROIT article quoted above. Under previous FIDIC contracts, the list of Employer’s risks did not include anything which might have been regarded as a *circumstance* rather than an *event*. A circumstance is a state of affairs. Thus for example physical conditions would in many cases be a circumstance rather than an event so, although they are also dealt with under Sub-Clause 4.12 (*Unforeseeable Physical Conditions*), they may also be a circumstance under Sub-Clause 19.1 which may

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<sup>1</sup> BGH S-FZ 2.413, p.18; BGHZ 7, p.338, 339

give rise to the right to claim for Force Majeure if the other conditions under the Clause can be fulfilled.

This opens the possibility that an event about which a Contractor is excluded from claiming for under Sub-Clause 4.12 might give rise to claim under Sub-Clause 19.1 (or indeed as will be discussed below under Sub-Clause 19.7). The most obvious example is *climatic conditions* which are not claimable at all under Sub-Clause 4.12. As is explained in the discussion under Sub-Clause 4.12 *climatic conditions* does not mean weather but the overall conditions imposed by the climate at the site of the Works. If one described the climatic conditions in a particular country one might say that there is a hot sunny season which runs from February to October and then a rainy season from November to January. This says nothing about what the weather might be on a particular day. It would be possible for it to rain in April without this being a difference in climate. However, if contrary to the normal expectations of the climate in this country the entire month of April turned out to be rainy and this disrupted the Works one could say that in this particular year the climatic conditions had changed. That would be an *exceptional event or circumstance* and might well be capable of being considered Force Majeure. On the other hand this unforeseeable change to the climate would not be claimable under Sub-Clause 4.12.

If a Contractor unexpectedly encounters rock this might also be a *circumstance* beyond his control. If the rock was unforeseeable a claim would be best made under Sub-Clause 4.12 because the Contractor has a right to an extension of time and Costs and in some circumstances profit. However if the presence of rock was foreseeable a claim under Sub-Clause 4.12 would not succeed and the right under Sub-Clause 19.1 to an extension of time on the basis that the presence of the rock was an exceptional circumstance outside the Contractor's control is far better than the alternative of no compensation at all.

It is of course often possible to argue that one of the events which, in normal circumstances, might be considered Force Majeure does not give rise to Force Majeure because it is not *exceptional*. For example between April 2003 and July 2008, 444 people described as "contractors" were killed by bombs or firearms in Iraq (<http://icasualties.org/oif/Contractors.aspx>). No doubt the same events also caused damage to the contractor's equipment and quite possibly affected the carrying on of the works. However with such a volume of casualties it becomes difficult to argue that bombing or fire-arms incidents can be treated as Force Majeure in this environment. They are far from *exceptional*. Similar arguments may be made with regard to out breaks of the Ebola virus, especially where outbreaks have previously occurred within a particular country.<sup>2</sup>

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<sup>2</sup> In 2015 Morocco refused to host the Africa Cup of Nations claiming that the outbreak of the Ebola virus across parts of Africa was a "force majeure" event which threatened public health in Morocco. Morocco

There is also no test of foreseeability under Sub-Clause 19.1. Force Majeure is claimable even it is not Unforeseeable. However a condition will not give rise to an entitlement under Sub-Clause 4.12 if it is not Unforeseeable as defined in Sub-Clause 1.1.6.8:

*“not reasonably foreseeable and against which adequate preventive precautions could not reasonably be taken by an experienced contractor by the date for submission of the Tender.”*

The experienced contractor is expected to have foresight and take reasonable preventive precautions and cannot make a claim under Sub-Clause 4.12 if he has not done so.

Under Sub-Clause 19.1, however, the exceptional event or circumstance need only be something *“which such Party could not reasonably have provided against before entering into the Contract.”*

This is only a part of the foreseeability test under Sub-Clauses 1.1.6.8 and 4.12. It is approximately the same as *against which adequate preventive precautions could not reasonably be taken* but allows an event to be treated as Force Majeure when it could have been foreseen but was not. If the Contractor did not *actually* foresee the event or circumstance – though he should have under the definition in Sub-Clause 1.1.6.8 – he could not have taken any precautions and it is therefore possible that the Force Majeure provision might apply even though he *ought* to have foreseen the event or circumstance.

Once the event or circumstance passes the exceptionality test it must then pass the further four tests set out in Sub-Clause 19.1. (There is a further requirement under Sub-Clause 19.2 that notice be given before any event or circumstance be treated as Force Majeure and this will be dealt with below).

These four tests are not alternatives – in other words all must be satisfied before an event or circumstance will be treated as Force Majeure.

The four tests are as follows:

- (a) the event or circumstance must be *“beyond a Party’s control.”*

It should be noted that the Sub-Clause does not say beyond *the* Party’s control and it may be arguable that an event which might have been controllable by the other Party is not to

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were concerned that supporters from countries where the Ebola virus existed could bring the virus into Morocco. The Confederation of African Football fined Morocco \$9.1 million holding that this was not a force majeure event.

be treated as Force Majeure. It would be a strange interpretation of the Sub-Clause to conclude that if an event was within the control of the other Party it would not be treated as Force Majeure for the benefit of the Party affected, but the interpretation is nevertheless a possible one and in one circumstance is expressly recognised in test (d). Test (d) excludes events which are not substantially attributable to the other Party, so it is already recognised that, although an event may be outside the control of the Party claiming, it will not be treated as Force Majeure if the other Party has caused the event. Test (d) and the meaning of “attributable” will be further explained below. However test (b) goes on to refer to the event not being one which “such party” could have provided against – which tends to suggest that the intention of the drafting is that “a Party” really means “the Party”.

Whether or not something is beyond a Party’s control will be a matter of fact in the particular circumstances. However “*beyond control*” refers to the event or circumstance, not to its consequences. Even though you can put up an umbrella when it starts to rain and prevent yourself getting wet, the rain-storm itself is beyond your control. Unlike the later tests, the Party is only likely to fail the test of “beyond control” when the *event or circumstance* is one with which it has some connection.

- (b) Which such Party could not reasonably have provided against before entering into the Contract.

Clearly a Party could not be reasonably expected to provide against something happening unless it could anticipate it. However, as noted above, this is not the same test as that for foreseeability under Sub-Clause 1.1.6.8. It follows that if, *in fact*, the Party did not foresee the event or circumstance before entering into the Contract it will meet this test even though, with a bit more foresight it ought to have foreseen it. Even though it may have foreseen the exceptional event or circumstance it is still possible that the event or circumstance could constitute force majeure, so long as it could not reasonably be provided against *before entering the Contract*. Thus an event or circumstance which occurs after the entering of the Contract may be an event of Force Majeure even if it was one which the party could have easily provided against (always assuming that by the time it occurred it was beyond that Party’s control and could not be reasonably avoided or overcome).

- (c) Which, having arisen, such Party could not reasonably have avoided or overcome.

There are two tests here – the exceptional event or circumstance must not have been capable of being *avoided* or *overcome*. It is difficult to see how an event or circumstance itself can be *avoided* or *overcome*. By definition it must have already occurred for the

tests to be considered so it will be too late to avoid or overcome it. What must be meant is that the *effects* of the event or circumstance cannot be *avoided* or *overcome*. In this context *avoid* must mean the finding of a way to continue the Works and not be affected by the exceptional event or circumstance. *Overcome* must mean the taking of measures which eliminate the effects of the exceptional event or circumstance. It may not be possible entirely to avoid or overcome the effects but only to avoid or overcome them in part. In that case only that part of the effect that could not be avoided or overcome would be treated as Force Majeure.

An example might be where a flood on site has destroyed a partly completed section of the Works. The Contractor may be able to avoid or overcome the delay by accelerating work elsewhere on the site during the clean-up and by later accelerating work on the damaged area. The effect of the event or circumstance can be avoided or overcome, though nothing could have been done about the event itself. Whether the event will be treated as Force Majeure will depend on whether the amount of work necessary to avoid or overcome the effect is reasonable. This obligation may be compared to one of using ‘reasonable endeavours’ to avoid loss. A party who is required to act under (c) “is not required to sacrifice its own commercial interests” – see *Yewbelle Ltd v London Green Developments Ltd & Anor*<sup>3</sup> approving the first instance statement of Lewison J.

It is clear that measures to avoid or overcome the effects of the Force Majeure must be capable of being entirely effective in order for the event not to be treated as Force Majeure. If this were not the case Sub-Clause 19.3 (Duty to Minimise Delay) would not be necessary.

(d) Which is not substantially attributable to the other Party.

This is an important and often overlooked qualification, particularly significant where the other Party is, for example a State Ministry. It is possible that some instances of what would normally be called Force Majeure will not be Force Majeure if attributable to the other Party. To take one example, a Contractor, in contract with a State would not be able to treat the outbreak of war as Force Majeure if the war had been started by the State party – an exception which the State party will be highly motivated to invoke! Similarly action by the Contractor which prevents the Employer or Engineer having access to the Site or using its equipment could not be treated by the Employer as Force Majeure.

Having set out the four above tests, the Sub-Clause goes on to list what Force Majeure *may* be so long as the tests are satisfied. This is an odd provision because, while the list is stated not to be exclusive (“*may include but is not limited to*”) it incorporates some

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<sup>3</sup> [2007] EWCA Civ 475

exceptions to the definition. Thus the list does not make any particular event or circumstance Force Majeure but it does set out the only two examples of what cannot be Force Majeure even though all other tests have been met. Thus under item (iii) riots, commotions, disorders,<sup>4</sup> strikes and lockouts which may otherwise constitute Force Majeure will not so constitute it if they involve the Contractor's Employees and under item (iv) munitions of war, explosive materials, ionising radiation or contamination by radio-activity are Force Majeure (despite the fact that only the last can be described as an *event or circumstance*) unless they are attributable to the Contractor's use of such materials. The consequence is that anything at all may be Force Majeure except these two, contractor-caused types of events or circumstances.

The issue of a force majeure event caused by a Contractor's ex-employees was recently considered in the case of *Rumdel Cape and Ors v South African National Roads Agency Soc Ltd*<sup>5</sup>. In this case the Contractor asserted that the works had stopped because the labour force which it was required to use was militant, unproductive and prone to acts of violence and intimidation with high levels of absenteeism and sick leave. The labour force was dismissed by the Contractor which resulted in riots and the death of a security guard. The Contractor argued that this was a force majeure event. The court held that the force majeure provisions of the contract did not apply because the labour force was employed by one of the parties. The court thereafter held that the Contractor had failed to prove that it was either impossible or unlawful for it to fulfil its contractual obligations and therefore there was no question of the provisions of Clause 19.7 being applicable.

Although the list in Sub-Clause 19.1 is described there as being of *events or circumstances*, item (iv) lists three materials and one potential event or circumstance. Item (iv) refers to *munitions of war, explosive materials and ionising radiation* each of which might, if misused, cause an event or circumstance but none of which are such an event or circumstance. It is not clear whether an event or circumstance arising from the misuse of one of these items will therefore be treated as a listed Force Majeure or a Force Majeure under the general definition. This has significant effects when the Contractor's rights to compensation are considered, because, while any Force Majeure can give an entitlement to an extension of time under Sub-Clause 19.4, only listed events can give rise to a right to Cost (see discussion under Sub-Clause 19.4).

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<sup>4</sup> See *Partial and Final Awards in Case 11499* and the narrative to Clause 17 where the meaning of 'disorder' is discussed.

<sup>5</sup> (7312/2014) [2014] ZAKZDHC 68

## **Sub-Clause 19.2 Notice of Force Majeure.**

Despite its title, this Sub-Clause is far more than a notice provision because it sets out not only the requirement for a notice but also the circumstances in which such a notice can be given. If such circumstances do not exist no notice can be given and without such notice no event of Force Majeure has any contractual effect.

The notice may not be given unless the Party giving the notice *is or will be prevented from performing any of its obligations under the Contract*. This brief statement makes it clear that a Party has no right to claim Force Majeure unless, at the time the notice is given, it is, or it will in future be, *prevented* from performing its obligations. Thus an event which might in some circumstances constitute Force Majeure but which, in the particular case, merely makes it more difficult for the Party to perform its obligations cannot constitute Force Majeure. This makes it absolutely clear that this provision is not a general risk-shifting provision. It merely excuses performance of obligations which a Party cannot perform because of the extraordinary event or circumstance.

The term *obligations* is not defined in the Contract but must have a very wide meaning. It is, for example, an obligation on the part of the Contractor (under Sub-Clause 8.3) to proceed in accordance with the Programme. Similarly it is an obligation (under Sub-Clause 8.2) for the Contractor to complete the whole of the Works within the Time for Completion. If Force Majeure prevents him from doing so he can give notice under Sub-Clause 19.2.

The Notice has to set out the event or circumstance and specify the obligation the performance of which is, or will be, prevented. This is therefore not the same sort of notice as has to be given under Sub-Clause 20.1 – which in the first instance requires merely a description of the event or circumstance giving rise to the claim but not the claim itself.

The Notice must be given within 14 days after the Party became aware, or should have become aware, of the relevant event or circumstance. This contrasts with the 28 day period applying under Sub-Clause 20.1 for other claims under the Contract.

Unlike Sub-Clause 20.1, Sub-Clause 19.2 does not expressly provide that when no claim is made within the prescribed period the claim will be barred. However, as will be explained below, Sub-Clause 19.4 read with Sub-Clause 19.2 has this effect – the result of the two Sub-Clauses read together is that an event which might otherwise constitute Force Majeure will not be Force Majeure unless the notice procedure is correctly followed.

In any event, although a claim for Force Majeure must be commenced with a notice under Sub-Clause 19.2, it will be seen below that Sub-Clause 19.4 also requires a notice to be given under Sub-Clause 20.1. Since the notice of claim under Sub-Clause 20.1 will be ineffective unless the notice under Sub-Clause 19.2 has already been given and since the Sub-Clause 19.2 notice is required to contain more detail than the Sub-Clause 20.1 notice, it would seem that the Contractor will meet his obligations under Sub-Clause 20.1 by giving the Sub-Clause 19.2 notice, though for absolute security, the Contractor would be wise to give timely notices under both Clauses.

Sub-Clause 19.2 finishes by stating that Force Majeure cannot be used to excuse a failure by either Party to make payments to the other Party.

**Sub-Clause 19.3      Duty to Minimise Delay**

This Sub-Clause restates what is already an obligation on the part of all contractual parties – to use reasonable endeavours to minimise delay in performance. Interestingly, however, it imposes no equivalent obligation to mitigate any other losses or consequences resulting from Force Majeure. In accordance with general legal principles, such other claims are probably subject to a mitigation requirement. However in view of the failure in this Sub-Clause to state this expressly there may be an argument that there is no obligation to mitigate anything other than delay.

The Sub-Clause also obliges a Party affected by Force Majeure to give notice to the other Party when it ceases to be affected by Force Majeure. A failure to give such notice of cessation is not subject to any express sanction. If the effect of the Force Majeure is to prevent the Party affected from completing the Works by the Time for Completion it will be arguable that there is no reason to give a notice of cessation until the Works are actually completed (at which point the giving of such notice will not have any purpose).

Cumulative Requirements for Force Majeure Claims

As can be seen from the above provisions, a Party wishing to claim Force Majeure must satisfy a total of 7 tests before its claim can be considered. Each one of the following questions must be answered in the affirmative:

	<b>Is the event or circumstance</b>	Yes	No
1	Beyond a Party’s Control?		
2	One which such Party could not reasonably have provided against before entering the Contract?		
3	One which, having arisen, such Party could not reasonably have avoided or overcome?		

4	One which is not substantially attributable to the other Party?		
5	Will the Party be prevented from performing any of its obligations under the Contract?		
6	Has Notice been given setting out both (i) the event or circumstance and (ii) specifying the obligation the performance of which is or will be prevented?		
7	Has the party used reasonable endeavours to minimise delay?		

If any one of these questions is answered “no” a claim for Force Majeure cannot be sustained.

**Sub-Clause 19.4 Consequences of Force Majeure**

Although Sub-Clauses 19.1 to 19.3 apply both to the Employer and the Contractor, Sub-Clause 19.4 applies only to the Contractor. This is logical because Sub-Clause 19.4 gives rights to claim extensions of time and Cost. The Employer’s rights are more limited – it will not be in breach if prevented from performing its obligations as a result of Force Majeure and it may gain a right to terminate under Sub-Clause 19.6.

The opening words of the Sub-Clause make it clear that unless notice has been given under Sub-Clause 19.2 the Contractor will have no right to claim an extension of time or payment of Costs. This is clear because the Clause states that it is only *Force Majeure of which notice has been given under Sub-Clause 19.2* which can give rise to any such entitlement. Thus the giving of notice under Sub-Clause 19.2 is a condition precedent to any right of recovery or extension of time.

Having given a notice under Clause 19.2 the Contractor is obliged to follow the notice procedure under Sub-Clause 20.1 and may be entitled to an extension of the Time for Completion and, in limited circumstances, to Cost.

Cost is not available for natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity. War, hostilities, invasion or acts of foreign enemies give rise to an entitlement whether they occur in the country in which the Works are being carried out or not, but Force Majeure which falls within the other examples given in Sub-Clause 19.1 only entitles the Contractor to Cost if the events or circumstances occur in the country in which the Works are being carried out. Events or circumstances not listed in Sub-Clause 19.1, which may nevertheless fall within the definition of Force Majeure, can never give the Contractor an entitlement to Cost but may give an entitlement to an extension of time. This means that the wording of the descriptions of the events or circumstances in Sub-

Clause 19.1 takes on a particularly strong significance and the strange wording of Sub-clause 19.1 (iv) may have an effect on the Contractor's entitlement.

As already noted above, although the list in Sub-Clause 19.1 is described there as being of *events or circumstances*, item (iv) lists three materials and one potential event or circumstance. It refers to *munitions of war, explosive materials* and *ionising radiation* each of which might, if misused, cause an event or circumstance but none of which are such an event or circumstance. It is not clear whether an event or circumstance arising from the misuse of one of these items will therefore be treated as a listed Force Majeure or a Force Majeure under the general definition. This has significant effects when the Contractor's rights to compensation are considered because, while any Force Majeure can give an entitlement under Sub-Clause 19.4 to an extension of time, only listed events can give rise to a right to Cost. It is therefore arguable that explosions and the adverse effects of radiation are not events giving rise to the right to Cost.

The Contractor is obliged to proceed in accordance with Sub-Clause 20.1, giving notice within 28 days and then, subsequently, within 42 days providing particulars. Since the notice of claim will be ineffective unless the notice under Sub-Clause 19.2 has already been given and since the Clause 19.2 notice is required to contain more detail than the Sub-Clause 20.1 notice it would seem that the Contractor will meet his obligations under Sub-Clause 20.1 by giving the Clause 19.2 notice, though for absolute security, the Contractor would be wise to give timely notices under both Sub-Clauses.

### **Sub-Clause 19.5 Force Majeure Affecting Subcontractor**

Where a Subcontractor is entitled to relief from force majeure on terms broader than those in FIDIC 1999, such additional or broader force majeure events or circumstances shall not excuse the Contractor's non-performance. The Contractor should therefore ensure, if possible, that any Subcontract is back-to-back with the main contract conditions in relation to relief from Force Majeure events.

### **Sub-Clause 19.6 Optional Termination, Payment and Release**

In two circumstances Force Majeure may entitle either the Contractor or the Employer to terminate the Contract. The test in each case is subtly different.

The first circumstance arises if the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Force Majeure of which notice has been given. The requirement here is that the period of substantial prevention is continuous but there is no requirement that the same Force Majeure need have caused the

entire period of substantial prevention. Thus two overlapping periods may give rise to the right to terminate.

The second circumstance arises if the execution of substantially all the Works in progress is prevented for multiple periods which total more than 140 days due to *the same* Force Majeure of which notice has been given. Thus this right to terminate will arise only if the same event or circumstance has caused all the periods of non-execution.

If, for example, the Works are regularly interrupted by general strikes, it is therefore unlikely that the second circumstance would come into effect – each strike being a different Force Majeure. However the right to terminate under the second circumstance may depend on how the Force Majeure is described. For example if a separate notice is given each time another strike breaks out, this would not allow the period to accumulate. However if, for example, the local union movement had declared a campaign of regular stoppages in support of a long-running campaign for higher wages and the Force Majeure were to be described as “national union work stoppage campaign for higher wages”, the same Force Majeure would be arguably at fault for the entire series of interruptions.

The notice of termination takes effect 7 days after it is given. There seems to be no requirement that the period of substantial prevention still be underway when the notice is given or when it takes effect. It is thus arguable that once one of the periods has expired either Party has the right to terminate at any time.

Upon termination the Contractor is required to proceed in accordance with Sub-Clause 16.3 by ceasing any work which is not necessary for protection of property or for safety reasons, hand over Contractor’s Documents and Plant, materials and other work for which it has already been paid and remove its other Goods from the Site and leave the site itself. This means that, with two important exceptions, the consequences of termination for Force Majeure, whether by the Employer or by the Contractor, are the same as if the Contractor had exercised its right to terminate for cause under Sub-Clause 16.2. The exceptions can be seen from a reading of Sub-Clause 16.4 which provides that where the Contractor terminates for cause it is entitled to the return of its Performance Security and to damages for loss of profit. It is difficult to see why the Contractor should not be entitled to the return of the Performance Security if the contract is terminated for Force Majeure but there is nothing either in Sub-Clause 4.2 or in the standard form of guarantee to provide for this. The lack of obligation to compensate for loss of profit is, however, consistent with the concept that Force Majeure is a shared risk.

The payment on termination is to be assessed by the Engineer. Although the word “determine” is used there is no reference to Sub-Clause 3.5 and it would seem therefore that the Engineer is not required to follow the process set out in Sub-Clause 3.5. This

may have some effects upon the process. Under Sub-Clause 3.5 the Engineer is required to consult with both Parties before reaching his determination. This obligation does not apply where Sub-Clause 3.5 is not applicable. An Engineer’s Determination under Sub-Clause 3.5 is binding upon the Parties until revised under Clause 20, but in the absence of a cross-reference the determination on Force Majeure payment will not have any binding effect. The FIDIC guide suggests that an Engineer’s Determination in relation to Sub-Clause 19.6 is to be made under Sub-Clause 3.5 but there is no basis for this suggestion in the Contract itself.<sup>6</sup>

The principles for calculation of the payment are clearly set out in the Clause. They are the same as when the Contractor exercises its right under Clause 16 to terminate for cause but with the important exception that the Contractor is not entitled to receive any compensation for loss of profit.

Responsibility for Care of the Works During a Period of Force Majeure

Clause 19 does not deal with responsibility for care of the works during a period in which they cannot be continued due to Force Majeure and it is therefore necessary to consider the general obligations of the Contractor to care for the works while they remain suspended because of a major Force Majeure.

Sub-Clause 17.2 gives the Contractor responsibility for the care of the Works during this period but Sub-Clause 17.3 provides some exceptions to this responsibility. These exceptions cover some but not all of the events or circumstances covered by Force Majeure. The general category of Force Majeure is not covered – if the Force Majeure is an exceptional event or circumstance of a type not listed in Sub-Clause 17.3, the Contractor will retain responsibility for care of the Works even though he may be entitled to an extension of time and/or Cost and may eventually have the right to terminate.

Where the risk is listed in Sub-Clause 17.3 the Contractor will be entitled to payment for Cost and profit in remedying any damage caused.

There are therefore some anomalies which can be seen from the table below:

<b>Event or Circumstance</b>	<b>Employer’s Risk</b>	<b>Force Majeure</b>	<b>Care of the Works Responsibility</b>	<b>Compensation in case of Force Majeure</b>
Extraordinary event or circumstance not specifically listed	No	May be if meets all tests of Force	Contractor’s risk both for cost and time.	EOT only

<sup>6</sup> This is something which ought to be dealt with by amendment to the Contract prior to tender.

<b>Event or Circumstance</b>	<b>Employer's Risk</b>	<b>Force Majeure</b>	<b>Care of the Works Responsibility</b>	<b>Compensation in case of Force Majeure</b>
		Majeure		
War, hostilities, invasion, act of foreign enemies	Yes	Yes	Employer pays including profit, and grants EOT	EOT and Cost
Rebellion, terrorism, revolution, insurrection, military or usurped power or civil war <i>within the Country</i>	Yes	Yes	Employer pays including profit, and grants EOT	EOT and Cost
Rebellion, terrorism, revolution, insurrection, military or usurped power or civil war <i>outside the Country</i>	No	Yes	Contractor's risk both for cost and time.	EOT only
Riot, commotion or <i>disorder within the Country</i> by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors	Yes	Yes	Employer pays including profit, and grants EOT	EOT and cost
Riot, commotion or disorder <i>outside the Country</i> by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors	No	Yes	Contractor's risk both for cost and time.	EOT only
Strike or lockout <i>inside the Country</i> by persons other than by the Contractor's Personnel and other employees of the Contractor and Subcontractors	No	Yes	Contractor's risk both for cost and time.	EOT and cost
Strike or lockout <i>outside the Country</i> by persons other than by the Contractor's Personnel and other employees of the Contractor and Subcontractors	No	Yes	Contractor's risk both for cost and time.	EOT only
Strike or lockout by the Contractor's Personnel and other employees of the	No	May be if meets all tests of Force	Contractor's risk both for cost and time.	EOT if all tests of Force Majeure met.

<b>Event or Circumstance</b>	<b>Employer's Risk</b>	<b>Force Majeure</b>	<b>Care of the Works Responsibility</b>	<b>Compensation in case of Force Majeure</b>
Contractor and Subcontractors		Majeure		
Munitions of war, explosive materials, ionising radiation or contamination by radio-activity, <i>within the Country</i> except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity	Yes	Yes	Employer pays including profit, and grants EOT	EOT and Cost
Munitions of war, explosive materials, ionising radiation or contamination by radio-activity, <i>outside the Country</i> except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity	No	Yes	Contractor's risk both for cost and time.	EOT only
Munitions of war, explosive materials, ionising radiation or contamination by radio-activity	No	May be if meets all tests of Force Majeure	Contractor's risk both for cost and time.	EOT if all tests of Force Majeure met.
Pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds	Yes	May be if meets all tests of Force Majeure	Employer pays including profit, and grants EOT	EOT if all tests of Force Majeure met.
Use or occupation by the Employer of any part of the Permanent Works except as may be specified in the Contract	Yes	No	Employer pays including profit, and grants EOT	No EOT or Costs
Design of any part of the Works by the Employer's personnel or by others for whom the Employer is responsible	Yes	No	Employer pays including profit, and grants EOT	No EOT or Costs
Any operation of the forces of nature which is Unforeseeable or against which an experienced Contractor could not	Yes	Yes	Employer pays including profit, and grants EOT	EOT and Cost

Event or Circumstance	Employer's Risk	Force Majeure	Care of the Works Responsibility	Compensation in case of Force Majeure
reasonably have been expected to have taken adequate preventative measures				
Foreseeable operations of the forces of nature which the Contractor could not reasonably have provided for before entering into the Contract	No	EOT if all tests of Force Majeure met.	Contractor's risk both for cost and time.	EOT and Cost

If the Force Majeure event causes damage to the Works, the Contractor must therefore give two notices – one under Sub-Clause 17.4 to claim costs and time for remedying the damage and one under Sub-Clause 19.2 in order to get the right to compensation for Force Majeure to the extent that it is not related to repairing damage.

### **Sub-Clause 19.7 Release from Performance under the Law**

This Sub-Clause does far more than the heading suggests.

As can be seen from the opening words - *Notwithstanding any other provisions of this Clause* – Sub-Clause 19.7 can be read on its own without reference to the rest of Clause 19. If any event or circumstance falling within the provisions of this Sub-Clause makes it impossible for either or both Parties to fulfil their contractual obligations, either Party has the right to be released from its contractual obligations.

Similarly if there is a provision of the law governing the Contract which entitles the Parties to be released from further performance of the Contract either Party has the right to be released from its contractual obligations.

Both Parties will then be released from further performance of their obligations under the Contract and compensation is based on the same principles as when the Contract is terminated for Force Majeure.

It is not clear whether the expression “discharge from further performance of obligations” is intended to have the same meaning as the expression “terminate the Contract” as appears in Clauses 15, 16 and 19.6. On the face of it, it would seem to be a narrower expression. The concept of termination of the Contract implies that both Parties will be released from their obligations and will also lose any rights they may have under the

Contract. This is dealt with in more detail in the discussion of Clauses 15 and 16. Discharge from further performance implies that the Party obtaining the discharge still retains all its rights but none of its obligations. In contrast to Sub-Clause 19.6 no provision is made for the Contractor to proceed in accordance with Sub-Clause 16.3 (Cessation of Work and removal of Contractor's Equipment). The Contractor has no further obligations but is not obliged to leave the Site and is not required to hand over Documents etc.

The Sub-Clause applies to all events and circumstances outside the control of the Parties. Thus an event which would, under Sub-Clause 19.1, fall outside the definition of Force Majeure because:

- The Party could reasonably have provided for it before entering the Contract
- The Party could reasonably have avoided or overcome it
- It is substantially attributable to the other Party
- Involves riot commotion disorder, strike or lockout by the Contractor's Personnel
- Involves damage caused by munitions of war, explosive materials, ionising radiation or contamination by radio-activity attributable to the Contractor's use of such materials

may be covered by Sub-Clause 19.7. There are clearly events or circumstances which fall under one or more of these exceptions to Force Majeure which are still within the control of the Parties but there will be many which are not.

Further, Sub-Clause 19.7 applies even though the following would rule out a claim on the basis of Force Majeure:

- Failure to give Notice under Clauses 19.2 or 20.1
- An event which makes it impossible or unlawful for one Party to make a payment to the other. (Excluded from Force majeure by Clause 19.2)

Although the Contractor is obliged under Sub-Clause 1.13 to comply with applicable Laws (see discussion under Sub-Clause 1.13), Sub-Clause 1.13 says nothing about what should happen if the Contractor is prevented from doing something which it would otherwise be obliged to do because it is or has become illegal. Presumably the Engineer could order a Variation under Clause 13 or the Contractor could simply not perform that element of the Contract. However, nothing is explicitly explained. Sub-Clause 19.7 is thus the only Clause in the Contract which deals specifically with the consequences of impossibility or illegality; although provisions such as Sub-Clause 4.12 (Unforeseeable Physical Conditions) provide some relief to the Contractor when unforeseeable difficulties are encountered, including those which may make the carrying out of the

Works impossible. Previous editions of FIDIC and many other standard contracts also contain another provision which deals with the consequences of impossibility or illegality.

Clause 13.1 of the 4<sup>th</sup> Edition of the FIDIC Contract was typical in providing:

*13.1 Work to be in Accordance with Contract*

*Unless it is legally or physically impossible, the Contractor shall execute and complete the Works and remedy any defects therein in strict accordance with the Contract to the satisfaction of the Engineer.*

The consequence of legal and physical impossibility there was to absolve the Contractor from executing the impossible or illegal activity. Such discussion as there has been about the meaning of clauses like this centres on what might be meant by “*physically impossible*” and, for example considers whether something which might be possible by the application of extraordinary resources should be treated as being in reality physically impossible. The conclusion is that where the problem can only be dealt with by measures *outside the range of the practicable and reasonable*<sup>7</sup> they will be treated as impossible. This test would be relevant to considering what might be impossible in terms of Sub-Clause 19.7. Since the above English law test was formulated in the context of a contract which only excused the Contractor from the consequences of *physical impossibility* and not all impossibility, as does Sub-Clause 19.7, it is all the more likely that commercial or financial impossibility in the sense that the carrying out of the contract has become beyond the range of the practical and the reasonable will be covered by Clause 19.7

The cases based on the earlier forms of contract also deal with the contractual remedies available – for example whether the impossibility can be overcome by a variation order or whether the Contractor is entitled to find another way to complete the Works without having to carry out the impossible element. However these cases are irrelevant under a contract like this one which does not relieve the Parties from doing the impossible while continuing to work under the Contract. This contract allows only the extreme remedy of release from the Contract.

However under the law of frustration (dealt with in the next paragraph) English law excuses a party from performance of a contract where its performance has become impossible even where the contract makes no specific provision to this effect. Thus under the English law, a Party to the present contract which considers one of its obligations to be impossible will either have to consider giving notice to release itself from performance

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<sup>7</sup> *Turriff Ltd v Welsh National Water* (1994) 1 Const Law yearbook 122, 133

under the Contract in accordance with Clause 19.7, or making a claim on the basis of the law of frustration. English law does not allow a Party to escape from an impossible contract if the impossibility existed when the contract was entered into. It is only if a later event creates the impossibility that the party can escape. However the impossibility foreseen under Clause 19.7 can be an impossibility which existed from the beginning of the Contract, whereas frustration can only occur as a result of something which happens after the Contract is underway.

The law of frustration is explained in an English case<sup>8</sup> which says that frustration

*“Occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.”*

English common law, as codified in the Law Reform (Frustrated Contracts) Act, makes it difficult for a party to succeed in a plea of frustration. In *Davis Contractors v Fareham*<sup>9</sup>, the English House of Lords held that a contract was not frustrated by a severe shortage of labour; the Court of Appeal also refused relief in *Wates v GLC*<sup>10</sup> when the contractor complained that runaway inflation had fundamentally altered the economics of the contract. It took a catastrophic landslide which buried the site, swept away a twelve storey block of flats and killed a number of people to persuade the Privy Council in *Wong Lai Ying v Chinachem Investment Co. Ltd*<sup>11</sup> that a contract had been frustrated.

If a contract is held to be frustrated, the result, broadly speaking, is that the contractor is to be paid for the work done prior to the frustrating event but otherwise both parties are discharged from further performance. In civil law jurisdictions, the doctrine of force majeure takes an altogether more relaxed approach to relieving the parties of their obligations under the contract and it is this more relaxed approach that has been adopted in the current clause.

Other legal systems have special rules relating to impossibility which, as does the rule under English law, run parallel with Sub-Clause 19.7. They may also refine the meaning of impossibility in the way the English law has, so that it includes something which is commercially highly impracticable though not absolutely impossible. They may also set

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<sup>8</sup> *Davis Contractors v Fareham* UDC 2 All ER 145,160 HL per Lord Radcliffe

<sup>9</sup> UDC (1956) AC 696

<sup>10</sup> (1983) 25 BLR 9

<sup>11</sup> (1979) 13 BLR 81

out specific remedies to enable the Party affected to substitute something it is capable of doing for what it finds impossible.

In summary it can therefore be said that, in contrast to previous editions of FIDIC, Contractors are not excused by the Contract from performing the impossible or the illegal while the Contract continues, though they may sometimes gain relief under Sub-Clause 4.12 (Unforeseeable Physical Conditions) or be excused from performing by the underlying law (including the law of frustration of contracts). Under this contract they are given only one specific remedy – the right to give a notice which gives them an immediate release from further performance under the Contract.

The following are some examples of illegality or impossibility.

Illegality would include an injunction or a change in the local legislation which prevented the Contractor working at all or otherwise prevented the project from proceeding. In this context, see Sub-Clause 1.13 (Compliance with Laws) and Sub-Clause 13.7 (Adjustments for Changes in Legislation) which deals with local legislation causing changes to the cost or duration of the works. Compliance with Sub-Clause 1.13 could in extreme circumstances give rise to a situation where the Works could not continue legally and Sub-Clause 13.7 only deals with the situation where the change in the law increases the cost or time necessary to perform the Works – it does not give the Engineer any authority to relieve the Contractor of his obligations to abide by the changed legislation.

Illegality would also include the situation where one Party or the other was precluded from continuing its contractual relationship with the other as a result of UN or other economic sanctions.

There is a spectrum of impossibility: at one extreme, there is something akin to frustration whereby circumstances beyond the control of either party prevent further performance such as the permanent flooding of the site due to some natural phenomenon. In the middle of the spectrum there would be projects which are physically impossible to build: for example, ground conditions might render the bridging of a river physically impossible so that the project would have to be aborted in favour of a tunnel. At the other end of the spectrum, a part of the particular design may be physically impossible to build. For example, it may be impossible to fit the specified reinforcement within a column of the size required. It is submitted that all these types of physical impossibility can meet the requirements of Sub-Clause 19.7. In the last example, the Engineer could forestall impossibility by issuing a variation order. The Employer might also be able to argue that the impossibility was not outside the control of the Contractor – the Contractor should have seen the problem when it made its bid and insisted on an alternative solution.

Physical impossibility could also include circumstances where the site was too small for the works designed or where under Sub-Clause 4.12 (Unforeseeable Physical Conditions) circumstances were encountered that were so severe as to prevent the completion of the works. However Sub-Clause 19.7 does not cover circumstances where the completion of the works is simply more difficult or expensive than anticipated; nor circumstances where methods or machinery which the Contractor did not allow for in his tender are found to be necessary. This situation is to be contrasted with the circumstances where the relevant method or machinery is specified in the contract with the result that the Contractor would be entitled to a variation if the relevant method or machinery proved physically impossible. The remedy would again be in the Engineer's hands under Sub-Clause 13.1 (Variations). Once the variation order is made the carrying out of the Works would no longer be impossible. It would however be arguable that this problem was not outside the control of the Contractor (and therefore not within Sub-Clause 19.7) – the Contractor had the opportunity when it made its bid to raise an objection but did not.

It is, however, a possible argument in response to a Contractor's notice under Sub-Clause 19.7 that nothing which is capable of being changed by a variation order is impossible.

If the Engineer's design is incapable of being built, for example, because structural elements as designed would be incapable of withstanding the loads to be imposed upon them by other elements of the works, this could amount to impossibility. The Contractor would be entitled to seek and obtain instructions from the Engineer which would amount to variations under Sub-Clause 13.1 (Variations). This situation is to be contrasted with a case such as *Sharpe v San Paulo Railway* (1873)<sup>12</sup> where a Contractor undertook to construct a railway for a lump sum. When it turned out that the quantities stated in the contract were substantially underestimated, it was held that, in the absence of fraud, the contractor had taken that risk when tendering a lump sum.

One type of impossibility which is not excluded under Sub-Clause 19.7 is financial impossibility. Sub-Clause 19.2 expressly excludes inability to make payments as a form of Force Majeure, but Clause 19.7 expressly overrides Clause 19.2 in that it applies “*notwithstanding any other provision of this Clause.*” Thus if, as a result of changed conditions which do not give it the right to an increase in the contract sum, the Contractor finds that the costs of continuing the contract are so far above the price it has agreed to perform for that it is unable to raise enough finance to continue, the Sub-Clause is possibly wide enough for this to be treated as a form of impossibility and to allow the Contractor to give notice and release itself from performance. The same might apply to the Employer who finds that, as a result for example of Unforeseeable Physical Conditions it is bound to pay the Contractor such large sums to continue the works, it

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<sup>12</sup> 8 Ch. App. 597

cannot meet its payment obligations, although in this case the Employer will first have to consider whether, by ordering a variation under Sub-Clause 13.1, it may be possible to omit enough Work to make the project affordable.

Sub-Clause 19.7 applies where it is impossible or unlawful for either or both Parties *to fulfil its or their contractual obligations*. This expression covers a wide spectrum. A relatively small problem might make it impossible for the Contractor to complete within the Time for Completion - a clear failure to fulfill its contractual obligations. A design problem in a corner of the site may make it impossible to complete the Works in accordance with the Contract. The unexpected discovery of rock may make it impossible to complete on time. This means that a relatively small impossibility or illegality may open the door to the operation of the provision.

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