Clause 8 Commencement Delays and Suspension

Summary

Clause 8 contains all the fundamental provisions relating to the start of the Works, the Time for Completion, delays and the entitlement of the Contractor to an extension of time and of the Employer to delay damages, and finally the circumstances in which a suspension of the Works can occur and the implications for the Parties.

Origin of Clause

Sub-Clause 8.1 deals with the Commencement of the Works and is based on Clause 41 of 4th edition Red Book. The wording has now been changed; it is the '*execution of the Works* 'which must be commenced as soon as '*reasonably practicable'*. The previous requirement was for the Contractor to start as soon as '*reasonably possible*'.

Sub-Clause 8.2 deals with the Time for Completion and is derived from Clause 43 of 4th edition Red Book. The wording differs but in essence the requirement is for the Contractor to complete in the time finally arrived at as the extended date for completion, i.e. including any extension of time granted.

Sub-Clause 8.3 sets out the requirements for a Programme and has a different emphasis from Clauses 14.1 and 14.2 in 4th edition Red Book.

Sub-Clause 8.4 deals with the Extension of Time for Completion and is derived from Clause 44 of the 4th edition Red Book. Significant changes are that the clause now omits the reference to '*other special circumstances*' which previously appeared and a new provision is added at d) for '*unforeseeable shortages...*'

Sub-Clause 8.5 relates to delays caused by authorities and is derived from Clause 31.2 of the 4th edition Red Book.

Sub-Clause 8.6 with deals with Rate of Progress is derived from Clauses 14.2 and 46 of the 4th edition Red Book.

Sub-Clause 8.7 sets out the Employer's right to delay damages and is derived from Clause 47 of the 4th edition Red Book. It was previously called *'Liquidated Damages for Delay'*.

Sub-Clauses 8.8 to 8.12 are derived from Clauses 40.1, 40.2 and 40.3 of the 4th edition Red Book. These deal with the suspension of work by the Engineer and the consequences of the suspension; including payment for Plant and Materials. These clauses also deal with prolonged suspension and the resumption of work following suspension.

Cross-references

Reference to Clause 8 is found in the following clauses:-

- Sub-Clause 1.1.3.2 Definitions – Commencement Date
- Sub-Clause 1.1.3.3 Definitions – Time for Completion
- Sub-Clause 1.9 Delayed Drawings or Instructions
- Sub-Clause 2.1 Right of Access to the Site
- Sub-Clause 4.7 Setting Out
- Sub-Clause 4.12 Unforeseeable Physical Conditions
- Sub-Clause 4.24 Fossils
- Sub-Clause 7.4 Testing
- Sub-Clause 7.10 Ownership of Plant and Materials
- Sub-Clause 10.1 Taking Over of the Works and Sections
- Sub-Clause 10.2 Taking Over of Parts of the Works
- Sub-Clause 10.3 Interference with Tests on Completion
- Sub-Clause 11.3 Extension of Defects Notification Period
- Sub-Clause 13.3 Variation Procedure
- Sub-Clause 13.7 Adjustment for Changes in Legislation
- Sub-Clause 15.2 Termination by Employer
- Sub-Clause 16.1 Contractor's Entitlement to Suspend Works
- Sub-Clause 16.2 Termination by Contractor
- Sub-Clause 17.4 Consequence of Employer's Risks
- Sub-Clause 19.4 Consequences of Force Majeure
- Sub-Clause 20.1 Contractor's Claims

Sub-Clause 8.1 Commencement of Work

This Sub-Clause defines when the construction works will commence. The Engineer (Red Book) and Employer (Silver Book) are required to give the Contractor not less than 7 days notice of the Commencement Date (which is defined as the date notified under this Sub-Clause). Unless otherwise provided for, the Commencement Date must be within 42 days of the Letter of Acceptance. Thereafter the Contractor must commence as soon as reasonably practicable.

'*Works*' are defined narrowly and mean the Permanent and Temporary works and it is this which must be started as soon as reasonably practicable. The definition of '*Contractor's Equipment'* and '*Temporary Works'* supports the view that the '*Works*' may not cover all aspects of mobilisation although the definition of ' *Temporary Works*' would cover the setting up of the site camp, laboratories etc.

If the Engineer or Employer failed to give notice of the Commencement Date such an act would be a breach of contract and the Contractor might be entitled to claim an extension of time and Costs under Sub-Clause 8.4. The Sub-Clause should be read together with Sub-Clause 2.1 – Right of Access to the Site. Access for the Contractor must be given from commencement, in

accordance with the prescribed time in the Appendix to Tender (Red and Yellow Books) or Particular Conditions (Silver Book). If no time is prescribed then the Employer must make sure that such parts of the Site are made available so that the Contractor can pursue the intended sequence and methods he set out in the Programme submitted under Sub-Clause 8.3. It should be noted that in many instances there will be no need for the Contractor to have access to all parts of the Site at once. Under English Law there would be implied into the contract a term that the Employer will provide the Site to the Contractor in order that he may carry out his obligations. This may not be the case in other jurisdictions. The FIDIC Guide advises that the Employer should not enter into a binding contract unless he is in a position to comply with Sub-Clause 2.1.

Failure to give access to the Site would no doubt trigger a claim for extension of time and costs under Sub-Clause 8.4 as being a '*... delay impediment or prevention..'* to completion of the Works. It is to be noted that there is in English law a doctrine of prevention which might apply if the Engineer has refused to award an extension of time when he should have done so and the Employer commits an act of prevention; a common example would be failing to give access to the Contractor. In such a situation the extension of time mechanism and the damages for delay provisions fall away and the Contractor must complete in a reasonable time: *Peak Construction (Liverpool) Limited v McKinney Foundations Limited*.[1]

Once on Site, the Contractor must '*proceed with the Works with due expedition and without delay*'. This wording is exactly the same as in the 4th edition. The FIDIC Guide states that the importance of this last sentence should not be overlooked. In the case of *Obrascon Huarte Lain SA v HM Attorney General for Gibraltar*[2] Jackson LJ held that this clause was not directed at every task on the contractor's to-do list. It was principally directed at activities which are or may become critical. Jackson LJ then referred to the case of *Sabic UK Petrochemicals Ltd (formerly Huntsman Petrochemicals (UK) Ltd) v Punj Lloyd Ltd (a company incorporated in India)*[3] to support this statement. However, the *Sabic case* appears to be concerned with the obligation of "due diligence" rather than "due expedition"

The phrase "due diligence and without delay" may be interpreted in the light of the other obligations outlined elsewhere within the Contract; for example, Clause 15 – Termination by Employer. A breach by a Contractor of the last sentence of Sub-Clause 8.1; i.e. *due expedition and without delay*, is <u>not</u> a specific ground for termination by the Employer. However, Sub-Clause 15.2 does allow an Employer to terminate if the Contractor without reasonable excuse fails to '*proceed with the Works in accordance with Clause 8*'. Clause 8 goes on to set out stringent requirements as to Programme (see Sub-Clause 8.3, not least for example, as to the order in which the Works will be carried out, procurement, manufacture and delivery of plant,

[1] (1976) 1 BLR 114
[2] [2015] EWCA Civ 712 (09 July 2015) at [132]
[3] [2013] EWHC 2916 (TCC)

details of estimated personnel and equipment.) Furthermore see the requirements on a Contractor as to Rate of Progress (Sub-Clause 8.6). Reading Clause 8 as a whole, therefore, to interpret the meaning of '*proceed with the Works with due expedition...*'', it is suggested that it must mean more than merely to start and keep going, but rather to proceed in accordance with the programming and resourcing details already submitted by the Contractor insofar as this is critical to the completion of the Works. In the case of *Wunda Projects Australia P/L*[4] the District Court of South Australia commented that a construction programme is dynamic and if there is lack of progress the programme has to be changed. Whether a Contractor is proceeding with 'due expedition' is to be measured against the updated and not the superseded programme. On this point also see below as to the particular obligations of the Contractor to provide updated programmes under Sub-Clause 8.3.

It is suggested that the addition of the words '*without delay*' must mean without a delay for which an extension of time is provided for elsewhere in the contract.

Sub-Clause 8.2 Time for Completion

This is the Contractor's paramount time-related obligation; he must complete the whole of the Works and if applicable, each Section of the Works, within the time required by the Contract, subject to any extensions of time to which he may be entitled. The time within which the Works must be completed is to be found in the Appendix to Tender and is calculated from the Commencement Date. The Time for Completion is defined at Sub-Clause 2.1 as the time for completing stated in the Appendix, with any extension to it. Owing to the nature of the claims process generally, and indeed the specific time scales set out in Sub-Clause 20.1 for making claims, there may be a period of uncertainty as to the actual date for completion and this could well be a lengthy period.

The reference to the 'w*hole of the Works*' means the passing of Tests on Completion and all work required to be completed for the purposes of issuing a Taking-Over Certificate, save for minor outstanding works and defects which will not substantially affect the use of the Works or their intended purpose.

Sub-Clause 8.3 Programme

The Contractor is required to provide a detailed Programme within 28 days of the receipt of the Notice of Commencement. It is to be revised whenever it is inconsistent with actual progress or the Contractor's obligations. There are stipulations in Sub-Clause 8.3 as to what the Programme shall include. The Contractor is obliged to proceed in accordance with it unless the Engineer informs him of its non-compliance within 21 days in which case the Contractor is obliged to revise it.

[4] [2010] SADC 96 (29 July 2010)

Generally, Sub-Clause 8.3 has a different emphasis from the previous Clauses 14.1 and 14.2 in the FIDIC 4th Red Book, where the Engineer's consent to the Programme submitted was required and the onus was on the Engineer to request such information. Further, the obligation on the Contractor to revise a non-conforming programme was also at the Engineer's request.

The FIDIC guide explains that Sub-Clause 8.3 does not empower the Engineer either to give or withhold approval, only to notify if the Programme does not comply with the Contract. Thus, it is suggested, neither party can misuse the Programme to obtain an unfair advantage. The guide envisages a situation where an over–optimistic Programme has been submitted – perhaps in terms of productivity for example, and advises that since there can be no approval, such a Programme could not be used as the basis for the unquestionable validation of a claim for an extension of the Time for Completion. This matter was considered in England in the case of *Glenlion v Guinness Trust*[5] where it was decided that just because a Contractor has proposed a programme achieving early completion he could not thereby impose obligations on the designer that the design should be ready earlier than was necessary to complete in accordance with the completion date, only that the Contractor should not be hindered in achieving the completion date.

However the situation might be different if the Programme were a contract document. There is in English law some authority that an inability to work in accordance with a programme or method could give rise to a claim for a variation and costs – see *Yorkshire Water Authority v Sir Alfred McAlpine*[6]. Although the 'Letter of Tender' is now defined separately from 'Tender' which comprises the Letter of Tender and all other documents which the Contractor submitted with the letter of Tender, care should still be taken to exclude the tender programme.

The requirement to provide detail as to timing and methods which must be included in the Programme, may make it easier to identify when there has been a breach of this Sub-Clause. Note also that the Silver Book for EPC/Turnkey projects also contains broadly the same requirements as to the content of the programme. One might consider that an Employer should not be concerned about methods and timing provided the end result is supplied on time, unlike the traditional situation which requires careful monitoring by the Engineer of both quality and progress. If the Contractor is to bear the risk inherent in the Silver Book then it is suggested that he should be left to carry out the project unfettered by interference from the Employer.

The Contractor must proceed with the Programme he has submitted in the absence of notice from the Engineer that it is non-compliant. The Employer's Personnel (defined by Sub-Clause 1.1.2.6 as including the Engineer and his staff) are entitled to rely on the Programme for the planning of their activities. In practical terms therefore the Engineer can rely on the Programme in preparation of his detailed design. In particular he will want to rely on the details included

[5] (1988) 39 BLR 89
[6] (1985) 32 BLR 114

regarding procurement, manufacture of plant, delivery and erection and testing. The Employer will want to be able to rely on it for the purposes of giving possession of the Site. Failure to give possession of the Site may give the Contractor entitlement to extension of time and Cost under the provisions of Sub-Clause 8.4(e).

The Contractor is required to give notice of probable future events which may adversely affect or delay the actual execution of the Works. This means any event, not just events which may affect the contractual Time for Completion.

Whilst it is no doubt good practice for the Contractor in any event to revise or update his Programme, he is now expressly obliged to revise it;

- whenever the current Programme is inconsistent with actual progress or with his obligations or,
- by the last sentence of Sub-Clause 8.3, in the event that he gives notice of specific probable future events or circumstances which may adversely affect or delay the execution of the Works, or
- if the Employer gives him notice that the Programme fails to comply either with the Contract or is inconsistent with actual progress and the Contractor's stated intentions.

Sub-Clause 8.4 Extension of Time for Completion

This Sub-Clause sets out the mechanism by which an extension of the Time for Completion may be determined. The starting point is that any delay must affect completion of the Works for the purposes of Sub-Clause 10.1. A distinction is therefore made between non-critical delays and critical delays. Critical delays give an entitlement to an extension of time and this follows common law principles. In *Kane Constructions Pty Ltd v Sopov*[7], Warren CJ stated that "any delay that does not affect practical completion is irrelevant."

The Engineer must grant an extension if the Contractor is entitled to one by reason of the causes listed in sub-paragraphs a) to e) and note that at b) an extension of the Time for Completion is to be granted for a cause of delay giving entitlement under another Sub-Clause of the Contract. For these - see the table below. The Contractor must comply with the procedure set out at Sub-Clause 20.1[8] and the Engineer must make a fair determination in accordance with the Contract. Although the Engineer may review previous extensions given, he is not empowered to decrease the total extension of time.

Generally the clause seems to be intended to balance the rights of both parties - the Contractor's right to have further time for an event for which he is not responsible and the Employer's right

[7] [2005] VSC 237 at 661
[8] *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)* [2007] EWHC 447 [103]

to delay damages for a delay for which he is not culpable. The FIDIC Guide states that the clause is for the benefit of both parties.

The Contractor must comply with the claims notification procedure under Sub-Clause 20.1. The words' *if and to the extent that completion for the purposes of Sub-Clause 10.1... is or will be delayed by...*' make it clear that it is a delay to completion as provided for by Sub-Clause 10.1 which is to be compensated for by the extension of time and not merely disruption to progress attributable to a qualifying cause.

Each of the qualifying causes listed are detailed below:-

a) A '*Variation'* or '*other substantial change in the quantity of an item of work'* Clause 13 makes it clear that Variations may include a) changes to quantities, d) omission of any work, e) any additional work, Plant, Materials or services, and f) changes to the sequence and timing of the Works. The latter has become more significant in light of the rigorous requirements for the Programme set out under Sub-Clause 8.3. In the Red Book 4th edition an issue arose from the wording which referred to 'the amount or nature of extra or additional work' which could be seen as inconsistent with the description of Variations in Clause 51, not all of which were extra or additional. The change in wording has removed this anomaly. In the event that a change was ordered which caused a delay to the Works but which did not fall within the description of what a Variation may include by Sub-Clause 13.1, the likely position under English law would be that *Peak Construction (Liverpool) Limited v McKinney Foundations Limited* (1976) 1 BLR 114 would apply; time would be at large and the Employer's right to delay damages would fall away also.

b) *'a cause of delay giving an entitlement to extension of time under a Sub-Clause of these Conditions*'. In the 4th edition it was unclear whether the sub-clause that was being referred to was intended to mean one dealing with events which might be a cause of delay (but which did not necessarily qualify for an extension of time). The wording in FIDIC 1999 has now removed any ambiguity in that it now expressly refers to a Sub-Clause which gives entitlement to an extension of time. Express references to entitlement to extension of time elsewhere in the Conditions can be found in the following table; most, but not all also deal with the Contractor's entitlement to money.

Sub-Clause	Contractor's Entitlement
1.9 Delayed Drawings or Instructions	Extension of time, Cost and reasonable profit
2.1 Right of Access to the Site	Extension of time, Cost and reasonable profit
4.7 Setting Out	Extension of time, Cost and reasonable profit
4.12 Unforeseeable physical conditions	Extension of time and Cost
4.24 Fossils	Extension of time and Cost

7.4 Testing	Extension of time, Cost and reasonable profit
8.4 Extension of time	Extension of time for a listed cause
8.5 Delays caused by authorities	Extension of time
8.9 Consequences of Suspension	Extension of time and Cost
10.3 Interference with Tests in Completion	Extension of time, Cost and reasonable profit
13.7 Adjustments for changes in legislation	Extension of time and Cost
16.1 Contractor's entitlement to suspend work	Extension of time, Cost and reasonable profit
17.4 Consequences of Employer's risks	Extension of time, Cost and reasonable profit in some instances
19.4 Force Majeure	Extension of time and Cost in some instances

c) '*exceptionally adverse climatic conditions'*. The wording is retained from the 4th edition Red Book. The FIDIC Guide suggests that a way of establishing whether such climatic conditions have in fact occurred would be to consider the frequency with which similar adverse conditions have occurred at the Site in light of the length of the Contract period, for example, for a two year contract, conditions which occurred 4 or 5 times the length of the contract period; i.e. once every 8 to 10 years, might be exceptionally adverse.

In order to qualify for an extension of time the climatic conditions (note that these need not necessarily be restricted to weather but could arguably include site conditions) must be '*exceptionally adverse'*. This does not mean both exceptional and adverse and therefore for example if a Contractor experienced a flood as a result of heavy rain- he would not have to show that the rain was both unusual and heavy but that it was particularly heavy.

d) '*unforeseeable shortages ...of personnel or Goods caused by epidemic or Governmental actions.*' . '*Unforeseeable*' is defined at Sub-Clause 1.1.6.8 in the Red and Yellow Books as '*not reasonably foreseeable by an experienced contractor by the date for submission of the Tender'*. This definition is now applied to the availability of labour or goods.

e) '*any delay, impediment or prevention...'* caused by the Employer his Personnel or other contractors. The quoted words are retained from the 4th edition. English Law requires clear words in a contract in order for an extension of time to be granted for a breach by an Employer; it is suggested that these words are indeed clear enough to cover an act of delay or prevention by the Employer and would not fall foul of the rule in *Peak Construction (Liverpool) Limited v McKinney Foundations Limited*[9] with the consequence that the extension of time mechanism would fail and time be considered at large.

[9] (1976) 1 BLR 114

Under English law an Employer cannot, in the absence of an express clause to the contrary, delay the progress of the works, by Variation or otherwise, and then claim delay damages. This is often referred to as the prevention principle. This principle was set out in *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*:[10]

> "It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if the other party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time."

The prevention principle operates by reason of implied term and therefore an express term to the contrary will override it. In *North Midland Building Limited v Cyden Homes Limited*[11] the English Court of Appeal held that parties to a construction contract were free to allocate the risk of concurrent delay. Therefore if there are both contractor delays and employer delays the contractor will not be entitled to an extension of time. The court found that if the drafting of such a clause is sufficiently clear, the "prevention principle" will not invalidate a clause in which it allocated risk in this way.

The procedure for the Contractor to notify any claims for extension of time is set out at Sub-Clause 20.1.

Causation and Concurrent delay

A concurrent delay has been defined as "a period of project overrun which is caused by two or more effective causes of delay which are of approximately equal causative potency" – see *Concurrent Delay* by John Marrin QC[12]. This definition has subsequently been approved in *Adyard Abu Dhabi v Sds Marine Services*[13] and in *North Midland Building Ltd v Cyden Homes Ltd*.[14]

Sub-Clause 8.4 does not address the situation where concurrency occurs. Consider the situation where the Contractor has been delayed by the Employer's failure to give possession of certain parts of the Site; however some or all of that delay would have occurred anyway due to either neutral factors or an event for which the Contractor is responsible. Does the Contractor get an

[10] [1973] 1 WLR 601 at 607
[11] [2018] EWCA Civ 1744
[12] (2002) 18 Const LJ No. 6 436
[13] [2011] EWHC 848 (Comm)
[14] [2018] EWCA Civ 1744

extension of time for all the period of delay? Should any extension of time be apportioned according to responsibility for the delay? Should any money payable also be apportioned?

The analysis used by parties in determining the true cause of delay has come under much consideration by the English and other Commonwealth courts. The dominant cause approach has been approved in certain cases; namely that if an event which is the Employer's responsibility is the dominant cause of loss that is sufficient for liability notwithstanding other concurrent causes. Another approach has been the 'but for' test – in other words but for the delay complained of, would the delay have occurred? Neither of these tests have been entirely satisfactory when applied in the context of a construction project. In the recent case of *De Beers UK Ltd v Atos Origin It Services UK Ltd*,[15] Edwards-Stuart J stated what he considered was the test when concurrent events occurred:

> "The general rule in construction and engineering cases is that where there is concurrent delay to completion caused by matters for which both employer and contractor are responsible, the contractor is entitled to an extension of time but he cannot recover in respect of the loss caused by the delay. In the case of the former, this is because the rule where delay is caused by the employer is that not only must the contractor complete within a reasonable time but also the contractor must have a reasonable time within which to complete. It therefore does not matter if the contractor would have been unable to complete by the contractual completion date if there had been no breaches of contract by the employer (or other events which entitled the contractor to an extension of time), because he is entitled to have the time within which to complete which the contract allows or which the employer's conduct has made reasonably necessary."

Whatever approach is adopted, however, the courts have recently stated the importance of establishing causation: *Adyard Abu Dhabi v SDS Marine Service* [2011] EWHC 848(Comm). The Court rejected an attempt to argue that notional or theoretical delay would suffice in establishing a right to an extension of time.

In *Henry Boot Construction (UK) Ltd v Malmaison Hotel (Manchester) Ltd*[16] the Court accepted the principle that a Contractor would be entitled to an extension of time for the whole of the period of delay in circumstances where there was another, concurrent delay. Dyson J stated:

> "… if there are two concurrent causes of delay, one of which is a relevant event, and the other is not, then the contractor is entitled to an extension of time for the period of delay caused by the relevant event notwithstanding the concurrent effect of the other event. Thus to take a simple example, if no work is possible on a site for a week not only because of exceptionally inclement weather (a relevant event), but also because

[15] [2010] EWHC 3276 (TCC)
[16] (1999) Con LR 32

> the contractor has a shortage of labour (not a relevant event), and if the failure to work during that week is likely to delay the works beyond the completion date by one week, then if he considers it fair and reasonable to do so, the architect is required to grant an extension of time of one week. He cannot refuse to do so on the grounds that the delay would have occurred in any event by reason of the shortage of labour."

This approach was adopted by Akenhead J in the case of *Walter Lilly & Company Ltd v Mackay & Anor.*[17] In this case Akenhead J stated:

> "I am clearly of the view that, where there is an extension of time clause such as that agreed upon in this case and where delay is caused by two or more effective causes, one of which entitles the Contractor to an extension of time as being a Relevant Event, the Contractor is entitled to a full extension of time."

In contrast it was held by the Scottish Court of Appeal in the decision of *City Inn Ltd v Shepherd Construction*[18] that an apportionment could be possible on delays where the events causing delay were both in operation at the same time with a single consequence and the Court there was concerned with the application of a common sense approach to the assessment. However, this case is to be treated cautiously and in *Adyard Abu Dhabi v Sds Marine Services*[19] the Court held that the approach adopted in *City Inn* "does not reflect English law."

The Engineer is required by Sub-Clause 20.1 to determine an extension of time (in the absence of agreement after consultation) in accordance with Sub-Clause 3.5 – Determinations. This requires him (after consulting with each Party to try to reach agreement) then to '*make a fair determination in accordance with the Contract.*' Similarly to the Red Book 4th edition, therefore, he is obliged not only to consider the causation of the delay but the fairness of his determination where time is concerned.

On the question of prolongation costs which may have been suffered as a result of the delay, note that the clauses giving Cost, and how that is to be determined, should all be considered individually. The provisions giving an entitlement to Cost cross-refer to Sub-Clause 3.5, while the provisions providing for payment and Variations do not – namely Sub-Clauses 11.2, 13.2, 15.5 and 16.4. Where Cost is to be determined, therefore, it is to be made in accordance with Sub-Clause 3.5; i.e., the determination is to be fair. This is different to the 4th edition where the Engineer was not asked to consider fairness in relation to Cost, only causation.

For example, consider the situation where a Contractor has suffered delay as a result of an error in the setting out of levels on a road project and he has shown that he could not reasonably have discovered it and avoided the delay and/or Cost but he has also had problems with a defaulting Sub-Contractor, for which he was responsible. Under Sub-Clause 4.7 – Setting Out,

[17] [2012] EWHC 1773 [370]
[18] [2010] BLR 473
[19] [2011] EWHC 848 (Comm)

he will be entitled to both time (under Sub-Clause 8.4 assuming compliance with Sub-Clause 20.1) and thus relief from payment of delay damages, and Cost, to be determined in accordance with Sub-Clause 3.5.

It is suggested that the sensible and fair result in many instances of concurrent delay would be for the time but not the money to be given to the Contractor (unless the Contractor can identify costs which are solely attributable to the Employer caused delay) and the addition of the requirement of fairness in determining Cost goes some way to enabling the Engineer to make such a decision.

Where the Engineer refuses an extension of time, the payment of delay damages must follow; see Sub-Clause 8.7 below.

The last part of Sub-Clause 8.4 requires the Contractor to give Notice to the Engineer in accordance with Sub-Clause 20.1. Sub-Clause 20.1 now requires that the Contractor gives Notice of a claim within 28 days of becoming aware of the event giving rise to delay and particulars are to be provided within 42 days. It is worth highlighting here that there is a clear departure from the position in the 4th edition in that failure to comply with the provisions of Sub-Clause 20.1 will now expressly bar the claim.

Sub-Clause 8.5 Delays Caused by Authorities

This Sub-Clause provides that unforeseeable delay or disruption caused to a Contractor by a public authority will give entitlement to an extension of time. It is expressly provided that such delay or disruption will fall within Sub-Clause 8.4 b) for the purposes of entitlement to time. However, it is difficult to see how the reference to '*disruption*' can be reconciled with the wording set out in Sub-Clause 8.4 elsewhere which is perfectly clear; it must be a delay to completion for the purposes of Sub-Clause 10.1 which will trigger a right to an extension of time and mere disruption to progress as distinct from delay to the completion date would not be sufficient. This point is specifically highlighted in the FIDIC Guide in the commentary to Sub-Clause 8.4 and there seems to be no clear reason for the inconsistency.

Sub-Clause 8.6 Rate of Progress

This Sub-Clause provides the basis for the Engineer to monitor progress by reference to the Programme submitted by the Contractor under Sub-Clause 8.3 and to require a Contractor who is in delay for reasons which are his responsibility under the Contract, to provide a Programme describing how he will accelerate to ensure completion within the Time for Completion (which is to include any extension of time granted). The Contractor shall adopt the methods described and the Employer can claim his costs incurred.

This Clause should be read together with the provisions set out in Sub-Clause 8.3.

The Sub-Clause only operates when the causes of delay are not ones which fall within Sub-Clause 8.4, thus giving relief to the Contractor by means of an extension of time. Whether the delay qualifies for an extension of time or not will be the first major question which arises and is beset with problems. The process of determining the actual entitlement of the Contractor could well be a lengthy one. Several applications for further time may be made which overlap. Since the Sub-Clause suggests that it is to be used when the Engineer has gone through the process of determining any extension of time, in practice therefore a Contractor could frustrate and prevent the use of the Sub-Clause by keeping the Engineer busy considering his claim(s). If the Contractor has applied for one or more extensions of time, the Engineer will have to determine them. If, for example, he has determined that the Contractor is entitled to only part of the claimed extension of time, then this Clause will operate for the period of delay for which relief has not been given.

A problem for the Contractor is that if, claiming that the delay warrants further time for completion, he refuses to act on the Sub-Clause 8.6 Notice – he might put himself at risk of a possible Employer termination under Sub-Clause 15.2 as having '*abandoned the Works or otherwise plainly demonstrated the intention not to continue performance*' or '*failing... to proceed with the Works in accordance with Clause 8.*' What constitutes a failure to proceed will be decided on the facts and see further the detailed commentary on Clause 15.

On the other hand if a Contractor complies with the Sub-Clause 8.6 Notice and it is subsequently found that the delay did indeed entitle him to an extension of time, the Employer will argue that he should not have complied and further that any costs of the compliance; i.e. the costs of the measures taken by the Contractor to complete on time, should not be met by him. It is suggested that the Contractor is likely to take the prudent course and comply and then argue his case later. He may then well say that he has been requested to accelerate by implication; this is not an uncommon argument in practice and there may well be many examples of correspondence between the parties on the topic which may build a picture of the facts on which the parties will rely in a dispute. However, simply because the Engineer (in error as it turned out) refused to grant an extension of time, this is unlikely to amount to an implied acceleration agreement. However, if the Contractor can show that he had no real alternative but to accelerate in light of the serious risk of termination, it is suggested that faced with this situation a DAB or Arbitrator may have some sympathy with that position.

The General Conditions contain no express mechanism for the Contractor to be instructed to complete ahead of the Time for Completion although the addition of the Value Engineering clause at 13.2 does allow the Contractor to submit a proposal for acceleration and reduction of cost and improvements to the efficiency or value of the Works. As indicated above it is difficult to demonstrate an implied instruction to accelerate. The FIDIC Guide advises that the parties should reach a separate agreement.

What happens if the Engineer fails to determine an extension of time? If the Engineer (or the Employer in the Silver Book) fails to operate the contractual procedure for determining an extension in accordance with the contract provisions, it would be open to the Contractor to argue that there would be no Time for Completion and that time was at large (at least under English Law) and the Contractor would be obliged to complete in a reasonable time and be paid his reasonable costs. Note however that there would be a distinction between failure to operate the mechanism set out in the contract and simply disagreeing with the Contractor, in which case the Contractor would have to operate the procedure for disputes under Clause 20.

Sub-Clause 8.7 Delay Damages

This is the Sub-Clause which sets out the amount, up to the maximum stated in the Appendix (for the Red and Yellow Books) and Particular Conditions (for the Silver Book) which can be paid by the Contractor to the Employer in the event of late completion of the Works or any Section, if applicable. The Employer is required to comply with the provisions in Sub-Clause 2.5 – Employer's Claims. The Employer is not entitled to recover his actual losses save for where he has terminated the Contract and for the effect here see the Clause 15 commentary.

The payment of damages for delay, previously called *'Liquidated Damages for Delay'*, was dealt with in the 4th edition Red Book at Clause 47. The requirement for the Employer to comply with his claims procedure (Sub-Clause 2.5) is new. The words in the 4th edition '*...and not as a penalty...*' have been removed. The express power given to the Employer in the 4th edition to deduct such damages from monies due or to become due to the Contractor has been removed. However, despite these changes, the overall concept of capped damages has been retained in the new forms and thus the parties agree a mechanism for a sum to be paid in the event of delay. The Contractor knows in advance the likely level of his risk in the event of delay and the Employer has some certainty as to his recovery levels in the event of delay and avoids the hurdles involved in proving his actual loss.

Historically, under English law, a liquidated damages provision had to be a genuine pre-estimate of loss. However, in *Cavendish Square Holding BV v Talal El Makdessi (Rev 3)*[20] the Supreme Court held that it was unhelpful to ask the question since the fact that the clause is not a pre-estimate of loss does not automatically mean it should be regarded as a penalty. The Supreme Court held that there may be other reasons to uphold the clause and the key question was whether the clause is penal, not whether it is a pre-estimate of loss. In assessing whether a liquidated damages provision was penal in nature the clause in question had to be considered including evidence of the commercial background.

Further, when considering the penal nature of a clause, the court or arbitrator must ask[21] "whether the impugned provision is a secondary obligation which imposes a detriment on the

[20] [2015] UKSC 67
[21] *Ibid* at [32]

contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation." The penalty may therefore be considered as a security for performance of the primary obligation. However, although the English courts may strike down a liquidated damages clause if the amount is "out of all proportion to any legitimate interest of the innocent party" it will not increase the amount.[22] The parties may agree a limited loss if they choose to do so and indeed can insert '*nil*' per week as the specified loss and in English Law this will be upheld: *Temloc v Errill Properties Limited* [1987] 39 BLR 30.

The Sub-Clause is triggered when the Contractor fails to comply with the Time for Completion in Sub-Clause 8.2 and the Works are not complete in accordance with that clause. The complicated references in the Red Book 4th edition to Clauses 48 and 43 in that contract have been removed and the clause is simpler and better for it.

The delay damages are stated to be the only damages due from the Contractor to the Employer for '*such default*'; i.e. for the failure to comply with the Time for Completion, save in the event of termination under Sub-Clause 15.2. It is to be noted that the clause maintains the last sentence that the Contractor is not relieved of his '*...obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract*.' In some jurisdictions these words might give an Employer a potential argument as to recovery of damages for other defaults. This point was debated in *Biffa Waste Services Ltd & Anor v Maschinenfabrik Ernst Hese GmbH and Ors*[23]. Ramsey J rejected an argument by Biffa that similar wording opened up a claim for unliquidated damages. He said that the words were to be read in context as a reminder of the other obligations under the contract. There were other rights of the Employer under the contract in relation to rates of progress and termination but Ramsey J. found that the provisions of the clause could not be construed to draw a distinction between simple failure to complete and failure to complete caused by a breach of another obligation. Biffa could not recover damages for delay caused by breaches of the contract, other than the liquidated damages.

Note that the limitation of liability under Sub-Clause 17.6 poses a real conflict with the provisions of this Sub-Clause and is wholly inconsistent with the Employer's right to recover delay damages. It expressly excludes liability of the Contractor to the Employer for loss of use of the Works (permanent or temporary) even if that loss of use is caused by the Contractor's failure to comply with the Time for Completion and otherwise delay damages would be triggered. Upon termination by the Employer under Clause 15 the position is different as the provisions for delay damages do not operate anyway. It is unclear how these clauses are to be reconciled and the FIDIC Guide does not currently assist on the matter.

Clauses 8.8 – 8.12 Suspension of Work, Consequences and Resumption of Work

[22] The position is different in a number of Civil law jurisdictions.
[23] [2008] EWHC 6 (TCC)(11 January 2008)

Sub-Clause 8.8 empowers the Engineer (in the Red and Yellow Books) and the Employer (in the Silver Book) to instruct the Contractor to suspend part or all of the Works. If this occurs the Contractor must protect the Works against damage. The Employer may inform the Contractor of the reason for the suspension but is under no obligation to do so. If he does and the reason is the Contractor's responsibility, the provisions contained in Sub-Clauses 8.9, 8.10 and 8.11 will not apply.

If the suspension is not due to the Contractor's default there is a procedure for the parties to follow set out in Sub-Clauses 8.9 and 8.10. In the event of a prolonged suspension, Sub-Clause 8.11 allows the Contractor to ask permission to proceed and if permission is declined, he may notify an omission for the purposes of Clause 13 or may give notice of termination under Sub-Clause 16.2.

The Engineer can instruct a suspension at any time. There would seem to be no restriction on his power to do so and there is no advice on this in the FIDIC Guide. For example, the Engineer could instruct a suspension in the event that the Employer is having funding difficulties. The Engineer is of course obliged to carry out his duties generally in accordance with Sub-Clause 3.1 in that he shall be deemed to act for the Employer. In making determinations, however, such as the one he makes under Sub-Clause 8.9, he is to proceed in accordance with Sub-Clause 3.5; i.e., to make a fair determination taking regard of relevant circumstances, but this requirement does not apply to the giving of the initial instruction under Sub-Clause 8.8 (see Sub-Clause 3.3). In the example given above, where the Employer asks the Engineer to suspend to allow him to deal with financing difficulties, it is suggested that there would be no major injustice if the Engineer then exercised his power to grant time and cost under Sub-Clause 8.9. The FIDIC Guide does suggest that the reason for the instruction to suspend is given to the Contractor in order to clarify the applicability of the provisions of Sub-Clause 8.9 which he may invoke.

Sub-Clause 8.8 requires the Contractor to '*protect, store and secure such part or the Works against any deterioration, loss or damage*.' Any Cost which the Engineer may determine under Sub-Clause 8.9 would no doubt include the cost of the secure storage of the Works or part of the Works.

The Contractor must comply with the notification requirements in Sub-Clause 8.9 when claiming that the instruction to suspend caused him delay and /or Cost. He is required to give notice to the Engineer (or to the Employer for the Silver Book). Sub-Clause 8.9 sensibly provides that a Contractor will not be entitled to recover time or Cost if he is responsible for making good his own faulty design or workmanship or materials, nor his failure to comply with the safe protection provisions in Sub-Clause 8.8.

Where the suspension has been for work on Plant or delivery of Plant /Materials for more than 28 days and the Plant/Materials have been marked as the Employer's property, Sub-Clause

8.10 provides for the Contractor to be paid the value of Plant and Materials which have not been delivered to Site.

Sub-Clause 8.11 provides for what happens in the event of a prolonged suspension; if the suspension under Sub-Clause 8.8 has continued for more than 84 days then the Contractor may ask for '*permission'* to proceed. If the Engineer (or Employer) declines to so do within 28 days, the Contractor may notify that the suspension is an omission under Clause 13 in respect of the affected part of the Works, to be valued in accordance with Clause 12. There is no requirement that this notice should be given in accordance with and comply with the provisions of Sub-Clause 20.1. If the whole of the Works is affected then the Contractor may terminate the Contract under Sub-Clause 16.2(f).

Sub-Clause 8.12 then goes on to refer to the '*permission or instruction to proceed*' being given. It is not clear what the difference is between permission and instruction as neither term is defined. If the Engineer does give either permission or an instruction to proceed then the parties are to examine the Works, Plant and Materials jointly and the Contractor is obliged to make good any damage if it has occurred during the suspension period. On resumption of work, Sub-Clause 8.9 expressly provides that the Contractor will be entitled to both time and Cost not only for complying with the suspension instruction under Sub-Clause 8.8 but also for resuming work under Sub-Clause 8.12.

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