



Suspension and Termination

Nicholas Gould

Partner, Fenwick Elliott LLP

Visiting Professor, King's College London

Termination

- Typical contract provisions (**dual notices**)
- Suspension
- The grounds for suspension and **termination**
- **Applicable law** requirements
- **Payment** (under the contract, damages etc.)

General Principles of Termination

Under ENGLISH LAW the terms of a contract may be classified as:

- Conditions – must be complied with;
- Warranties – breach leads to damages only;
- Intermediate terms – consider how serious the breach is.

Innocent party has a choice – accept the repudiation or demand completion of the contract.

Beware – are you accepting a repudiatory breach or breaching the contract (so that the other party can accept your fundamental breach)?

Beware – Middle East civil codes do not provide for repudiation!

Examples of repudiatory breaches

Contractor breaches:

- Abandonment – refusing to work;
- Defects – not usually a repudiatory breach;
- Delay – depends, but not usually.

Employer breaches:

- Refusal – so that the contractor cannot complete his work;
- Making completion impossible – site access;
- Ordering the contractor to stop work;
- Failure to pay instalments – NOT usually a repudiation;
- Undercertifying – NO;
- Suspending the works – not usually, but depends on the terms of the contract.

Suspension

Arises under:

- Contract;
- Legislation – e.g. section 112 of HGCRA 1996.



Right to suspend is based on defined grounds (e.g. full payment).

A written **notice** being served, and identifying the grounds.

Right comes to an end if the default is made good (e.g. payment is made).

A **further notice** is usually required to terminate the contract.

The financial account is prepared under the termination provisions of the contract.

Contractual provisions for termination and suspension (under the FIDIC forms of contract)

Consider the FIDIC Suite of contracts.

The "Red Book" is still the benchmark, but the "Yellow Book" is now very popular and the "Silver Book" is also being widely used.

Suspension:

- Engineer may suspend (cl. 8);
- Consequences – money/time (cl. 8.9);
- 84 days – contractor may ask for clarification:
 - Part suspended = omission;
 - Wholly suspended = contractor may give notice of termination.

FIDIC Suspension and Termination

Contractor may **suspend** (cl. 16) if:

- Engineer fails to **certify payment**;
- Employer fails to provide **evidence** that it has the money to pay (cl. 2.4).

Contractor can claim EOT and prolongation costs.

Engineer should issue a clause 3.5 **determination**.

Clause 16 Suspension and Termination by Contractor

Sub-clause 16.1 Contractor's Entitlement to Suspend Work

Sub-clause 16.2 Termination by Contractor

Sub-clause 16.3 Cessation of Work and Removal of Contractor's Equipment

Sub-clause 16.4 Payment on Termination

FIDIC Clause 16.2 Termination

Contractor may terminate if (on 14 days' written notice, immediately*):

- No evidence of funds within 42 days of the written request under cl. 2.4;
- Engineer fails, within 56 days, to provide the payment certificate;
- No payment within 42 days of certificate;
- Employer "*substantially*" fails to perform;



- Employer fails to enter into the detailed contract within 28 days of the letter of acceptance:
 - Prolonged suspension;
 - Insolvency.

Employer may terminate if contractor:

- Fails to provide the bond;
- Fails to comply with a Notice to Correct;
- Abandons works;
- Fails to proceed “without reasonable excuse”;
- Fails to rectify notice of rejection/remedial works notice;
- Subcontracts the whole of the works;
- Assigns;
- Becomes insolvent;
- Commits act of bribery or corruption.

Employer’s Right to Terminate

Clause 15

- Sub-clause 15.1 Notice to Correct
- Sub-clause 15.2 Termination by Employer
- Sub-clause 15.3 Valuation at Date of Termination
- Sub-clause 15.4 Payment after Termination
- Sub-clause 15.5 Employer’s Entitlement to Termination
- *Obrascon Huarte Lain SA v Her Majesty’s Att General for Gibraltar* [2014] EWHC 1028 (TCC)

Other provisions

Clause 9.4(c) Failure to Pass Test on Completion:

“if the failure deprives the Employer of substantially the whole benefit of the Works or Section, reject the Works or Section (as the case may be), in which event the Employer shall have the same remedies as are provided in subparagraph (c) of Sub-clause 11.4 [Failure to Remedy Defects].”

Clause 11.4(c):

“if the defect or damage deprives the Employer of substantially the whole benefit of the Works or any major part of the Works, terminate the Contract as a whole, or in respect of such major part which cannot be put to the intended use. Without prejudice to any other rights, under the Contract or otherwise, the Employer shall then be entitled to recover all sums paid for the Works or for such part (as the case may be), plus financing costs and the cost of dismantling the same, clearing the Site and returning Plant and Materials to the Contractor.”

Clause 19.6:

“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 under Sub-clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given ...”

Clause 19.7:

“Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the Parties (including, but not limited to, Force Majeure) arises which makes it impossible or unlawful for either or both Parties to fulfil its or their contractual obligations or



which, under the law governing the Contract, entitles the Parties to be released from further performance of the Contract ...”

Payment

- Under the contract
- Under the applicable law
- Contractor (cl. 16.4):
- Return bond
 - Pay under clause 19.6; Optional Termination, Payment and Release (in the FM clause
 - Loss of profit, and other damage resulting from termination.

Employer

- Clause 2.5
- Withhold further payment
- The cost of completing the execution of the project
- Recover damages from contractor.

Middle East issues

In the UAE, a distinction is made between everyday contracts, and commercial contracts which are referred to as Muqawala contracts. Construction contracts would therefore be governed by the law applicable to Muqawala contracts, and termination can occur in accordance with article 892 in the following manner:

- Completion of all the agreed works or services;
- By mutual consent; or
- Court order.

An amendment to deal with this issue is often made to the FIDIC contract for use in the Middle East.

Summary

- Read the contract/identify the grounds for suspension/termination.
- Issue first notice (set out grounds).
- Allow time to pass – check contract.
- Issue second notice only if the grounds still exist.
- Terminating a contract is a serious matter – so consult senior management throughout, they should make the final decision.
- Demobilise and leave the site SAFE.



APPENDIX – Extracts Form FIDIC Red Book 1999

2.4 Employer's Financial Arrangements

The Employer shall submit, within 28 days after receiving any request from the Contractor, reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price (as estimated at that time) in accordance with Clause 14 [Contract Price and Payment]. If the Employer intends to make any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars.

2.5 Employer's Claims

If the employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor. However, notice is not required for payments due under Sub-Clause 4.19 [*Electricity, Water and Gas*], under Sub-Clause 4.20 [*Employer's Equipment and Free-Issue Material*], or for other services requested by the Contractor.

The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.

The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [*Extension of Defects Notification Period*].

This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause, except in respect of Fines imposed under Sub-Clause 4.8 [*Safety Procedures*] or Sub-Clause 4.18 [*Protection of the Environment*].

3.5 Determination

Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with, supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].

8.1 Commencement of the Works

The Engineer shall give the Contractor not less than 7 days' notice of the Commencement Date. Unless otherwise stated in the Particular Conditions, the Commencement Date shall be within 42 days after the Contractor receives the Letter of Acceptance.



The Contractor shall commence the execution of the Works as soon as IS reasonably practicable after the Commencement Date, and shall then proceed with the Works with due expedition and without delay.

8.9 Consequences of Suspension

If the Contractor suffers delay and/or incurs Cost from complying with the Engineer's instructions under Sub-clause 8.8 [Suspension of Work] and/or from resuming the work, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-clause 20.1 [Contractor's Claims] to:

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

(b) payment of any such Cost, which shall be included in the Contract Price. After receiving this notice, the Engineer shall proceed in accordance with Sub- Clause 3.5 [Determinations] to agree or determine these matters.

The Contractor shall not be entitled to an extension of time for, or to payment of the Cost incurred in, making good the consequences of the Contractor's faulty design, workmanship or materials, or of the Contractor's failure to protect, store or secure in accordance with Sub-clause 8.8 [Suspension of Work].

15.2 Termination by Employer

The Employer shall be entitled to terminate the Contract if the Contractor:

(a) fails to comply with Sub-clause 4.2 [Performance Security] or with a notice under Sub-clause 15.1 [Notice to Correct],

(b) abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract,

(c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension], or

(ii) to comply with a notice issued under Sub-clause 7.5 [Rejection] or Sub- Clause 7.6 [Remedial Work], within 28 days after receiving it,

(d) subcontracts the whole of the Works or assigns the Contract without the required agreement,

(e) becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events, or

(f) gives or offers to give (directly or indirectly) to any person any bribe, gift, gratuity, commission or other thing of value, as an inducement or reward:

(i) for doing or forbearing to do any action in relation to the Contract, or

(ii) for showing or forbearing to show favour or disfavour to any person in relation to the Contract,



or if any of the Contractor's Personnel, agents or Subcontractors gives or offers to give (directly or indirectly) to any person any such inducement or reward as is described in this sub-paragraph (f). However, lawful inducements and rewards to Contractor's Personnel shall not entitle termination.

In any of these events or circumstances, the Employer may, upon giving 14 days' notice to the Contractor, terminate the Contract and expel the Contractor from the Site. However, in the case of sub-paragraph (e) or (f), the Employer may by notice terminate the Contract immediately.

The Employer's election to terminate the Contract shall not prejudice any other rights of the Employer, under the Contract or otherwise.

The Contractor shall then leave the Site and deliver any required Goods, all Contractor's Documents, and other design documents made by or for him, to the Engineer. However, the Contractor shall use his best efforts to comply immediately with any reasonable instructions included in the notice (i) for the assignment of any subcontract, and (ii) for the protection of life or property or for the safety of the Works.

After termination, the Employer may complete the Works and/or arrange for any other entities to do so. The Employer and these entities may then use any Goods, Contractor's Documents and other design documents made by or on behalf of the Contractor.

The Employer shall then give notice that the Contractor's Equipment and Temporary Works will be released to the Contractor at or near the Site. The Contractor shall promptly arrange their removal, at the risk and cost of the Contractor. However, if by this time the Contractor has failed to make a payment due to the Employer, these items may be sold by the Employer in order to recover this payment. Any balance of the proceeds shall then be paid to the Contractor.

15.4 Payment after Termination

After a notice of termination under Sub-clause 15.2 [Termination by Employer] has taken effect, the Employer may:

- (a) proceed in accordance with Sub-clause 2.5 [Employer's Claims],
- (b) withhold further payments to the Contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established, and/or
- (c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-clause 15.3 [Valuation at Date of Termination]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

16.1 Contractor's Entitlement to Suspend Work

If the Engineer fails to certify in accordance with Sub-clause 14.6 [Issue of Interim Payment Certificates] or the Employer fails to comply with Sub-clause 2.4 [Employer's financial Arrangements] or Sub-clause 14.7 [Payment], the Contractor may, after giving not less than 21 days' notice to the Employer, suspend work (or reduce the rate of work) unless and until the Contractor has received the Payment Certificate, reasonable evidence or payment, as the case may be and as described (2q) in the notice.

The Contractor's action shall not prejudice his entitlements to financing charges under Sub-clause 14.8 [Delayed Payment] and to termination under Sub-clause 16.2 [Termination by Contractor].



If the Contractor subsequently receives such Payment Certificate, evidence or payment (as described in the relevant Sub-clause and in the above notice) before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable.

If the Contractor suffers delay and/or incurs Cost as a result of suspending work (or reducing the rate of work) in accordance with this Sub-clause, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-clause 20.1 [Contractor's Claims] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-clause 8.4 [Extension of Time for Completion], and
- (b) payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters.

16.2 Termination by Contractor

The Contractor shall be entitled to terminate the Contract if:

- (a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-clause 16.1 [Contractor's Entitlement to Suspend Work] in respect of a failure to comply with Sub-clause 2.4 [Employer's Financial Arrangements],
- (b) the Engineer fails, within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate,
- (c) the Contractor does not receive the amount due under an Interim Payment Certificate within 42 days after the expiry of the time stated in Sub-clause 14.7 [Payment] within which payment is to be made (except for deductions in accordance with Sub-clause 2.5 [Employer's Claims]),
- (d) the Employer substantially fails to perform his obligations under the Contract,
- (e) the Employer fails to comply with Sub-clause 1.6 [Contract Agreement] or Sub-Clause 1.7 [Assignment],
- (f) a prolonged suspension affects the whole of the Works as described in Sub-Clause 8.1.1 [Prolonged Suspension], or
- (g) the Employer becomes bankrupt or insolvent, goes into liquidation, has a receiving or administration order made against him, compounds with his creditors, or carries on business under a receiver, trustee or manager for the benefit of his creditors, or if any act is done or event occurs which (under applicable Laws) has a similar effect to any of these acts or events.

In any of these events or circumstances, the Contractor may, upon giving 14 days' notice to the Employer, terminate the Contract. However, in the case of subparagraph (f) or (g), the contractor may by notice terminate the Contract immediately.

The Contractor's election to terminate the Contract shall not prejudice any other rights of the Contractor, under the Contract or otherwise.



16.4 Payment on Termination

After a notice of termination under Sub-clause 16.2 [Termination by Contractor] has taken effect, the Employer shall promptly:

- (a) return the Performance Security to the Contractor,
- (b) pay the Contractor in accordance with Sub-clause 19.6 [Optional Termination, Payment and Release], and
- (c) pay to the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor as a result of the termination.

19.6 Optional Termination, Payment and Release

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 under Sub-clause 19.2 [Notice of Force Majeure], or for multiple periods which total more than 140 days due to the same notified Force Majeure, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub-clause 16.3 [Cessation of Work and Removal of Contractor's Equipment].

Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;
- (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and
- (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.