

Clause 16

Summary

Clause 16 deals with suspension and termination by the Contractor.

Sub-Clause 16.1 deals with the Contractor's right to suspend work in the event that the Engineer fails to certify in accordance with Sub-Clause 14.6 [*Payment Certificates*] or the Employer fails to comply with Sub-Clause 2.4 [*Employer's Financial Arrangements*] or Sub-Clause 14.7 [*Payment*]. Prior to the Contractor suspending work it must give 21 days' notice. The right to suspend does not affect the Contractor's entitlement to terminate or claim financing charges. In the event that the Contractor suffers delay or cost as a result of suspension it must give notice under Sub-Clause 20.1 [*Contractor's Claims*].

Sub-Clause 16.2 deals with the Termination by the Contractor. There are seven grounds specified. In most cases the Contractor may give 14 days' notice if it intends to terminate the contract; however, where there has been a prolonged suspension under Sub-Clause 8.11 [*Prolonged Suspension*] or, *inter alia*, bankruptcy, liquidation, insolvency or receiving or administration orders have been made against the Employer then the Contractor may by notice terminate immediately.

Sub-Clause 16.3 deals with Cessation of Work by the Contractor and Removal of the Contractor's Equipment. This Sub-Clause applies where the termination takes place under Sub-Clause 15.5 [*Employer's Entitlement to Termination*]; Sub-Clause 16.2 [*Termination by Contractor*]; or Sub-Clause 19.6 [*Optional Termination, Payment and Release*].

Sub-Clause 16.4 deals with Payment on Termination. Once termination under Sub-Clause 16.2 [*Termination by Contractor*] has taken effect then the Contractor is entitled to the return of the Performance Security; payment in accordance with Sub-Clause 19.6 [*Optional Termination, Payment and Release*] and loss of profit or other loss and damage sustained by the contractor as a result of termination.

Origin of clause

Clause 16 of FIDIC 1999 had its origins in clause 69 of the FIDIC 4th edition. The right to suspend as well as terminate was included in the 4th edition.

Cross-references

Reference to Clause 16 is found in the following clauses:-

Sub-Clause 8.11	Prolonged Suspension
Sub-Clause 11.3	Extension of Defects Notification Period
Sub-Clause 14.2	Advance Payment
Sub-Clause 15.5	Employer's Entitlement to Termination
Sub-Clause 17.6	Limitation of Liability
Sub-Clause 19.6	Optional Termination, Payment and Release

16.1 Contractor's Entitlement to Suspend Work

The Contractor has the right under the Contract to suspend in only 3 circumstances and in each of these circumstances the right only comes into effect once the Contractor has given notice to the Employer (note not to the Engineer). The right is then to suspend work or reduce the rate of work.

The Sub-Clause is rather unclear on what is intended by the reduction of the rate of work. The concept covers a wide range of changes – from a slight go slow to a virtual cessation. Nor is it clear how proportional the reduction of the rate of work must be. If the breach justifying the reduction is minimal can the Contractor slow to virtual crawl – or must the breach be quite substantial in order to justify such a major reduction? In cases of termination the courts have construed fault clauses in a commercial way so as to exclude reliance on trivial breaches. This stems from the often followed approach of Lord Diplock in *Antaios Compania Naviera SA v Salen Rederierna AB*.¹ Similarly, Akenhead J. in the English High Court, when considering the FIDIC Red Book, stated “The parties can not sensibly have thought (objectively) that a trivial contractual failure in itself could lead to contractual termination.”² There is no reason why these principles should not be equally applicable to suspension. A Contractor who does not act proportionately stands the risk of being accused of being in breach of Sub-Clause 15.2 (demonstrating an intention not to continue performance of his obligations under the contract) and facing a termination notice from the Employer. Even if the Employer does not go this far it may well later argue that any delay was caused not by the suspension but by the Contractor's unjustifiable slowing down of the Works and that there should therefore be no extension of time.

The three situations where the right to suspend occurs are:

¹ [1985] AC 191 at 201D

² *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) at [321]

- (a) if the Engineer fails to certify in accordance with sub-Clause 14.6 (Issue of Interim Payment Certificates).

Sub-Clause 14.6 sets out the complex arrangements for certification which are the pre-requisite for the Employer's obligation to pay. The process is described in the commentary on Sub-Clause 14.6. As can be seen there is plenty of scope for the Engineer to delay issue of Interim Payment Certificates without failing to follow the contractual procedures. The question therefore is – what is the Contractor's position if the Engineer fails for good reason or, at least for an arguable reason, to issue the IPC? The right to suspend arises if the Engineer simply “fails” to issue the IPC so it may be arguable that any failure to issue an IPC entitles the Contractor to give notice of suspension. It would be a brave Contractor who proceeded on this basis – because failure of the Contractor to proceed with the Works is a ground for Employer termination under Clause 15(2)(c)(i).

However the Engineer should not delay issuing a Payment Certificate, however much he may consider he needs more information once it is clear that the Contractor intends to exercise his right to suspend. The Payment Certificate need be for no more than the Engineer *fairly determines* to be due.

- (b) If the Employer fails to comply with Sub-Clause 2.4 [Employer's Financial Arrangements]

As noted under Sub-Clause 2.4, there is no limit to the number of requests that a Contractor can make under this provision, nor need the Contractor be reasonable in making his requests. A Contractor who wishes to irritate the Employer is given a very good opportunity to do so – because the Employer dare not ignore such requests for fear of giving the Contractor the right to suspend or reduce the rate of work.

Sub-Clause 2.4, moreover, contains two Employer obligations; the first is to provide *reasonable evidence* that financial arrangements have been made and are being maintained that will enable the Employer to pay the Contract Price; the second is to give detailed particulars to the Contractor if he intends to make any material change to his financial arrangements. The consequences of the Employer being in breach of the first provision are clear; although what amounts to *reasonable evidence* is a matter of fact.³ They are not so clear in respect of the second. If, for example, the Employer has at some stage in the Contract formed an intention to make a material change to his financial circumstances but has failed to notify the Contractor and has then gone ahead with the

³ See *NH International (Caribbean) Ltd v National Insurance Property Development Co. Ltd* [2015] UKPC 37

change, it will be impossible for him to remedy the breach – he can no longer give notice once the material change has taken place. So long as the new financial arrangements enable him to meet his financial obligations under the Contract he will have no difficulty complying with a Contractor’s notice under Sub-Clause 2.4 but he still cannot give the notice required of his intention to change.

It is unclear whether Sub-Clause 16.1 is intended to deal with this situation as it provides that any notice of suspension or intention to reduce work is conditional on the Employer providing reasonable evidence under Sub-Clause 2.4. In the situation described above the Employer can never provide “*reasonable evidence*”. Does this mean that the Contractor has no right to suspend or that the Employer can do nothing to prevent him having the right to suspend? The Sub-Clause provides no clear answer.

(c) The Employer fails to comply with Sub-Clause 14.7 (Payment).

Sub-Clause 14.7 obliges the Employer to make payments 28 days (in the case of the advance payment) or 56 days after the Engineer receives the Statement and supporting documents.

As explained in the discussion of Sub-Clause 14.7 this sub-clause can, potentially, prove to be unfair to the Employer. Under Sub-Clause 14.7, the amount the Employer is obliged to pay is that certified in the Interim or Final Payment Certificate but he is obliged to make that payment 56 days after the Engineer receives the Statement and supporting documents. In circumstances where the Statement and supporting documents contain errors, which the Engineer asks the Contractor to correct before issuing the Interim Payment Certificate, the Employer’s obligation to pay, and the Contractor’s right to suspend, can come into effect before the Interim Payment Certificate can be issued. If the statement is correctly completed and there is no problem with the supporting documents but the Engineer has not certified within 56 days of receipt of the Statement and supporting documents then, in order to avoid the Contractor taking advantage of the right to suspend where the Engineer has still failed to certify correctly the Employer will need to pay the full amount claimed by the Contractor in the statement. Any overpayment can be recovered in the next interim payment.

The Notice of Suspension or Reduction of Rate of Work

The notice under Sub-Clause 16.1 is a clear condition precedent to the Contractor’s right to suspend. The Contractor has no right to use a breach by the Employer which might otherwise give rise to a right to suspend as an excuse for suspending or slowing progress unless he has given notice as required.

There is no special form required for the notice. However it must:

- Be addressed to the Employer
- State whether it is intended to suspend or to reduce the rate of work
- Describe the basis for the intended suspension or reduction of the rate of work
- State specifically what the Contractor needs to have or to see before he resumes work
- Give not less than 21 days notice

Consequences of Notice

On the expiry of the notice the Contractor is entitled to suspend work or reduce the rate of work as specified in the notice.

Once the notice is complied with the Contractor is required to resume work “as soon as is reasonably practicable.” How long this will take will depend on the circumstances – the extent of the suspension or reduction in rate, the time it has lasted for, the logistics of resuming work and any circumstances which have occurred in the meantime.

Care of the Works Must Continue During Suspension

Under Clause 17.2 the Contractor has full responsibility for the care of the Works from the Commencement Date until the issue of the Taking-Over Certificate. During this period the Contractor is responsible for rectifying any loss or damage at his own cost. (See commentary on the effect of Clause 17.2 on the Contractor’s obligations under Clause 19.2 [Force Majeure]). The consequence is that suspension under Clause 16.1 does not give the Contractor the right to abandon the Site. Indeed a failure to care for the Works during a period of justified suspension might give the Employer the right to terminate under Sub-Clause 15.2 (b).

Notice of Claim

In order to claim an extension of time, cost or profit the Contractor must give notice under Sub-Clause 20.1. The time when the Contractor became aware or should have become aware of the event or circumstance will be when the suspension or reduction in work rate period commences. The Contractor should not be required to give notice earlier because, although he will be aware as soon as the circumstances which give him the right to give notice under Sub-Clause 16.1 that he might become entitled to suspend or reduce the rate of work, he cannot be certain that such a right has come into existence until the Employer has failed to comply with the notice.

16.2 Termination by the Contractor

When the Contractor exercises its rights under this Sub-Clause it can expect to have to justify its position at least before a DAB and probably in arbitration. A ground for termination which may seem clear at the time notice is given may seem not so clear once the whole situation has been considered in the greatest detail by a tribunal, following detailed work by lawyers for both sides. Contractors need to be cautious when using their rights to terminate. Even though there may be a fundamental ground for terminating it is good tactics, and reduces the risk of the process, for the Contractor to identify as many grounds as possible under the terms of Clause 16.2.

Some grounds are clearer than others. Where the basis of termination is a matter of opinion (for example an allegation that the Employer has failed to perform one or more of his obligations), the risk is higher than if the ground can be objectively measured (for example failure on the part of the Engineer to issue a Payment Certificate within the time allowed).

It is very common for a Contractor's notice of Termination to be followed immediately by an Employer's notice of Termination or for the notices to be given the other way round. Sometimes there is a race to terminate. In such circumstances both parties will be relying on much the same facts as the basis for their termination arguments – what the Employer calls the Contractor's abandonment of the Works, may be what the Contractor calls the Employer's failure to fulfil his obligation to provide an instruction – thereby making it impossible for the Contractor to continue. When there is such a clear clash of reasoning one side is bound to lose the argument. It seems obvious to say that it is dangerous to rely on an argument which the other side can counter but both Employers and Contractors often make this mistake and fail to bolster their termination case by relying not just on the contentious issues but by adding as many other issues as possible. The Contractor will only need to succeed in one argument to make his case for termination – the more arguments he advances the better.

A general issue which arises under this Sub-Clause is whether a breach by the Engineer might qualify as a breach by the Employer and justify termination in those circumstances where an Employer breach would justify termination. Under Sub-Clause 3.1 (a) the Engineer when carrying out his duties under the Contract is “deemed to act for the Employer.” This would seem to suggest that if the Engineer acts in a positive way in breach of the Contract, his breach is to be treated as that of the Employer. More commonly, however, the Contractor's complaint against the Engineer is one of failure to perform his obligations under the Contract – failure to certify, failure to make a Determination fairly, failure to provide designs or other documents on time. When failing to act as appropriate is the Engineer still carrying out his duties under the Contract

and therefore acting for the Employer? The answer is probably no. However, whenever the Employer is mentioned in the discussion below, it is also necessary to consider whether the reference should be to the Employer or Engineer alone or to the Employer *and* the Engineer.

There are seven grounds for Termination by Contractor specified. Each is considered below.

(a) the Contractor does not receive the reasonable evidence within 42 days after giving notice under Sub-Clause 16.1 in respect of a failure to comply with Sub-Clause 2.4 [Employers Financial Arrangements]

See the commentary on Sub-Clause 16.1 above.

Sub-Clause 16.1 is a pre-requisite to the Contractor exercising its rights to suspend but is also the pre-requisite to the Contractor exercising its rights to terminate under this provision. The Clause was probably drafted with the thought in mind that the Contractor would give a 21 day notice of suspension, then suspend and then, after a further 21 days have the right to terminate. In fact there is nothing to stop the Contractor giving a 42 day notice of suspension under Sub-Clause 16.1, then (if the required certificate is not given) immediately giving notice of termination as well as suspending. As noted above, there is no limit on the number of requests a contractor can make under Sub-Clause 2.4, nor any requirement of reasonableness – thus a Contractor could use the provision to harass and annoy an Employer to the point where he stops responding to the requests. Since Sub-Clause 16.1 requires a minimum notice period of 21 days, a cunning Contractor who has been looking for an excuse to terminate might decide to give the Employer 43 days notice to provide evidence in the expectation that the Employer will wait for the last day to provide the evidence. By the time the Employer had responded, the Contractor's right to terminate would have come into effect.

(b) The Engineer fails within 56 days after receiving a Statement and supporting documents, to issue the relevant Payment Certificate

See the commentary on Sub-Clauses 14.6 and 16.1 for the problems this requirement may cause the Employer even if the Engineer believes that he has not received all the documentation necessary to enable him to issue a Payment Certificate.

In order to protect the Employer's position the Engineer must not delay more than 56 days before issuing his Payment Certificate, however inadequate he believes the justification. The Certificate need only be for the amount the Engineer *fairly considers* to be due.

- (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])*

The expiry of time under Sub-Clause 14.7 for Advance Payments is 42 days after the issuing of the Letter of Acceptance or 21 days after receipt of the required documents (See Sub-Clause 14.7(a)). For other payments it is 56 days after the Engineer receives the Contractor's Statement and supporting documents.

See the commentary on Sub-Clauses 14.7 and 16.1 for comment on the possible problems between the obligation for the Employer to receive a Payment Certificate before making payment and the possible right of the Engineer to delay issuing such a Certificate. If the Engineer has not issued a Payment Certificate (however right he may be in not doing so), it may be necessary for the Employer to pay the amount demanded in the Contractor's Statement in order to avoid the Contractor having the right to terminate.

The final words in brackets carry a warning for the Employer. The Employer cannot recover amounts due to him except by following the procedure set out in Sub-Clause 2.5 – i.e. giving notice of claim and then waiting for the Engineer's Determination. If he does recover by reducing a payment in breach of this procedure, the Contractor gains the right to terminate.

Moreover, and more dangerously for the Employer, if the Engineer's Determination is later challenged before the DAB and the DAB sets it aside in whole or in part, the DAB's decision will be binding immediately and, until the Employer pays the balance of the relevant IPC, the Contractor has the right to terminate. This right will apply immediately the DAB's decision is given.

This is a highly dangerous situation for an Employer who is aware that the Contractor is looking for a way to escape its contractual obligations. Thus, if an Employer has made a deduction following an Engineer's Determination and the Contractor challenges the claim before a DAB, the Employer needs to consider reimbursing the Contractor at least in the interim prior to the DAB giving its decision. If the decision then goes in the Employer's favour it can deduct the amount due from the next following Interim Payment Certificate.

- (d) *The Employer substantially fails to perform his obligations under the Contract.*

This provision is not the mirror image of the Employer's right to terminate under Sub-Clause 15.2(b) – the nearest equivalent, which instead requires the Employer to show that the Contractor has *plainly demonstrated his intention not to continue performance of his*

obligations under the Contract. Nor does the Contractor have the right given to the Employer to cement in place a right to terminate by giving a notice to correct as permitted under Sub-Clause 15.1.

The Sub-Clause is not entirely clear. Is the requirement that the Employer substantially fails to perform an obligation, several obligations or all obligations?

The meaning may depend on what the adverb “substantially” qualifies. Does it qualify only the verb “fails” or does it qualify the compound verb “fails to perform”. If the only requirement is for the Contractor to show that the Employer has substantially failed in one respect, then the right would come into play when the Employer had substantially failed to meet an individual obligation. If the requirement is that the Contractor shows that the Employer has *substantially failed to perform his obligations* the right to terminate would only come into effect when the substantiality is applied to the whole package of obligations under the Contract.

There was no equivalent provision in the 4th edition of FIDIC, so there is no experience as to how this may be interpreted. Under the 4th edition, the equivalent provision (Clause 63.1), giving the Employer the right to terminate the Contractor, referred to *persistently or flagrantly neglecting to comply with any of his obligations under the Contract.* This has been generally interpreted as giving the right to terminate when the Contractor had failed to perform any single obligation, though again it could be interpreted to come into effect when the Contractor was not performing any obligations at all. Since the interpretation of this clause has tended to recognise that persistent or flagrant failure to comply with an individual obligation gives rise to a right to terminate, it might be tempting to assume that the *substantially* in Sub-Clause 16.2(d) qualifies only “failure”, and not “failure to perform his obligations” and would therefore apply even if there was one substantial breach.

However it seems more likely that the provision was intended to apply only where the Employer was effectively demonstrating that it had no intention of performing all its obligations under the Contract, rather than one obligation under it. The following reasons point in this direction:

- The other provisions of Sub-Clause 16.2 provide adequate reasons for termination in most circumstances. There is no good policy reason to allow a termination for a breach, however substantial, of what might be quite a minor contractual obligation. For example Sub-Clause 16.2(e) (see below) would be entirely unnecessary if Sub-Clause 16.2 allowed termination for a substantial breach of any single obligation.

- If the provision applied to any single obligation it would be possible for there to be a substantial breach of some obligation which was not in itself in any way significant. For example, the Employer is required to give notice under Clause 3.4 of his intention to replace the Engineer. If he entirely fails to give notice but in fact appoints someone properly qualified and acceptable, he could be said to have substantially failed to meet his notice requirements. It is unlikely that the draftsman intended that a breach of this nature, which has no real effect, entitles the Contractor to terminate – yet that is the effect Sub-Clause 16.2(d) would have if substantial failure to comply with any single obligation gave the Contractor the right to terminate.
- Sub-Clause 15.1 [*Notice to Correct*] provides a means by which a breach can be turned into a ground justifying termination by the Employer. However this requires that the Contractor be given the opportunity to correct the breach before he can be terminated.
- The nearest equivalent provision in Sub-Clause 15.2 (Sub-Clause 15.2(b)) gives the right to the Contractor to terminate where the Contractor *plainly demonstrates his intention not to continue performance of his obligations under the Contract* and this is tied to circumstances where the Contractor *abandons the Works*. In this context it is clear that the failure to continue performance of the obligations is a reference to the collectivity of the obligations not to an individual obligation. It is unlikely that it was intended that the Contractor could terminate for a failure to comply with a specific single obligation when the Employer could only terminate when the Contractor demonstrated a general intention not to perform.

This is a provision which may be breached by the Engineer on the Employer's behalf. In this case it is very clear that a failure to meet obligations is the foundation of the right to terminate. However it is only when he is *carrying out* duties or *exercising* authority that the Engineer is deemed to act for the Employer under Sub-Clause 3.1. A failure by the Engineer to act therefore probably does not entitle the Contractor to terminate.

(e) The Employer fails to comply with Sub-Clause 1.6 [Contract Agreement] or Sub-Clause 1.7 [Assignment].

Sub-Clause 1.6 incorporates two obligations – for the Parties to enter a Contract Agreement within 28 days after the Letter of Acceptance and for the Employer to bear any costs of stamp duty etc.

Fortunately the Sub-Clause is easily complied with – the consequences for breach are extraordinarily draconian. In normal circumstances the submission of a tender and the

letter of acceptance would constitute a contract and the signing of the Contract Agreement is only confirmation of a contractual relationship. The draftsman obviously assumes this is the case otherwise the Contractor would never get to the point of being able to rely on the terms of Clause 16.2 in order to terminate the Contract! So although there will be a Contract in the absence of a Contract Agreement, the Contractor has the right to terminate if this formality is not complied with. By the time the 28 days have expired it will be too late for the Employer to remedy the situation. However despite this the Contractor probably does not retain his right to terminate for the duration of the contract. Once he continues to perform though aware of this breach, he will probably be prevented under the principles of estoppel, in common law legal systems, and good faith, in civil law legal systems, from taking advantage of the situation.

Sub-Clause 1.7 is clear but Employers undergoing corporate reorganisation will need to take care to ensure that no assignment takes place without the agreement of the other party.

- (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.*

This is a mirror image of the equivalent provision in Sub-Clause 15.2 – see comment under that Clause.

Once one of these events has occurred the Contractor has the right, upon giving 14 days notice (or on a notice having an immediate effect in the case of (f) and (g)) to the Employer, to terminate the Contract.

The language here is identical to that under Sub-Clause 15.2 and the interpretation of the Clause will be the same.

Once the event giving rise to the right to terminate has occurred, there is nothing in the clause which seems to prevent the Contractor holding the threat of termination over the Employer indefinitely thereafter. Used in this way, a petty failure of compliance with Sub-Clause 1.6 [Contract Agreement] would effectively give the Contractor a right to terminate at will with all the financial consequences at any time thereafter. A tribunal sympathetic to an Employer could however imply a requirement that the Contractor act reasonably promptly or not at all unless the Employer's default was a continuing one. In

this connection, see *Mvita Construction Co. Ltd. v Tanzania Harbours Authority*⁴ and the decision of the Tanzanian Court of Appeal that although the words "then the Employer may...terminate" do not mean "at that time" but "in that event", the Employer must terminate within a reasonable time of the Engineer's notice "to avoid a change of the circumstances certified [under that Contract] by the Engineer". Under a system of law which imposes an obligation of good faith on the Parties a much delayed termination would probably not be treated as effective.

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

This provision applies in all those circumstances where the termination is not the result of Contractor fault. Upon termination under Sub-Clause 15.5 [*Employer's Entitlement to Termination*]; Sub-Clause 16.2 [*Termination by Contractor*] or Sub-Clause 19.6 [*Optional Termination, Payment and Release*] the Contractor shall promptly:

- “(a) cease all further work, except for such work as may have been instructed by the Engineer for the protection of life or property or for the safety of the Works,
- (b) hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment, and
- (c) remove all other Goods from the Site, except as necessary for safety, and leave the Site.”

Under 16.3(b) the Contractor is required to *hand over Contractor's Documents, Plant, Materials and other work, for which the Contractor has received payment*. It may not be clear what amongst these items, the Contractor has been paid for.

The term “Contractor's Documents” is defined in Sub-Clause 1.1.6.1 to include the documents of a technical nature (including computer programs and software and models) supplied by the Contractor under the Contract. The cost of these is unlikely to be separately mentioned in the payment provisions of the Contract – if the contract has Bills of Quantity, payment for them may be included in the Preliminaries, in which case it will still be hard to tell whether they are paid for. More likely there will be a provision that the cost of such items is included in the rates or prices for physical items of work. The Contractor will probably expect to recover the cost of these items over the term of the contract within the rates or prices for other items. Thus, where there is a premature end to the Contract it will be arguable whether they have been paid for.

There should be no such problem with Plant and Materials which are defined as items which are to be incorporated into the Permanent Works.

⁴ (1988) 46 BLR 19

It is not clear what is intended by the expression “*other work*”. It could easily include Temporary Works, (defined in Sub-Clause 1.1.5.7), which are not normally specifically paid for but whose cost is included in the rates or prices for the Permanent Works.

However, if the issue of what the Contractor is required to hand over causes arguments because of the above issues then this ought ultimately to be capable of being resolved under Sub-Clause 16.4 or Sub-Clause 19.6 which deal with payment on termination. However these provisions by no means deal with all payment obligations following a termination which is not the Contractor’s fault.

Under Sub-Clause 16.3(c) the Contractor is required to *remove all other Goods from the Site, except as necessary for safety, and leave the Site*. If the termination is disputed, the Employer may seek to prevent the Contractor from removing its equipment. In such a case the Contractor’s claim against the Employer would be one in tort for trespass to goods. In *Final Award in Case 6216*⁵ an ICC arbitral tribunal had to consider whether it had jurisdiction to deal with a claim which arose out of a tort. The tribunal held that the FIDIC dispute resolution provisions were sufficiently wide enough to allow them to resolve the tort claim, applying English law

16.4 Payment on Termination

If the Contractor terminates under Sub-Clause 16.2 [*Termination by Contractor*], the Employer is required to 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 this termination.”

In the context of Sub-Clause 16.3, Sub-Clause 19.6 raises several problems.

Under Sub-Clause 16.3(b) the Contractor will have handed over only the items for which he has received payment. However under Sub-Clause 19.6(a) he is entitled to be paid for work done and under Sub-Clause 19.6(b) to be paid for Plant and Materials ordered for the Works. He is then required to hand over anything paid for by the Employer. Thus it is possible that the Contractor will, under Sub-Clause 16.3 be required to take away certain Plant and Materials, but under Sub-Clause 19.3, be entitled to be paid for them

⁵ ICC International Court of Arbitration Bulletin Vol.13, No 2, p.58

and required to return them. Employers should therefore not assume that because the Contractor has removed any Goods from the Site – as required under Sub-Clause 16.3, they will not be obliged to pay for them.

Sub-Clause 16.4 (c) requires the Employer to pay *loss of profit or other loss or damage sustained by the Contractor as a result of this termination*. In this it contrasts with a termination under Sub-Clauses 15.5 and 19.6 under which only cost is paid. From an Employer’s point of view a termination under Sub-Clause 15.5 (which is always the Employer’s right) or Clause 19.6 (which is possible though unlikely) or of course Sub-Clause 15.2 will be substantially preferable to a Contractor’s termination under Clause 16.2. This may open an interesting strategy for the Employer of which the Contractor needs to be cautious.

If an Employer realises it is in a position where the Contractor intends to terminate and good grounds exist for a Contractor’s termination under Sub-Clause 16.2, the Employer may save himself considerable expense by terminating under Sub-Clause 15.5. That this is a practical strategy is recognised in the MDB harmonised edition which expressly forbids termination under Sub-Clause 15.5 for this reason and which also requires an Employer who terminates under Sub-Clause 15.5 to pay the Contractor in accordance with Sub-Clause 16.4 (c) – i.e. for loss of profit or other loss or damage.

This issue was recently addressed by the English High Court in *TSG Building Services PLC v South Anglia Housing Ltd*.⁶ In this case there was a clause which provided that the parties should work together in “the spirit of trust, fairness and co-operation....within the scope of their agreed roles, expertise and responsibilities....and in all matters governed by the Contract they shall act reasonably.....” (Clause 1.1). It was argued that this clause prevented one party from terminating at convenience in an unreasonable way. The judge held that the provision of “reasonableness” did not apply to the termination at convenience clause. The court concluded that either party could terminate for any or no reason. The clause provided an “unconditional and unqualified right” meaning that termination under the contract was properly effected by South Anglia with no compensation payable to TSG Building Services. The court also found that Clause 1.1 should be interpreted narrowly to apply only to matters within the context of that clause so that good faith did not extend to the whole contract. In countries where there is an express statutory requirement of good faith then it may still be possible to run an argument that an Employer faced with termination for default cannot terminate at convenience to avoid paying to the contractor additional losses.

The type of “loss of profit or other loss or damage sustained by the Contractor” was considered in the case *NI Property Development Company Ltd v NH (International)*

⁶ [2013] EWHC 1151 (TCC)

*Caribbean Ltd.*⁷ In this case an issue arose about whether the Claimant could recover overheads on work not executed at the time of termination of the Contract. The arbitrator found that the Claimant was not entitled to overheads on works not executed holding that if the contract had intended the contractor to recover this type of loss it would have said so in terms. The High Court of Tobago agreed with the arbitrator's reasoning.

'Other loss or damage' is a vague term which may have different meanings in different jurisdictions. Under most common law jurisdictions they will be limited to losses which were within the contemplation of the parties at the time the contract was entered into and will exclude losses which are too remote. However it is likely to cover the Contractor's direct and indirect losses caused by the need to terminate the contract early. Payment under Sub-Clause 16.4 is excluded from the limitation of liability provisions in Sub-Clause 17.6 [*Limitation of Liability*] and payment under this Sub-Clause is not intended to form part of the Contract Price.⁸

By: Andrew Tweeddale and George Rosenberg (Consultant)

⁷ (2008) High Court of Trinidad and Tobago

⁸ *Bouygues SA & Herve Pomerleau Int. Inc v Shanghai Links Executive Community Ltd* [1998] 4 HKC 206 and see Sub-Clause 14.1 [*The Contract Price*]