Clause 8: Commencement, Delays and Suspension

Written by Taner Dedezade[1]

The main changes to clause 8 are:

- The enhanced Programme requirements in Sub-Clause 8.3 [*Programme*];
- The introduction of an Advance Warning mechanism in Sub-Clause 8.4 [*Advance Warning*];
- In Sub-Clause 8.5 [*Extension of Time for Completion*]:
    - A major change from the 1999 edition is that, now, a Sub-Clause 20.2 notice is not required when applying for an extension of time stemming from a Variation;
    - further definition of exceptionally adverse climatic conditions in Sub-Clause 8.5;
- The key change to this clause is the inclusion of a final paragraph which provides that Sub-Clause 13.3.1 [*Variation by Instruction*] shall apply to revised methods including acceleration methods. This is a major change and appears to be limited only to the Engineer being able to instruct acceleration "*to reduce delays resulting from causes listed under Sub-Clause 8.5*".
- The new carve out relating to Sub-Clause 8.8 [*Delay Damages*]. The first paragraph of Sub-Clause 8.8 makes it clear that there is a cap on Delay Damages as stated in the Contract Data. The last (new) paragraph makes it clear that the cap will be lifted in the case of fraud, gross negligence, deliberate default or reckless misconduct by the Contractor.

Clause 8, in more detail:

8.1 [*Commencement of the Works*]

The only notable change in this Sub-Clause is that in the 2017 edition there is a requirement that the Engineer gives 14 days' notice to the Contractor stating the Commencement Date, whereas in the 1999 edition, there is only a 7-day notice period.

8.2 [*Time for Completion*]

This clause is unchanged save for the omission of reference to the achieving of the Tests on Completion (which is dealt with in the new definition of Sub-Clause 10.1) and so did not need to be dealt with in Sub-Clause 8.2 of the 2017 edition.

8.3 [*Programme*]

Whilst readers would be forgiven for initially thinking that the programming requirements would be lessened as there is reference to submitting "*an initial programme*" in the 2017 edition and a "*detailed time programme*" in the 1999 edition, the degree of prescription given in the 2017 edition is far greater. The 1999 edition had no guidance on how detailed the plan should be. The 2017 edition has most notably tried to narrow that gap by including a new requirement in Sub-Clause 8.3 (g) that "*all activities (to the level of detail specified in the Employer's Requirements), logically linked and showing the earlier and later start and finish dates for each activity, the float (if any) and the critical path(s)*". There is now even an invitation for the Employer to specify the programming software in the Employer's Requirements and an electronic copy of the Programme that needs to be provided.

There is an express provision in the 2017 edition that removes the ambiguity in the 1999 edition that

[1] Taner Dedezade is a Barrister at Corbett & Co. International Construction Lawyers Ltd. He can be contacted at taner.d@corbett.co.uk

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

no Programme can now constitute a notice under Sub-Clause 20.1.

There is a more elaborate mechanism in the 2017 edition requiring Notice to be given when actual progress differs from the Programme and a 14-day time period for the Contractor to issue a revised Programme but no stipulated consequence for a failure to comply with that time-period. As with the 1999 edition, therefore, there is no periodic update required of the programme but see Sub-Clause 4.20(a).

There is a new provision in Sub-Clause 8.3(b) of the 2017 edition that requires the Contractor to add into its programme the dates the Employer is to give right of access in accordance with the Contract Data. If there are no dates in the Contract Data then the Contractor must set out the dates that the Contractor requires the Employer to give right of access to and possession of (each part of) the Site.

In Sub-Clause 2.1 it provides that in the absence of any times set out in the Contract Data, the Employer shall give the Contractor right of access to, and possession of, those parts of the Site "*within such times as may be required to enable the Contractor to proceed in accordance with the Programme or, if there is no Programme at the time, the initial programme submitted under Sub-Clause 8.3*".

Late possession is an Employer Risk Event allowing the Contractor to claim time and money. It was often the case with the 1999 edition that Sub-Clause 2.1 would be enhanced/amended by the Employer so as to remove the risk that a Contractor would simply claim time and money as soon as they found out that they did not have full access from the outset of the project. Whether this additional requirement in Sub-Clause 8 was an attempt to distort the risk allocation in the contract or whether it will effectively deal with this issue is questionable, as I expect every Contractor will simply set out in its programme that they require all possession from the Commencement Date.

8.4 [*Advance Warning*]

This new clause requires both parties to give advance warning to each other of any known or future events which may adversely affect: the work of the Contractor's Personnel; and the performance of the Works when completed; increase the Contract Price and/or delay the execution of the Works or Section (if any). The mechanism then suggests that, if appropriate, the Engineer invites the Contractor to put forward a variation proposal to avoid or minimise the effects of the notified event. There is no sanction provided in the event of a failure to comply with this provision. It would seem that this is an attempt by FIDIC to bring in the concept of 'partnering' into the FIDIC contract and to get the parties to co-operate with each other before delay claims start to surface and positions start to become entrenched. It may be that this clause could be used in conjunction with Sub-Clause 21.3 [*Avoidance of disputes*].

8.5 [*Extension of time for Completion*]

An important change to this clause is that a Sub-Clause 20.2 Notice (previously 20.1 notice) is no longer required if a Contractor is seeking an extension of time resulting from a Variation.

The five grounds for extension of time remain. Sub-Clause 8.5 (c) exceptionally adverse climatic conditions has been enhanced and Employer-Supplied Materials has been added to unforeseeable shortages in Sub-Clause 8.5(d).

Concurrent delay has not been addressed in the clause save to state in the new last paragraph of Sub-Clause 8.5 that should the parties wish to deal with it, they should do so in the Special Provisions. The Guidance section refers to the possibility for the parties to make reference to the SCL protocol. See the last paragraph of Sub-Clause 17.2 for an inconsistent approach. In that clause, there is reference to apportionment.

Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk

8.6 [*Delays caused by Authorities*]

There is no change to this clause save to include "*private utility entities*".

8.7 [*Rate of Progress*]

The key change to this clause is the inclusion of a final paragraph which provides that Sub-Clause 13.3.1 [*Variation by Instruction*] shall apply to revised methods including acceleration methods. This is a major change and appears to be limited only to the Engineer being able to instruct acceleration "*to reduce delays resulting from causes listed under Sub-Clause 8.5*". The only other change is the inclusion of the reference to Sections.

8.8 [*Delay Damages*]

The key change to this clause is the inclusion of the new final paragraph. The first paragraph of Sub-Clause 8.8 makes it clear that there is a cap on Delay Damages as stated in the Contract Data. The last (new) paragraph makes it clear that the cap will be lifted in the case of fraud, gross negligence, deliberate default or reckless misconduct by the Contractor.

8.9 – 8.13

Aside from the change in heading in Sub-Clauses 8.9, 8.10 and 8.11 which now state that these clauses relate to Employer's Suspension, there are no fundamental changes in these clauses. In Sub-Clause 8.9 [*Employer's Suspension*], there is an additional requirement to state the date and cause of the suspension. In Sub-Clause 8.10 [*Consequences of Employer's Suspension*], whereas previously, the Contractor was entitled to Cost only, now there is an entitlement to Cost Plus Profit. In Sub-Clause 8.11 [*Payment for Plant and Materials after Employer's Suspension*], there are additional requirements for proving an entitlement for payment for Plant and Materials. Both Sub-Clauses 8.12 [*Prolonged Suspension*] and 8.13 [*Resumption of* Work] provide enhancements but neither are material.

Article Author

Taner Dedezade[2]

Email: taner.d@corbett.co.uk

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Tel: + 44 (0)20 8614 6200
Fax: + 44 (0)20 8614 6222
Email: info@corbett.co.uk
www.corbett.co.uk