

Can I Suspend and/or Terminate my Construction & Engineering Contract? Key Grounds under FIDIC Contracts and Important Considerations under English & Middle East Laws

Introduction

A Party to a Construction and Engineering (C&E) Contract may wish to suspend and/or terminate their Contract for a variety of reasons including the other Party's failure to perform the Contract or they are of the view that the Contract is no longer commercially beneficial, which leads to the conclusion that suspension and/or termination appears to be a viable option.

The decision to suspend and/or terminate a Contract, however, should not be taken lightly and if a Party gets it wrong the suspension and/or termination will be unlawful and is highly likely to lead to a long and expensive formal dispute – an extremely costly mistake!

To enhance your knowledge and reduce the risk of getting it wrong we discuss Suspension & Termination under the FIDIC Design & Build Contract 1999 (**Yellow Book/99**), together with several important considerations under English Law and Middle East Laws below.

Yellow Book/99

The Yellow Book/99 is a popular design and build contract used widely for C&E Projects across the globe and provides the Employer/Engineer and the Contractor with the right to Suspend and/or Terminate the Contract in a variety of circumstances including the following.

Employer/Engineer (Clause: 15)

- The Engineer has the right to suspend the Works and instruct the Contractor accordingly (SC:8.8), which after 84 days may lead to termination (SC:8.9);
 - The Engineer is deemed to act for the Employer when completing its duties under the Yellow Book/99 (SC:3.1) i.e., the Employer/Engineer suspends the Works;
- The Employer has the right to terminate the Contract, upon 14 days' notice, if the Contractor (SC:15.1):
 - Fails to provide the Security or comply with a Notice to Correct;
 - Abandons the Works;
 - Fails to proceed with the Works in accordance with CI/8;
 - Fails to rectify the Works in accordance with a Notice of Rejection and/or Remedial Work;
 - Subcontracts the whole the Works or assigns the same without the relevant permission;
 - Becomes bankrupt/insolvent (terminate immediately); and
 - Commits an act of corruption/bribery (terminate immediately).
- The Employer has the right to terminate the Contract at any time for the "...Employer's convenience..." (SC:15.5);

- The above termination for convenience takes effect 28 days after either the date on which the Contractor received the Notice, or the Employer returned the Contractor's Security (SC:15.5);

Contractor (Clause: 16)

- The Contractor has the right to suspend the Works, upon giving 21 days' notice, as follows (SC: 16.1);
 - If the Engineer fails to certify an interim payment certificate in accordance with the Contract; or
 - If the Employer fails to comply with its Financial Arrangements / Payments obligations under the Contract.
- The Contractor has the right to terminate the Contract, upon 14 days' notice, on the following grounds (SC:16.2):
 - Employer fails to provide evidence of funds for the project in accordance with the written request under the Contract (SC: 16.1);
 - Engineer fails, within 56 days of receipt of the Statement, to issue a relevant Payment Certificate;
 - Employer fails to pay the Contractor, within 42 days of receipt, the amount due under the Interim Payment Certificate;
 - Employer "substantially fails" to perform in accordance with the Contract;
 - Employer fails to enter in a formal Contract within 28 days of the Letter of Acceptance;
 - Works enter into a period of Prolonged Suspension (terminate immediately); or
 - Employer becomes bankrupt/insolvent (terminate immediately).

Important Considerations: Governing Law

Parties should also be mindful of how the law governing their Contract (**Governing Law**) operates and may apply to their Contract in relation to Suspension and/or Termination.

Under the Yellow Book/99 the Governing Law is set out in the Appendix to Tender (SC/1.4) and includes all "...legislation, statutes, ordinances and other Laws, and regulations and by-laws or any legal constituted public authority..." (SC/1.1.6.5).

English Law

Under English Law a party to a C&E Contract has a right to suspend the Works and terminate the Contract in accordance with its terms (as under FIDIC above).

Further, a party has the right to suspend the Works which can lead to terminating the Contract, on at least 7 days' Notice, where a sum due under the Contract has not been paid in full – see Section 112 of the Housing Grants, Construction and Regeneration Act 1996, as amended 2009, and commonly known as the "Construction Act".

In addition, under English Law a party has a right to terminate the Contract in accordance with case law i.e., the application of the doctrine of binding precedent.

In this context, it should be noted that each breach of Contract provides the innocent party with a right to damages, however, in certain circumstances if a party breaches the Contract the innocent party has a right to elect to bring the Contract to an end i.e. terminate, and claim damages namely: **(1)** if the Contract includes express wording to that effect and/or **(2)** the English Law/case law provides for the same – commonly known as a repudiatory or fundamental breach of the Contract (*Heyman v Darwins [1942] A.C. 356*).

Specifically, under English Law if a party commits a repudiatory or fundamental breach of the Contract then the law provides the innocent party with the right to elect to either **(A)** accept the repudiation and bring the Contract to an end i.e., terminate, and claim damages or **(B)** affirm and continue performance of the Contract together with claiming damages (*Photo Production v Securicor [1980] A.C. 827 HL*).

Parties should be mindful, however, that the above is a complex area of English Law and far from straightforward. In other words, it carries several significant risks including: do valid grounds exist to terminate the Contract under the Contract and/or under English law? Does a party's breach constitute a repudiation? Has the innocent party affirmed the repudiation? Is the termination lawful or unlawful?

If you are unsure of the position as a matter of the Contract/English law, then it's extremely wise to obtain comprehensive legal advice from an experienced C&E Solicitor as early as possible in the Suspension and/or Termination process.

Middle East (ME) Laws

Countries in the Middle East (United Arab Emirates (**UAE**), Bahrain, Kuwait, Oman & Qatar), adopt a civil law system of law, based on the French (Napoleonic) civil code and Islamic law, and its principal feature is that each country's law is set out within several written codes, including their respective Civil Codes which include Articles pertaining to specific legal issues/principles. ME Laws, therefore, do not apply case law in the same fashion as the English Law mentioned above.

With regard to Suspension and/or Termination, however, ME Laws provide the following:

- Right to Suspend the Works (UAE: Art/247, Bahrain: Art 150, Kuwait: Art/219, Oman: Art/157 & Qatar: Art/191).
- Employer's Right to Terminate the Contract (Bahrain: Art/611, Kuwait: Art/688 & Qatar: Art 707). UAE and Oman, however, adopt a different approach and a C&E Contract may be terminated upon one of the following:
 - Completion of the Works; or
 - Cancellation by consent; or
 - Cancellation by Court Order (Oman: Art. 646 and UAE: Art. 892).

Generally, however, the parties' C&E Contract amends the above, providing the grounds on which a Party may suspend the Works and terminate the Contract, and the Parties are required to perform in accordance with the Contract (UAE: Art/243, Bahrain: Art/128, Kuwait: Art/196, Oman: Art/155 and Qatar: Art/171).

Similar to the above, Parties should be aware that suspending the Works and terminating a C&E Contract under ME Laws is far from straightforward and if you have any doubts regarding your position as to whether a proposed suspension and/or termination is lawful or unlawful, you should obtain comprehensive strategic legal advice from an experienced C&E Solicitor as early as possible in the Suspension and/or Termination process.

Conclusion

We hope the above enhances your knowledge and assists in managing the above legal risks. We have provided Clients with the optimal strategic legal advice in relation to Suspension and/or Termination of C&E Contracts on projects across the globe, in both Common Law and Civil Law jurisdictions, and are happy to provide you with the benefit of that experience in a ***Complimentary Strategic Legal Consultation (30 minutes)***, which will:

- Enhance your understanding of Suspension and Termination;
- Highlight the 3 Key Steps to Suspension and/or Termination;
- Improve your understanding of the methods to identify whether the grounds exist under the C&E Contract and/or its Governing Law to consider whether Suspension and/or Termination are viable; and
- Expand your knowledge of the key risks of getting it wrong and potential alternative legal strategies to reach your objectives.

Please email us directly on info@cels.global using **Suspension & Termination** in the subject heading to book your ***Complimentary Strategic Legal Consultation***. We look forward to hearing from you

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