

# MDA CONSULTING



## FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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**FIDIC: COMMUNITY UNREST AND STRIKES – WHO SHOULD BEAR THE RISK?**

### **Introduction**

Working on site and providing onsite commercial support often exposes you to various incidents such as strikes, community unrest, service delivery protests, taxi protests and other “unique” South African events, which disrupt and delay the works. A number of these events/incidents are typically associated with the aims and/or obligations of the employer. For example: employing local labour or engaging taxi associations to obtain “buy-in” for rapid transport networks. Under such circumstances, the questions that often arise are (i) who (should) bear the risk, (ii) who shall take responsibility for the time and money lost and (iii) how should the innocent party be compensated?

All participants to a project (save for the trade unions and taxi associations) lose money or are prejudiced in some way when strikes, community unrest, service delivery protests or taxi protests are experienced and when works, as a result thereof, are disrupted and delayed. The question is often raised as to whether any of the standard form contracts, and more particularly the general conditions of FIDIC, adequately address these risks?

The ‘go-to’ clause, clause 19.1, under the general conditions of FIDIC contract for Construction,

provides for and categorizes events such as strikes and community unrest as a “*force majeure event*”. Clause 19.1 [*Definition of Force Majeure*] which states the following:

*“In this Clause, “Force Majeure” means an exceptional event or circumstance:*

- a. *which is beyond a Party’s control,*
- b. *which such Party could not reasonably have provided against before entering into the Contract,*
- c. *which, having arisen, such Party could not reasonably have avoided or overcome, and*
- d. *which is not substantially attributable to the other Party.*

*Force Majeure may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as conditions (a) to (d) above are satisfied:*

- i. *war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*
- ii. *rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,*
- iii. *riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors,*
- iv. *munitions of war, explosive materials, ionizing radiation or contamination by radio-activity, except as may be attributable to the Contractor’s use of such munitions, explosives, radiation or radio-activity, and*
- v. *natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity”*

Community Unrest -  
Who shall take  
responsibility for the  
time and money  
lost?

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In the event that a force majeure event occurs the general conditions of FIDIC entitles the contractor to submit a claim and be reimbursed for the time and money lost. Clause 19.4 which specifically deals with this states that:

*“If the Contractor is prevented from performing any of his obligations under the Contract by Force Majeure of which notice has been given under Sub-Clause 19.2 [Notice of Force Majeure], and suffers delay and/or incurs Cost by reason of such Force majeure, the Contractor 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. if the event or circumstance is of the kind described in sub-paragraphs (i) to (iv) of Sub-Clause 19.1 [Definition of Force Majeure], and, in the case of sub-paragraphs (ii) to (iv), occurs in the Country, payment of any such Cost.”*

It is clear that on the FIDIC approach the employer takes it’s share of responsibility for force majeure events.

The following two questions come to mind and should be asked when one or more of the ‘unique’ South African events occur:

- i. Firstly, do these events fall within the definition of ‘force majeure’, and
- ii. Secondly, if so, is the model of compensation balanced, given the South African context?

Do the unique South Africa events fall within the definition of ‘force majeure’?

Even though no express words / terms such as ‘community unrest’ or ‘protest’ are included, it can be argued that these unique events comply with the requirements / conditions set out in clause 19.1 sub-paragraphs (a) to (d).

It can also be further argued that clause 19.1 further caters / provides for these (or some of) unique South African events by including words such as “rebellion”, “revolution”, “insurrection”, “riot”, “commotion”, “disorder”, “strike” and “lockout” (see sub-paragraph (ii) and (iii) of clause 19.1).

However, even if this is the case and the general conditions provide for the contractor to pursue a claim for an extension of time and cost in the event of these unique events, clause 19.1 introduces / includes a qualification and limitation on the employer’s risk and liability. This qualification / limitation is:

“ ...  
(iii) riot, commotion, disorder, strike or lockout by persons other than the Contractor’s Personnel and other employees of the Contractor and Subcontractors,  
... ”

This qualification / limitation is a concern and even more so when:

- the construction project is situated in a rural / excluded area;
- more than one contractor is involved; and / or
- the employer is a state owned company

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It often happens that the area where the project site is situated has a high unemployment rate. As such, the employers often oblige the contractor to employ local workers as part of its labour component. Such obligation introduces numerous / various demands and often results in instability and unrest of the project site.

Even if the clause 19.1 makes provision for and includes the unique South African events as a 'force majeure' event, the question remains why should the contractor take the responsibility and the risk for the loss of time and money due to one / more than one of the unique South African events, if such event/s could have been foreseen by the employer when the employer initiated the project?

If the events fall within the definition of 'force majeure' under clause 19.1, is the model of compensation balanced given the South African context?

As set out above, clause 19.4 entitles the contractor to pursue a claim in the event that a force majeure event occurs. In terms of this clause the contractor is entitled to payment of 'Cost'.

"Cost" is defined as per sub-paragraph 1.1.4.3 as:

*"...all expenditure reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit."*

It is clear from this definition that even though the contractor is entitled to submit a claim for an extension of time and payment of its Cost, the contractor may not be adequately compensated for all money lost as it is not entitled to include or claim for its profit.

Not only, in most circumstances, does the occurrence of the above-mentioned events, delay the contractor's works but it also disrupt the works. This contributes to the decrease of the productivity level of the contractor's employees / personnel (even for days after the actual protest / strike).

Costs associated with the disruption and decrease of productivity cannot be claimed for under clause 19.1 and is not provided for in the definition of 'Cost'.

The general conditions of FIDIC and more particularly clause 19 propose that an event such as a strike or community unrest is a shared risk between the employer and contractor, however the employer's risk and liability is limited if the contractor's personnel and employees participate in such event. In this event the contractor would only get time.

As FIDIC is an international standard form contract used for international projects, it can be said that the principle of force majeure and more particularly the model of compensation in an international context is equitable and balanced. However, the difficulty is, taking into consideration the South African context, that the contractor is affected by force majeure events / incidents, which is unique to South Africa and over which the contractor has no control, more than expected<sup>1</sup>. Based on this the question remains whether the principle of force majeure and more particularly the model of compensation in South African context is balanced? This is a concern in the South African construction industry.

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Based on the above, it is therefore advisable that the parties, at tender stage, should consider and look at the definition of force majeure and all foreseeable / possible events and deal with it upfront by deciding whose risk the event should be and to include the necessary particular condition/s.

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<sup>1</sup> A good example of a matter where a force majeure event (unique to South Africa) occurred and where the model of compensation (in the South African context) was unbalanced is the matter of Rumdel Cape EXR Holdings [see *Rumdel Cape EXR Holdings Mazcon Joint Venture v South African National Road Agency* (7312/2014 [2014] ZAKZDHC 40)]. In this matter community unrest occurred which led to dangerous working circumstances / environment. The JV sought an order that the SA Roads Agency should pay for additional security measures to be implemented and a declaration that the violent events constitute force majeure.

This application was dismissed. The judge stated that the necessity for the increase in the level of security is not something which can be laid at the door of the Road Agency and that the JV should have insured against this risk. The judge further stated and found that the JV has not demonstrated that it would be prevented from performing any of its contractual obligations by force majeure. As a result thereof the judge found that the provisions relating to force majeure do not apply – see <http://www.saflii.org/za/cases/ZAKZDHC/2014/40.html>  
<http://www.saflii.org/za/cases/ZAKZDHC/2014/40.html><http://www.saflii.org/za/cases/ZAKZDHC/2014/40.html>.

We understand that this judgment may be subject to an appeal.

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