

“Reasonable” Remedy Period

FIDIC suit of contracts are commonly used by the contracting parties in the construction industry given that it reflects the experience accumulated for more than 60 years, since its first issuance. As it is known to practitioners in the field, FIDIC rainbow suit is drafted from common law perspective, albeit it is being used globally also in countries subject to civil law system. Hence, it is critical to determine how these provisions would apply under the governing laws of a country rooting from civil law system.

Generally, no severe problems are faced in applying FIDIC provisions under civil law system, and it is practical to work with FIDIC contracts as most of the professionals in the construction industry are familiar with these standard contracts. That being noted, there are some points for consideration to better the suitability for a specific project while drafting Particular Conditions to a FIDIC Contract governed by the laws of a country under the civil law system.

One point among these on which this article will focus relates to granting of a “reasonable” remedy period to the Contractor before termination of the Contract by the Employer for the Contractor’s default as per Sub-Clause 15.2.2 [*Termination*]. The issue of implementation of FIDIC Contracts’ relevant provisions to the concept of “reasonable” time will be reviewed from a Turkish law perspective, as a civil law system country.

In order to review Turkish law approach to “reasonable” period concept, one would need to consult with the Turkish Code of Obligations (“TCO”). Pursuant to Article 123 of TCO, if a party to a bilateral contract, defaults in performing its contractual obligations, the other party may serve a notice on that defaulting party and may require remedying of such default by providing a “reasonable” remedy period adequate for the defaulting party to cure such default. In fact, providing such a remedy period is a precondition to exercise the rights provided for the creditor against a defaulted debtor under the TCO. Exceptionally, pursuant to Article 124 of TCO, it is not required to provide a reasonable remedy period if;

- (i) it is apparent that it is impossible for the defaulting party to cure such default even if a reasonable remedy period is given,
- (ii) due to delay suffered, the other party has no benefit in remedy of such default by the defaulting party, or
- (iii) it is clear by reading the contract that if a specific contractual obligation is not performed until or on a specific time, then the performance of such obligation will not be accepted.

Naturally, the remedy period may differentiate depending on the specifics of the case at stake, nonetheless, in any case it should be adequate to allow for remedy of any default. According to the dominant view in Turkish doctrine, any contract provision envisaging a remedy period that is not adequate for performance of an obligation is in violation of TCO Article 123 and may be considered null and void pursuant to TCO Article 27. [1] In parallel, Turkish Supreme Court's decision dated 2015 indicates that, “[...] while an adequate period of time should have been given for the performance of the obligation, such period was not given to the debtor; therefore, the termination of the contract is unjust”. [2] Further, in another decision dated 2017, the Supreme Court upholds the decision of court of first instance in which the court evaluated the progress in the project and gave an adequate period to the Contractor for performance of the obligation defaulted by the debtor. [3]

Proceeding from the Turkish law regulations to FIDIC suit of contracts, 1999 Revision through Sub-clause 15.1 [*Notice to Correct*] sets forth that the remedy period should be reasonable. Under FIDIC 2017 Revision, while the same principle is preserved, the criteria for “reasonable period” in which the Contractor shall remedy the failure is also detailed by incorporation of a wording. Accordingly, the remedy period is required to be determined by “*taking due regard of the nature of the failure and the work and/or other action required to remedy it*”. This detailed clarification is very helpful to explain what is deemed “reasonable”.

Sub-Clause 15.2 [*Termination for Contractor's Default*] of FIDIC suit of contracts under both revisions of 1999 and 2017 lists the incidents entitling the Employer to terminate the Contract due to Contractor's default. While Contractor's failure in complying with a Notice to Correct mentioned above is one of those reasons, there are some other circumstances entitling the

Employer to termination as well. Sub-Clause 15.2.2 [*Termination*] sets forth that if any of the events listed under Sub-Clause 15.2 [*Termination for Contractor's Default*] occurs, then the Employer may serve a Notice on the Contractor by giving 14 days for remedy of the default event accompanied with the Employer's intention to terminate the Contract. Unless the default mentioned under the Notice is remedied by the Contractor within 14 days, then the Employer may then immediately terminate the Contract by giving a second Notice.

For instance, pursuant to provision of Sub-Clause 15.2 [*Termination for Contractor's Default*], if the Contractor fails to comply with a binding agreement, or a final and binding determination under Sub-Clause 3.7 [*Agreement or Determination*], then the Employer may terminate the Contract by giving 14 days' Notice. Nonetheless, in case the Contract is governed by Turkish Law, to establish the interpretative link of the above explained FIDIC provisions with the provisions of TCO, it would be crucial to determine whether 14 days would be evaluated as a "reasonable" remedy period under Turkish Law. In such a case, the content of any such agreement or determination and the nature of actions necessary to comply would be considered to evaluate the appropriateness of the fixed remedy period of 14 days.

Another example could be the scenario where the Contractor fails to comply with an Engineer's instruction under Sub-Clause 7.6 [*Remedial Work*]. Accordingly, if the Contractor has not satisfied the instruction within 28 days after receiving it, the Employer may terminate the Contract by giving 14 days' Notice. Although 28 plus 14 days would amount up to more than a month and this might be seen as an adequate time to comply with Engineer's such instruction, and accordingly termination of the Contract by the Employer for the Contractor's default would be a fair consequence; the scope of remedial works necessary for complying with such instruction needs to be considered while evaluating whether such period is reasonable. Otherwise, it may be concluded by the Turkish Courts that the termination is unlawful since no reasonable remedy period suitable to the nature of the actions to be taken is not granted by the Employer to enable the Contractor to remedy its default by determining that the fixed remedy period set forth under the Contract is not adequate to the nature of the actions necessary to remedy such default.

Having taken a look at the provisions under FIDIC suite of contracts in conjunction with the constraints under TCO, it can be summarized that when dealing with a contract under Turkish law

the parties need to be aware of the necessity of giving a suitable period sufficient to provide the Contractor with a realistic opportunity to cure any default which may occur throughout implementation of the project. In that vein, with a view to enable smoother performance of the project, the parties may via Particular Conditions include under Sub-Clause 15.2.2 [*Termination*] an expression that enables review and revision of the fixed 14 days' period according to the nature of the default and the actions required for remedy thereof or amend the wording under the relevant sub-clause that the Employer would grant a reasonable remedy period in line with the requirements of Turkish law.

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References

- [1] KILIÇOĞLU, Ahmet. (2021), *Borçlar Hukuku Genel Hükümler*, Turhan Kitabevi: Ankara, p.887.
- [2] Supreme Court 19. Civil Chamber. E. 2014/11331, K. 2015/8233, T. 03.06.2015.
- [3] Supreme Court 23. Civil Chamber. E. 2015/8849, K. 2017/1013, T. 04.04.2017.

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