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CMS guide to the FIDIC 2017 suite

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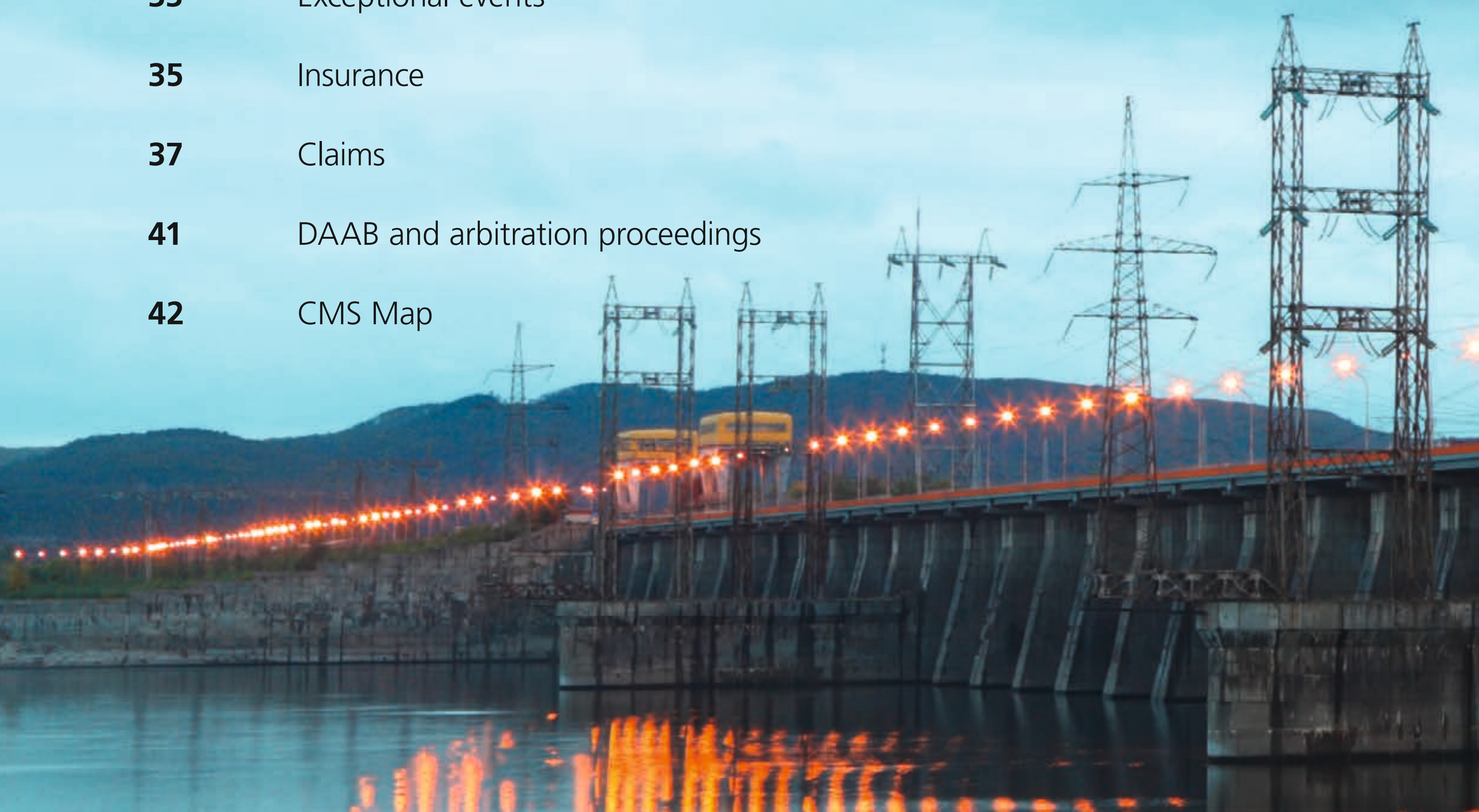

Introduction

At the beginning of December 2017, FIDIC published its much-heralded and long awaited new editions of the Red, Yellow and Silver Books. The new versions contain extensive amendments and are an attempt to modernise the FIDIC form 18 years after the First Editions were released in 1999.

This CMS Guide explains the main areas of change from the 1999 editions and cover some of their implications for early users. It focuses on the Yellow Book but touches on the Red and Silver Books where the changes to those versions are significantly different.

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Structure and terminology

The structure of the 2017 Yellow Book will be very familiar to those used to working with the 1999 edition:

- There is an optional Contract Agreement, an example of which is contained at the back of the booklet, which continues to be very short form;
- There are the General Conditions. Points to note here are that:
  a. There are now 21 clauses (as opposed to the 20 clauses in the 1999 edition). This is primarily as a result of FIDIC's decision to split what was the old clause 20 so that the new clause 20 deals only with the processes for dealing with claims and the new clause 21 deals with dispute resolution. We deal in more detail with these clauses below.
  b. Generally the clauses are in the same order and deal with the same issues as the 1999 edition save that clauses 18 and 19 have been reversed – clause 18 now deals with force majeure (which is now referred to as 'Exceptional Events') and clause 19 deals with insurance.
- The booklet contains suggestions for Particular Conditions for clauses dealing with issues that are commonly encountered where the standard terms would need alteration. FIDIC have also now included their 'Golden Principles' for the preparation of Particular Conditions and urge those using them to 'take all due regard' of these Principles. These include the Principle that the Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions. We suspect in most cases this Principle will be ignored.
- There are Contract Data. These are what used to be called the 'Appendix to Tender' and must be completed by the parties to provide the project-specific details.
- There are Procedural Rules for DAB proceedings (now called DAAB proceedings). These have been considerably expanded.
- The booklet continues also to provide templates for other contract documents such as the Letters of Tender and Acceptance and the Dispute Avoidance/Adjudication Agreement.

The definitions are now in alphabetical order (rather than being subdivided between topics and ordered accordingly).

There are many more divisions and subheadings within the Sub-Clauses so that the old difficulties caused by there being multiple paragraphs within the Sub-Clauses are much reduced.

Reciprocity of rights and obligations

FIDIC has always prided itself on having a fair and balanced approach to risk allocation in the Yellow and Red Books (the Silver Book being rather different). This has been further emphasised in the 2017 edition by for example increasing the number of rights and obligations that are reciprocal.

A good example of this in all three books is Sub-Clause 1.13:

- Both the Contractor and the Employer are now under an obligation to comply with all applicable Laws;
- The Contractor is now also under an obligation to assist the Employer in obtaining its permits etc. (Sub-Clause 1.13(c)) – mirroring the Employer's obligations set out in Sub-Clause 2.2;
- The indemnities from the Employer to the Contractor and from the Contractor to the Employer for failures to comply with Sub-Clause 1.13 do not apply if such failure has been caused by a failure to provide such assistance.

The obligations in Sub-Clause 6.3 not to poach staff have also been made reciprocal.

The new duty to provide advance warning of matters likely to cause delay/additional cost/performance issues set out in Sub-Clause 8.4 is also reciprocal.

The processes for dealing with both Employer and Contractor claims in Clause 20 is another good example of where increasing reciprocity has been introduced. We deal in more detail with Clause 20 below.

Best practice

FIDIC has taken the opportunity to incorporate provisions concerning best practice - for example:

- The Contractor can ask the Employer (and the Employer can ask the Contractor) to remove persons engaged in fraud, corruption and similar practices (Sub-Clauses 2.3 and 6.9) and fraud/corruption etc. has been added to the list of triggers for termination set out in Clauses 15 and 16 (in place of the more limited bribery wording which existed previously).
- The health and safety provisions in Sub-Clause 4.8 and the quality assurance provisions in Sub-Clause 4.9 have been expanded and updated.
- References to environmental impact assessments have been include in Sub-Clause 4.18.
- A new Key Personnel clause has been included at Sub-Clause 6.12.

Design issues

There have been several modifications to the design provisions.

Perhaps the most important relate to the fitness for purpose (FFP) obligations:

— Users of the 1999 FIDIC Yellow Book will be familiar with the fact that it contains an express FFP requirement (Sub-Clause 4.1). This has been retained but modified, such that the purpose must be stated in the Employer's Requirements (rather than anywhere in the Contract) – and there is an additional provision that if no such purposes are stated the Works must be fit for their ordinary purposes. A similar position applies to the Silver Book, but the new Red Book retains the old wording in relation to any design work included within its scope (i.e. fitness for purposes '*as are specified in the Contract*').

— This FFP obligation is now backed up by an indemnity in Sub-Clause 17.4 – the Contractor is now required to indemnify the Employer for failures of the Works or any Section or any major item of Plant not being FFP. This is tempered to some extent by the exclusion of liability for indirect and consequential losses and the fact that any liability under this indemnity will fall within the cap on the Contractor's liability (see further on this point below). However, the inclusion of this indemnity is likely to cause Contractors problems.

— The FFP obligation and the indemnity are backed up by an express requirement in the new professional indemnity insurance Sub-Clause (Sub-Clause 19.2.3) that, if so stated in the Contract Data, the Contractor's PI policy must indemnify it against its liabilities for failure to achieve the FFP requirements. This is rather optimistic - particularly at times when the Contractors' PI insurance market hardens. Contractors would be well advised to keep an eye out for this when examining the Contract Data and to discuss these requirements with their brokers on a pro-active basis to see what can be achieved so that they can respond on this issue as necessary when submitting tenders.

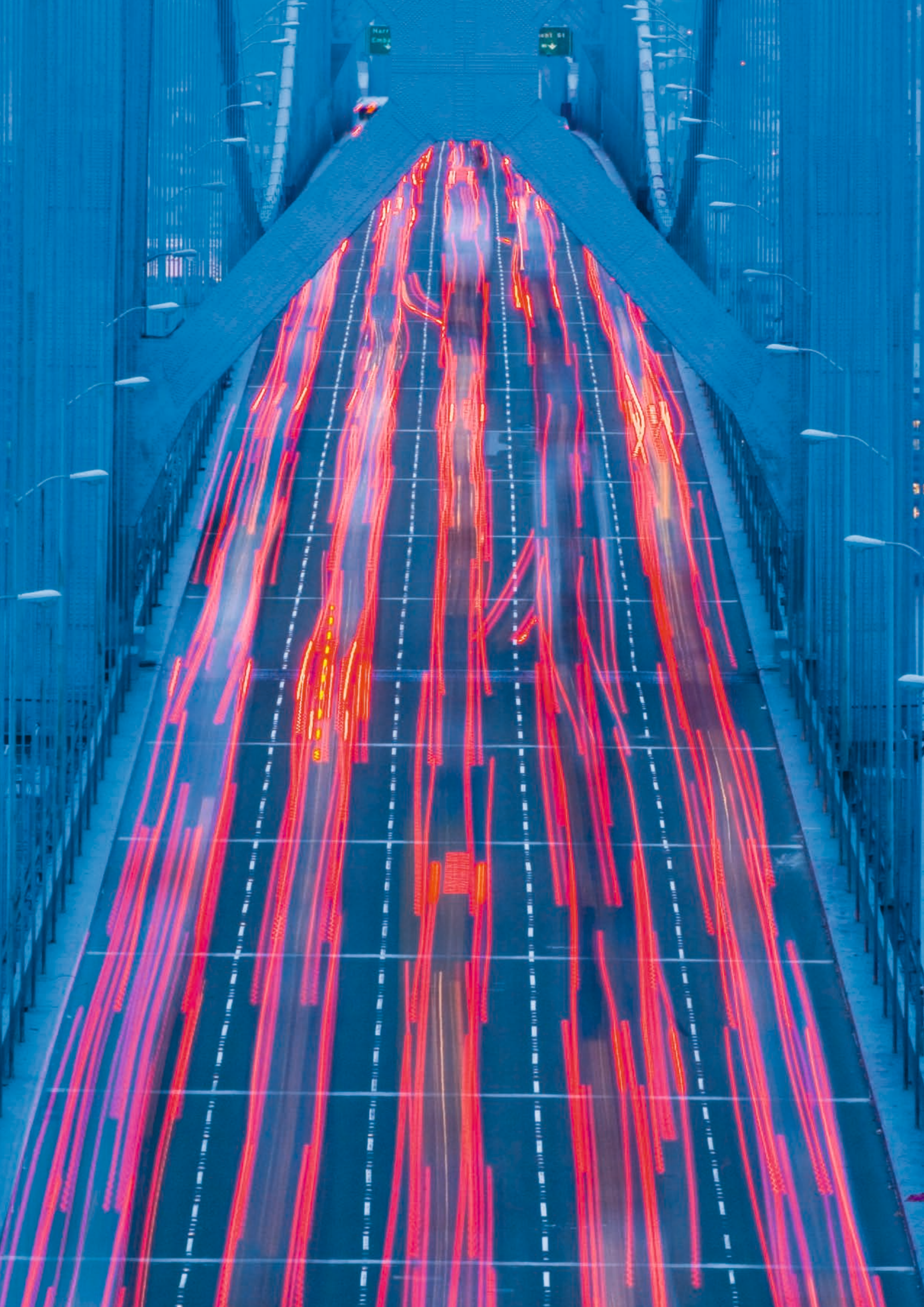
It should also be noted that the provisions of Sub-Clauses 5.3 and 5.4 concerning compliance of the design with the contract and applicable standards remain as 'strict' obligations rather than being subject to skill and care. Contractors will need also to consider these provisions in their conversations with their brokers on PI insurance.

The processes for the Contractor to scrutinise the Employer's Requirements for errors are now all found in Sub-Clause 1.9 of the Yellow Book. The payment provisions which apply if an experienced contractor would not have found those errors at the relevant time have also been altered. The variation provisions will apply to the measures the Contractor is required to take to deal with the error and the Contractor will also be able to claim 'Cost Plus Profit' if it incurs Cost as a result of such error (see below for an explanation of this new term). Similar provisions apply in respect of errors in relation to items of reference in the setting-out provisions (Sub-Clause 4.7). The Engineer will need to be vigilant to make sure there is no double recovery.

The Silver Book does not contain express provisions to this effect. Instead, the Contractor is deemed to have scrutinised, prior to the Base Date, the Employer's Requirements and is responsible for their accuracy save for certain specified matters. There are no Employer's Requirements in the Red Book.

There are increased requirements in Sub-Clause 5.1 concerning the qualifications and competence of personnel engaged in preparing design – in part, no doubt, to recognise mandatory requirements in this respect that are imposed under some legal systems.

FIDIC has also included in the booklet an 'Advisory Note' on BIM which includes guidance as to which General Conditions may require review and possible alteration in the Particular Conditions if BIM is to be used on the project.



Performance security and the employer's financial arrangements

The provisions concerning the Performance Security to be provided by the Contractor set out in Sub-Clause 4.2 remain largely unchanged. However, an additional provision has been included to the effect that a request for an increase or decrease in the amount of the security can be made if Variations and adjustments under Clause 13 result in a change to the Contract Price of more than 20%. Similar amendments are commonly made to the FIDIC conditions to allow for this and such amendments may now be thought no longer to be necessary. However, Employers may still wish to make amendments - for example to adjust the percentage change to the Contract Price that triggers this provision, and/or to include changes to the Contract Price consequent on payments in respect of Cost and Cost Plus Profit, and/or to provide for the consequences if he Contractor fails to provide a necessary increase to the Performance Security.

Sub-Clause 2.4 concerning provision of evidence of the Employer's financial arrangements for the project has always been controversial and is disliked by many Employers. The provision featured in the well-known case of *NH International v National Insurance Property Development Company*, where it led to the termination of a large hospital project in Trinidad and Tobago (please click here for our Law-Now on this case). The clause has, been retained in the 2017 edition albeit in an amended form.

The Employer's financial arrangements are now to be detailed in the Contract Data. This on the basis that the Contractor will see them and will not be prepared to enter into the contract unless satisfied that they are sufficient.

There are also additional provisions to the effect that if the Employer intends to make a material change to these arrangements it must give notice to the Contractor. Also if the Contractor is instructed to carry out a Variation of a value in excess of 10% of the Accepted Contract Amount, or does not receive payment, or is aware of a change in the Employer's financial arrangements, it can request evidence that financial arrangements are in place to enable the Employer to pay the remaining balance of the Contract Price. This is a fairly onerous requirement (as the *NH International* case referred to above shows) albeit what is adequate will now no doubt be judged against what was included in the Contract Data (on the basis that what is included there was judged to be adequate evidence at the time the contract was entered into).

The provisions in Sub-Clauses 16.1 and 16.2 entitling the Contractor to suspend performance of the Works and then to terminate in relation to non-compliances under Sub-Clause 2.4 have been retained but apply only to a failure to provide reasonable evidence. On the face of it this therefore only applies if the Contractor is entitled to make a request for this pursuant to Sub-Clause 2.4.

Where there has been a change in the financial arrangements detailed in the Contract Data, the Contractor is only entitled to make such a request if it has not received a Notice from the Employer to that effect. However, the Employer's Notice need only provide '*detailed supporting particulars*' and is not expressly required to meet the reasonable evidence test. This potentially leaves a gap where the Employer's Notice, whilst providing detailed supporting particulars, sets out financial arrangements which the Contractor deems to be unsatisfactory. On the express wording of the clause, the Contractor would not appear to have the ability to make a request for reasonable evidence in such circumstances. Whether this textual gap can be overcome by giving the clause a broad interpretation (or through the implication of terms) will depend on the approach taken by the applicable law.

Site risk and access

There are no material changes to the provisions at Sub-Clauses 4.10 – 4.12 dealing with risk allocation for site conditions. In the Yellow and Red Book these Sub-Clauses do, however, include further detail on the processes to be followed if claims are to be made pursuant to them. No changes have been made to the Silver Book in this regard as the Contractor accepts full responsibility for site conditions.

The obligations on the Employer concerning setting-out data and provision of data relating to the site previously included in Sub-Clauses 4.7 and 4.10 have been moved to form a new Sub-Clause 2.5. This is a more logical place for them. In addition the data the Employer is required to provide has been expanded to include data relating to topography and climatic conditions.

Also, the definition of 'Unforeseeable' has been altered such that what is unforeseeable is now judged as at the Base Date (i.e. 28 days before the latest date for submission of the Tender) rather than the date of submission of the Tender itself.

In relation to access to/possession of the site, the provisions of Sub-Clause 2.1 are also largely unchanged. However, Sub-Clause 4.15 (dealing with access routes to the site) has been altered. Now, the Contractor is deemed satisfied with the access routes in place as at the Base Date and if they are subsequently changed the Contractor can claim an extension of time and Cost. This may cause some difficulties for Employers who are not necessarily in control of those access routes and may not know what assumptions the Contractor has made about them. In addition there are no provisions allowing for a reduction in the Contract Price or any adjustment to the Date of Completion if the access routes are improved for the Contractor after the Base Date.

Payment

The structure of Clause 14 remains largely the same. Notable alterations to it include:

— Sub-Clause 14.2 (concerning advance payments) has been amended to make it clearer that it will only apply if so provided in the Contract Data. More detailed provisions as regards the expiry and renewal of Advanced Payment Guarantees have been included making it clear that the Employer is entitled to call on the full amount of an Advanced Payment Guarantee if it is not extended more than 7 days prior to its expiry.

— An additional pre-condition to all payments has been added: the Contractor must have appointed its Contractor's Representative (see Sub-Clause 14.6).

— Additional requirements have been included in Sub-Clause 14.6 as to what the Engineer must include in/with his/her Interim Payment Certificates (now called 'IPCs', with the Final Payment Certificate being the 'FPC'). He/she must provide supporting particulars and identify any differences between an amount the Contractor has applied for and that which is certified. This is backed up by an additional provision that entitles the Contractor to re-apply for any excluded amounts in the next Statement and if it is not satisfied these amounts have been included in the related IPC he can refer them to the Engineer for processing under Sub-Clause 3.7.

— In relation to the final payment by the Employer, in order to preserve any claims for payment the Contractor considers it has, not only must it include them in the Final Statement and the Statement at completion (save for matters arising after Taking-Over), it must also make a claim in respect of them within 56 days of receipt of the FPC. If it fails to do so it will be deemed to have accepted the amounts certified in the FPC.

These last two amendments are further examples of FIDIC including provisions that are intended to clarify the differences between all the parties involved at an early stage such that claims can be resolved earlier rather than later.

Users of the 1999 editions will be used to the old FIDIC approach of entitling the Contractor to claim 'Cost' (as defined) under some Sub-Clauses and 'Cost plus reasonable profit' under other Sub-Clauses. The definition of 'Cost' remains broadly the same in the new editions (although it now includes references to taxes). However, a new definition of 'Cost Plus Profit' has been included and this replaces references to 'Cost plus reasonable profit'. The profit is to be stated in the Contract Data and if not stated there applies at a rate of 5%.

Variations

The principle that there are limited grounds on which the Contractor can object to a Variation has been retained but the grounds of objection have been altered. These now include:

— The fact that the varied work was Unforeseeable having regard to the nature of the Works set out in the Employer's Requirements;

— The variation would adversely affect the Contractor's ability to comply with its obligations concerning health and safety and the environment;

— It may adversely affect the Contractor's ability to comply with its FFP obligations

The provisions in relation to Variations relating to omissions have been altered. They now provide that the parties can agree an omission in order for the omitted work to be carried out by others – but if that happens the Contractor will be entitled to loss of profit and other losses/damages the Contractor may suffer as a result of the omission.

The rules concerning both valuations of varied works and of omitted works have also been expanded and clarified in Sub-Clause 13.3.

The change in law provisions have been retained but altered so that:

— Changes in permits etc. obtained by the Employer or the Contractor under Sub-Clause 1.13, or changes in the requirements for any such permits etc. are also to be treated as changes in law;

— Whilst the change in law provisions have always stated that the Contract Price may be reduced to take account of any decrease in Cost as a result of change in law, there is now also a process included whereby the Employer can request a reduction in the Contract Price as a result of the same.

Time and programme obligations

Sub-Clause 8.3 has been expanded to include significantly more detail concerning the Contractor's programme. The programming software to be used can be stated in the Contract or specified by the Engineer. The Contract specifies the number of paper and electronic copies to be submitted by the Contractor. More detail is included as to what each programme must show – including, for example, logic links between activities and the critical path(s). There is also now an additional requirement set out in Sub-Clause 9.1 to submit a separate testing programme.

The grounds on which the Contractor can claim an extension of time are now set out in Sub-Clause 8.5 but remain largely unchanged (save for providing new criteria for 'exceptionally adverse climatic conditions' and providing an extension of time for delays caused by private utility companies as well as public authorities). However, an additional paragraph has been included at the end of the Sub-Clause which provides that if there are any delays caused by matters for which the Employer is responsible which are concurrent with delays caused by matters for which the Contractor is responsible they are to be dealt with in accordance with the rules and procedures set out in the Particular Conditions or, if there are no relevant Particular Conditions, '*as appropriate taking due regard of all relevant circumstances*'. This paragraph is controversial and likely to be the subject of considerable debate. Do the periods of delay all have to be on the critical path? Do the competing events have to have approximately the same causative potency? What happens in the case of 'neutral' events such as exceptionally adverse climatic conditions? What difference, if any, does the wording '*as appropriate taking due regard of all relevant circumstances*' make to the position that would have applied in any event? For an overview of the current English law position as to concurrent delay, please see our recent Law-Now here.

We mentioned briefly in Section 3 above the new 'advance warning' provision included at Sub-Clause 8.4. This requires each party to notify the other and the Engineer of any known or probable future events which could adversely the work of the Contractor's Personnel or the performance of the Works once completed, or increase the Contract Price, or delay completion. The Engineer can then request the Contractor to submit a proposal for a Variation to avoid or minimise the effect of any such event. Users of the NEC suite of contracts will be familiar with this sort of concept through the 'early warning' provisions found in all NEC contracts. Unlike the NEC suite, however, FIDIC has not included any express provision requiring any failure to comply with this requirement in any assessment of the Contractor's entitlement to an extension of time and additional payment.

Limitations on liability

The main limitation on liability clause has now been moved from Sub-Clause 17.6 to Sub-Clause 1.15 (Silver Book Sub-Clause 1.14) – in part to indicate its importance and also to make it clear that it applies more generally and is not limited to the parties' indemnities.

Carve-outs from the exclusion of liability for loss of profit/indirect and consequential loss have been expanded to include also now Delay Damages, Variations, and claims under the IP indemnities. A new carve out also exists for losses incurred following termination for convenience under what is now Sub-Clause 15.7, and also for losses incurred in respect of omissions of work to give it to third parties (see Section 9 above in this respect) – although there is still no carve out for the Employer's termination losses following a default based termination (even though there is for the Contractor's termination losses).

Also gross negligence has been added to the list of issues in respect of which liability is uncapped.

A new provision has also been added to Sub-Clause 8.8 such that the cap on Delay Damages does not apply for fraud, wilful misconduct, gross negligence etc. This mirrors the carve-out from the caps on liability in Sub-Clause 1.14/1.15.

Remedying of defects

A notable amendment here is the inclusion in Sub-Clause 11.10 of a new limitation period for Plant. This provides that the Contractor is not liable for any defects or damage occurring more than two years after the expiry of the Defects Notification Period ('DNP') for Plant (unless prohibited by law or in the case of fraud etc). Whilst not entirely clear this is probably to be read as excluding liability for defects or damage occurring more than two years after the expiry of the relevant DNP rather than imposing a shorter limitation period in respect of Plant – although this is not entirely clear.

Termination

A number of changes have been made in relation to termination.

As regards termination by the Employer for Contractor default:

— New termination triggers have been included:

a. Failure to comply with a final and binding Engineer's determination (subject to such failure amounting to a 'material' breach of contract).

b. Failure to comply with any DAAB decision (whether final and binding or not) (subject to the same materiality test referred to above).

c. If the Delay Damages cap (if one is specified) is exceeded. The Employer simply has to demonstrate that this is the case and does not have to have deducted or recovered Delay Damages up to the cap before this trigger comes into effect. This amendment was typically inserted by Employers into their Particular Conditions so they will no longer need to insert this change. However, it typically goes hand-in-hand with a trigger if the overall cap on liability is reached – that trigger has not been included so most Employers will continue to want to include this.

d. If the Contract is '*is found, based on reasonable evidence*' to have engaged in corruption, fraudulent, collusive or coercive practices in relation to the Contract (this replaces the previous more limited termination trigger for bribery). It is unclear precisely what is intended by the wording just quoted. For example, whether the reference to '*found*' is intended to imply a decision of the DAAB or arbitral tribunal. And whether the reference to '*reasonable evidence*' means that a termination might still be valid if the Contractor were subsequently exonerated from the relevant allegations, but the Employer nonetheless acted on reasonable evidence at the time.

— The old trigger for a failure by the Contractor to comply with a Notice to Correct has been qualified by the materiality test referred to above.

— The list of events in respect of which immediate termination is possible (rather than requiring 14 days' notice) has now been extended to include breach of assignment and sub-contracting obligations.

The Employer's right to terminate for convenience has been significantly modified by requiring it to pay loss of profit and other losses and damages suffered by the Contract as a result of the termination. The Contractor's entitlement in this regard is also carved out of the indirect and consequential loss exclusion and could therefore represent a very significant exposure to the Employer. This contrasts with the position previously, where the Contractor was entitled only to its costs reasonably incurred in anticipation of completing the Work together with demobilisation costs and payments for Work already completed. This mirrored the Contractor's entitlement in relation to a termination under the old Force Majeure Clause (now Exceptional Events).

These changes make the consequences to the Employer of termination for convenience largely indistinguishable from a termination for default by the Contractor. We suspect this position will be unpalatable to many Employers.

In a similar fashion to the new/altered triggers for termination by the Employer:

- a failure by the Employer to comply with a final and binding Engineer's determination and a failure to comply with any DAAB decision (whether final and binding or not) (subject to the same materiality test referred to above) has been included in the list of triggers for termination by the Contractor;
- the fraud/collusion etc. trigger also applies to the Contractor;
- the trigger for substantial failure by the Employer to perform its obligations under the Contract is now subject to the materiality test referred to above.

An additional new trigger has also been included – such that if the Contractor does not receive a Notice of the Commencement Date within 84 days after receiving the Letter of Acceptance the Contractor has the right to terminate. This has been added to prevent a situation where a Contractor has committed to prices and timescales for the project but there is then a prolonged delay to the start. This provision gives the Contractor the option of walking away.

This new trigger, coupled with the changes to the termination for convenience provision, appears to be intended to provide protection to Contractors against the risk of projects being let (for political purposes for example) without there being any genuine will or ability to proceed on the part of the Employer. Some Employers may find these provisions unpalatable and seek to restore the position which existed under the 1999 editions. Contractors accepting such a situation should carry out sufficient due diligence to satisfy themselves that the Project is likely to proceed promptly and will not be cancelled.

In addition, a new Sub-Clause 1.16 (Silver Book Sub-Clause 1.15) has been included. This provides that (unless any mandatory law provides otherwise) termination of the contract under a given Sub-Clause requires no action of any party other than as set out in that Sub-Clause. This is probably to be read as relating to the act of termination itself i.e. to the extent possible, no additional formalities are to be required (unless mandatory under the governing law) in order to effect termination and does not extend to the consequences of termination – although this is not entirely clear.

Care of the works and indemnities

The old Clause 17 dealing with Employer's Risks and indemnities has been restructured although the basic approach and risk allocation remains the same.

The Contractor remains responsible for any loss or damage to the Works until Taking Over, save for specified risks for which the Employer is responsible. The list of Employer risks has been expanded to include interference with any right of way, light, air, water or other easement which is the unavoidable result of the execution of the Works in accordance with the Contract, as well as a catch-all provision for any act or default of the Employer's Personnel or the Employer's other contractors.

An apportionment provision has been included so that the Contractor may recover a proportion of EOT and its Cost Plus Profit to the extent that loss or damage to the Works, Goods or Contractor's Documents have been caused by a combination of risks for which the Employer and Contractor are responsible.

As noted above, the Contractor's indemnities have been expanded to include an indemnity against the Works not being fit for purpose when completed. The Employer's indemnities have also been modified so that the Contractor is now indemnified, in addition to bodily injury sickness disease and death, against damage to property other than the Works arising from the Employer's negligence, wilful act, breach of the Contract or any of the other events said to be at the Employer's risk. The previous Employer indemnity for certain matters excluded from insurance cover is overtaken by these changes and has been removed.

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Exceptional events

The old Force Majeure Clause has been moved to Clause 19 and renamed 'Exceptional Events'. The Clause remains largely identical to its predecessor however.

The list of specific Exceptional Events has been slightly expanded by the addition of tsunami as a specified natural catastrophe (with the result that the Contractor is entitled to the payment of Cost for such an event).

Clause 18.2 now makes clear that a party is only excused from performing its obligations due to an Exceptional Event from the date a Notice is given in accordance with the Clause.

Insurance

The insurance provisions have been completely re-written and will need to be considered afresh by parties in conjunction with their insurance brokers.

In addition to the insurances previously required to be taken out by the Contractor, the Contractor is required to maintain professional indemnity insurance at a level not less than stipulated in the Contract Data. Specific provision has also been made for such insurance to indemnify the Contractor against fitness for purpose obligations where this is required in the Contract Data.

The Contractor is also required to take out Goods insurance in addition to insuring the Works, Materials and Plant. This appears to be principally intended to cover loss and damage to the Contractor’s Equipment and any Temporary Works.

Claims

FIDIC is acutely aware of the fact that construction projects are all too often dogged by claims and disputes. It has therefore included new and altered provisions intended to help the parties deal with claims appropriately and promptly in order to avoid disputes as far as possible.

For example, when claims are to be made under specific Sub-Clauses, in many cases there are increased requirements as to when and how to submit Notices of those claims. We have already referred to several of these (for example, for claims relating to errors in the Employer's Requirements, changes on access routes to the site) in this Guide. There is also a new definition of 'Notice' (a written communication identified as a notice issued in accordance with Sub-Clause 1.3 and the provisions of Sub-Clauses 4.20 and 8.3 provide that progress reports and programmes cannot constitute Notices). These provisions are also designed to make sure that it is clear when a party is making a claim and to avoid a situation where a party might try to seek a tactical advantage by hiding its claim in more day-to-day correspondence.

There are also additional requirements included in Clause 3 concerning the appointment and qualifications of the Engineer and his/her representative/delegates. The Silver Book includes corresponding provisions in respect of the Employer's Representative. These include:

- The additional requirements in Sub-Clause 3.1 that if the Engineer/Employer's Representative is a legal entity it must appoint a natural person to act. The person acting as Engineer must be a professional engineer appropriately qualified to act as such and who is fluent in the ruling language of the contract. These requirements also apply to any Engineer's Representative appointed under Sub-Clause 3.3
- Verbal instructions can no longer be issued by the Engineer/Employer's Respresentative and followed up in writing (which was the previous position under the Red Book). Instructions should now comply with the new Notice procedure and work should not be carried out before a written Notice is issued.
- The old requirement that when making a determination in relation to claims (which used to be in Sub-Clause 3.5 but which is now in Sub-Clause 3.7) such determination must be 'fair' remains, but is now supplemented in the Yellow and Red Books by a requirement that the Engineer acts 'neutrally' in exercising his/her functions under Sub-Clause 3.7. This requirement is not replicated in the Silver Book. In addition Sub-Clause 3.4 Yellow and Red Books makes it clear that the Engineer cannot be obliged to obtain the Employer's consent prior to exercising his/her authority under Sub-Clause 3.7. The Silver Book contains corresponding provisions at Sub-Clauses 3.3 and 3.5 respectively.

This is all designed to emphasise the Engineer/Employer's Representative's neutrality when dealing with claims and is intended to indicate that a degree of rigour will be applied by the Engineer/Employer's Representative when dealing with them such that both parties can have confidence in the processes being followed.

The separation of old Clause 20 into two distinct clauses – Clause 20 dealing with Claims and Clause 21 dealing with dispute resolution – is also intended to help an unnecessary escalation of issues into disputes.

Users of the 1999 editions will be familiar with the system of notification of Employer's Claims under Sub-Clause 2.5 followed by the Engineer's determination under Sub-Clause 3.5, and the notification of Contractor's claims under Sub-Clause 20.1 followed by the Engineer's determination under Sub-Clause 3.5. The provisions of the old Sub-Clauses 2.5 and 20.1 were different (and equivalent provisions in the Silver Book) and the consequences of non-compliance with those provisions were potentially different (depending on the governing law).

These provisions have now changed. The process for both Employer and Contractor Claims is now set out in Clause 20 and is the same for both parties.

Some of the principles will be familiar to those used to operating Sub-Clause 20.1 in the 1999 editions – but users will immediately spot that what used to be covered in just over one page now extends to 4 ½ pages, so there is a lot more detail for the parties to absorb and comply with.

The process for dealing with claims for issues other than payment or time claims is short. If the claim is not agreed it goes to the Engineer/Employer's Representative for agreement/ determination under Sub-Clause 3.7 (Silver Book Sub-Clause 3.5) and a Notice to do so is given as soon as reasonably practicable.

There is a detailed process for dealing with time/money claims set out in Sub-Clause 20.2.

The usual provision requiring notification of the claim within 28 days has been retained – as has the provision stating that if the notice is not given in time the claim is lost. However, the harshness of that consequence has been alleviated by:

— The fact that the wording of this provision and of the extension of time Sub-Clause is the same as in the 1999 edition – so the English law decision in the *Obrascon* case that the Contractor has two chances to submit an extension of time claim will still apply (for our Law-Now on this case please click here);
— If the Engineer or – in the case of the Silver Book – the other party considers that the claim has been submitted out of time he/she must give notice of this within 14 days – and if that notice is not given the claim is deemed valid (although this can be challenged by the recipient of the claim);
— If the party making the claim disagrees with a decision by the Engineer or – in the case of the Silver Book – a notice from the other party that the claim is out of time, or considers that '*there are circumstances that justify its late submission*' it should still put in a detailed claim with justifications as to why that is the case.

Clarification has been included to set out what a 'fully detailed claim' means. It now requires the submission of more detail – but this is counter-balanced by the fact that the claimant now has 84 days rather than 42 days to submit it. There is also an additional condition precedent for a claimant to comply with in order for its claim to be preserved. If it fails to state the contractual or legal basis for its claim within this 84 day period the Engineer/Employer's Representative can notify it of this failure and the claim will lapse (subject to the claiming party's ability to seek to justify the late submission as noted above).

Under Sub-Clause 20.2.5, the Engineer/Employer's Representative is to proceed to agree or determine the claim pursuant to Sub-Clauses 3.5 or 3.7 after receiving a fully detailed claim. However, a fully detailed claim is much more than the statement as to the legal basis of the claim, and there would appear to be no trigger for an Engineer/Employer's Representative's decision if the statement as to the legal basis of the claim is provided but the fully detailed claim is not.

As noted, the Engineer/Employer's Representative proceeds to seek agreement in respect of the claim and failing that makes a determination in accordance with Sub-Clause 3.5/3.7. What used to be a couple of paragraphs in the 1999 editions is now 3 pages long.

Sub-Clause 3.5/3.7 now includes much more detail on processes and timeframes for reaching agreement on the claim (42 days unless otherwise agreed) and the process for recording agreement if reached. It also includes a 42 day period for the Engineer/Employer's Representative to make his/her determination if agreement is not reached. If a determination is not made in that time, the claim will be deemed to have been rejected and a dispute arisen. Further detail has also been included as to how the agreement or determination is to be given effect by the parties.

If a party is dissatisfied with the Engineer/Employer's Representative's determination then it must issue a Notice of Dissatisfaction (or 'NOD') within 28 days and can then proceed to dispute resolution under Clause 21. If however the aggrieved party fails to serve such NOD or issues it out of time, the Engineer/Employers Representative's determination will be deemed accepted and becomes final and binding. The party serving a NOD must also commence Dispute Avoidance and Adjudication Board proceedings within 42 days of the NOD, otherwise it will lapse and the Engineer/Employer's Representative's determination will become final and binding.

DAAB and arbitration proceedings

Aside from the new 42 day period within which Dispute Avoidance and Adjudication Board ('DAAB', the new name for the old Dispute Adjudication Board) proceedings are to be commenced after the service of an NOD, a number of other changes have been made to the DAAB and Arbitration provisions (now contained within a separate Clause 21).

A standing DAAB is now to apply in all three of the contracts. Previously a standing DAB was only stipulated in the Red Book, with ad-hoc DABs provided in the Yellow and Silver Books.

The DAAB has been given a new dispute avoidance role (hence the change in name) whereby it can provide 'informal assistance' to the parties. The Parties must both agree before the DAAB provides such assistance and any views or advice given by the DAAB is said not to bind it in formal DAAB proceedings arising subsequently. Natural justice issues may however arise in certain circumstances if a DAAB is seen to unquestionably adopt previous informal advice when deciding subsequent DAAB proceedings.

The DAAB Procedural Rules have been significantly expanded increasing from 2 to 7 pages in length. They also now contain a requirement for the DAAB to regularly meet with the Parties and/or visit the Site outside the context of any formal proceedings. Ordinarily, such meetings or Site visits are to be held at intervals of between 70 and 140 days. Critics will argue that this simply adds unnecessary further costs to the process.

Where a DAAB decision requires the payment of an amount by one Party to another, the DAAB is now empowered to require that the receiving party provide appropriate security for repayment of that amount in the event that the DAAB decision is reversed in arbitration proceedings.

The reference of a Dispute to the DAAB is now said to '*interrupt the running of any applicable statute of limitation or prescription period*'. It is unclear when, if at all, the running of such a period would recommence, given that a party is not permitted to commence arbitration immediately after a DAAB decision (i.e. it must first await the outcome of the 28 day Amicable Settlement period).

The equivalent of the old Clause 20.7 has been amended to make clear that DAAB decisions which have not become final and binding may nonetheless be enforced by separate arbitration proceedings. The amendments broadly follow the drafting proposed in a FIDIC Guidance Memorandum for users of the 1999 Conditions of Contract issued on 1 April 2013 noting that a substantial number of arbitral tribunals had found the position under the First Edition contracts to be unclear in this regard. A well known example of the effect of this uncertainty is the *Persero* litigation in Singapore (click here for our Law-Now on the final Court of Appeal decision in that litigation).

The arbitration clause has been amended to provide for '*one or three arbitrators*' appointed in accordance with the ICC Rules, whereas previously three arbitrators had been stipulated. There is no corresponding entry in the Contract Data for the Parties to identify whether one or three arbitrators are required. The intention appears to be that the ICC Court will decide the number of arbitrators to be appointed. This may have been thought necessary to avoid jurisdictional issues which can arise where the ICC Expedited Procedure applies, which requires the appointment of a sole arbitrator even where an arbitration clause stipulates three arbitrators. The Expedited Procedure is relatively new (having only been applicable from March this year), but challenges to similar procedures under other rules have led to inconsistent results (with at least one being upheld in China, and one being rejected in Singapore).

CMS Map

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