



Fenwick Elliott

**FIDIC: AN OVERVIEW  
THE LATEST DEVELOPMENTS, COMPARISONS, CLAIMS AND FORCE MAJEURE**

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**Introduction**

- 1 The purpose of this paper is twofold. First to provide a brief overview of the history and development of the FIDIC form; and second to discuss the different ways the employer and contractor are treated when it comes to making claims. This second section includes a brief discussion about the different approaches under the civil codes and common law jurisdictions. This leads to a short comment at the end about the treatment of force majeure.
- 2 Accordingly this paper is set out in the following sections:
  - (i) The FIDIC form: a brief history;
  - (ii) The new FIDIC form 1999;
  - (iii) The MDB version of the New Red Book May 2006;
  - (iv) The future the new FIDIC DBO contract September 2007;
  - (v) Making a claim under the FIDIC form the employer;
  - (vi) Making a claim under the FIDIC form - the Contractor;
  - (vii) Force majeure the FIDIC form and NEC3 compared

## The FIDIC form: a brief history

- 3 The Fédération Internationale des Ingénieurs-Conseils (“FIDIC”) organisation was founded in 1913 by France, Belgium and Switzerland. The UK did not join until 1949. The first edition of the *Conditions of Contract (International) for Works of Civil Engineering Construction* was published in August 1957 having been prepared on behalf of FIDIC and the Fédération Internationale des Bâtiment et des Travaux Publics (FIBTP).<sup>1</sup>
- 4 The form of the early FIDIC contracts followed closely the fourth edition of the ICE Conditions of contract. In fact so closely did the FIDIC form mirror its English counterpart that Ian Duncan Wallace said:

*as a general comment, it is difficult to escape the conclusion that at least one primary object in preparing the present international contract was to depart as little as humanly possible from the English conditions.*<sup>2</sup>
- 5 One difficulty with the first FIDIC contracts was that they were based on the detailed design being provided to the contractor by the employer or his engineer. It was therefore best suited for civil engineering and infrastructure projects such as roads, bridges, dams, tunnels and water and sewage facilities. It was not so suited for contracts where major items of plant were manufactured away from site. This led to the first edition of the “Yellow Book” being produced in 1963 by FIDIC for mechanical and electrical works. This had an emphasis on testing and commissioning and was more suitable for the manufacture and installation of plant. The second edition was published in 1980.
- 6 Both the Red and Yellow Books were revised by FIDIC and new editions published in 1987. A key feature of the 4<sup>th</sup> edition of the Red Book was the introduction of an express term which required the engineer to act impartially when giving a decision or taking any action which might affect the rights and obligations of the parties, whereas the previous editions had assumed this implicitly. Although this talk concentrates on the new FIDIC forms, it should be remembered that the FIDIC 4<sup>th</sup> edition (“The Old Red Book”) remains the contract of choice throughout much of the Middle East, particularly the UAE.
- 7 In 1995 a further contract was published (known as the Orange Book). This was for use on projects procured on a design and build or turnkey basis, dispensing with the engineer entirely and providing for an “Employer’s Representative” who, when determining value, costs or extensions of times had to: *“determine the matter fairly, reasonably and in accordance with the Contract”*.
- 8 Consequently the need to submit matters to the engineer for his “Decision” prior to an ability to pursue a dispute, was eliminated. In its place an Independent Dispute Adjudication Board was introduced consisting of either one or three members appointed jointly by the employer and the contractor at the commencement of the Contract, with the cost being shared by the parties. This provision mirrored a World Bank amendment to the FIDIC Red Book.

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<sup>1</sup> Gradually further sponsors were added including the International Federation of Asian and West Pacific Contractors Associations the Associated General Contractors of America, and the Inter-American Federation of the construction industry.

<sup>2</sup> I.N. Duncan Wallace QC, The International Civil Engineering Contract, 1974.

- 9 A Supplement to the Red and Yellow Books was published in November 1996 which provided all users with the ability to incorporate alternative arrangements comprising an option for a Dispute Adjudication Board to go with modelled terms of appointment and procedural rules, and an option for payment on a lump sum basis rather than by reference to bills of quantities.

#### **The New Fidic Forms - 1999**

- 10 In 1994 FIDIC established a task force to update both the Red and the Yellow Books in the light of developments in the international construction industry, including the development of the Orange Book. The key considerations included:
- (i) The role of the engineer and, in particular, the requirement to act impartially in the circumstances of being employed and paid by the employer;
  - (ii) The desirability for the standardisation of within the FIDIC forms;
  - (iii) The simplification of the FIDIC forms in light of the fact that the FIDIC conditions were issued in English but in very many instances were being utilised by those whose language background was other than in English; and
  - (iv) That the new books would be suitable for use in both common law and civil law jurisdictions.
- 11 This led to the publication of four new contracts in 1999:
- (i) Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: The Construction Contract (the new Red Book);
  - (ii) Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the Contractor The Plant and Design/Build Contract (the new Yellow Book);
  - (iii) Conditions of Contract for EPC/Turnkey Projects: the EPC Turnkey Contract (the Silver Book);
  - (iv) A short form of contract (the Green Book).
- 12 In keeping with the desire for standardisation, each of the new books includes General Conditions, together with guidance for the preparation of the Particular Conditions, and a Letter of Tender, Contract Agreement and Dispute Adjudication Agreements. Whilst the Red Book refers to works designed by the employer, it is appropriate for use where the works include some contractor-designed works whether civil, mechanical, electrical or construction work.

#### *The content of the new FIDIC forms*

- 13 The new FIDIC form has 20 clauses which are perhaps best viewed as chapters covering the key project topics. I propose to consider some of the more important ones.

- 14 Clause 2 addresses the role of the Employer. There are two particularly interesting sub-clauses. First sub-clause 2.4 requires the Employer following request from the Contractor to submit:

*"reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the contract price punctually"; and*

*"Before the Employer makes any material change to his financial arrangements, the Employer shall give notice to the Contractor with detailed particulars."*

- 15 If the Employer fails to provide this evidence, the Contractor can suspend work, *"or reduce the rate of work"*, unless or until the Contractor actually receives the reasonable evidence. This was an entirely new provision to the 1999 FIDIC form and provides a mechanism whereby the Contractor can obtain confirmation that sufficient funding arrangements are in place to enable him to be paid, including if there is a significant change in the size of the project during construction.

- 16 Second, as will be discussed later on, in another new development, sub-clause 2.5 requires the Employer to give notice and particulars to a Contractor:

*"if the Employer considers himself to be entitled to any payment under any clause of these conditions or otherwise in connection with the Contract."*

- 17 Clause 3 deals with the position of the Engineer. There was one significant change from the 1987 edition. The express reference in the 1987 edition to the Engineer's impartiality has gone. Unless otherwise stated:

*"Whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer."*

- 18 Now, the conditions provide that the Engineer shall proceed in accordance with sub-clause 3.5 to agree or determine any matter:

*"... the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances."*

- 19 Clause 4 is by far the longest sub-clause and covers the Contractor's general obligations including the requirement that in respect of Contractor-designed works<sup>3</sup>:

*"it shall, when the works are completed, be fit for such purposes for which the part is intended as are specified in the Contract."*

- 20 This is an absolute duty.

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<sup>3</sup> Obviously, the reference to design changes throughout the various FIDIC forms.

21 Sub-clause 4.2 specifies that the Contractor shall provide a Performance Security<sup>4</sup> where the amount has been specified in the Appendix to Tender, and the sub-clause continues with provisions for extending the security. Some protection is afforded to the Contractor as the sub-clause requires the Employer to provide an indemnity to the Contractor against damage, loss and expense resulting from a claim under the performance security:

*" to the extent to which the Employer was not entitled to make the claim".*

22 An Employer should decide upon the form of the performance security during the finalisation of tender documentation. Whilst the Old Red Book favoured Bonds which were in conditional terms, payable upon default, there has been a general trend towards the use of first or on-demand bonds.<sup>5</sup> This is reflected in the 1999 form where the performance guarantees are in an on-demand guarantee form, which are payable upon the submission of identified documentation by the beneficiary. It is still necessary to state in what respect the Contractor is in breach of his obligations.<sup>6</sup> In keeping with the intentions of FIDIC to achieve a degree of uniformity and hence clarity, the securities derive from the Uniform Rules of the International Chamber of Commerce.<sup>7</sup>

23 Clause 4.21 provides details of the information required to be inserted by the Contractor in the Progress Reports. The provision of this report is a condition of payment. Under clause 14.3, payment will only be made within 28 days of receipt of the application for payment and the supporting documents, one of which is the Progress Report.

24 Whilst the importance of ensuring that the progress reports are accurate might seem obvious, His Honour Judge Wilcox, in a recent case<sup>8</sup> involving a construction manager, highlighted some of the potential difficulties where that reporting is not accurate.

25 Under the terms of the particular contract, the construction manager was described as being the only person on the project with access to all of the information and the various programmes. He was the only available person who could make an accurate report to the Client at any one time, of both the current status of the Project and the likely effects both on timing and on costs. He was at "*the centre of the information hub*" of the Project.

26 It is only with knowledge of the exact status of the Project on a regular basis that the construction manager can deal with problems that have arisen, and therefore anticipate potential problems that may arise, and make provisions to deal with these work fronts. That is not dissimilar from the status of the Contractor under FIDIC conditions.

27 An Employer will need accurate information of the likely completion date, and the costs, because this would affect his pre-commencement preparation and financing costs. Any change to the likely completion date would give an Employer the chance to adjust its operational dates. Judge Wilcox concluded:

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<sup>4</sup> The FIDIC Form has a number of sample forms of security.

<sup>5</sup> See Lord Denning in *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Umma Bank* (1978) QB 159.

<sup>6</sup> Under some jurisdictions, a declaration made in bad faith may be capable of challenge.

<sup>7</sup> Uniform Rules for Demand Guarantees (URDG, No. 458); Uniform Rules for Contract Bonds (URCB No. 524).

<sup>8</sup> *Great Eastern Hotel Co Ltd v John Laing Construction Ltd* 99 Con LR 45

*"Where a completion date was subject to change the competent Construction Manager had a clear obligation to accurately report any change from the original Projected completion date, and the effect on costs."*

28 Sub-clause 4.21(h) confirms that the Contractor has a similar obligation here.

29 Clauses 6 and 7 deal with personnel, plant, materials and workmanship. Clause 6 has particular importance in relation to staff. The Contractor must not only engage labour and staff, but must also make appropriate welfare arrangements for them.

30 Clause 8 deals with Commencement, Delay and Suspension. Sub-clause 8.3 sets out the manner in which the Contractor should provide programmes showing how he proposes to execute the works. For example the programme must be supported by a report describing the methods which the Contractor is to adopt. The extension of time provisions are clear. By sub-clause 8.4:

*" the Contractor shall be entitled ... to an extension of the Time for Completion if and to the extent that completion ... is or will be delayed by any of the following causes"*

31 Sub-clause 8.7 deals with delay or liquidated damages. To be able to levy such damages, the Employer must make an application (in effect a claim) in accordance with sub-clause 2.5.

32 Clause 12 deals with Measurement and Evaluation. Measurement is a central feature of Clause 12 and is the basis ultimately upon which payment to the Contractor is calculated. Sometimes called a "measure and value" type of contract, the arrangements in place in the FIDIC form proceed on the basis that the Works are to be measured by the Engineer, and those quantities and measured amounts of work are then to be paid for alternatively at the rates and prices in the Contract, or else on the basis of adjusted rates, or entirely new rates (if there is no basis for using or altering Contract rates for the work).

33 Clause 13 addresses variations and incorporates adjustments for changes in legislation and in costs. However, provided the Contractor notifies an inability to obtain the required goods, a variation is not binding. Equally it is not binding in the case of contractor design if the proposed variation would have an adverse impact on safety, suitability or the achievement of performance criteria as specified.

34 The amount the Contractor is going to be paid, and the timing of that payment, is of fundamental importance to both Contractor and Employer alike. The manner in which the payment is made is traditionally dependent on the precise wording of the contract.<sup>9</sup> Under the code of Hammurabi<sup>10</sup> the rule was as follows:

*"If a builder build a house for some one and complete it, he shall give him a fee of two shekels in money for each sar of surface."*

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<sup>9</sup> Although in the UK, section 109 of the 1998 Housing Grants Construction and Regeneration Act now gives most contractors the right to payment by instalments.

<sup>10</sup> King Hammurabi ruled the kingdom of Babylon from 1792 to 1750 BC.

- 35 Thus the amount to be paid was clear and, given that the punishment for violating most of the provisions of the code was death, it might be presumed that most builders were paid, provided the house was constructed properly. However, unlike the FIDIC form, the rule does not say when the payment has to be made.
- 36 Clauses 15 and 16 deal with termination by the Employer and suspension and termination by the Contractor, whilst clause 17 deals with risk and responsibility. This includes at sub-clause 17.6 the exclusion of the liability of both Contractor and Employer:
- “for loss of use of any works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other party in connection with the contract”.*
- 37 Clause 17 includes a cap on the liability of the Contractor to the Employer, something which was again new to the 1999 FIDIC form.
- 38 Clause 19 deals with Force Majeure. As is discussed below, whilst most civil codes make provision for force majeure, at common law, force majeure is not a term of art and no provision will be implied in the absence of specific contractual provisions.
- 39 Finally clause 20 deals with claims, and again this is something I deal with below.

#### The MDB version of the new Red Book

- 40 The MDB version of the FIDIC Red Book evolved out of the fact that the world’s banking community tended to adopt the FIDIC Conditions as part of their standard bidding documents. However when doing this, the banks also introduced their own amendments. There were inevitable differences between these amendments and the banks realised there would be a benefit in having their own uniform conditions. This has resulted in a “harmonised edition” which was the product of preparation by the FIDIC Contracts Committee and by a group of participating banks.<sup>11</sup> The first harmonised edition of the 1999 Conditions was published in May 2005, only to be amended in March 2006.<sup>12</sup> The clear aim is that all MDB-funded contracts will incorporate these amendments.
- 41 There are a number of differences between the FIDIC form and the MDB version. Perhaps the most notable (or indeed controversial) changes are those to be found in clause 3. These include the following additional clause:

*“The Engineer shall obtain the specific approval of the Employer before taking action under the following sub-clauses of these conditions:*

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<sup>11</sup> The banks involved were the African Development Bank, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Bank for Reconstruction and Development (the World Bank), Islamic Bank for Development, Nordic Development Fund.

<sup>12</sup>There is a useful supplement prepared by FIDIC to the MDB version which acts as a user’s guide. This includes a section on Changes to the Construction Contract General Conditions.

- (a) *Sub-clause 4.12: Agreeing or determining an extension of time and/or additional costs.*
- (b) *Sub-clause 13.1: Instructing a Variation; except: (i) in an emergency; or (ii) if such a variation would increase the Accepted Contract Amount by less than the percentage specified in the Contract Data.*
- (c) *Sub-clause 13.3: Approving a proposal for variation submitted by the contractor in accordance with Sub-clauses 13.1 or 13.2.*
- (d) *Sub-clause 13.4: Specifying the amount payable in each of the applicable currencies."*

42 Further, whilst under the 1999 edition:

*"The Employer undertakes not to impose further constraints on the Engineer's Authority, except as agreed with the Contractor."*

Under the MDB version, this is replaced with:

*"The Employer shall promptly inform the Contractor of any change to the authority attributed to the Engineer."*

43 Perhaps the first of these changes is the most controversial. Under the 1999 edition, the Employer actually undertook not to change the basis of the Engineer's authority without the agreement of the Contractor. This has been changed to give the Employer the right to make whatever changes it likes to the basis of the Engineer's authority. The only restriction is that it must inform the Contractor of these changes. There is no longer any requirement that the Contractor agrees to these changes.

44 The view of contractors is that this is a retrograde step permitting unilateral alteration of the engineer's authority, and thus potentially impacting upon the balance of risk.<sup>13</sup>

45 There are a number of other features within the MDB version.<sup>14</sup> These include apparently simple changes such as that from "reasonable profit" to "profit". The reason for this is that by sub-clause 1.2(e) that profit is fixed at 5% unless otherwise agreed.

46 In sub-clause 2.4, the four circumstances under which an Employer is entitled to make a call under the performance security have been deleted. There is no equivalent replacement and now the Employer is able to make a call in respect of amounts to which it is entitled under contract. Arguably, this represents an extension of the Employer's rights, although it might be felt that the reference to the ICC Uniform Rules provides an adequate safeguard for the employer, the financing institutions and the Contractor.

47 The amendments to sub-clause 4.12 proved to be controversial. Sub-clause 4.12 provides that a Contractor may be entitled to an extension of time in respect of unforeseeable physical conditions. Under the May 2005 version of the MDB harmonised edition, sub-clause 1.1.6.8 defined unforeseeable as meaning:

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<sup>13</sup> Richard Appuhn and Eric Eggink, The Contractor's View on the MDB Harmonised Version of the new Red Book (2006) ICLR 4.

<sup>14</sup> Not all the differences are set out in this paper.

*"Not reasonably foreseeable and against which adequate preventative precautions could not be taken by an experienced contractor by the date for the submission of the Tender."*

- 48 The European International Contractors (EIC) group criticised the addition, referring to it as a "*twist of Catch-22 proportions*",<sup>15</sup> and the editors of the International Construction Law Review indicated that the change calls for "*rational justification and explanation of its practical application*".<sup>16</sup>
- 49 It could be argued that the addition to the clause serves to add clarity to the original definition, no more. For example, in demonstrating that the physical conditions would have been unforeseeable to an experienced contractor, the Contractor would already have to show that there were no adequate precautions which could have reasonably been taken. However, the EIC raised three questions of the amendment:
- (i) Is it the intention that contractors should make allowances for precautionary steps for unforeseeable events and circumstances?
  - (ii) Is it the intention of the MDB harmonised edition to shift the balance of risk under the contract for unforeseeable events to the contractor?
  - (iii) How can you take reasonable precautions against an event which is not reasonably foreseeable?
- 50 The answer to the first question does appear to be yes, which may well have had an impact on the tender returns. If the answer to the second question is yes then this would suggest that the contract drafters are moving towards the risk profile adopted under the Silver Book. A simple comparison between the two forms of wording seems to make it clear that this is not the intention behind the new clause.
- 51 It was the third question that demonstrated the real difficulty with the new wording and this may have been one factor that led to the revision being dropped. However, as there have been two versions, care should be taken to check which definition has been adopted.
- 52 The 10 particular locality sub-clauses, 6.12 - 6.22, form part of the MDB contract. These are likely to be reflected in local labour and health and safety legislation.
- 53 Under sub-clause 8.1, the project cannot commence until the Contract Agreement has been signed by both parties, the Contractor has reasonable proof that the Employer can fund the works and the Contractor has received any advanced payments it was entitled to.
- 54 However, the changes to sub-clause 12.3 are pro-Employer. Sub-clause 12.3 sets out circumstances when the Contractor can claim enhanced rates. In the MDB version, the rates shown in sub-paragraphs (a)(i) and (ii) (which can trigger the use of rates other than those specified in the Contract) have been increased from 10% and 0.01% to 25% and 0.25%

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<sup>15</sup> Richard Appuhn and Eric Eggink The Contractor's View on the MDB Harmonised Version of the New Red Book [2006] ICLR 4

<sup>16</sup> Introduction to Volume 23 of the ICLR, January 2006

respectively. This seems to be a pro-Employer change as the increase in the threshold amount is of no benefit to the Contractor.

- 55 Conversely, the threshold as to when any repayment of the advance payment (if any) must be made has been increased from 10% of the Accepted Contract Amount to 30%, a more Contractor-friendly change.
- 56 Some clauses in the MDB version are entirely new. One such is 15.6 which deals with corrupt or fraudulent practice. Sub-clause 15.6 states that:

*"If the Employer determines that the Contractor has engaged in corrupt, fraudulent, collusive or coercive practices, in competing for or in executing the Contract, then the Employer may, after giving 14 days notice to the Contractor, terminate the Contractor's employment under the Contract and expel him from the Site, and the provisions of Clause 15 shall apply as if such expulsion had been made under Sub-Clause 15.2 [Termination by Employer].*

*Should any employee of the Contractor be determined to have engaged in corrupt, fraudulent or coercive practice during the execution of the work then that employee shall be removed in accordance with Sub-Clause 6.9 [Contractor's Personnel].*

*For the purposes of this Sub-Clause:*

*See Notes for definitions of corrupt, fraudulent, collusive or coercive practices for each Participating Bank."*

- 57 The sub-clause will be slightly different for each Participating Bank as each has its own definition of corrupt, fraudulent, collusive or coercive practice. The sub-clause has some similarities with sub-paragraph (f) of sub-clause 15.6; however, unlike sub-clause 15.1(f), here 14 days' notice must be given. This new sub-clause is also more widely drawn, for example making it clear that the tendering process must be fair as it refers to both "competing for" and "executing" the Works. In the case of *Cameroon Airlines v Trasnet Ltd*,<sup>17</sup> an arbitration tribunal ruled that Trasnet had to repay commission monies it had added to its tender sum the commission monies being money paid as bribes to officials.
- 58 This extension to clause 15 is entirely in keeping with the global trend in seeking to clamp down on this type of behaviour. For example, in the UK, the Anti-Terrorism, Crime and Security Act 2001<sup>18</sup> provides that a UK citizen can be guilty of an offence in the UK if he is involved in offering or receiving bribes abroad, provided that what he has done would amount to an offence in the UK.
- 59 Under sub-clause 17.6, the sub-clause has been extended to make it absolutely clear that certain items, for example delay damages, are not covered by the limitation of liability provisions.

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<sup>17</sup> [2004] EWHC 1829

<sup>18</sup> Thereby adopting the 1999 Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

## The future - the DBO form

- 60 On 13 September 2007, in Singapore, FIDIC launched their new DBO<sup>19</sup> form of contract. The FIDIC DBO form has arisen out of recognition that for concession contracts in the transport and water/waste sectors, the market typically uses the existing FIDIC Yellow Book with operations and maintenance obligations tacked on. FIDIC has recognised that this is unsatisfactory, and in a similar way some of the contractual developments described above, in order to achieve uniformity and therefore a higher degree of certainty, the new form has been prepared to meet the demand.
- 61 The DBO approach to contracting combines design, construction, and long-term operation and maintenance of a facility into one single contract awarded to a single contractor (who will usually be a joint venture or consortium containing all the skills required by the particular DBO arrangement).
- 62 There are two options:
- (i) D-B-O: "green-field" scenario;
  - (ii) D-B-O: "brown-field" scenario
- 63 FIDIC has chosen to produce a document based on the DBO green-field scenario with a Guide containing guidelines on the changes necessary to cover a brown-field arrangement. The base scenario is the "green-field" scenario plus a 20 year operation period.
- 64 The new contract will mirror the existing forms in that again it will only have 20 clauses. However, the following new definitions have been introduced in the contract:
- (i) Auditing Body;
  - (ii) Commissioning Certificate
  - (iii) Maintenance Retention Fund & Asset Replacement Fund;
  - (iv) Exceptional Risk
- 65 Three key factors and potential advantages in the new form are:
- (i) Time - possibilities to overlap some design and build activities;
  - (ii) Cost - cost restraints, commitments, and other risks carried by Contractor; and
  - (iii) Quality - as the Contractor is responsible for 20 years' operation, it is in his interest to design and build quality plant with low operation and maintenance costs.
- 66 Given the increasing sophistication of the industry, it seems likely that this new DBO form will not be the last new FIDIC form.

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<sup>19</sup> DBO meaning design-build-operate

## Making a claim under the FIDIC Form - the employer

67 The ability to make claims under any contract is always an area that requires careful consideration. Under the FIDIC form, it is noticeable that the Employer and Contractor are treated very differently.

### *Introduction - the claims mechanism*

68 Sub-clause 2.5 of the FIDIC Conditions of Contract for Construction<sup>20</sup> provides that:

*If the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the contractor. However, notice is not required for payments due under Sub-Clause 4.19 [Electricity, Water and Gas], under Sub-Clause 4.20 [Employer's Equipment and Free-Issue Material], or for other services requested by the Contractor.*

*The notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.*

*The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer considers himself to be entitled in connection with the Contract. The Engineer shall then proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period].*

*This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.*

69 The final paragraph of the conditions for EPC/Turnkey projects reads slightly differently as follows:

*The Employer may deduct this amount from any moneys due, or to become due, to the Contractor. The Employer shall only be entitled to set-off against or make any deduction from an amount due to the Contractor, or to otherwise claim against the Contractor, in accordance with this Sub-Clause or with sub-paragraph (a) and/or (b) or Sub-Clause 14.6 [interim payments].*

70 The key features of this sub-clause are:

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<sup>20</sup> The same wording is used for the Plant and Design-Build Conditions.

- If the Employer considers himself entitled to either any payment or an extension of the Defects Notification period under the Contract, the Employer or Engineer shall give notice and particulars to the Contractor.
- The notice relating to payment should be given as soon as practicable after the Employer has become aware of the event or circumstance which gives rise to the claim.
- Any notice relating to the extension of the Defects Notification Period should be given before the expiry of that period.
- The Employer must also provide substantiation including the basis of the claim and details of the relief sought.
- Once notice has been given, the Engineer shall make a determination in accordance with sub-clause 3.5.
- Any amount payable under sub-clause 2.5 may be included as a deduction in the Contract Price and Payment Certificates.
- The Employer cannot make any deduction by way of set-off or any other claim unless it is in accordance with the Engineer's determination.
- Notice is not required for payments due to the Employer for services under sub-clause 14.19 or equipment under sub-clause 4.20.

71 Sub-clause 2.5 is a new "Contractor-friendly" clause. I say this because it is designed to prevent an Employer from summarily withholding payment or unilaterally extending the Defects Notification Period. One particularly important feature can be found in the final paragraph which specifically confirms that the Employer no longer has a general right of set-off. The Employer can only set-off sums once the Engineer has agreed or certified any amount owing to the Contractor following a claim.

72 The Employer should remember that in accordance with sub-clause 14.7, he must pay any amount certified, even if he disagrees with the Engineer's decision. By sub-clause 14.8, were the Dispute Adjudication Board to decide that the Employer had not paid the amount due, the Contractor would be entitled to finance charges.

73 Sub-clause 2.5 imposes a specific notice procedure on any Employer who considers that it has any claims against the Contractor. Unless the Employer follows the procedure laid down by this sub-clause, he cannot withhold or otherwise deduct any sums due for payment to the Contractor. The notice must be in writing and delivered in accordance with the requirements of sub-clause 1.3. It is unclear as to whether the particulars are required to be provided at the same time as the notice is served. The sub-clause does not require that the particulars are provided at the same time as no time limit or frame is imposed on either.

74 The Employer must give notice "as soon as practicable" of him becoming aware of a situation which might entitle him to payment. Therefore unlike sub-clause 20.1, where a Contractor has 28 days to give notice, there is no strict time limit within which an Employer must make a

claim, although any notice relating to the extension of the Defects Notification Period must of course be made before the current end of that period. In addition it is possible that the Applicable Law might just impose some kind of limit.

- 75 It might have been thought that one option would have been to suggest that the Employer should be bound by the same 28-day limit as the Contractor. Instead, sub-clause 2.5 provides a simpler claims mechanism with no time bar. However, the rationale for the difference in treatment is presumably that in the majority of, if not all, situations, the Contractor will be (or should be) in a better position to know what is happening on site and so will be much better placed than an Employer to know if a claims situation is likely to arise.
- 76 The particulars that the Employer must provide are details of the clause (or basis) under which the claim is made, together with details of the money or time relief sought. Details of any notices served by the Employer are also required by sub-clause 4.21(f) to form part of the regular progress reports.
- 77 Under sub-clause 3.5 of the Construction and Design-Build Conditions, the Engineer must first try and agree the claim. Under the EPC/Turnkey Conditions, the primary onus to agree or determine any claims lies with the Employer. If either party is not satisfied with the determination made by the Engineer under sub-clause 3.5, then the resulting dispute could be referred to the Dispute Adjudication Board under clause 20. An Employer would therefore be advised not to deduct the amount to which he is believed to be entitled, before any such determination of the Dispute Adjudication Board, as to do so would leave the Employer liable to a claim from the Contractor.

#### **What does sub-clause 2.5 cover?**

- 78 There are a number of different clauses throughout the Contract which provide the Employer with a right to claim payment from the Contractor. These include:

Sub-clause 4.19	Electricity, water and gas
Sub-clause 4.20	Employer's equipment and free-issue material
Sub-clause 7.5	Rejection
Sub-clause 7.6	Remedial work
Sub-clause 8.1	Commencement of works
Sub-clause 8.6	Rate of progress
Sub-clause 8.7	Delay damages
Sub-clause 9.4	Failure to pass tests on completion
Sub-clause 10.2	Taking over of parts of the works
Sub-clause 11.3	Extension of defects notification period

Sub-clause 11.4	Failure to remedy defects
Sub-clause 13.7	Adjustments for changes in legislation
Sub-clause 15.3 -	Valuation at date of termination
Sub-clause 15.4 -	Payment after termination
Sub-clause 17.1 -	Indemnities
Sub-clause 18.1 -	General requirements for insurances
Sub-clause 18.2 -	Insurance for works and contractor's equipment

### *MDB harmonised edition*

79 There are, of course, two different versions of sub-clause 2.5. There are some slight differences between the FIDIC Standard Form and the version produced by the Multilateral Development Banks known as the MDB harmonised edition. Some of these differences are minor. For example, the reference to Free-Issue Material has been changed to Free-Issue Materials.

80 However, a more significant change has been introduced to the sentence which details when the Employer must give notice. It now reads as follows:

*The notice shall be given as soon as practicable and no longer than 28 days after the Employer became aware, or should have become aware, of the event or circumstances giving rise to the claim. A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period.*

81 The first impression given by the addition of the underlined words is that they serve to tighten up the period in which the Employer must notify any claim an impression reinforced by the apparent 28-day time limit. However, the new words introduce an additional subjective reasonableness test. Whereas before, all that mattered was when the Employer actually became aware of the circumstances giving rise to a claim, now some consideration needs to be given to when the Employer should have realised that a claims situation had arisen.

82 However, in reality, save for extreme cases, little has changed. There is still no time limit to serve as a condition precedent to deprive the Employer of the opportunity to make a claim.

### **Making a claim under the FIDIC form - the contractor**

#### *Introduction - the claims mechanism*

83 For the Contractor, it is a different story. Sub-clause 20.1<sup>21</sup> states that:

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<sup>21</sup> Clause 20.1 is identical in the Red, Yellow and Silver Books, except that in the Silver Book, the Employer performs the role of the Engineer.

*"If the Contractor considers himself to be entitled to any extension to the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.*

*"If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply."*

84 The NEC3 contains similar provisions:

*"The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if*

*The Contractor believes that the event is a compensation event and*

*The Project Manager has not notified the event to the Contractor.*

*If the Contractor does not notify of a compensation event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not."*

85 That said, the regime is very different between FIDIC and NEC. Under FIDIC, the duty is to notify of an entitlement to additional time or money; under NEC3 there is a duty to notify of an event.

86 The key features of sub-clause 20.1 are that:

- The Contractor must give notice to the Engineer of time or money claims, as soon as practicable and not later than 28 days after the date on which the Contractor became aware, or should have become aware, of the relevant event or circumstance.
- Any claim to time or money will be lost if there is no notice within the specified time limit.
- Supporting particulars should be served by the Contractor and the Contractor should also maintain such contemporary records as may be needed to substantiate claims.
- The Contractor should submit a fully particularised claim after 42 days.
- The Engineer is to respond, in principle at least, within 42 days.
- The claim shall be an interim claim. Further interim updated claims are to be submitted monthly. A final claim is to be submitted, unless agreed otherwise, within 28 days of the end of the claim event.

- Payment Certificates should reflect any sums acknowledged in respect of substantiated claims.
- Contrary to the old FIDIC Books,<sup>22</sup> the notice to be served under sub-clause 20.1 relates to claims for an extension of time as well as claims for additional payment.

87 The 28-day deadline does not necessarily start on the date of the claim event itself but on the date the Contractor objectively should have become aware of the event. Whilst it is relatively easy to identify the claim event in the case of a single event such as the issuing of engineers' instructions or the receipt of borehole tests indicating unforeseen ground conditions, when, however, the claim event is a continuous event, such as unforeseeable weather over a certain period of time, it can become extremely difficult to pinpoint the exact start of the 28-day period. The Contractor also needs to remember that where the effects of a particular event are ongoing then, rather unusually, the Contractor is specifically required to continue submitting notices at monthly intervals.

88 As outlined above, it can immediately be seen that a different set of rules apply to the Contractor than to the Employer.

*Is sub-clause 20.1 a condition precedent?*

89 Yes. Sub-clause 20.1 is a condition precedent and potentially provides the Employer with a complete defence to any claim for time or money by the Contractor not started within the required time frame.

90 Generally, in England and Wales, the courts will take the view that timescales in construction contracts are directory rather than mandatory, so that the Contractor should not lose its right to bring its claim if such claim is not brought within the stipulated timescale.<sup>23</sup> In the case of *Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv*,<sup>24</sup> however, the House of Lords held that a notice provision should be construed as a condition precedent, if:

- (i) it states the precise time within which the notice is to be served, and
- (ii) it makes plain by express language that unless the notice is served within that time the party making the claim will lose its rights under the clause.

91 Sub-clause 20.1 plainly fulfils both these conditions as:

- (i) the notice of claim must be served "as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance", and
- (ii) "If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional

<sup>22</sup> In the Orange Book (1995), sub-clause 20.1 only sets a notification deadline in respect of claims for additional payment. However, similar provisions in respect of time-related claims can be found at sub-clause 8.6.

<sup>23</sup> *Temloc v Errill Properties* (1987) 39 BLR 30, (CA) per Croom-Johnson LJ

<sup>24</sup> [1978] 2 Lloyd's Rep. 113, (HL) per Lord Salmon.

payment, and the Employer shall be discharged from all liability in connection with the claim."

- 92 Sub-clause 20.1 was thus clearly drafted as a condition precedent. However, there is always a possibility that a court/arbitral tribunal might decline to construe it as a condition precedent, having regard to the particular circumstances of the matter before it and the impact of the applicable law.

*Are there any ways round sub-clause 20.1?*

- 93 Quite possibly not, at least in England and Wales.

*Prevention*

- 94 The concept of preventive acts is based on the universally accepted provision that one is not entitled to benefit from one's own wrongs. It thus operates to defeat claims for the employer's claims for liquidated damages if, by its own acts or omissions, the employer has prevented the main contractor from completing its work by the date for completion, and thus rendered "time at large".
- 95 To protect its right to claim liquidated damages and to avoid the time for completion to be declared "at large", the employer will therefore insert provisions into the contract enabling the contractor to seek an extension of the time for completion in case the employer is responsible for the delay incurred by the contractor.
- 96 The issue with conditions precedent to the contractor's right to claim for an extension of time, such as sub-clause 20.1, is that if the contractor fails to comply with such conditions, then its right to claim for additional time will be forfeit, and thus the question arises as to whether the employer will then still be able to claim liquidated damages (and arguably rely on its own wrong).
- 97 This issue was considered in 1999 in the case of *Gaymark Investments Pty Ltd v Walter Construction Group Ltd* in the Northern Territory of Australia,<sup>25</sup> where the court found that the "prevention principle" took precedence over the notification provisions, notwithstanding the fact that such provisions had clearly been drafted as a condition precedent. The employer was accordingly not allowed to claim for liquidated damages and the contractor not deprived of its right to claim for an extension of time in spite of its failure to serve a valid notice.
- 98 This judgment gave rise to a long debate as to whether the same principles should be applied in England and Wales and other common law jurisdiction. Whilst some commentators argued that a similar approach might be adopted,<sup>26</sup> others strongly rejected the reasoning of the court in *Gaymark*.<sup>27</sup>

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<sup>25</sup> (1999) 18 BCL 449, (2005) 21 *Construction Law Journal* 71.

<sup>26</sup> Keating on Building Contracts (8th edition 2006) at paragraph 9-025.

<sup>27</sup> Professor Ian Duncan-Wallace "Prevention and Liquidated Damages: a Theory Too Far" (2002) 18 *Building and Construction Law*, 82.

99 One author submitted that the better approach for resolving the tension between “time bar” clauses and the “prevention principle” would be to accept first that the “prevention principle” is a rule of construction (as opposed to a rule of law) and can therefore be excluded by contractual provisions such as sub-clause 20.1, and second that the “prevention principle” does not apply because the major cause for the contractor’s loss in the above circumstances is the contractor’s failure to operate the contractual machinery.<sup>28</sup>

100 This second option was clearly accepted in 2001 by the Inner House of the Court of Session of Scotland in the case of *City Inns Ltd v Shepherd’s Construction*,<sup>29</sup> in which Lord MacFadyen found that there was a causal connection between the contractor’s failure to comply with the notification provisions of the contract and its liability to pay a sum of money which bears no relation to the loss resulting to the employer from that breach of contract. Lord MacFadyen thus held that the liquidated damages remained payable by the contractor:

*“on the basis that it is a genuine pre-estimate of the loss suffered by the employer as a result of the delay in completion, and is not converted, by the fact that the contractor might have avoided that liability by taking certain steps which the contract obliged him to take, but failed to do so, into a penalty for failing to take those steps. The fact that the contractor is laid under an obligation to comply with clause 13.8.1 [obligation to notify], rather than merely given an option to do so, does not in my opinion deprive compliance with clause 13.8.1 of the character of a condition precedent to entitlement to an extension of time. Non-compliance with a condition precedent may in many situations result in a party to a contract losing a benefit which he would otherwise have gained or incurring a liability which he would otherwise have avoided. The benefit lost or the liability incurred may not be in any way commensurate with any loss inflicted on the other party by the failure to comply with the condition. But the law does not, on that account, regard the loss or liability as a penalty for the failure to comply with the condition (The ‘Vainqueur José’, per Mocatta J at 578, col. 2).”*

101 The crucial fact in this case was that, under the terms of the contract, but for its failure to serve a valid notice on time, the contractor would have been in a position to claim an extension of time and therefore defend the employer’s claim for liquidated damages. The fact that it failed to comply with this simple requirement may lead to very harsh consequences such as the employer being able to claim liquidated damages despite being responsible for the delay incurred by the contractor. However, the contractor only had itself to blame for losing the right to claim additional time.

102 Six years after Lord MacFadyen’s decision in *City Inns Ltd v Shepherd’s Construction*, the position of the English courts with regard to the effect of the “prevention principle” on notification clauses was also finally clarified in the judgment of the TCC in *Multiplex Construction v Honeywell Control Systems*,<sup>30</sup> where Mr Justice Jackson held that:

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<sup>28</sup> Hamish Lal, “The Rise and Rise of ‘Time-Bar’ Clauses: The ‘Real Issue’ for Construction Arbitrators” (2007) ICLR 118.

<sup>29</sup> Outer House, Court of Session, CA101/00.

<sup>30</sup> [2007] EWHC 447 (TCC)

*"Whatever may be the law of the Northern Territory of Australia, I have considerable doubt that Gaymark represents the law of England. Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent. If Gaymark is good law, then a contractor could disregard with impunity any provision making proper notice a condition precedent. At his option the contractor could set time at large."*<sup>31</sup>

- 103 The debate as to whether the decision of the court in *Gaymark* should also be followed by the courts in England and Wales is therefore now over. Equally importantly, Mr Justice Jackson said this about the rationale of the condition precedent:

*"Contractual terms requiring a contractor to give prompt notice of delay serve a valuable purpose; such notice enables matters to be investigated while they are still current. Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent."*

- 104 The condition precedent did not render time at large. A condition precedent which bars a right to an extension of time if not complied with is valid.

#### **Good faith**

- 105 Unlike England, many jurisdictions are governed by their own civil codes. Whilst these codes recognise contract autonomy and allow the parties to determine the terms and conditions of their contract, they will also insist that these conditions do not contravene any mandatory provision of the law or public policy. One such example is the concept of good faith. Many civil codes provide that a contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith. It is not always that easy to define what good faith might mean. The English courts have said this:

*"It is a principle of fundamental justice that if a promisor is himself the cause of the failure of performance, either of an obligation due to him or of a condition upon which his own liability depends, he cannot take advantage of the failure."*<sup>32</sup>

- 106 It is possible that the concept of good faith can help defeat the harsh consequences of clause 20.1. However, the concept of time bars is also accepted and upheld by the courts in several civil law jurisdictions, provided they appear to be reasonable under the circumstances. As you would expect, everything would depend on the circumstances of the case and the conduct of both parties. If a contractor is only a few days late in submitting its sub-clause 20.1 notice in respect of very substantial claims and the forfeiture of its contractual rights would result in serious financial difficulties, then one might reasonably be entitled to argue that it would be contrary to good faith for the employer to rely on clause 20.1. Similarly, if the employer has actual knowledge of the "event or circumstance giving rise to the claim", and/or suffers no

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<sup>31</sup> [2007] EWHC 447 (TCC) at para. 103.

<sup>32</sup> *CIA Borcad & Panona SA v George Wimpey & Co* [1980] 1 Lloyd Rep 598

substantial harm as a result of not receiving the contractor's notice on time, then, having regard to its implied obligation of good faith, the employer may not be able to rely on sub-clause 20.1 to defeat the contractor's claims.

107 In France there is the concept of "*abus de droit*" (misuse of a right). Under the Egyptian Civil Code, for example, "the exercise of a right is considered unlawful in the following cases:

- If the sole aim thereof is to harm another person;
- If the benefit it is desired to realize is out of proportion to the harm caused thereby to another person;
- If the benefit it is desired to realize is unlawful."<sup>33</sup>

108 Article 148 of the Egyptian Code further provides that "a contract must be performed in accordance with its contents and in compliance with the requirements of good faith".

109 However, in France, for example, where contractual time bars have been given effect by the Courts provided they appear to be reasonable under the circumstances.<sup>34</sup> Similarly, before Egyptian courts, an agreement to a contractual forfeiture of a right for the non-accomplishment of a certain action within a determined period of time might still be valid and binding.<sup>35</sup>

110 In practice, much will therefore depend on the circumstances of the case and the conduct of both parties. The contractual obligation to deliver timely notice of one's intention to claim additional time or money will normally be upheld, unless the particular circumstances of the case show that such conclusion would lead to a misuse of a right or a breach of the parties' good faith obligations.

111 If therefore a contractor is only a few days late in submitting its sub-clause 20.1 notice in respect of very substantial claims and the forfeiture of its contractual rights would result in serious financial difficulties, then one might reasonably be entitled to argue that it would be an *abus de droit* for the employer to rely on clause 20.1. Similarly, if the employer has actual knowledge of the "event or circumstance giving rise to the claim", and/or suffers no substantial harm as a result of not receiving the contractor's notice on time, then, having regard to its implied obligation of good faith, the employer may not be able to rely on sub-clause 20.1 to defeat the contractor's claims.

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<sup>33</sup> Article 5 of the Egyptian Civil Code. The prime author of the Egyptian civil code, Prof. Abdel-Razzak Al-Sanhuri had studied law in Lyon, France between 1921 and 1927, which might explain the influence of some of the concepts of the French Civil Code such as "*abus de droit*" on the Egyptian civil.

<sup>34</sup> FIDIC, *An Analysis of International Construction Contracts*, edited by Robert Knutson (2005), p.84

<sup>35</sup> See for example Article 750 of the Egyptian Civil Code on insurance contracts.

## Conclusion

- 112 Therefore, unless you are able to come to an agreement with the employer,<sup>36</sup> whatever the jurisdiction it is better to serve the notice in time. Compliance with the notice provisions is intended to be a condition precedent to recovery of time and/or money and, without notices, the employer has no liability to the contractor. Certainly parties should treat the sub-clause in this way.
- 113 Whilst there are fundamental differences in the approach adopted by common law and civil law systems in analysing time bar clauses and in deciding whether such clauses should be given effect, the contractor will always face a difficult battle in order to convince a judge or arbitral tribunal not to apply the clear words of the contract. Irrespective of the law applicable to that contract, the contractor will need to justify its failure to serve a timely notice and/or demonstrate that given the particular circumstances of the case, it would be unfair, inequitable or against mandatory principles of the law for its right to claim additional time and/or money to be forfeit.
- 114 To avoid having to put forward complex legal arguments, the prudent contractor should never assume that conflicts can be resolved informally, and instead always take care to comply with the timescales set out in sub-clause 20.1 and submit the required notice within the prescribed period of 28 days.
- 115 The rationale for the difference in treatment between the employer and contractor is that presumably in the majority of, if not all, situations, the contractor will be (or should be) in a better position to know what is happening on site and so will be much better placed to know if a claims situation is likely to arise than an employer. Nevertheless, sub-clause 2.5 is a clear step forward for the contractor from the 1987 Old Red Book edition as one reason for the introduction of the clause was, as noted above, to prevent an employer from unilaterally withholding payment.

## Force majeure the FIDIC form and NEC compared

- 116 In my brief discussion about the different ways in which the employer and contractor are treated when it comes to making claims, I mentioned the NEC3 contract and also the contrast between the civil and common law jurisdictions. Another area where both these points can be illustrated, relates to the concept of *force majeure*.
- 117 One of the potential difficulties with international projects is that the contracts entered into are governed by laws which may be unfamiliar to one or other of the contracting parties. For example, there is a difference in the way that *force majeure* is treated in common and civil law jurisdictions. Whilst most civil codes make provisions for *force majeure* events, at common law, *force majeure* is not a term of art and its meaning is far from clear. No *force majeure* provision will be implied in the absence of specific contractual provisions, and the extent to which the parties deal with unforeseen events will be defined in the contract between them. Thus without a specific clause, there will not necessarily be relief for *force majeure* events.

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<sup>36</sup> There is anecdotal evidence on certain NEC3 projects of 30 or 40 notices being served in one day and it is clearly in the interests of any project that the parties concentrate on getting the project finished rather than dealing with claims. However it is only in the interests of the Contractor if he has an agreed on how he is to proceed with claims.

118 The aim of the *force majeure* clause is to exempt a party from performance on the occurrence of a *force majeure* event. Commercially, the clause is there to address risks which cannot necessarily be economically insured and which are outside the control of the parties to the contract. There are, of course, many definitions of that *force majeure* event. For example, in the case of *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp and Paper Co*, [1976] 1 SCR 580, Dickson J in the Supreme Court of Canada said that:

*“An act of God or force majeure clause generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill.”*

119 The definition of *force majeure* provided in the new FIDIC form at clause 19 is widely drawn. Clause 19.1 defines a *force majeure* event as one:

- (i) which is beyond a Party's control;
- (ii) which such Party could not reasonably have provided against before entering into the Contract;
- (iii) which, having arisen, such Party could not reasonably have avoided or overcome; and
- (iv) which is not substantially attributable to the other Party.

120 *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, rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war;
- (ii) riot, commotion, disorder, strike or lockout by persons other than the Contractor's Personnel and other employees of the Contractor and Sub-Contractors;
- (iii) munitions of war, explosive materials, ionising radiation or contamination by radioactivity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radioactivity; and
- (iv) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.

121 The broad definition of *force majeure* to be found here, and it should be remembered that the examples listed above are examples and not an exhaustive list, reflects the basic premise of a *force majeure* clause, namely that it serves to exempt a party from performance on occurrence of a *force majeure* event.

122 One problem with the FIDIC form is that there is a risk of potential overlap and/or contradiction between sub-clause 19.1 and the definition of *force majeure*, which one can find in the civil codes of most, if not all, civil law jurisdictions. For example, the definition of *force majeure* under the Quebec Civil Code is much narrower in scope. Article 1470 simply provides

that: “A superior force [in the French version, *force majeure*] is an unforeseeable and irresistible event, including external causes with the same characteristics.”

- 123 Therefore incorporating clause 19 could be said to be duplicating or enlarging upon what is provided for in the civil codes of a civil law jurisdiction. In any event, the Particular Conditions note that the Employer should verify, before inviting tenders, that the wording of clause 19 is compatible with the law governing the Contract.
- 124 In fact, there was no specific *force majeure* clause in the Old Red Book FIDIC 4<sup>th</sup> Edition. However, the Contractor was afforded some protection by clause 65, which dealt with special risks including the outbreak of war, and clause 66, which dealt with payment when the Contractor was released from performance of its contractual obligations. The scheme of the FIDIC form is that the party affected, which is usually the Contractor but could here be the Employer, is entitled to such an extension of time as is due and (with exceptions) additional cost where a *force majeure* occurs.
- 125 For clause 19 to apply, the *force majeure* event must prevent a Party from performing any of its obligations under the Contract. The now classic example of this is the refusal of the English and American courts to grant relief as a consequence of the Suez Crisis during the 1950s. Those who had entered into contracts to ship goods were not prevented from carrying out their contractual obligations as they could go via the Cape of Good Hope even though the closure of the Suez Canal made the performance of that contract far more onerous.
- 126 Clause 19.7 of the FIDIC form is also of interest. Here, the parties will be released from performance (and the Contractor entitled to specific payment) if (i) any irresistible event (not limited to *force majeure*) makes it impossible or unlawful for the parties to fulfil their contractual obligations, or (ii) the governing law so provides. It acts as a fall-back provision for extreme events (i.e., events rendering contractual performance illegal or impossible) which do not fit within the strict definition of *force majeure* laid out under sub-clause 19.1. It also grants the party seeking exoneration the right to rely on any alternative relief-mechanism contained in the law governing the contract.
- 127 If English law applies, following the landmark case of *Davis Contractors v Fareham UDC*,<sup>37</sup> the affected party will be able to rely on the common law concept of frustration, which “occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract”. Here, the contract was to build 78 houses for a fixed price in 8 months. Because of labour shortages and bad weather, it took the contractor 22 months to build the houses. It was held by the House of Lords that the contract had not been frustrated. To claim frustration, therefore, it will not be enough for a contractor to establish that new circumstances have rendered its contractual performance more onerous or even dangerously uneconomic.
- 128 For frustration, what is required is a radical turn of events completely changing the nature of the contractual obligations. It is a difficult test to fulfil, but not as difficult as that of sub-clause 19.4 (*force majeure*) or the first limb of sub-clause 19.7 which both refer to the concept

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<sup>37</sup> 2 All ER 145

of impossibility (or illegality). To take the example put forward by A. Puelinckx of a wine connoisseur signing a contract for the construction under his house of a very sophisticated wine cellar.<sup>38</sup> If the house is burned down before execution of the contract, leaving the basement part in perfect condition, this will certainly be considered frustration under English law. However, no claim could be put forward under a strict interpretation of sub-clauses 19.4 or 19.7 as the house could in theory be rebuilt and the contractual obligation to build the cellar performed. French law would apply the same reasoning as sub-clauses 19.4 or 19.7 and because performance is still possible, would hold the above-described events as a mere *imprévision*, which would not afford any financial relief to the affected party.

- 129 What is common to both the notion of frustration and that of *force majeure* as interpreted under English law, though, is that no relief will be granted in case of economic unbalance. A recent illustration concerning the interpretation of a *force majeure* clause under English law can be found in the case of *Thames Valley Power Limited v Total Gas & Power Limited*,<sup>39</sup>. Here there was a 15-year exclusive gas supply contract between Thames Valley Power Limited (buyer) and Total Gas & Power Limited (supplier) for the operation of a combined heat and powerplant at Heathrow Airport. Clause 15 of the supply contract provided in part as follows:

*“if either party is by reason of force majeure rendered unable wholly or in part to carry out any of its obligations under this agreement then upon notice in writing [...] the party affected shall be released from its obligations and suspended from the exercise of its rights hereunder to the extent that they are affected by the circumstances of force majeure and for the period that those circumstances exist.”*

- 130 The supplier sought to rely on clause 15 to stop supplying gas at the contract price as the market price for gas had increased significantly and rendered it “uneconomic” for the supplier to supply gas. Christopher Clarke J, however, found that:

*“The force majeure event has to have caused Total to be unable to carry out its obligations under the [agreement]. [...] Total is unable to carry out that obligation if some event has occurred as a result of which it cannot do that. The fact that it is much more expensive, even greatly more expensive for it to do so, does not mean that it cannot do so.”*

- 131 Clause 19 would certainly be interpreted in much the same way by English courts. In large projects where the performance of the parties’ contractual obligations is spread over several years, the parties might thus consider whether or not to add a hardship clause to the contract which will stipulate when and how the parties will rearrange the contractual terms in the event the contract loses its economic balance.

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<sup>38</sup> Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative Study in English, French, German and Japanese Law *Journal of International Arbitration*, Vol. 3 No. 2 (1986), pp. 47/66.

<sup>39</sup> (2006) 1 Lloyd’s Rep 441.

*The NEC 3<sup>rd</sup> edition*

132 At first look, the new NEC form, whose third edition was published in July 2005, does not include a *force majeure* event. However, reference to the guidance notes shows that clause 60.1(19) qualifies as a *force majeure* event. This clause refers to events which:

- Stop the Contractor from completing the works; or
- Stop the Contractor completing the works by the dates shown on the Accepted Programme and which
- Neither Party could prevent;
- An experienced Contractor would have judged that the contract dates have such a small chance of occurring that it would have been unreasonable for him to have allowed for it; and
- Is not one of the other compensation events stated in this contract.

133 Thus it looks very much like a *force majeure* clause and that is exactly what it is. Indeed, the reference to the guidance notes confirms this explicitly, referring to "*force majeure*". The drafting of this compensation/*force majeure* event is plainly very broad. Indeed, maybe it is too broad. Therefore, it may well be that this is exactly the type of clause that many employers will seek to delete or revise. And under common law jurisdictions, this will mean that no protection will be provided to the Contractor for typical force majeure events.

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