An introduction to FIDIC, international procurement and development bank procurement

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Introduction

1. The purpose of this paper is to discuss certain issues relevant to international procurement by reference to the FIDIC form of contract and the approach of the World Bank to procurement and the FIDIC form of contract.

2. More specifically, this paper is set out in the following sections:
   
   (i) The FIDIC form: a brief overview;
   (ii) The MDB version of the Red Book;
   (iii) World Bank procurement;
   (iv) The Joint Venture;

THE FIDIC FORM: A BRIEF HISTORY

3. The 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 the Fédération Internationale des Ingénieurs-Conseils (FIDIC) and the Fédération Internationale des Bâtiment et des Travaux Publics (FIBTP). FIDIC often describes its Contract as having been prepared “by engineers for engineers”.

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 commented that:

   “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”.  

5. One difficulty with the original FIDIC Red Book was that it was 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 so 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 4th 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

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1 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.

might affect the rights and obligations of the parties, whereas the previous editions had assumed this implicitly.

7. A supplement was published in November 1996 which provided the user 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.

8. 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 provided for an “Employer’s Representative”, who, when determining value, costs or extensions of time, had to:

   “determine the matter fairly, reasonably and in accordance with the Contract”.

9. 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.

10. Although this talk concentrates on the new FIDIC forms, it should be remembered that the FIDIC 4th edition 1987 (“The Old Red Book”) remains the contract of choice throughout much of the Middle East, particularly the UAE. However, this is slowly changing, as the government in Abu Dhabi introduced its own version of the 1999 FIDIC Red Book under cover of Law 21 of 2006. The Conditions, known as the Abu Dhabi Government Conditions of Contract which apply only to government and not private contracts, came into force in September 2007.

The new FIDIC forms 1999

11. 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 the FIDIC forms.

   (iii) The simplification of the FIDIC forms in light of the fact that the FIDIC conditions were promulgated in English but in very many instances were being utilised by those whose language background was other than English.

   (iv) The new books would be suitable for use in both common law and civil law jurisdictions.

13. The 1994 Task force led to the publication of four new contracts in 1999:

The Red Book is intended for projects where the main responsibility for design rests with the Employer (or its Engineer). Thus, the works are usually completed by the Contractor in accordance with the Employer’s design. However, the works may also include elements of civil, mechanical, electrical and/or construction works designed by the Contractor. The work done is quantified, with payment made on the basis of a bill of quantities (although it is also possible for payment to be made on a lump sum basis). The Red Book is the most commonly used standard form of construction and engineering contract where most (or all) of the works are to be designed by (or on behalf of) the Employer.

(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 “Yellow Book”).

The Yellow Book is intended for projects where responsibility for design rests with the Contractor. The Contractor will design the project in accordance with requirements specified by the Employer. The testing procedures prescribed by the Yellow Book are usually more complicated than those in the Red Book. Payment is made on a lump sum basis, usually against a schedule of payments.

(iii) Conditions of Contract for Engineering Procurement and Construction/Turnkey Projects (the “Silver Book”).

The Silver Book is intended for Engineering Procurement and Construction (“EPC”) arrangements. Under an EPC contract, the Contractor is responsible for the entirety of the works and design required to provide the Employer with a facility that is ready for operation at the “turn of a key”. Accordingly, the Contractor’s risk for time and cost is considerably greater than the risk it would assume under the Yellow Book.

(iv) Short Form of Contract (the “Green Book”).

The Green Book is intended for engineering and building work of relatively small capital value. Accordingly, the Green Book is suitable for relatively simple or repetitive work, or work that will not require input from specialist sub-contractors.

12. FIDIC is also aware of the need to develop new contract forms in order to adapt to changing conditions. Since the original publication of the 1999 suite of contracts, FIDIC has also introduced the following:

(i) Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer, for bank-financed projects only (the “Pink Book”).

The Pink Book is intended for projects funded by Multilateral Development Banks, such as the World Bank or the European Bank for Reconstruction and Development.

Indeed, The World Bank is clear that:
“These SBDW are mandatory for use in major works contracts (those estimated to cost more than US$10 million, including contingency allowance) unless the Bank agrees to the use of other Bank Standard Bidding Documents on a case-by-case basis.”

The SBDW notes that the use of the Conditions of Contract for Construction for Building Engineering Works Designed by the Employer, Multilateral Development Bank Harmonized Edition, prepared by FIDIC, is compulsory. The User’s Guide makes it clear that: “The provisions in Section I (Instructions to Bidders) and Section VII (General Conditions of Contract) must be used with their text unchanged.”

(ii) Conditions of Contract for Design, Build and Operate Projects (the “Gold Book”).

The Gold Book combines design, construction, operation and maintenance of a facility into a single contract, and is intended for “Design, Build and Operate” projects. The project’s commissioning testing is followed by a 20 year operation and maintenance period, during which the Contractor must achieve various operational targets and then hand over the project to the Employer in an agreed condition. The DBO form was a response to the call for a standard concession contract for the transport and water/waste sectors. The market had been using the existing FIDIC Yellow Book with operations and maintenance obligations tacked on. FIDIC recognised this unsatisfactory state of affairs and the need to tailor a form to meet the demand.

Under the DBO form, the Contractor (who, given the size of these projects, will typically be in the form of joint venture or consortium) will be responsible for:

- designing and constructing the works during the design-build period; and
- operating and maintaining the facilities for a 20 year period once the facility has been handed over with the issue of the Commissioning Certificate.

However, the Contractor will have no responsibility for the financing and ultimate commercial success of the project.

(iii) Dredgers Contract (the “Blue Book”).

The Blue Book is intended for dredging and reclamation work and ancillary construction. The Employer undertakes the design of the project.

(iv) Consultant Model Agreements, including the Model Representative Agreement (the “White Book”).

The White Book is an agreement to be used by the Employer and its consultant. In common with other contracts a new version is being prepared.

(v) Conditions of Subcontract for Construction for Building and Engineering Works Designed by the Employer (the “2011 Subcontract”).

Sub-contracts for all the main forms will be prepared as part of the current review.

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3 This was the first update since 1994.
14. In addition, there are a number of other forms, based on the FIDIC terms. For example, in 2007 the Abu Dhabi Executive Affairs Authority General Conditions of Contract, introduced for construction of projects undertaken in Abu Dhabi on behalf of Public Entities.

15. FIDIC also introduced a Procurement Procedures Guide in 2011.

16. There are also steps being taken to revise the entire suite, starting with the Yellow Book and followed next by the Red and Silver Books, although it is not anticipated that FIDIC will be in a position to release a test edition until some time towards the end of 2016 at the earliest. In a progress report issued in October 2014 the FIDIC Contracts Committee listed the following revisions as being “on the drawing board”:

   a. Task Group 4A - Update of Joint Venture Model Agreement and Sub-Consultant Model Agreement;
   b. Task Group 4B - Update of Client / Consultant Model Agreement (White Book);
   c. Task Group 6 - Update of 1999 Rainbow Suite (Red, Yellow and Silver book);
   d. Task Group 7 - Update of Dredgers Contract;
   e. Task Group 9 - New Yellow Book / Silver Book Sub-contract Forms
   g. Task Group 11 - New Operate, Design & Build (ODB) Form of Contract; and

The content of the FIDIC forms

17. 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.

18. The Guidance for the Preparation of Particular Conditions include notes of the preparation of Tender Documents, and also highlight some of the key points which, if missed, could lead to difficulties during the project. For example many major contracts are usually conducted by a Joint Venture. If so, detailed requirements must be set out. These may include, parent company guarantees from each member of the JV and the appointment of a leader providing a single point of contact for the Employer.

19. The FIDIC form envisages that the agreement between the parties will consist of a number of documents. The contract will typically comprise of the following:

   (i) Letter of Acceptance - the Red, Yellow and Gold Books define the Letter of Acceptance as the “letter of formal acceptance, signed by the Employer, of the Letter of Tender,

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4 Whilst this paper does not anticipate what those changes and revisions may be, the sub-contract and Gold Book are obvious starting points. See for example paragraph 21 below.
including any annexed memoranda comprising agreements between and signed by both Parties”.

(ii) Memoranda annexed to the Letter of Acceptance - the memoranda recording the technical and commercial aspects of the works.

(iii) Letter of Tender - under the Red, Yellow and Gold Books, this is a letter from the Contractor in response to the Employer’s invitation to tender, setting out its offer for the works. Under the Red and Yellow books, the Letter of Tender is deemed to include the Appendix to Tender.

(iv) Appendix to Tender - this document specifies the key terms of the contract between the parties. Usually, the Employer will complete parts of the Appendix to Tender with which it requires the bidder to comply. The bidder subsequently completes the remainder of the Appendix to Tender by specifying the details of its offer.

(v) General Conditions of Contract; Particular Conditions of Contract - the Conditions of Contract set out the core terms of the contract between the parties. In doing so, the Conditions of Contract set forth the rights, obligations and responsibilities of the parties arising in connection with the design and construction of the works. The Conditions of Contract also prescribe procedures for the management of the project, such as the role of the Engineer under the Red and Yellow Books.

(vi) Specification - under the Red Book, the specification sets out the technical requirements of the works, and how those works are to be executed.

(vii) Drawings - under the Red Book, the drawings supplement the Specification by setting out the design of the project.

(viii) Employer’s Requirements - the Employer’s Requirements are used in the Yellow, Silver and Gold Books to set out the purpose, scope, design and technical aspects of the works. This may comprise a detailed design specification or certain performance requirements for the end product.

(ix) Contractor’s Proposal - in the Yellow and Gold Books, the Contractor’s Proposal details the Contractor’s proposals for the works.

(x) Schedules - in the Red, Yellow and Gold Books, Schedules are defined as documents “completed by the Contractor and submitted with the Letter of Tender, as included in the Contract”. The Schedules may therefore consist of bills of quantities, data, and price lists.

(xi) Tender - under the Silver Book, the Tender is used instead of the Letter of Tender and documents that support it (Contractor’s Proposals, Schedules, etc). The Silver Book defines the Tender as the “Contractor’s signed offer for the Works and all other documents which the Contractor submitted therewith (other than these Conditions and the Employer’s Requirements, if so submitted), as included in the Contract”.

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Addenda - the Addenda are issued by the Employer if it wishes to amend any of the tender documents after commencement of the tendering process. The Addenda may amend the tendering procedure, as well as the tender documents that comprise the contract between the parties.

The FIDIC General Conditions

20. From a practical point of view, the key to reading and understanding the FIDIC form is to understand its structure. The FIDIC form has 20 clauses which are perhaps best viewed as chapters covering the key project topics. Those clauses are as follows:

(i) Clause 1 - General provisions;
(ii) Clause 2 - The Employer;
(iii) Clause 3 - The Engineer or Employer’s representative;
(iv) Clause 4 - The Contractor;
(v) Clause 5 - Design (Silver Book) or Nominated sub-Contractor (Red Book)
(vi) Clause 6 - Staff and Labour
(vii) Clause 7 - Plant, materials and workmanship
(viii) Clause 8 - Commencement, delays and suspension
(ix) Clause 9 - Tests on completion
(x) Clause 10 - Taking over
(xi) Clause 11 - Defects liability
(xii) Clause 12 - Tests after completion
(xiii) Clause 13 - Variations and adjustments
(xiv) Clause 14 - Contract price and payment
(xv) Clause 15 - Termination by Employer
(xvi) Clause 16 - Suspension and termination by Contractor
(xvii) Clause 17 - Risk and responsibility
(xviii) Clause 18 - Insurance
(xix) Clause 19 - Force majeure
21. In the Gold book, there is a slightly different order, with the insurance clause having been moved to clause 19, whilst clause 17 has been renamed “risk allocation” and the force majeure clause has been dropped and replaced with a new clause 18 headed “exceptional risks”. This may well represent the way forward for any future amendment of the remaining four FIDIC contracts.

22. I propose to consider some of the more important clauses and have taken the Red Book as a base. The General Provisions which primarily consist of definitions should not be neglected as a number of key points can be found tucked away here. For example sub-clause 1.3, which is headed “communications” also notes that certificates and approvals must not be unreasonably withheld. Whilst sub-clause 1.8, headed “Care and Supply of Documents” also says that a party noticing an error in a document must give proper notice of that error.

23. Clause 2 addresses the role of the Employer. Sub-clause 2.1 specifies that the Employer must give the Contractor a right of access to, and possession of, all parts of the site within a specified time limit. Failure to do so entitles the Contractor to claim an extension of Time for Completion and associated costs.

24. There are two particularly interesting sub-clauses. First sub-clause 2.4 renders it mandatory upon 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.”

25. Failure to submit such evidence provides the Contractor with the entitlement to suspend work, “or reduce the rate of work”, unless and until the Contractor has received 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.

26. Second, 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”.

27. In short, sub-clause 2.5 requires the Employer to follow a specific procedure when making a claim against the Contractor. This procedure aims to prevent the Employer from summarily withholding or reducing any sums due to the Contractor.

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5 In the revised version there will be 21 clauses, with clause 20 dealing with claims and clause 21 dealing with disputes.
6 Not that there is a definition of this term.
28. Both these clauses were the subject of a case which came before the Privy Council in 2015. Sub-clause 2.4 was an entirely new provision inserted into the 1999 FIDIC Rainbow suite of contracts. It provides a mechanism whereby the contractor can obtain confirmation that sufficient funding arrangements are in place to enable him to be paid. This is something which may be of particular importance if the employer is a company which has been specifically set up to carry out the project in question and this is therefore typically backed by loan finance. It may also be important if the employer orders a significant variation midway through the project. It is also a clause that typically the employer will seek to delete.

29. The dispute in NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago)\(^8\) was a long-standing one arising out of a contract, under the FIDIC Red Book, to construct a new hospital in Tobago. NHIC made a request under sub-clause 2.4 for “reasonable evidence.” NIPDC had confirmed that funds were available to be used for the project and that money certified as being due would “be paid by the Government” and further that “the Government stands fully behind the project”. However, NHIC said that they were entitled to and required evidence that Cabinet approval had been obtained for funding of the project. Without such approval payments could not be made by NIPDC. Shortly before Cabinet approval was obtained, NHIC terminated the contract due to non-compliance with clause 2.4.

30. In short, the arbitrator decided that HHIC was fully entitled to terminate the contract as a result of this failure by the Employer to provide proper evidence that it held funds to cover the contract price. The arbitrator said that clause 2.4 required more than showing that “the employer is able to pay”, let alone that it was enthusiastic about the project. What was required was evidence of “positive steps” on the part of the employer which showed that “financial arrangements” had been made to pay sums due under the Agreement.

31. The Privy Council agreed with the arbitrator, for example citing the arbitrator’s views that “the mere fact that an employer is wealthy is inadequate for the purposes of sub-clause 2.4” and that “the mere fact that an Employer has good reasons for wanting a project completed does not itself mean that he has made and maintained the necessary financial arrangements”. Accordingly the termination was valid.

32. Clause 3 deals with the position of the Engineer. Obviously the Engineer is not a party to the construction contract having a separate contract with the Employer. However, there have been significant changes in the Engineer’s role as the FIDIC form has developed. As noted above, in the 1999 form, the express reference in the 1987 edition to the Engineer’s impartiality was replaced with the following:

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

33. So under the FIDIC form, the Engineer essentially acts as agent for the Employer and is expressly stated to be acting for the Employer whenever he carries out his duties under the Contract.

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\(^7\) We come back to this clause at paragraph 124 below.  
\(^8\) [2015] UKPC 37
34. The Red, Yellow and Gold Books all provide for the appointment of the Engineer for the purposes of administering the contract. The Silver Book, on the other hand, places responsibility for contract administration with the Employer, although there is provision for appointment of an Employer’s Representative to perform this function on the Employer’s behalf.

35. On a practical level, the Engineer is engaged by the Employer to perform the following functions:

(i) the design of the project, including preparation of design drawings, materials specifications and the bill of quantities and the specification of the standard of workmanship to be achieved;

(ii) the preparation of tender documents and advice on the relative merits of each bid;

(iii) the supervision and inspection of the work undertaken by the Contractor; and

(iv) the administration of the contract in relation to certifications and disputes.

36. The key aspects of the Engineer’s appointment may be summarised as follows:

(i) the Engineer is appointed by the Employer;

(ii) the Engineer must perform the functions specified in the contract, although he cannot amend the contract;

(iii) the Engineer’s authority is based on the contract documents, being their express terms, as well as implied authority which gives efficacy to the express terms;

(iv) the Particular Conditions specify certain acts requiring specific permission from the Employer;

(v) the Engineer is deemed to act on the Employer’s behalf; and

(vi) the Engineer’s acts or omissions do not relieve either the Employer or the Contractor from their respective obligations under the contract.

37. As noted already, the Engineer is not a party to the contract. Instead, his contract is with the Employer. Nonetheless, Clause 3 is explicit in stating that the Engineer is deemed to act as the Employer’s agent whenever he performs his duties under the contract.

38. Sub-clause 3 provides a two-step process for the resolution of claims before the Engineer. Whilst the Engineer is expressly the agent of the Employer:

(i) under the first stage the Engineer’s duty is to “…endeavour to reach agreement…” between the parties;⁹ if that fails then

(ii) the Engineer is obliged to make “…a fair determination…”

⁹ This is a step that is not always followed. And there is apparently no real remedy for an aggrieved party.
39. So what is a fair determination? In England & Wales, there has been considerable debate about the role of the Engineer. Rix LJ in the case of Amec Civil Engineering Limited v Secretary of State for Transport,\(^\text{10}\) summarised the obligations of the Engineer or indeed the architect in such circumstances. He said that the Engineer or architect must:

(i) “retain his independence in exercising [his skilled professional] judgment”;

(ii) “act in a fair and unbiased manner” and “reach his decisions fairly, holding the balance”;

(iv) if he hears representations from one party, he must give a similar opportunity to the other party to answer what is alleged against him; and

(vi) “act fairly and impartially” where fairness is “a broad and even elastic concept” and impartiality “is not meant to be a narrow concept”.

40. Nonetheless, the Court of Appeal in Amec held that, in reaching decisions, an Engineer is not bound by rules of natural justice.

41. Under English law, there is a degree of disagreement as to whether the Engineer owes a duty of care in tort to the Contractor. This relates to two issues, being certification and design. With respect to certification, it has been held in Pacific Associates v Baxter\(^\text{11}\) that an Engineer, when certifying an interim payment, does not owe the Contractor any duty of care in relation to the tender documents he had prepared and supplied to the Contractor.

42. However, in that case, the contract between the Contractor and the Employer featured a disclaimer in relation to the Engineer’s work and its effect on the Contractor. This disclaimer may well have influenced the Court of Appeal’s judgement. The decision in Pacific Associates therefore suggests that a party’s duty of care in tort may be negated or qualified by the contract even if that party is not privy to that particular agreement. However, the question of whether an Engineer may be held negligent to a Contractor in tort for certification is yet to be finally determined, such that the general applicability of Pacific Associates is not entirely clear.

43. With respect to design, it is worth noting that sub-clause 3.1 attempts to limit the Engineer’s liability, by providing that the Engineer’s acts shall not relieve the Contractor from any of its responsibilities under the contract, including responsibility for errors, omissions, discrepancies and non-compliances.

44. Clause 4 is by far the longest sub-clause and covers the Contractor’s general obligations. sub-clause 4.1 outlines the Contractor’s general obligation that:

“The Contractor shall design (to the extent specified in the Contract), execute and complete the Works in accordance with the Contract and with the Engineer’s instructions, and shall remedy any defects in the Works…”

\(^{10}\) [2005] CILL 2288

\(^{11}\) (1998) 44 BLR 33
45. In addition, clause 4 includes the requirement that in respect of Contractor designed works:\(^{12}\):

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

46. This is an absolute duty. In Viking Grain Storage v T.H. White Installations Ltd\(^{13}\), Judge John Davies said:

“The virtue of an implied term of fitness for purpose is that it prescribes a relatively simple and certain standard of liability based on the “reasonable” fitness of the finished product, irrespective of considerations of fault and of whether its unfitness derived from the quality of work or materials or design.”

47. In a similar way, sub-clause 4.1 of the Yellow Book notes that the:

“Contractor shall design, execute and complete the Works in accordance with the Contract, and shall remedy any defects in the Works. When completed, the Works shall be fit for the purposes for which the Works are intended as defined in the Contract”.

48. In the Silver Book, clause 5 deals with design responsibility. Given the turnkey nature of the contract, the intention is to make the Contractor responsible for the integration of the design and the construction of the works. Clause 5.1 notes that:

“The Contractor shall be responsible for the design of the works and for the accuracy of the Employer’s Requirements (including design criteria and calculations)….Any data received by the Contractor, from the Employer or otherwise shall not relieve the Contractor from his responsibility for the design and execution of the works.”

49. Clause 5 requires the Contractor’s design to be prepared by:

“qualified designers who are engineers or other professionals who comply with the criteria (if any) stated in the Employer’s Requirements”.

50. In the absence of provisions to the contrary, the Contractor must submit for the Engineer’s approval details of proposed designers and design subcontractors. Under sub-clause 1.3 the Engineer’s consent must not be unreasonably withheld or delayed. The Contractor further warrants that:

“he, his designers and design Subcontractors have the experience and capability necessary for the design”.

51. Sub-clause 4.2 of the Red Book specifies that the Contractor shall provide a performance security\(^{14}\) 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

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\(^{12}\) Obviously, the reference to design changes throughout the various FIDIC forms.

\(^{13}\) (1986) 33 BLR 14

\(^{14}\) The FIDIC form includes a number of sample forms of security.
Contractor as the sub-clause includes an indemnity by the Employer in favour of 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”.

52. The Employer ought to have reached a decision on what document it requires to comprise the performance security and its wording at the stage of the preparation of tender documentation. Whilst the Old Red Book favoured bonds which were in conditional terms, payable upon default, there has been a trend towards the use of first or on-demand bonds. This is reflected in the 1999 form where the performance guarantees are in an on-demand guarantee form, which is payable upon the submission of identified documentation by the beneficiary. It is necessary to state in what respect the Contractor is in breach of his obligations. In keeping with the intentions of FIDIC to achieve a degree of uniformity and hence clarity, the securities derive from the guidance of the International Chamber of Commerce and the Uniform Rules published by that body.

53. The remainder of Clause 4 sets out the obligations by which the Contractor must meet the general obligation imposed under sub-clause 4.1. In this regard, Clause 4 sets out specific obligations as to the following:

(i) Subcontractors (sub-clause 4.4);
(ii) Setting Out (sub-clause 4.7);
(iii) Safety Procedures (sub-clause 4.8);
(iv) Quality Assurance (sub-clause 4.9); and
(v) Contractor’s Equipment (sub-clause 4.17).

54. 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.

55. Whilst the importance of ensuring that the Progress Reports are accurate might seem obvious, His Honour Judge Wilcox, in a case involving a construction manager, highlighted some of the potential difficulties where that reporting is not accurate.

15 See Lord Denning in Edward Owen Engineering Ltd v Barclays Bank International Ltd and Umma Bank (1978) QB 159.
16 Uniform Rules for Demand Guarantees (URDG, No. 458); Uniform Rules for Contract Bonds (URCB No. 524). The ICC updated its rules for Demand Guarantees on 1 July 2010 with ICC Publication No. 758 superseding No.458. In December 2009, FIDIC announced that it will “probably” incorporate amended model forms of guarantee when it comes to amend the 1999 contract forms. Users should check to see if the form of the Performance Guarantee in the contract in question refers to the ICC rule 458 or 758 to see which applies.

17 Great Eastern Hotel Co Ltd v John Laing Construction Ltd [2005] 99 Con LR 45
56. 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 on both timing and costs. He was at “the centre of the information hub” of the project.

57. 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.

58. 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:

> 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.

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

60. Clause 5 of the Red Book, deals with nominated subcontractors. Clause 5 sets out the procedure by which the Employer may impose on the Contractor the appointment of a particular sub-Contractor, who is nominated either in the contract or on instructions from the Engineer.

61. Although a Contractor cannot subcontract the whole of the works, he can subcontract a part, albeit that a percentage limit or restriction is often placed on the Contractor’s ability to do this.

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

63. Clause 7 sets out the Contractor’s duties with respect to the quality of the work and the testing of any plant, materials and workmanship.

64. Clause 8 makes provision for Commencement, Delay and Suspension. Clause 8 governs the construction period of the project. Noteworthy provisions include:

   (i) Commencement of the Works (sub-clause 8.1);
   (ii) Time for Completion (sub-clause 8.2);
   (iii) Contractor’s programme of works (sub-clause 8.3);
   (iv) Extension of Time (sub-clause 8.4);
   (v) Delays (sub-clauses 8.5, 8.6, and 8.7); and
(vi) Suspension of Work by the Engineer (sub-clause 8.8, 8.9, 8.10, 8.11, and 8.12).

65. 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. Indeed looking at the new sub-contract, the programming obligations under sub-clause 8.3 and Annex F are considerably more extensive than the main contract. This is even though sub-clause 8.5 notes that the subcontractor monthly progress reports need only be in the same detail and format as the Contractor reports.

66. Annex F of the FIDIC Subcontract 2011 alone lists some 17 separate requirements, a-q. These include logically linking all activities, identifying the critical path and all float, as well as including sufficient flexibility to interface the subcontractor’s activities with the Contractor. The subcontract programme must be submitted to the Contractor within 14 days of receiving the Letter of Acceptance. Then the contractor has 14 days to either approve or reject the programme\textsuperscript{18}. If the Contractor fails to respond then the initial programme becomes the subcontract programme by default. The programme must be updated within seven days of the occurrence of one of six-listed events including the subcontractor changing his methods or sequencing, there being any delay which impacts on the critical path or the subcontractor receiving from the Contractor an instruction, pursuant to sub-clause.8.4 to accelerate where the subcontractor’s progress is too slow. Employers under the Red Book itself may well, if they are not already, start requiring a similar level of detail from the Contractor.

67. The extension of time provisions are clear. By sub-clause 8.4:

\begin{quote}
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”.
\end{quote}

68. sub-clause 8.4 then proceeds to list the circumstances which entitle the Contractor to an extension of Time for Completion. In the event that sub-clause 8.4 applies, the Contractor will be relieved from liability for liquidated damages that would otherwise be payable under sub-clause 8.7. In order to claim an extension of Time for Completion, the Contractor must establish that the delay event will actually delay completion under sub-clause 10.1, and comply with the notice requirements of sub-clause 20.1.

69. Under the Abu Dhabi version, clause 8.4 requires the Contractor to have made “reasonable and proper” efforts to mitigate delay. It also spells out that the Contractor shall not be entitled to an extension of time, if the delay is concurrent with another delay for which the Contractor is responsible.

70. Sub-clause 8.7 deals with the payment of delay or liquidated damages by the Contractor to the Employer in the event of delay to the completion of the works. To be able to levy such damages, the Employer must make an application in accordance with sub-clause 2.5.

\textsuperscript{18} A further difference to the main contract.
71. Clause 9 specifies the procedures to be undertaken for Tests on Completion, which must be executed by the Contractor following completion of the works and prior to the issue of a Taking-Over Certificate by the Engineer.

72. Clause 10 prescribes the procedure by which works are to be taken over by the Employer, upon the happening of which responsibility for the works will pass to the Employer.

73. Clause 11 obliges the Contractor to rectify any defects notified to the Contractor during the Defects Notification Period, as defined in the Appendix to Tender.

74. Clause 12 of the Yellow and Silver Books deal with tests after completion. Both Silver and Yellow Books provide for a 3-stage commissioning process before take-over (Tests on Completion):

(i) Pre-commissioning tests, including "dry" functional tests;

(ii) Commissioning tests, including operational tests to demonstrate that the Works or relevant section operate safely, as specified and under all operating conditions; and

(iii) Trial operation to demonstrate that the Works or section perform reliably and in accordance with the Contract.

75. Clause 12 of the Red Book 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).

76. 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.

77. 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. Under the code of Hammurabi the rule was as follows:

“If a builder build a house for someone and complete it, he shall give him a fee of two shekels in money for each sar of surface.”

78. 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

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19 Although in the UK, section 109 of the 1998 Housing Grants, Construction & Regeneration Act now gives most contractors the right to payment by instalments.

20 King Hammurabi ruled the kingdom of Babylon from 1792 to 1750 BC.
the house was constructed properly. However, the rule does not say when the payment has to be made.

79. Clause 14 addresses the financial aspects of the project, including:
   (i) advance payment;
   (ii) application for payment; and
   (iii) the issue of interim and final payment certificates.

80. Clause 14 also sets out procedures for payment by the Employer. If the project is covered by the UK Housing Grants, Construction & Regeneration Act then all the payment provisions, including payless and payment notices, will override these provisions.

81. Clause 15 specifies the circumstances in which the Employer may terminate the contract, including termination by convenience. Clause 15 also prescribes the procedures that the Employer must follow if it takes the decision to terminate the contract, and the financial

**Termination by the Employer**

82. Termination is a serious step and any party undertaking to do so should take care to ensure that the procedure set out in the Contract is followed precisely. In the event of a dispute, those procedures will usually be carefully considered and strictly applied.

83. The determination procedure in the FIDIC form has recently come before the Technology and Construction Court in London, in *Obrascon Huarte Lain SA v Her Majesty’s Attorney General for Gibraltar* 21, and the difficulties that the Employer faced when it sought to terminate in apparently straightforward circumstances demonstrates the need for real care in effecting these provisions. In *Obrascon* the Court was asked to consider whether or not an Employer had effectively terminated a contract based on the FIDIC Yellow Book, and in particular:

   a. The meaning and effect of sub-clause 15.1 which states that: “If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time.”

   b. The meaning and effect of sub-clause 15.2 which lists the circumstances in which an Employer may terminate the Contract, upon giving of 14 days’ notice, which includes if the Contractor:

   “(a) fails to comply…with a notice under sub-clause 15.1…

   (b)...plainly demonstrates the intention not to continue performance of his obligations under the Contract...

   (c) without reasonable excuse fails:

(i) to proceed with the Works in accordance with clause 8...”

c. The effect on termination of the Employer failing to comply with the delivery of notices provision.

84. Mr Justice Akenhead noted generally that courts will give termination for fault clauses a commercially sensible construction, and that sub-clauses 15.1 and 15.2 should be applied in the same manner. In doing so, His Honour stated that for determination clauses such as the FIDIC form the appropriate threshold to terminate will be “significant or substantial breaches as opposed to trivial, insignificant or insubstantial ones.”

**Sub-clause 15.1**

85. The Judge first considered sub-clause 15.1, and stated that a notice given under that sub-clause:

a. Will apply only to “more than insignificant contractual failures by the Contractor”.

b. Must specify a time for compliance/to rectify the stated default that is reasonable in the circumstances prevailing at the time of the notice (for instance, it will be relevant if a large proportion of the workforce is ill, or if the subject matter has been raised previously).

c. Will be construed strictly given the potentially serious consequences of non-compliance.

d. Will not be effective unless the Contractor is actually given the opportunity to remedy the failure stated in the notice, and the Employer cannot prevent or hinder the Contractor in doing so.

86. In this case, two sub-clause 15.1 notices were served (one on 16 May 2011 and one on 5 July 2011) in respect of which it was alleged that no critical, substantive, or permanent work had been carried out by the Contractor for the preceding five months. The notices specified a number of defaults, several of which were accepted as effective by the Court and several of which were not. By way of example the Contractor was required to:

a. “resume tunnel excavation work” within a 14 day period. The Judge considered this work to be sufficiently serious to be effective, and the time period reasonable in all the circumstances, especially as the detailed design was approved sufficiently and the relevant approval firms were provided well within the specified time.

b. “commence temporary sheet piling of the subway”. The Judge was not satisfied that the Contractor was in breach of failing to carry out this work pursuant to clause 8 of the Contract (which sets out the requirement to commence and carry out the works). In this case the specified work was not on the critical path and it was therefore difficult to find that a deferment of the specified work would necessarily have led to any overall delay to the project. The notice in respect of this default was therefore not effective.
87. Having concluded that the sub-clause 15.1 notices were (largely) effective, and that the defaults stated therein had not been rectified by the specified times for compliance, the Judge concluded that the Employer was entitled to terminate under sub-clause 15.2(a).

Sub-clause 15.2

88. The Judge then went on to consider whether or not the Employer was entitled to terminate pursuant to sub-clause 15.2 by the date the Employer provided the letter of termination (being 28 July 2011). In addition to sub-clause 15.2(a), the Judge also considered whether or not termination had been effective under sub-clauses 15.2(b) and (c), namely, had the Contractor “plainly demonstrated[d] the intention not to continue performance of these obligations under the contract” or “without reasonable excuse fail[ed]…to proceed with the Works in accordance with Clause 8”.

89. The question of compliance with sub-clauses 15.2(b) and (c) was held to be primarily a matter of fact and degree in the circumstances, however, although the Judge also considered that the following basic points of principle apply:

a. The test is an objective one. For instance, if the Contractor privately intended to stop work permanently but continued openly and assiduously to work hard at this site this would not give rise to a plain “demonstration” of intention not to continue to performance.

b. The grounds for termination must relate to “significant and more than minor” defaults by the Contractor.

90. At the date of Employer’s letter of termination the Contractor was, and had for many months been doing no work of any relevance, without contractual excuse. The permanent works remained suspended and there was no indication that the Contractor would or could re-start the permanent work. There was no acceptance of responsibility by the Contractor for any of the problems associated with ground and water contamination which were all its risks and responsibility under the Contract. The Judge posed the question as follows, objectively, “how much longer could it otherwise take to form the view that OHL [the Contractor] was not intending to perform its key responsibility of getting on with the work? The answer is “no longer””. Accordingly the Judge found that both sub-clauses 15.2(b) and (c) were satisfied at that date.

Service of termination notice

91. Finally, having approved all substantive steps to termination, the Judge was asked to consider whether or not the failure by the Employer to serve its termination notice in accordance with the contract undermined the effectiveness of that notice (such that the Employer’s right to terminate was lost).

92. The Employer’s letter of termination was delivered by hand to the Contractor’s site office in Gibraltar, where it was signed for by one of the Contractor’s employees, and it was dispatched by the site office to the main Madrid office promptly. Sub-clause 1.3 of the Contract Conditions required all notices to be delivered to the Contractor’s Madrid office, however, that sub-clause also included the following wording:
“However:

(i) If the recipient gives notice of another address, communications shall thereafter be delivered accordingly;”

93. In considering these provisions the Judge reiterated that a commercially realistic interpretation is appropriate and stated that “courts in the past have been slow to regard non-compliance with certain termination formalities including service at the “wrong” address as ineffective, provided that the notice has actually been served on responsible officers of the recipient.” The Judge went on to set out the following points of principle:

a. Termination is a serious step and there must be substantive compliance with the contractual provisions to achieve an effective termination.

b. Generally, where notice has to be given to effect termination, it must be in sufficiently clear terms to communicate the termination clearly to the recipient.

c. It is a matter of contractual interpretation, first, as to what the requirements for the notice are and, secondly, whether a specific requirement is an indispensable condition compliance without which the termination cannot be effective. That interpretation needs to be tempered by reference to commercial common sense.

94. In light of the above, the Judge found that neither sub-clause 15.2 or 1.3 used words such as would give rise to making the giving of notice served only Contractor’s Madrid office a pre-condition to an effective termination. Looking at the subject matter and purpose to be fulfilled; the Judge noted that the primary purpose of sub-clause 1.3 was to provide an arrangement for notices to be effectively dispatched to and received by the Contractor, and for sub-clause 15.2 it is to ensure that the Contractor is made aware that its continued employment at the project is at an end.

95. Throughout the project correspondence had been frequently sent to the Contractor’s site office in Gibraltar, including the sub-clause 15.1 notices which had been received without objection from the Contractor. The Judge held that in these circumstances, in effect and practice the parties operated as if the site office was an appropriate address for service.

96. Therefore the Judge concluded that service at the Madrid office was not an indispensable requirement of either sub-clause 15.2 or 1.3, and it would be sufficient that an otherwise compliant and effective notice was actually served on the Contractor’s “personnel at a sufficiently senior level”.

97. It was held that the Employer’s letter of termination was validly served, and the Contract was terminated accordingly.

98. Clause 16 entitles the Contractor to terminate or suspend the contract in certain specified circumstances. This includes, for example, the Employer’s failure to comply with its payment obligations, or the Engineer’s failure to issue an interim payment certificate.

99. Clause 17 specifies the risks and responsibilities for which one party must indemnify the other. Accordingly, under Clause 17 the parties respectively accept responsibility for rectification of the loss or damage inflicted on works, goods or documents.
100. Sub-clause 17.6 excludes the liability of both, the Employer and the Contractor, in the following terms:

    “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”

101. This includes a cap on the liability of the Contractor to the Employer.

102. Clause 18 lists the insurance requirements to be implemented at or prior to commencement of the works.

103. Clause 19 deals with Force Majeure. Provision for force majeure is necessary because under common law, unlike civil law, force majeure is not a term of art and no provision will be implied in the absence of specific contractual provisions.

104. As mentioned above under the Gold Book, there have been a number of changes made to clauses 17-19. The insurance clause has been moved to 19, whilst clause 17 (formerly risk and responsibility) has been renamed “risk allocation”. The “force majeure” clause that was previously clause 19 has been dropped and replaced with a new clause 18 headed “exceptional risks”. The main change in this revised approach to the way in which risks and insurance are treated has been to set out in a much more detailed and precise way, the risks which the Employer and Contractor are to bear.

105. That said, the definition of “exceptional risk” is very similar to the definition of force majeure previously to be found in clause 19 of the 1999 forms. Now, clause 17 details risks borne by each party and takes care to differentiate between the risks during the two project periods. If risks occur which are either exceptional or the responsibility of the Employer, the Contractor is entitled to an extension of time and payment of costs during the design-build period. However, as the operation service period cannot be extended, naturally enough, the Contractor will only receive cost if these risks occurred during that time.

106. Finally, clause 20 deals with claims, disputes and arbitration, and this is something, particularly in terms of Dispute Boards, with which you will be familiar. Although, before discussing that issue, it is worth remembering that one must always check to see what law governs the contract.

Substantive Law

107. The FIDIC forms are drafted with international construction projects in mind. By their definition, such projects will inevitably involve international elements. The parties to the contract may be based in different jurisdictions, the project may be located in a country other than the parties’ own, or the parties may agree that a neutral jurisdiction should be designated as the forum for the resolution of their disputes. The international aspects of multi-jurisdictional construction projects give rise to potentially complex issues concerning conflicts of laws. Jurisdictions which in some form relate to a construction project may have widely differing and sometimes conflicting laws.
108. Of primary importance is the law that governs the contract, as it determines the parties’ contractual rights and obligations. In addition, the parties may be subject to various local laws (i.e. laws of the jurisdiction where the contract is to be performed), regardless of whether they are different to the governing law of the contract. This is due to the fact that such local laws may be mandatory, making contracting out impossible. Examples of such laws include health and safety, labour, planning and tax regulations. Invariably, local law will also define the rights relating to real property. In addition, mandatory laws may be imported into the construction contract by virtue of a multilateral development bank’s procurement rules. The FIDIC forms recognise this reality by specifying at sub-clause 5.4 that the Contractor must ensure that the permanent works comply with applicable laws and regulations.

109. On the subject of governing law sub-clause 1.4 provides that:

(i) the contract shall be governed by the law of the country (or “other jurisdiction”) stated in the Appendix to Tender;

(ii) where the contract is produced in more than one language, then the version which is in the ruling language stated in the Appendix to Tender shall prevail; and

(iii) if no language is nominated, the language for communications shall be the language in which the Contract (or most of it is written).

110. The reference in sub-clause 1.4 to “other jurisdiction” is intended to take account of federal legal systems.

111. In principle, the parties are free to choose whichever governing law they desire, including the law of a jurisdiction which is completely unrelated to the contract. However, this freedom of choice may be subject to limitations, such as requirements of good faith and laws concerning public policy. For instance, it might not be possible to choose the governing law of one jurisdiction if that choice is based solely on the purpose of bypassing the more prohibitive laws of another jurisdiction. In addition, where the Employer is a public body, the domestic law may render it impossible for the parties to agree to a governing law that is different to the Employer’s domestic law.

112. Despite the fact that it is intended under sub-clause 1.4 that the governing law will be stated in the relevant contract document, there is no express default provision which specifies the governing law if the parties fail to state a law. If a governing law is not chosen, this can give rise to real uncertainty later as to the law (or laws) governing the contract. Ultimately, this issue will most probably arise in the context of a dispute and will be decided by the forum (e.g. the court or arbitral tribunal) that has jurisdiction over that dispute.

Local Law

113. In addition to the governing law of the contract, the parties’ obligations may be subject to the law of the jurisdiction in which the project is located. This may be of concern to the Employer, as the relevant local laws may render it liable for the acts or omissions of the Contractor by virtue of its status as owner of the project. The FIDIC forms address this concern by requiring the Contractor to comply with all applicable laws and regulations during the execution of the
works. The Contractor’s breach of this obligation would, in turn, entitle the Employer to make a claim in respect of losses stemming from the Contractor’s contravention of local laws. The obligation itself is set out in sub-clause 1.13, which provides as follows:

(i) the Contractor must comply with applicable laws;

(ii) the Employer is responsible for obtaining planning and other permissions for the permanent works;

(iii) if the Employer must indemnify the Contractor against any consequence of failing to obtain the correct planning permissions;

(iv) the Contractor is responsible for the giving of all notices and payment of all taxes relating to the completion of the works; and

(v) the Contractor must indemnify the Employer for the consequences of failure to comply with its obligations as regards the giving of notices and payment of taxes.

114. Examples of the mandatory provisions in local law provisions include:

(i) Decennial Liability (civil law);

(ii) Adjudication and accompanying payment provisions (common law);

(iii) Take-over procedures (Romania).

115. Sub-clause 1.13 does not specify when exactly the Employer must obtain the relevant permits and permissions. Likewise, no remedy is prescribed in relation to the Employer’s failure to secure such permits, which could, in turn, cause a delay to the Contractor. It is, nonetheless, arguable that delays suffered by the Contractor for lack of permits would be attributable to the Employer and therefore entitle the Contractor to make a claim for an extension of Time for Completion under sub-clause 8.4. However, the Contractor may encounter difficulties in establishing the precise point of the delay due to the lack of a timeframe in which the Employer is to obtain the permits. This could, in turn, affect the length of any extension of Time for Completion (assuming one is secured in the first place).

116. The Contractor’s obligations under sub-clause 1.13 must be considered in conjunction with sub-clause 2.2, which provides that, on request from the Contractor, the Employer must provide “reasonable assistance” in the procurement of necessary permits. What amounts to “reasonable assistance” will depend on the circumstances, but may include the Employer’s authentication of the Contractor’s permit applications. The Employer would not, however, be expected to perform any functions which the Contractor can complete by itself. Nonetheless, given the vagueness of the expression “reasonable assistance”, the Contractor may encounter difficulties in establishing that delays in the procurement of permits are attributable to default by the Employer.

117. Aside from the compliance obligation imposed by sub-clause 1.13, the parties must adhere to applicable laws by virtue of the laws themselves. In this respect, the parties must comply not only with such laws at the time of the contract, but also with their subsequent amendments.
during the lifetime of the works. To cater for potential changes in the law, the application of sub-clause 1.13 is not restricted to applicable laws as at the date of the contract.

118. As far as changes in applicable laws are concerned, the parties bear their own respective risks arising from such changes. As an exception to this general principle sub-clause 13.7 of all FIDIC forms allocates to the Employer the risk of a change in law adversely affecting the Contractor’s performance of contractual obligations. sub-clause 13.7 provides for adjustments to the contract price (following a determination by the Engineer) in the event there is “any increase or decrease in Cost resulting from a change in the Laws of the Country” made:

(i) after the Base Date; and

(ii) which affects the Contractor’s performance of obligations under the contract.

119. In addition, if the Contractor considers that the change in law will cause a delay to the project, then the Engineer may, following receipt of a notice from the Contractor, make a determination that the Contractor is entitled to an extension of Time for Completion.

120. As far as the remit of sub-clause 13.7 is concerned, the expression “change” includes not only the creation of new laws and amendments to existing laws, but also changes in the interpretation of such laws by courts and governments. As a result, the concept of “change” is open to potentially wide interpretation by the parties, and could be deemed to include ad hoc policy interpretation.

121. Finally, in the event that it becomes unlawful for either or both of the parties to perform their obligations under the contract, sub-clause 19.7 provides that upon notice by either party, both parties shall be discharged from further performance of the contract.

Making a claim under the FIDIC form of contract

122. Clause 20 of the FIDIC forms sets out the procedures for claims by the parties. Clause 20 prescribes a multi-tiered dispute resolution procedure:

(i) submission of a claim to the Engineer, who makes a determination in accordance with sub-clause 3.5;

(ii) referral of the dispute to the Dispute Adjudication Board (the “DAB”);

(iii) the giving of a notice of dissatisfaction with the DAB’s decision;

(iv) Amicable Settlement; and

(v) Arbitration.

How does the Employer make a claim under the FIDIC form?

123. As stated above, sub-clause 2.5 of the FIDIC Conditions of Contract for Construction provides details as to how the Employer is to make a claim. The key features of this sub-clause are:
• If the Employer considers himself entitled to either any payment or an extension of the Defects Notification period, he 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.

• 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.

• 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.

124. 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. 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.

125. The Employer must give notice “as soon as practicable” after becoming aware of a situation which might entitle him to payment. It was thought that unlike sub-clause 20.1, where a Contractor has 28 days to give notice, there was 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. However, in the Privy Council case of NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago) following termination by the Contractor, the Employer sought to set off claims of its own against the contractor. The Contractor said that the Employer could not do this, as the claims had not been notified in accordance with sub-clause 2.5. However, the Privy Council agreed with the contractor, noting that it was hard to see how the words of sub-clause 2.5 could be clearer. Lord Neuberger said that the purpose of sub-clause 2.5:

“is to ensure that claims which an Employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given ‘as soon as practicable’. If the Employer could rely on claims which were first notified well after that, it is hard to see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer’s claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer’s function

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22 [2015] UKPC 37
is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served ‘as soon as practicable’

126. Lord Neuberger continued:

“Perhaps most crucially, it appears to the Board that ... although the closing part of clause 2.5 limits the right of an Employer in relation to raising a claim by way of set-off against the amount specified in a Payment Certificate, the final words are ‘or to otherwise claim against the Contractor, in accordance with this sub-clause’. It is very hard to see a satisfactory answer to the contention that the natural effect of the closing part of clause 2.5 is that, in order to be valid, any claim by an Employer must comply with the first two parts of the clause, and that this extends to, but, in the light of the word ‘otherwise’, is not limited to, set-offs and cross-claims.”

127. The Privy Council felt that the words “any payment under any clause of these Conditions or otherwise in connection with the Contract” were of very wide scope. Sub-clause 2.5 made it clear that if the employer wanted to raise such a claim, it must do so promptly and in a particularised form. Finally, the Privy Council felt that the purpose of the final part of the clause was to emphasise that, where the employer has failed to raise a claim as required by the earlier part of the clause, the back door of set-off or cross-claims is:

“as firmly shut to it as the front door of an originating claim”.

128. Further, it is a time bar in two parts. Not only must the Employer make a claim “as soon as practicable”, but the Employer must also provide particulars or other substantiation; again the absence of these could prove fatal to the right to assert a right of set-off. Obviously Employers (and those acting as Employers’ Representatives) should take careful note of this decision, and ensure that any claims are promptly notified to the contractor.

129. The notice must be in writing and served in accordance with sub-clause 1.3, although there is a degree of ambiguity as to whether the particulars must be provided at the same time as the notice.

130. As far as the particulars are concerned, the Employer must furnish the Contractor with details of the basis on which the claims are made, as well as details of the relief sought. In the event that either party is dissatisfied with the Engineer’s subsequent determination, a reference may be made to the DAB in accordance with Clause 20.

131. 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

[21 What the Privy Council did not do was provide any definition of “as soon as practicable”. Therefore this is likely to be a question of fact depending on the circumstances of each particular project. However, the judgment of the Privy Council does suggest that employers too might be subject to a time bar, under the FIDIC form at least. Indeed it might be that depending on the definition of “as soon as practicable” that time bar is potentially stricter that the 28-day time bar contractors are subject to.}
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 believes he is 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.

132. An issue which often crops up is what happens if the Engineer either makes no determination at
all, or fails to consult with either or both of the parties.

In what circumstances can a Contractor make a claim?

133. A different set of rules apply to the Contractor. Under sub-clause 20.1, the Contractor has a
duty to notify the Employer of an entitlement to additional time or money. The key features of
sub-clause 20.1 are that:

- The Contractor must give notice 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.

134. 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 receipt of an
instruction, when, however, the claim event is a continuous event, such as unforeseeable
weather over a certain period of time, it can become difficult to pinpoint the exact start of the
28-day period.

135. Sub-clause 20.1 is a time bar clause or condition precedent which 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. In England & Wales, following the House of Lords case
of Bremer Handelgesellschaft mbH v Vanden Avenne Izegem nv24 such clauses are only binding
if the language of the clause in question is clear. Here, sub-clause 20.1 expressly makes it clear
that:

“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.”

24 [1978] 2 Lloyd’s Rep. 113
Further the courts have recently confirmed their approval for condition precedents, provided they fulfil the conditions laid out in the Bremer case. In the case of Multiplex Construction v Honeywell Control Systems\textsuperscript{25}, Mr Justice Jackson held that:

"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."

Judge Jackson’s words were endorsed by HHJ Davies QC in the case of Steria Ltd v Sigma Wireless Communications Ltd\textsuperscript{26} who said that:

“In my judgment an extension of time provision confers benefits on both parties; in particular it enables a Contractor to recover reasonable extensions of time whilst still maintaining the contractually agreed structure of a specified time for completion (together, in the majority of cases, with the contractual certainty of agreed liquidated damages, as opposed to uncertain unliquidated damages). So far as the application of the contra proferentum rule is concerned, it seems to me that the correct question to ask is not whether the clause was put forward originally by Steria or by Sigma; the principle which applies here is that if there is genuine ambiguity as to whether or not notification is a condition precedent, then the notification should not be construed as being a condition precedent, since such a provision operates for the benefit of only one party…”

However, in April 2014 Mr Justice Akenhead had to consider a case arising from disputes relating to a project to build a tunnel at Gibraltar airport. The case, Obrascon Huarte Lain SA v Her Majesty’s Attorney General for Gibraltar\textsuperscript{27}, raised a number of interesting issues, not least about the sub-clause 20.1 condition precedent.

Amongst a number of claims, OHL sought an extension of time of 474 days. The Judge decided that the Contractor, OHL was entitled to no more than seven days extension of time (rock and weather). However, this was subject to compliance with sub-clause 20. It was accepted by OHL that sub-clause 20.1 imposed a condition precedent on the contractor to give notice of any claim. The Judge held that properly construed and in practice, the “event or circumstance giving rise to the claim” for extension must occur first and there must have been either awareness by the Contractor or the means of knowledge or awareness of that event or circumstance before the condition precedent bites. Importantly Mr Justice Akenhead said that he could see:

\textsuperscript{25} [2007] EWHC 447 (TCC)
\textsuperscript{26} [2008] CILL 2544. See also the Scottish case of Education 4 Ayrshire Ltd v South Ayrshire Council [2009] ScotCS CSOH 146 where Lord Glennie was wholly unsympathetic to the suggestion that allowance should be made for the fact that notices given in compliance with conditions precedent would be drafted by business rather than lawyers, noting that: “It is within judicial knowledge that parties to contracts containing formal notice provisions turn immediately to their lawyers whenever there is a requirement to give notice in accordance with those provisions. But even if that were not the case, there is nothing in clause 17.6.1 that would not readily be understood by a businessman unversed in the law”.
\textsuperscript{27} [2014] EWHC 1028 (TCC). The case was considered by the Court of Appeal in 2015, but the appellate court made no comment on this part of Mr Justice Akenhead’s decision, [2015] EWCA Civ 712.
“...no reason why this clause should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer.”

140. In coming to this conclusion, the Judge, made reference to sub-clause 8.4 of the FIDIC conditions, which sets out the circumstances, in which the contractor is entitled to an extension of time. Sub-Clause 8.4 states that:

“The Contractor shall be entitled subject to Sub-Clause 20.1... to an extension of the Time for Completion if and to the extent that the completion for the purposes of Sub-Clause 10.1...is or will be delayed by any of the following causes...”

141. Sub-clause 20.1 did not call for the notice to be in any particular form and it should be construed as allowing any claim provided that it is made by notice in writing to the engineer, that the notice describes the event or circumstance relied on and that the notice is intended to notify a claim for extension (or for additional payment or both) under the contract or in connection with it. It must be recognisable as a “claim”. The onus of proof was on the employer if he should want to establish that the notice was given too late.

142. Is there the possibility that a court/arbitral tribunal might decline to construe the time bar as a condition precedent, having regard to the particular circumstances of the matter before it and the impact of the applicable law?

143. On the strict wording of the Contract, the answer is no and contractors should always try and work on this basis. That said, it is often suggested that in civil code jurisdictions it can be possible to raise a successful challenge to time bars under the mandatory laws of that country on the basis of the time bar being contrary to the notion of good faith28 or some other similar legal principle. For example, it has been suggested that a German court might interpret the Contractor’s duty to give notice not as a condition precedent to give notice but an obligation (“obliegenheit”) of the Contractor. This would mean that the Contractor does not lose the right to make a claim but that the Contractor must prove that his claims are valid and are not affected by his failure to meet his notice obligation in time29. The general point being here, that it is wrong that a party who has genuinely suffered a loss might be prevented from bringing a claim in respect of that loss for a technical procedural breach.

144. That said, remember that most civil codes contain a provision confirming the importance of what has actually been agreed between the parties. For example Article 246(1) of the UAE Civil Code says that:

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28 See for example the comments of Michael E. Schneider and Matthias Scherer (taken from the Switzerland Chapter of FIDIC — An Analysis of International Construction Contracts- www.lalive.ch/files/mes_msc_analysis_of_construction.pdf) who note that by the adoption of Article 2 of the Swiss Civil Code (Good Faith Rule) and the principle of "venire contra factum proprium" the Employer could be deemed to have waived his right to insist on the 28-day rule if he has not clearly insisted on a strict adherence to the rule in a consistent manner.

29 FIDIC’s clause 20.1 - a civil law view, Mauro Rubino-Sammartano, Construction Law International Volume 4 No 1 March 2009
“The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.”

145. The Scottish case of *City Inn Ltd v Shepherd Construction Ltd* suggests there may be. The dispute related to the construction of a hotel under a contract incorporating the JCT Standard Form (Private Edition with Quantities) 1980 as amended. The core element of the dispute was whether or not the Contractor was entitled to an extension of time of 11 weeks and consequently whether or not the Employer was entitled to deduct LADs. Sub-clause 13.8 contained a time bar clause, requiring the Contractor to provide details of the estimated effect of an instruction within ten days. Lord Drummond Young characterised the clause thus:

“I am of opinion that the pursuers’ right to invoke clause 13.8 is properly characterized as an immunity; the defenders have a power to use that clause to claim an extension of time, and the pursuers have an immunity against that power if the defendants do not fulfil the requirements of the clause.”

146. However, the Judge also felt that an immunity can be the subject of waiver. The architect and Employer have the power, at least under the JCT Standard Forms, to waive or otherwise dispense with any procedural requirements. This was what happened here. Whilst the Employer (in discussions with the Contractor) and the architect (by issuing delay notices) both made it clear that the Contractor was not getting an extension of time, neither gave the failure to operate the condition precedent at sub-clause 13.8 as a reason. The purpose of sub-clause 13.8 is to ensure that any potential delay or cost consequences arising from an instruction are dealt with immediately.

147. The point made by the Judge is that whilst sub-clause 13.8 provides immunity, that immunity must be invoked or referred to. At a meeting between Contractor and Employer, the EOT claim was discussed at length. Given the importance of sub-clause 13.8, the Judge felt that it would be surprising if no mention was made of the clause unless the Employer, or architect, had decided not to invoke it. Significantly, the Judge held that both Employer and architect should be aware of all of the terms of the contract. Employers and certifiers alike will need to pay close attention to their conduct in administering contracts in order to avoid the potential consequences of this decision.

148. The Inner House agreed with Lord Osbourne saying:

“silence in relation to appoint that might be taken may give rise to the inference of waiver of that point. In my view, that equitable principle can and should operate in the circumstances of this case.”

149. However, perhaps even FIDIC itself has recognised the potentially harsh consequences of the strict time limits within sub-clause 20.1. In the new Gold book, there is a new clause, sub-clause 20.1(a) which gives the Dispute Board an element of discretion noting that:

*However, if the Contractor considers there are circumstances which justify the late submission, he may submit the details to the DAB for a ruling. If the DAB considers the*
circumstances are such that the late submission was acceptable, the DAB shall have the authority under this sub-clause to override the given 28-day limit and advise both the parties accordingly.

150. Sub-clause 20.1(a) now enables a Contractor to submit to the dispute board, the details of any circumstances which may justify the late submission of a claim. The clause provides that if the dispute board considers that the circumstances are such that the late submission was “acceptable”, the dispute board may override the condition precedent. No definition of “acceptable” has been given, so a Contractor is still best advised to operate as if the 28-day limit strictly applies. However, there is now some degree of latitude. There are a number of reasons why late submission might be “acceptable”. The most likely one is that the Contractor will be able to say that the Employer and/or Engineer was aware of the issue which gave rise to the claim. For example, the problem might have been discussed at site meetings or inspections or even been raised in sub-clause 4.21 Progress Reports and the Contractor’s Programme.

151. In addition, the Gold Book has expanded the role of the DAB further by introducing a new provision, at sub-clause 20.4, headed “Avoidance of Disputes”. Sub-clause 20.4 states as follows:

“if at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. Such informal assistance may take place during any meeting, site visit or otherwise. However, unless the Parties agree otherwise, both Parties must be present at such discussions. The Parties are not bound to act upon any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute Resolution process and decision by any views given during the informal assistance process, whether provided orally or in writing.

If a dispute of any kind whatsoever arises between the Parties, whether or not any informal discussions have been held under this Sub-clause, either Party may refer the dispute in writing to the DAB according to the provisions of sub-clause 20.5 …”

152. In England & Wales there has been some disquiet about asking someone who is tasked with adjudicating a dispute to undertake the dual role of formally trying to mediate a settlement. In Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd31, HHJ LLoyd QC commented that the conduct of the adjudicator meant that this was a case of “apparent bias” in that he appeared to lack impartiality. In his view, the circumstances would lead a fair minded and informed observer32 to conclude that there was a real possibility or a real danger, the two being the same, that the adjudicator was biased. The dilemma posed by this new clause can be demonstrated by reference to comments made by the Judge in his decision:

31 BLR 207 [2001]
32 And in England & Wales following the case of Porter v Magill [2002] 2.A.C. 375, this is the test to be adopted. See discussion below in relation to General Condition 4 of the Dispute Adjudication Agreement for further information. There was in the Glencot case no question in the Judge’s mind that the adjudicator had acted in any way other than completely properly.
“There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking.”

153. One difficulty is that in any mediation process, a mediator will be often become privy to confidential and other commercial considerations of the parties. A mediator is there to facilitate a settlement. This role is clearly incompatible with that of an adjudicator who is there to decide upon the parties’ legal rights and obligations.

154. Now, sub-clause 20.5 of the FIDIC Gold Book 2008 does not go so far as to talk about mediation, but the same point arises, will a party feel comfortable adopting this process in the knowledge that he might be asking the DAB later to make a formal adjudication on the issue? The DAB may not be bound by any views given during the informal assistance process, but it may be difficult for them to put these views to one side. The likely answer is that this approach will suit some parties more than others, but the important point is that FIDIC is offering the parties the services of the DAB in an alternative way to try and resolve or manage any potential disputes. In many respects this new option is a natural extension of the DAB’s role. If you have a permanent DAB that is meeting on a regular basis this may already provide an opportunity for informal discussions. The FIDIC Guide to the Gold Book states that:

“Prevention is better than cure, and the DAB is entrusted also with the role of providing informal assistance to the Parties at any time in an attempt to resolve any agreement.”

155. The likely position is that in time as more parties become familiar with such a concept, they will be more willing to explore alternative ways and approaches to resolving their differences, but ultimately as is always the case, just what is the best approach will depend on the particular circumstances and timing of the project and dispute in question. In any event, sub-clause 20.5 reflects the global trend of encouraging dispute avoidance and informal dispute resolution. To this end, sub-clause 20.5 of the other FIDIC forms requires that the parties attempt to settle disputes in an amicable fashion before commencement of arbitration proceedings.

156. Further, clause 8.4 of the Gold Book introduced, for the first time in a FIDIC contract, a requirement that both Employer and Contractor “endeavour to” advise the other of any circumstances of which they are aware which may adversely affect the project, e.g. increase the Contract Price or cause delay. This early warning system is used in other contracts, and can be a valuable project tool and is a further mechanism whereby both parties will learn of the possible existence of claims at an early stage.

157. Therefore, it can be seen that FIDIC is following the worldwide trend to encourage dispute avoidance. This is a trend to be found in Abu Dhabi where the Emirate has finally introduced a

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33 In the *Glencot* case, the adjudicator was privy to a number of without prejudice offers and it would seem he was also privy to some rather heated discussions.

34 It already features in the NEC3.
form of the 1999 Red and Yellow Books. Thus for the first time the Middle East, having for many years resisted such a change in favour of the 1987 Old Red Book FIDIC 4th Edition, has recognised and adopted the Dispute Board concept. The standard amicable settlement clause to be found at clause 20.5 has been expanded to include the right, at any time, for either party to refer a dispute to independent management review, those senior managers then being required to endeavour to reach a settlement.

158. There are a number of steps parties can take to avoid the adverse effects of time bars. They include the following:

(i) Parties should take care when concluding contracts to check any time bar clauses governing claims they might make;

(ii) Parties should appreciate the risks they then run of not making a claim (even if to maintain goodwill) unless the other party agrees to relax the requirements or clearly waives them. This is perhaps especially the case where time bar clauses, if cautiously operated, may generate a proliferation of claims;

(iii) Remember that the courts see the benefits of time bar provisions and support their operation. A tribunal might bar an entire claim for what seems like a technical reason by which time it will usually be too late to make a new, compliant claim; and

(iv) Indeed even where the contract contains a clause such as sub-clause 20.1(a) of the FIDIC Gold Book 2008, potential claimants should not necessarily rely upon the other party already having the information they are required to provide.

159. Equally those considering making claims, should consider the following:

(i) When is notice required?

(ii) Who has to give notices?

(iii) To whom should notice be given?

(iv) In what form must the notice be given?

(v) What information must be provided with the notice?

(vi) What are the response times?

(vii) Are there any continuing notice obligations?

(viii) Is there an agreement in place not to serve notices?

(ix) What happens if you fail to serve a notice?

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35 The 2007 Abu Dhabi Executive Affairs Authority General Conditions of Contract which has been introduced for construction projects undertaken in Abu Dhabi on behalf of public entities.
**Enforcement of DAB Decisions**

160. On 1 April 2013 the FIDIC Contracts Committee issued a Guidance Note dealing with the powers of, effect of and the enforcement of Dispute Adjudication Board (“DAB”) decisions.

161. The purpose of the Guidance Note is to clarify clause 20 of the General Conditions of the Rainbow Suite or 1999 Conditions of Contract. The guidance is intended to address the question of how one enforces DAB decisions that are binding but not yet final. FIDIC say that their intention is to make it explicit and clear that the failure to comply with a DAB decision should be capable of being referred to arbitration under sub-clause 20.6 without the need first to obtain a further DAB decision under sub-clause 20.4 and to comply with the amicable settlement provisions of sub-clause 20.5.

162. Such an approach will be familiar to those who operate in jurisdictions where short-form adjudication has been introduced (for example the Housing Grants, Construction and Regeneration Act in the UK) and where decisions that are binding and not yet final can be immediately enforced. Indeed the Building and Construction Industry Security of Payment Act 2006 in Singapore goes as far as to state that an application for review of an adjudicator’s decision can only be heard if that decision has actually been paid.

163. The idea behind clause 20.4 is that whether or not a party has given notice of its dissatisfaction, the DAB’s decision should be immediately binding on the parties and they must comply with it promptly. If a party fails to comply with a DAB decision and that decision has become final, sub-clause 20.7 already provides for a party to refer the other party’s failure to comply with such a decision direct to arbitration. However, if the DAB decision is binding but not final (i.e. the “losing” party has served a notice of dissatisfaction), there is now doubt about whether or not there is a straightforward route to enforcing that decision.

164. The reason why FIDIC has issued this guidance now owes much to the discussion and disagreement that followed the Singapore case of CRW Joint Operation v PT Perusahaan Gas Legara (Persero). Here, the Singapore Court of Appeal held that an Arbitral Tribunal had, by summarily enforcing a binding but non-final DAB decision by way of a final award without a hearing on the merits, acted in a way which was: “unprecedented and more crucially, entirely unwarranted under the 1999 FIDIC Conditions of Contract”. The problem for the court was that the Arbitral Tribunal had assumed that they should not open up, review and revise a DAB decision which was the subject of a notice of dissatisfaction.

165. The Singapore case examined the grounds for setting aside arbitration awards in construction-related disputes. If, within 28 days after receiving a dispute adjudication board (DAB) decision, either party gives notice to the other party that it is dissatisfied with the decision, the decision will be binding but not final. This case looked at whether a party may refer to arbitration the failure of the other party to comply with a DAB decision that is binding but not final. There have been many judgments as the case has moved between the Singapore Courts and arbitration tribunals.

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36 TBK [2011] SGCA 33
These currently culminated in the decision of the Singapore Court of Appeal in *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation*, where in a split decision, the Majority of the Court of Appeal found that binding but non-final DAB decisions could be submitted directly to arbitration on the discrete question of non-compliance. The Majority considered the DAB’s powers under Sub-clause 20.4 and set out the following three propositions:

(a) “A DAB decision is immediately binding once it is made. ...

(b) The corollary of a DAB decision being immediately binding once it is made is that the parties are obliged to promptly give effect to it until such time as it is overtaken or revised by either an amicable settlement or a subsequent arbitral award.

(c) The fact that a DAB decision is immediately binding once it is made and unless it is revised by either an amicable settlement or arbitral award is significant ... the issuance of an NOD [notice of dissatisfaction] self-evidently does not and cannot displace the binding nature of a DAB decision or the parties’ concomitant obligation to promptly give effect to and implement it.”

While the Majority’s decision is on face value a victory for contractors seeking the protection of a security of payment regime, the result is bittersweet. Interim enforcement of the DAB decision was obtained only after going through two sets of arbitration, High Court and Court of Appeal proceedings, and over a period of six years. A decision on the merits of the underlying dispute is still to be decided.

Furthermore, the pathway to interim relief laid down by the Majority differs from all previous judgments in the *Persero* series, whereas the Minority judgment held that the Conditions of Contract provide no scope whatsoever for expedited relief by enforcing non-final DAB decisions.

However, where a party does not comply with the DAB decision and where the Singapore case is followed, the decision of the dispute board itself cannot simply be enforced as an arbitral award, without some form of arbitration, or local court litigation (where the contract permits it), which opens up and reviews again the issues decided by the DAB. This is particularly unhelpful to a Contractor who has been awarded money. It is to avoid similar problems in the future, that FIDIC has now issued the Guidance Note which suggests amendments to clause 20.

The Guidance Note follows the approach to be found particularly in sub-clause 20.9 of the FIDIC Gold Book. It provides a new sub-clause 20.4, and amends the wording to sub-clause 20.7 as well as providing further provisions at clauses 14.6 and 14.7. The amendments are for use in the Red Book, Silver Book and Yellow Book. The Gold Book already adopts a different approach, and so the amendments proposed in the Guidance Note should not be used in their current state. FIDIC recommends the introduction of a new penultimate paragraph of sub-clause 20.4:

“If the decision of the DAB requires a payment by one Party to the other Party, the DAB may require the payee to provide an appropriate security in respect of such payment.”

37 [2015] SGCA 30
171. This gives the DAB a contractual right or power to order one party to provide security. The DAB cannot force a party to comply, and so once again a party may have to go to arbitration in order to obtain an appropriate sanction and then seek to enforce that award in an appropriate court.

172. In relation to the payment provisions in clause 14, a payment under sub-clause 14.6 “shall” now include any amounts due to or from the Contractor in accordance with the DAB’s decision. Sub-clause 14.7 further requires that amounts due under a DAB decision be included within any Interim Payment Certificate that is to be issued. The intention here is that any amount ordered by the DAB to be paid should be included within an assessment of payment made by the Engineer or the Employer’s Representative, and then included within the Interim Payment. Failure to do so is simply a further breach.

173. Sub-clause 20.7 is then deleted and replaced with the following:

“In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under sub-clause 20.6 [Arbitration] for summary or other expedited relief, as may be appropriate. sub-clause 20.4 [obtain Dispute Adjudication Board’s Decision] and sub-clause 20.5 [Amicable Settlement] shall not apply to this reference.”

174. Sub-clause 20.7 relates to decisions that are either binding or final and binding. Therefore regardless of any notice of dissatisfaction, or more importantly any arguments or issues as to the adequacy or timing of any notice of dissatisfaction, a valid referral can be made to arbitration. The amendment also clarifies that the parties expect a summary or expedited relief to be used if and as appropriate. That said, the ICC’s emergency arbitrator provisions are unlikely to be appropriate. This is because they are for use when the contract itself does not provide for an expedited procedure. A DAB dispute resolution procedure is such an expedited procedure. Therefore it is probably more appropriate to commence arbitration and seek an immediate award for payment if there is any failure to honour the DAB decision.

175. Of course, this guidance will only apply to future contracts, where the amendment is negotiated and agreed. However for current contracts, the likelihood must be that it will be more difficult for a party to persuade a court or tribunal that the current (1999) drafting does actually achieve FIDIC’s intentions that the DAB decision, if it is not followed, can be summarily enforced. The issuing of contract amendments will be used as proof that the existing contract form does not achieve this aim. By simply issuing guidance that the Singapore Court of Appeal’s decision was contrary to FIDIC’s intentions regarding the operation of clause 20, FIDIC may have had a different effect. But by issuing amendments to the existing contract, FIDIC have gone further and might be said to have admitted that their existing contract was not sufficiently clear.

176. That said, it is useful to know now some of the changes that are likely to appear in the new FIDIC Form, and the Guidance Note itself is a useful reminder of the need for clarity and certainty within tiered dispute resolution provisions, not only in FIDIC and other standard forms but also bespoke construction contracts.
Enforcement of the DAB procedure

177. Notwithstanding the Guidance Note issued by the FIDIC Contracts Committee on 1 April 2013, the DAB procedure set out in clause 20 of the Rainbow Suite remains one of the most frequently contested provisions of the FIDIC form. In addition to issues surrounding the enforceability of DAB decisions themselves, another potential hurdle that needs to be overcome is the appointment of the DAB itself.

178. The difficulties that can face parties seeking to appoint a DAB are illustrated well by two recent cases, one from England and one from Switzerland, in which the following questions were addressed:

(i) Is the DAB procedure prescribed in clause 20 of the FIDIC Red Book a mandatory pre-condition to submitting a dispute to arbitration or litigation (as the case may be)? And if so

(ii) What are the legal consequences of failing to comply with this procedural requirement?

179. The above questions encompass a number of issues for parties contracting with the FIDIC Rainbow Suite, for instance; what can I do if the other party to the contract refuses to assist in the appointment of the DAB? How do I resolve my dispute if there is no DAB and no DAB decision? Do I have to go through the DAB process where the contract is at an end and/or obtaining a decision of the DAB will just be an unnecessary duplication of cost?

180. Unfortunately the answer to these questions is still not entirely clear. Although the two courts provided almost identical legal analysis of the first question, having no trouble deciding that the DAB procedure is a mandatory pre-condition to arbitration or litigation, the courts both gave a different ruling on the actual effect of the “pre-condition”.

The Swiss Case

181. The Swiss case, Decision 4A_124/2014, involved a contract based on the FIDIC Red Book, and a long and ultimately unsuccessful attempt to resolve a dispute through a DAB. A brief timeline of this process is as follows:

(i) March 2011: The Contractor first notified the Employer of its intention to refer a dispute to a DAB.

(ii) May 2011: The parties' respective adjudicators were appointed.

(iii) October 2011: The prospective chairman of the DAB was (provisionally) agreed upon by the parties.

(iv) March 2012: The prospective chairman disclosed an irreconcilable conflict of interest.

(v) June 2012: A new prospective chairman was agreed upon.

(vi) September 2012: The prospective chairman circulated a draft Dispute Adjudication Agreement (“DAA”).

(vii) 17 October 2012: The Employer returned the draft DAA with suggested amendments.
182. The Employer challenged the jurisdiction of the Arbitral Tribunal on the basis that the Contractor had failed to complete the DAB procedure required by the contract.

183. At first instance the Arbitral Tribunal found in favour of the Contractor, and stated that the DAB procedure at clause 20 of the FIDIC form was:

“not mandatory in that it would be a pre-condition to the right to initiate arbitration or that failure to observe it would lead to inadmissibility.”

184. In coming to this decision the Tribunal read down the mandatory word “shall” in sub-clause 20.2 against what the Tribunal considered to be the broader context of the whole of clause 20. The Tribunal reasoned that; the word “may” in sub-clause 20.4, the exception at sub-clause 20.8 (which allows a party to refer a dispute directly to arbitration in certain circumstances if a DAB is not in place or has expired at the time a dispute arises), and other factors such as there being no time limit to constitute a DAB (although time was put forward in obiter dictum only), all pointed to the fact that the DAB procedure was intended to be optional only, and not mandatory.

185. On appeal, the Swiss Supreme Court found the opposite and concluded that the DAB procedure in clause 20 was a mandatory precondition to arbitration.

186. In finding that the DAB process is mandatory the Court held there to be “no doubt” that the word “shall” in sub-clause 20.2 corresponded to an obligation or duty, and that that obligation was not diminished by the broader context of the clause. In particular, the Court noted that to follow the wide interpretation of sub-clause 20.8 used by the Arbitral Tribunal would “clearly be contrary to the goal the drafters of the system had in mind”, and would result in the DAB procedure being merely an “empty shell.” The Court considered that the correct interpretation of sub-clause 20.8 was that it would apply only in the exceptional situation where the mission of a standing DAB has expired before a dispute arises between the parties, or other limited circumstances such as the inability to constitute a DAB due to the intransigence of one of the parties. In this case the contract provided for ad hoc DAB appointments under sub-clause 20.2, and not a standing DAB, and therefore sub-clause 20.8 did not apply. The Court also noted that the absence of a time-limit to constitute a DAB did not take away from the obligation in sub-clause 20.2 (although the Court did consider the lack of a prescribed time limit to be a deficiency in the system).

187. However, having come to the conclusion that the DAB procedure was mandatory, the Court went on say that in the case at hand several factors had persuaded it to depart from enforcing the DAB procedure as a condition precedent to arbitration, namely:

(i) The purpose of the DAB system was to allow disputes to be resolved speedily and during the carrying out of a project, principally by using a permanent/standing DAB. In the case at hand the project was already finished and the contract prescribed an ad-hoc rather than a standing DAB, therefore the Court considered that a DAB constituted
in those circumstances would be more similar to an arbitral tribunal than the DAB contemplated by clause 20 in any case.

(ii) The Contractor had spent 15 months trying to constitute a DAB to hear its dispute without success (it is of note that no party was able to be blamed for the length of this process although the Employer’s “passivity” was acknowledged by the Court).

(iii) The Employer’s motive for disputing the move to arbitrate was deemed to be “questionable at best”.

Therefore in all the circumstances, and in light of the rules of good faith that are implied into commercial contracts in civil law countries, the Court held that the Contractor was entitled to abandon the DAB procedure and to submit the matter to arbitration.

The English Case

188. Following the Swiss decision, the question of enforceability of the DAB process was put before the Technology and Construction Court of England and Wales in the case of Peterborough City Council v Enterprise Managed Services Limited. Just as with the Swiss case, Peterborough involved; contract terms based on the FIDIC Red Book, an ad-hoc rather than a standing DAB, and a dispute taking place after the completion of the project. However, a perhaps material difference is that unlike the Swiss case, in Peterborough the party who raised the dispute (in this case the Employer) did not attempt to appoint a DAB at all and instead initiated proceedings in court in the first instance. Subsequent to court proceedings being initiated the Contractor argued that the DAB procedure was a mandatory pre-condition to litigation and therefore the proceedings should be stayed.

189. On the first question, is the DAB procedure mandatory, the Employer argued that in this case the DAB procedure was not mandatory because no DAB was “in place” at the time the dispute was raised and therefore the exclusion at sub-clause 20.8 of the contract applied (namely that either party was entitled to “opt out” of the DAB procedure and instead refer a dispute directly to court). The Judge firmly rejected this argument and held that sub-clause 20.8 was intended to apply only to cases where a standing DAB was prescribed and by the time the dispute arose that DAB had ceased to be in place. In this case the contract provided for ad-hoc DAB appointments under sub-clause 20.2, and therefore the exclusion at sub-clause 20.8 did not apply and the contract required the determination of the dispute through DAB adjudication prior to any litigation.

190. On the second question, what are the legal consequences of failing to comply, the Employer argued that even if the DAB procedure was mandatory its court proceedings should not be stayed namely on the grounds that:

(i) any DAB decision would inevitably be subject to a notice of dissatisfaction from one of the parties, and court proceedings would be necessary in any case. Therefore it would be a waste of cost and time to insist on the DAB procedure; and

(ii) the “rough and ready” DAB procedure was not suitable to resolve the complex issues in dispute.

191. In respect of the second point the Judge noted that whether or not the Employer’s submission was correct, the complexity of issues was foreseeable at the time the parties chose to incorporate the DAB machinery, and therefore both parties had agreed to it and were bound by it.

192. The Judge expressed more sympathy for the first submission and noted that on purely practical grounds it would probably be better to allow the court proceedings to continue. However, he went on to state that the relevant case law showed a clear presumption in favour of adhering to the dispute resolution procedure provided for in the contract, and the proceedings should be stayed accordingly.

193. Interestingly, although the Judge deferred to the weighting of established case law, in his reasoning he noted that in this case “the various factors are too finely balanced to...displace the presumption in favour of adopting the method of dispute resolution chosen by the parties in their contract.” The Judge’s comments appear to contemplate that on a more compelling set of facts the presumption that the contractual machinery will apply (i.e. that the DAB procedure is mandatory), might be displaced by what is practical and fair in the circumstances.

The Swiss and English decisions compared

194. Both the Swiss and English courts emphasised that DAB procedures must be treated as mandatory. Notwithstanding this, both courts appeared to accept that in certain exceptional circumstances it will be possible to skip the DAB procedure and move directly to arbitration or litigation. What circumstances might qualify as sufficient to avoid a mandatory DAB procedure is still far from defined, and it remains merely a theoretical possibility in England. Nevertheless the above cases do provide some guidance.

195. One of the main differences between the two decisions was the attitudes of the parties. In the Swiss case, the Employer was essentially trying to frustrate the entire dispute resolution process, first by moving very slowly when it came to the appointment of the DAB and then using the lack of a DAB to allege that the Arbitration Tribunal did not have jurisdiction. It is of note that the Court found no provision in the contract to criticise the Employer for what it described as “passivity” in following the DAB procedure; however, it was able give consideration to the Employer’s behaviour under the principle of good faith that is implied into commercial contracts by the Swiss Civil Code.

196. In the English case there was no question of bad faith by either party and this may have had an influence on the Judge’s decision not to allow the court proceedings to continue. However it should be noted that the Judge would have had less scope to consider the conduct of the parties in any case because the principle of good faith is not implied into commercial contracts in common law jurisdictions (English law does imply the obligation of mutual cooperation into most commercial contracts although this would have dubious application to the dispute resolution process).
197. Therefore while both courts agreed that the DAB procedure in clause 20 of the FIDIC Red Book is mandatory, they reached different conclusions on the legal consequences of failing to comply with that requirement. In the Swiss case the Employer was prevented from insisting on the mandatory nature of the DAB procedure that it had done so much to frustrate in the first place. This is rather helpful for contractors who are faced with an Employer who is apparently trying to prevent what is seen as a legitimate dispute from being resolved through the DAB process. In England there is a stronger presumption that the parties are bound by the contractual machinery they agreed to, and so parties should expect to receive less sympathy from the courts than their civil law counterparts in circumstances such as where the other party is making the DAB procedure difficult or where a duplication of costs is likely.

THE MDB VERSION OF THE NEW RED BOOK

198. So why does this paper deal with procurement and the FIDIC form? The answer to this question lies in the popularity and success of the FIDIC form. The European International Contractors have said that:

"‘standardisation’, both in technical and diminutive matters, is more likely to result in a satisfactory and trouble-free execution of projects".39

199. There is no doubt that the FIDIC form is one of the more popular forms of contract, with client/employers, contractors and international financing institutions. Of course, that is not to say that the FIDIC form has been adopted wholeheartedly worldwide. The FIDIC form has not gained widespread acceptance in the United States or the UK, for example.

200. The advantage of standard form contracts, in any form of jurisdiction, is that they offer a saving in time and cost on repetitive transactions. Parties are familiar with them. With the standard form of contract, the need for negotiation and re-drafting is minimised.

201. FIDIC is also well known for its attempts to adopt an even-handed allocation of risk. For example, A. Sandberg, then head of legal services at Skanska, said of the 1999 Rainbow Suite:40

"Contractors in general agree that the FIDIC Conditions of Contract have been and still are important for facilitating the tendering for and negotiating of international construction contracts. The great benefits of the present Red and Yellow Books are that the balance of risks and responsibilities as well as allocation of duties and authorities between the parties generally is accepted by both employers and contractors. The FIDIC Conditions have therefore become the baseline conditions for a fair international construction contract."

202. The MDB version of the FIDIC Red Book evolved out of the habit of the world’s banking community of adopting the FIDIC Conditions as part of their standard bidding documents. Typically, each bank would introduce 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

40 A Contractor’s View on FIDIC Conditions of Contract for EPC Turnkey Projects - ICLR (1999) Vol 16
product of preparation by the FIDIC Contracts Committee and a group of participating banks.\textsuperscript{41} The first harmonised edition of the 1999 Conditions was published in May 2005, only to be amended in March 2006 and then revised again in June 2010.\textsuperscript{42}

203. These amendments only apply to the Red Book, which is why the MDB Version is typically known as the “Pink Book.”

204. There are a number of differences between the FIDIC form and the MDB version. One of the purposes of this paper is to consider these changes and to see how they reflect the concerns of the world banking community, particularly as reflected in the role of the World Bank itself.

205. As part of its loan package, the World Bank and the other multilateral development banks insist that recipients of aid incorporate the FIDIC terms into their tender documentation. The World Bank *Procurement User’s Guide For Procurement of Works* makes it clear that:

“The provisions in Section I (Instructions to Bidders) and Section VII (General Conditions of Contract) [of the MDB version] must be used with their text unchanged.”

206. In other words, the harmonised edition is not intended to replace the 1999 Red Book, except in relation to projects financed by the MDB banks.

207. Now as it happens, the World Bank also revised its General Contract Conditions in August 2010. Frustratingly as we shall see, notwithstanding that the World Bank and FIDIC have had at least 5 years to consult, it has not been possible to agree on a unified wording and there remain differences between the Pink Book and the World Bank’s conditions.

208. The key question is whether this even-handed approach is maintained in the new Red Book, MDB harmonised edition. Remember that it is the stated aim of FIDIC to produce

“*documents which offer a fair balance of risks between the contracting parties*”.

209. It can be seen that there is an immediate tension. Is it really likely that the incorporation of a number of clauses which reflect the approach of various lending institutions will maintain the “fair balance of risks” of which FIDIC is so proud? The short and simple answer to this question is that a number of the differences between the standard FIDIC Red Book and the MDB harmonised edition call into question whether or not FIDIC has been able to maintain its even-handed approach and balance between the Employer and Contractor.

210. Of course some of the amendments reflect the third party to this contract, namely the Funder. For example, by clause 1.15, representatives of the Bank are allowed to inspect the site and/or inspect and audit the Contractor’s accounts and records relating to the contract. Alternatively,

\textsuperscript{41} 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.

\textsuperscript{42} 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.
by clause 4.1, the Contractor has to source all equipment, material and services for use on the project from an “eligible source country”, effectively one approved by the Bank.

211. Perhaps the most notable if not controversial changes are those to be found in clause 3 and the role of the Engineer. 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:*

(i)   *Sub-clause 4.12: Agreeing or determining an extension of time and/or additional costs.*

(ii)  *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.*

(iii) *Sub-clause 13.3: Approving a proposal for variation submitted by the Contractor in accordance with Sub-clauses 13.1 or 13.2.*

(iv)  *Sub-clause 13.4: Specifying the amount payable in each of the applicable currencies.*

212. 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.”

213. 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. Indeed the Employer now has the unilateral right to replace the Engineer. Whereas the second change might be viewed as fettering the Engineer, particularly in the fact that the new clause says that the Engineer cannot agree or determine any extension of time or cost consequence of said extension without the Employer’s approval.

214. 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. Accordingly, it is likely to impact upon the way in which potential contractors tender for the project.

215. There are a number of other similar features within the MDB version. The impact of some of these is obvious but sometimes, the point is not so clear at first glance. These include apparently simple changes such as the change from the 1999 Red Book’s “reasonable profit” to “profit”. By sub-clause 1.2(e) that profit is fixed at 5% unless otherwise agreed. From a

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43 The Abu Dhabi version takes a similar approach, listing even more clauses where approval is required.


45 Not all the differences are set out in this paper.
funder’s point of view, the purpose of the change is a clear one; everyone knows what the Contractor’s profit is. Some might argue that 5% is a little low, or at least not reasonable.

216. Under clause 2.5 of the 1999 FIDIC Red Book, the Employer is now required to give notice of his claims “as soon as practicable” after the Employer becomes aware of any event which gives rise to a claim. Whilst this is far from as onerous as the condition precedent, 28-day limit placed on the Contractor by clause 20.1, it is a new requirement of the 1999 form and could be said to be an example of the balance FIDIC is looking for.\(^46\)

217. However, under the MDB harmonised version, the following change has been introduced to the sentence which details when the Employer must give notice. The sub-clause 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.

218. 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. 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.

219. In sub-clause 4.2, 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 and may make it easier for the Employer to make a call under the performance security, especially as the Pink Book gives the Employer a discretionary right to make a claim. Against this, it might have been felt that the reference to the ICC Uniform Rules provides an adequate safeguard for the Employer, the financing institutions and the Contractor.

220. Under 4.2 too, the Engineer can request a prompt increase or decrease to the amount of the performance security where a variation leads to a reduction by 25% of the Contract Price.

221. The amendments to sub-clause 4.12 have had an interesting history. 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:

\(^46\) And talking of time limits, the Engineer now has 28 days from receipt of a claim, to make his or her determination.
“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”.

222. This was a controversial amendment. The European International Contractors Group criticised the addition, referring to it as a “twist of Catch-22 proportions” and the editors of the International Construction Law Review indicated that the change calls for:

“rational justification and explanation of its practical application”.

223. 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?

224. The answer to the first question does appear to be yes, which may well have 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.

225. It was the third question which demonstrated the real difficulty with the new wording and this may have been one factor which led to the revision being dropped. However, as there have been two versions, care should be taken to check which definition has been adopted.

226. The position of clause 6 is an interesting one. Clause 6 deals with the workforce and places a wide responsibility onto the shoulders of the Contractor. This clause reflects the international flavour and the type of projects for which FIDIC contracts are often used. In particular, with overseas projects where the Contractor may employ staff from his own country and also where those projects are in remote locations (for example process plants), this provision of welfare is key. The Contractor will therefore need to allow for such provision in his tender and take into account, in doing so, the particular location of the works and the difficulties that might be encountered in making arrangements for payment (e.g. local currency conversion), housing (e.g. location), feeding (e.g. local laws/religious customs) and transport (e.g. local infrastructure).

227. Although the Contractor’s prima facie responsibility extends to local staff and labour, in engaging local staff and labour the Contractor should also be aware of local labour laws (which may not be the same as the law governing the Contract) and, in particular, aspects of that law which might conflict with the obligations of the Contract (see below). Where problems such as this arise, the Contractor will have to ascertain whether he can “contract out” of local, conflicting labour laws or whether he is bound by them. In either case, the ensuing risk must be built into the Contractor’s price for the Works.

228. The Guidance provided in the 1999 edition for the preparation of Particular Conditions, sets out some examples of sub-clauses that can be added to clause 6 to take account of particular circumstances and the locality of the site. These, for example, cover matters such as the provision and importation of foreign staff and labour, measures against insect and pest nuisance, alcoholic liquor and drugs, arms and ammunition, and festivals and religious customs.

229. The new MDB Harmonised Edition FIDIC form includes 12 of these “particular locality” clauses as part of the General Conditions. The reasons for the adoption of these clauses have nothing to do with concerns about financial security. They reflect the concern of the world banks about the welfare, health and safety of the local workforce. For example, the following additional paragraph has also been included as part of 6.1:

“The Contractor is encouraged, to the extent practicable and reasonable, to employ staff and labour with appropriate qualifications and experience from sources within the Country.”

230. This is self-explanatory. It is also not an obligation but like a number of the other amendments simply reflects a desire on the part of the World Bank to encourage local enterprise. However, as it happens, one likely impact of these clauses is to increase the administrative burden placed upon the Contractor, and hence the cost. For example, sub-clause 6.22, which deals with the employment records of workers, requires that a Contractor keep

“complete and accurate records of the employment of labour.”

The records must include:

“the names, ages, genders, hours worked and wages paid to all workers. These records shall be summarised on a monthly basis and shall be available for inspection”

That is a higher administrative burden that can be found on contracts in the UK.

231. The June 2010 revision introduced two new clauses, 6.23 which recognised a worker’s right to form and join workers’ organisations of their choice and to bargain collectively without interference by the Contractor and 6.24 which introduced a provision requiring the Contractor to base the employment relationship on principles of equal opportunity and fair treatment.

232. 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 subparagraphs (a)(i) and (ii), which can trigger the use of rates other than those specified in the

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49 See for example sub-clause 4.4
233. 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 based on reasonable evidence\(^{50}\) 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 Contract and expel him from the Site, and the provisions of Clause 15 shall apply as if such termination had been made under sub-clause 15.2 [termination by Employer].

Should any employee of the Contractor be determined based on reasonable evidence, 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].

234. The sub-clause has some similarities with sub-paragraph (f) of sub-clause 15.2; however, unlike sub-clause 15.1(f), here 14 days’ notice must be given. The June 2010 addition does provide the contactor with some comfort imposing the need for there to be “reasonable evidence” before an Employer can take the step of termination.

235. 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,\(^{51}\) 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.

236. 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 new Bribery Act is now in force. This significantly expands the scope of existing provisions introducing a new corporate offence of failing to prevent bribery\(^{52}\) which comes into force.

237. The World Bank too is always analysing ways to bolster up its anti-corruption activities. These include investigative powers and sanctions.

238. Sabotage has been added at sub-clause 17.3 as an Employer risk item. 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.

239. However, the story is not entirely one-sided. Not every change is pro-Employer. Take, for example, sub-clause 4.2. As stated above, under the standard form, clause 4.2 provides a mechanism whereby the Contractor can obtain confirmation that sufficient funding

\(^{50}\) And these four words were added in June 2010

\(^{51}\) [2004] EWHC 1829

\(^{52}\) Sections 7-9 of the Bribery Act 2010
arrangements are in place to enable him to be paid. Under the MDB harmonised edition, there have been a number of changes. First, the Employer must submit reasonable evidence of its financial arrangements before the project commences. In other words, the Contractor does not have to request it. This seems to be pro-Contractor. However, there has been a further more subtle change. Under the standard form, the Employer has to give notice if it “intends to make” any material change to his financial arrangements. Under the MDB version, that notice only has to be given “before the Employer” makes the change. This would have the effect of pushing back the time that an Employer needs to inform a Contractor of any such change.

240. Further under the June 2010 revision, by clause 4.2, the Contractor is left with the choice of bank or financial institution who is to issue the performance security - provided it is a “reputable” one.

241. Finally, the MDB version of the clause requires an Employer to notify the Contractor within seven days if a bank has suspended payment of any loan which may be financing the project. This therefore gives the Contractor some early warning of potential financial problems with the project, something which he does not have under the FIDIC standard form.

242. In similar vein, 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 advance payments it was entitled to. The condition is stated to be condition precedent and the Contractor is given the option of terminating the contract if no instruction is received.

243. In addition, 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.

244. The position of the Contractor is also improved by the provisions made by sub-clause 14.9 for the use of retention bonds in respect of the second half of retention after the issue of the Taking Over certificate.

245. Limits have been imposed on the Employer’s right to terminate at his own convenience. This should prevent the Employer from acting pre-emptively, if it considers that the Contractor is poised to determine.

246. So where does that leave the MDB harmonised contract form. It will be clear from the above that there have been two editions of the MDB conditions issued within a short time of each other, suggest that they were not quite right initially. It was also perhaps inevitable, given the fact that the conditions derive from a particular source with a particular pro-Employer interest, that the conditions are certainly viewed by the contractors as being of an “Employer-friendly” nature. However, the fact remains that in terms of procurement on World Bank funded projects, the adoption of the MDB harmonised form is a mandatory requirement.
PROCUREMENT UNDER FIDIC

247. As noted above, in 2011, FIDIC produced its own guide to procurement headed: “FIDIC Procurement Procedures Guide. The Introduction to the Guide says that it is intended to present:

“a systematic approach to the procurement of engineering and building works for projects of all sizes and complexity.”

248. By procurement, the Guide refers to the process from the identification of a project, through the receipt of tenders and up to the award of the contract. Accordingly, the relevant procurement activities are:

(i) To establish what is to be procured;
(ii) To decide on the appropriate strategy;
(iii) To solicit tender offers;
(iv) To evaluate tender offers; and finally
(v) To award contracts.

249. The Guide provides a useful summary of the procurement process.

PROCUREMENT AND THE WORLD BANK

250. You cannot ignore the role of the World Bank in international procurement. One of its primary purposes is to make loans, at low affordable interest rates, to developing countries. Indeed, if the developing countries cannot afford a loan, the bank will make grants. Note that commercial banks will not generally lend to projects in countries that have rescheduled their debts or are perceived to be about to reschedule. Often these grants and loans are used to fund infrastructure projects. Typically, the way the World Bank operates is to agree to make a loan in advance. The loan account will then remain open for a fixed period. More often than not, these infrastructure projects will be carried out by major contractors and consultants, either themselves or in joint ventures with local parties.

251. Whilst the role of the bank might stretch to insisting that specific procurement documentation is used, the World Bank will not administer contracts itself. In other words, the World Bank will lend money, but not necessarily intervene if the Contractor or consultant is having problems getting paid. Their view is that any attempt to influence the payment process could result in the bank being dragged into the middle of contractual disputes. The bank does not have the mandate nor, to be fair, the resources to undertake this.

252. In the view of the Bank, many payment problems are caused by the use of lump sum contracts associated with weak supervision, although these contracts do offer the advantage of not rewarding poor performance for delays in execution.

253. The World Bank has its own procurement rules. Four considerations guide the World Bank’s requirements:
(i) The need for economy and efficiency in the implementation of the project, including
the procurement of the goods, works, and non-consulting services involved;

(ii) the World Bank’s interest in giving all eligible bidders from developed and developing
countries the same information and equal opportunity to compete in providing goods,
works, and non-consulting services financed by the World Bank;

(iii) the World Bank’s interest in encouraging the development of domestic contracting and
manufacturing industries in the Borrowing country; and

(iv) the importance of transparency in the procurement process

254. As made clear above, the World Bank, along with other development banks, as part of their
loan packages, insists upon the use of its own standard package of documents for the
procurement projects. This package is known as the Standard Bidding Documents for
Procurement Works. The Standard Bidding Documents for Works, otherwise known as the
SBDW, have been prepared by the World Bank for use by borrowers in the procurement of
works through international competitive bidding. The User’s Guide for the Procurement of
Works notes that an important feature of the SBD-W is that it can be used with minimum
changes.53

255. The World Bank also produces a User’s Guide for Procurement of Works. The most recent was
revised in April 2015. Copies of these documents can be found on the World Bank website
www.worldbank.org. The SBDW contains its own standard form of contract terms, being an
amended version of the 1999 FIDIC Red Book and the Red Book only. The Red Book, as stated
above, is used for civil engineering or building works that are to be designed by the Employer.54

256. The World Bank is clear that:

“These SBDW are mandatory for use in major works contracts (those estimated to cost
more than US$10 million, including contingency allowance) unless the Bank agrees to
the use of other Bank Standard Bidding Documents on a case-by-case basis.”

257. However, this may well not be the case for very much longer. On July 21, 2015, the World
Bank’s Board of Executive Directors approved a new policy governing procurement in projects
financed by the Bank. The new Procurement Framework is intended to allow the World Bank to
better respond to the needs of client countries, while preserving robust procurement standards
throughout World Bank-supported projects. The new Procurement Framework will go into
effect in 2016, although the precise date is not yet known. The World Bank website notes that:

“Value for money, sustainable development and integrity are the vision of the new
approach. It will help clients get better development results as it gives the World Bank
the space and capacity to significantly increase its support to help countries develop
their own procurement systems. For the first time, the World Bank will allow any

53 Many of the features of World Bank procurement are of course equally applicable to many other forms of
procurement.
54 See clause 4.1.
contract award decisions to be based on criteria other than lowest price, including quality and sustainability.”

258. The new policy followed a lengthy consultation period which ran from May 2012 to December 2014. This has resulted in a New Framework Procurement Framework which is dated 11 June 2015. The stated “vision” behind the new framework is:

“Procurement in Investment Project Financing supports clients to achieve value for money with integrity in delivering sustainable development.”

259. According to the World Bank:

The Framework has been designed from the outset to be fit for purpose and to meet the diverse needs of Bank clients.

260. The World Bank also states that:

The Bank will update its standard bidding documents to reflect the new Framework. The Bank will continue to work with the other MDBs to further develop the master procurement document, including review of other international contract forms to enhance the current suite of standard selection documents. The Bank will also continue to engage with industry and other trade bodies such as FIDIC and NEC to establish a range of appropriate selection documents and contracts. Management has heard clearly in consultations that many Borrowers view some existing forms as biased toward industry, but has equally heard concerns from the private sector about their risks of participating in Bank-financed procurements at all levels. In Management’s view, this dichotomy is best managed by introducing more choice into the selection of the optimum approved contract form, with Bank approval through the PPSD/Procurement Plan.

261. However for now, the SBDW notes that the use of the Conditions of Contract for Construction for Building Engineering Works Designed by the Employer, Multilateral Development Bank Harmonized Edition, prepared by FIDIC, is compulsory. The User’s Guide makes it clear that: “The provisions in Section I (Instructions to Bidders) and Section VII (General Conditions of Contract) must be used with their text unchanged.”

262. The User’s Guide to the Bidding Process sets out the following stages:

(i) Publicity: advertising or notice
(ii) Preparation and issuing of bidding documents
(iii) Bid preparation submission
(iv) Bid opening
(v) Bid evaluation

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55 Front Page of The New Procurement Framework
56 Paragraph 8 of the Executive Summary
57 Paragraph 71 on page 33.
263. For World Bank projects, the Employer must remember that it is a mandatory requirement for them to use the standard bidding documents issued by the Bank for any contracts financed by the Bank. It is the potential Employer who is responsible for the preparation and issuing of the bidding documents. They must use the published version of the SBD-W without suppressing or adding text to any of the sections.

264. A potential Employer must advertise any upcoming bidding processes in at least one newspaper of national circulation, official gazette or electronic portal with free access, in the borrower’s country. Any invitations to tender must also be published in the UNDBonline (UN Development Business on line) and the dgMARKET. Notification must be given in sufficient time to enable prospective bidders to obtain pre-qualification or bidding documents and prepare their responses.\(^5\)

265. The World Bank considers that not less than six weeks from the date of the invitation to bid is the minimum appropriate time to allow tenderers to prepare a bid. Where large works or complex items of equipment are involved, this period should be extended to a minimum of 12 weeks. As with any large project, the World Bank recommends that site visits are arranged where appropriate. The World Bank also requires that employers respond promptly to requests for clarification from bidders and amend, as may be required, the bidding documents.

266. The Employer is, as you would expect, responsible for the bid opening. Care must be taken at such an event lest the process has to be cancelled and started again.\(^6\)

267. In relation to the bid evaluation, the World Bank advises the following:

(i) the appointment of experienced staff to conduct the valuation of the bids;

(ii) keeping the bid evaluation process strictly confidential;

(iii) rejecting any attempts or pressures to distort the outcome this includes fraud/corruption;

(iv) always complying with the requirements of the World Bank; and

(v) applying “only and all” of the criteria specified in the bidding documents.

268. The standard format for the invitation for bids includes the statement that qualified domestic bidders may be eligible to receive a margin of preference of 7.5% bid evaluation.

269. Any evaluation of a bidder’s technical proposal must include an assessment of the bidder’s technical capacity to mobilise key equipment and personnel for the contract, taking into account its proposals regarding methods, scheduling and sourcing of materials. Other issues that will need to be considered are:

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\(^5\) See paragraph 8 of the World Bank guidelines.

\(^6\) Note that the term “bid opening” must be used with caution. For example, a bid for which a bid withdrawal or bid substitution notice was received on time shall not be opened, but returned unopened to the bidder in question. Thus, the sequence in which bids are handled and opened is crucial.
(i) experience
(ii) financial situation
(iii) current contract commitments
(iv) cash-flow capacity
(v) allocation of equipment
(vi) personnel
(vii) time for completion
(viii) pending litigation.

270. A domestic bidder, for an individual firm, is one registered in the country of the borrower which has more than 50% ownership by nationals of the country of the borrower and does not subcontract more than 10% of the contract price to foreign contractors. A domestic joint venture must be registered in the country of the borrower and must satisfy the requirements set out as for individual firms.

271. In relation to financial resources, a bidder will need to demonstrate that it has sufficient construction cash-flow for the number of months the project will run, taking into account the time needed by an Employer to pay an invoice. A bidder must demonstrate access to/availability of adequate financial resources, be they liquid assets or lines of credit.

272. When it comes to the suitability of key personnel, what matters is a minimum number of years of experience in a similar position or on a comparable project. The World Bank guidelines note that the requirement of specified education and academic qualifications is normally unnecessary for such positions. The World Bank is well aware that many competent staff have learned their profession on the job, rather than through academic training.

273. When it comes to the evaluation and qualification criteria, the key is that bidders are:

“qualified by meeting pre-defined, precise minimum requirements … For that purpose, clear-cut, fail-pass qualification criteria need to be specified in order to enable bidders to make an informed decision whether to pursue a specific contract and, if so, either as a single entity or in joint venture. The criteria adopted must relate to characteristics that are essential to ensure satisfactory execution of the contract, and must be stated in unambiguous terms.”

274. That is not unusual and is entirely in keeping with the principle of the equal treatment of tenderers. In short, this principle requires that all tenders comply with the tender conditions so as to ensure an objective comparison of the tenders submitted by the various tenderers.

See section (iii) of the World Bank User’s Guide for procurement of works.
This concept has come before the courts on many occasions, for example the European Court in the case of *EMM G Lianakis AE and Others v Municipality of Alexandroupolis*.61

275. This was a case about Article 36(2) of Council Directive (EEC) 92/50 which provides that:

“Where the contract is to be awarded to the economically most advantageous tender, the contracting authority shall state in the contract documents or in the tender notice the award criteria which it intends to apply, where possible in descending order of importance.”

276. Here, the town council had invited tenders for a town planning project. It had set out the award criteria in the contract notice and had listed these criteria in a specific order of priority. The list was (i) proven experience on projects carried out over the last three years (ii) manpower and equipment and finally (iii) the ability to complete the project by the anticipated deadline. Thirteen consultancies responded. However, during the evaluation procedure, the committee in charge of the appointment set weightings of 60%, 20% and 20% for each of the three award criteria. It also set up certain sub-criteria, for example stipulating that experience should be evaluated by reference to the value of completed projects.

277. As the stipulation of the weighting factors and sub-criteria were only made at a date after the submission of the tenders, certain tenderers brought proceedings against the town council. The Greek Court referred the case to the European Court, asking whether Article 36(2) precluded a contracting authority from acting in this way, i.e. stipulating at a later date the weighting factors and sub-criteria to be applied to the award criteria referred to in the contract documents or notice.

278. The European Court noted that the purpose of the legislation is to ensure that there is no discrimination between different service providers. Where a contract is to be awarded to the economically most advantageous tender, a contracting authority must state in the contract documents the award criteria that it intends to apply. Potential tenderers must be in a position to ascertain the existence and scope of the criteria elements when preparing their tenders. Therefore, a contracting authority cannot apply weighting rules or sub-criteria that it has not previously brought to the tenderers’ attention.

279. Tenderers must be placed on an equal-footing throughout the procedure, which means that the criteria and conditions governing each contract must be adequately publicised by the contracting authorities. Here, the projects award committee referred only to the award criteria and it was only later after submission of the tenders that it introduced the stipulation of the weighting factors. Accordingly, this did not comply with the article requirements.

280. In other words, the European Court was making clear that compliance with the legislation requires the equal treatment of tenderers. The evaluation process must be transparent and objective. That had not happened here.

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61 Case C-532/06. For UK cases see *Letting International Ltd v London Borough of Newham* [2008] EWHC 1583 and a whole variety of cases in Northern Ireland. For one example, see *McLaughlin & Harvey Ltd v Departmental Finance & Personnel* [2008] NIQB 122
281. As to the consequences of any such breach? Well, where a public authority does not adhere to applicable public procurement law (colloquially the “OJEU Procedure”) when tendering for work then it is susceptible to a claim by an aggrieved tenderer. The whole thrust of the public procurement law is to ensure that those tendering are able to compete on an equal basis and that public contracts are awarded fairly. It is perhaps less well known that in addition to the OJEU Procedure, there is common law authority to the effect that public authorities engaged in tendering processes may in fact create collateral contracts with the tendering parties. The nature of those contracts is likely to be that if the public authority in question has stated that it will evaluate tenders in accordance with a given procedure, then that public authority is obliged to the tendering parties to do just that.

282. There are also some interesting comments to be found in the User’s Guide about the bill of quantities. The guide notes that the objectives of the Bill of Quantities are:

(i) to provide special information on the quantities of Works to be performed to enable bids to be prepared efficiently and accurately; and

(ii) when a contract has been entered into, to provide a priced Bill of Quantities for use in the periodic evaluation of Works executed.

283. The best way to achieve these objectives is to itemise the works in sufficient detail.

284. A daywork schedule should only be included if the probability of unforeseen work outside of the items included in the bill of quantities is relatively high. The daywork schedule should comprise a list of the various classes of labour, materials and equipment for which basic daywork rates or prices are to be inserted, together with a statement of the conditions under which a Contractor will be paid for work executed on a daywork basis. In addition, a tenderer should enter a percentage against the basic daywork subtotal amount representing profit, overheads, supervision and other charges. With dayworks, work must not be executed on a daywork basis except by written order.62

285. The World Bank User’s Guide tries to deal with the difficulties of provisional sums by noting that specific provisional quantities should be entered against items and a tenderer should not deal with these issues merely by increasing the quantities for a class of work beyond that normally expected to be required.

286. It is expected that the rates and prices bid will include all plant, labour, supervision, materials, erection, insurance, profit, taxes and duties.63 That is, unless stated otherwise.

287. The World Bank also recognises the potential costs of the “particular locality” or “social clauses” to be found within the MDB harmonised version of the FIDIC form, as discussed above. The potential Employer is required to decide on a case-by-case basis whether these costs are to be considered by the bidder as part of its overhead or as an item of cost associated with one or more of the items within the bill. The general rule is that such costs should be part of the bidder’s overhead unless the cost to comply would represent a large component of the works.

62 See sub-clause 13.6 of the general conditions of contract.
63 This will include all risk and liabilities.
In any event, the prices used must not be lump sums as it is important that the facilities are measured and paid through monthly instalments in order that supervision and control of the necessary facilities and services can be maintained.

288. The World Bank *User’s Guide* gives two examples. Sub-clause 6.7 has specific regard to HIV/AIDS prevention. Where a government has public programmes in place for HIV/AIDS, it is likely that a Contractor would only need to create a support basis the costs of which can and should be included in its overhead. However, the costs of accommodating workers in remote locations may well be of a much higher value and so should be treated differently.

289. One special item to note is the prohibition on child labour. This is particularly important to the World Bank and specific note is made of sub-clause 6.21 in the *User’s Guide* with reference to Article 1 of the Convention of the Rights of the Child adopted by the UN General Assembly in November 1989 which states:

“a child means every human being below the age of 18 years unless the law applicable to the child, majority is obtained earlier”.

290. Then there is bribery and corruption. We have already seen that this is an area where steps are being taken internationally to tighten up procedures and deal with corruption. The World Bank is obviously enough a key player in all of this. One of the purposes of the May 2010 Update was to align certain fraud and corruption policies.

291. Clause 15.6 of the World Bank standard form - Corrupt or Fraudulent Practices - notes that:

“If the Employer determines that the Contractor and/or any of its personnel or its agents, or its Subcontractors, subconsultants services providers, suppliers and/or their employees has engaged in corrupt, fraudulent, collusive or coercive or obstructive practices, in competing for or in executing the Contract, then the Employer may, after given 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 termination 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

(ii) “corrupt practice” means the offering, giving, receiving or soliciting of any thing of value to influence the action of a public official in the procurement process or in the contract execution;

(iii) “fraudulent practice” means a misrepresentation of the facts in order to influence a procurement process or in the execution of the Contract to the detriment of the borrower, and includes collusive practise amongst bidders ...designed to establish
bid prices at artificial non-competitive levels and deprive the borrower of the benefits of free and open competition

(iv) “collusive practice” is an arrangement between two or more parties designed to achieve an improper purpose, including to influence improperly the actions of another party;

(v) “coercive practice” is impairing or harming, or threatening to impair or harm, directly or indirectly, any party or the property of the party to influence improperly the actions of a party;

(vi) “obstructive practice” is:

(aa) deliberately destroying, falsifying, altering or concealing of evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation into allegations of a corrupt, fraudulent, coercive or collusive practice; and/or threatening, harassing or intimidating any party to prevent it from disclosing its knowledge of matters relevant to the investigation or from pursuing the investigation, or

(bb) acts intended to materially impede the exercise of the Bank’s inspection and audit rights provided for under sub-clause 3.1(e) below.”

292. That is a wide-ranging clause and the World Bank is serious. The Instructions to bidders include at section 3.1 that:

“(b) will reject a proposal for award if it determines that the Bidder recommended for award has, directly or through an agent, engaged in corrupt, fraudulent, collusive, coercive or obstructive practices in competing for the contract in question;

(c) will cancel the portion of the loan allocated to a contract if it determines at any time that the representatives of the Borrower or of a beneficiary of the loan engaged in corrupt, fraudulent, collusive, or coercive practices during the procurement or the execution of that contract, without the Borrower having taken timely and appropriate action satisfactory to the Bank to remedy the situation; and

(d) will sanction a firm or an individual, at any time, in accordance with prevailing Bank’s sanctions procedures, including by publicly declaring such firm or individual ineligible, either indefinitely or for a stated period of time: (i) to be awarded a Bank-financed contract; and (ii) to be nominated sub-Contractor, consultant, manufacturer or supplier, or service provider of an otherwise eligible firm being awarded a Bank financed contract.”

this is an approach repeated elsewhere. There is a potential prohibition on tendering for Public Sector contracts\(^{64}\), if a company is convicted of corrupt activities.

294. This is all entirely in keeping with the global trend in seeking to clamp down on this type of behaviour. For example, in the UK the 2010 Bribery Act came into force on 1 July 2011. The Act created four new criminal offences: paying a bribe; receiving a bribe; bribery of a foreign official; and the widely drawn corporate offence of failing to prevent bribery\(^{65}\). The intention is that the UK courts will have jurisdiction if an offence is committed by someone with a close connection with the UK or by a corporation that does business in the UK regardless of where the alleged offence was carried out.

295. Being engaged in corrupt or fraudulent practice may well affect a Contractor’s ability to work on or bid for other projects. The European Procurement Regulations, for example Regulation 23(1)(c) of the Public Contracts Regulations 2006, state that a public authority shall treat as ineligible and shall not select a Contractor if that public authority has actual knowledge that the Contractor or any of its directors or any other person who could be said to represent the Contractor has been convicted of bribery. In 2010, the World Bank revised its Guidelines for the “Selection and Employment of Consultants” to reflect an agreement amongst the MDBs to cross-debar firms and individuals found to have violated the fraud and corruption provisions of their respective procurement guidelines. Paragraph 1.11(e) states that:

“A firm or an individual sanctioned by the Bank in accordance with subparagraph (d) of paragraph 1.22 of these Guidelines or in accordance with the World Bank Group anticorruption policies and sanction procedures shall be ineligible to be awarded a Bank-financed contract, or to benefit from a Bank-financed contract, financially or otherwise, during such period of time as the Bank shall determine.”

296. The World Bank duly keeps an open register of debarred firms on its website.

297. The MDB worked with FIDIC to harmonise the wording of the clauses and the various amendments which appeared in the conditions special to each of the banks. It is important to note that the harmonised edition is not intended to replace the 1999 Red Book. It is there to standardise the varying provisions that have been included by the various multilateral development banks.

298. It is important to remember that the MDB harmonised edition of the FIDIC contract, has been prepared for a measurement type of contract and should not be used, without major modifications, for other types of contract, e.g. design and build. The standard text must be

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\(^{64}\) See Article 45 of the EU Public Sector Procurement Directive 2004 and Regulation 23(1)(c) of the Public Contracts Regulations 2006 in the UK

\(^{65}\) Under ss 7-9 of the 2010 Bribery Act, this latter offence will be committed where a person associated with a relevant commercial organisation (and note that the definition includes not only employees, but agents and external third parties) bribes another person intending to obtain or retain a business advantage and where that organisation cannot show that it had adequate procedures in place to prevent bribes being paid.
used in its entirety. One reason for this is to ensure a high degree of reading, understanding and interpretation by all concerned, including bidders and the banks. The World Bank says:

“the use of standard conditions of contract for all Civil Works will ensure comprehensiveness of coverage, better balance of rights or obligations between Employer and Contractor, general acceptability of its provisions, and savings in time and cost for big preparation and review, leading to more economical prices.”

299. Unfortunately neither FIDIC nor the World Bank are currently practising what they preach.

300. Take clause 15.6. In May 2010 the World Bank revised its Contract Conditions and one of the stated aims was to align certain clauses relating to fraud and corruption. In June 2010, FIDIC introduced certain amendments to the Pink Book – the MDB form. Sub-clause 15.6 is different, with the Pink Book having introduced the qualification that any determination by the Employer be based on reasonable evidence.

301. There are other differences\textsuperscript{66}, for example:

(i) Clause 1.6 of the Pink Book defines “Notice of Dissatisfaction” and then uses the term in Clause 20. The World Bank form does not;

(ii) The obligation of confidentiality at sub-clause 1.12 applies to both Employer and Contractor whereas the World Bank only refers to the Contractor,

(iii) In clauses 4.2, 14.2 and 14.9 the Pink Book allows the Contractor to select a “reputable” financial institution; the World Bank insists on one that is from a country approved by the Employer; and

(iii) In sub-clauses 4.13 and 8.1, the Pink Book asks the Employer to provide effective access to site.

302. So the World Bank and FIDIC have not as yet been able to achieve the standardisation and so familiarisation which they seek, which is somewhat disappointing given the stated aim of the MDB Form or Pink Book. Equally, does the World Bank form and the Pink Book achieve the balance which is the stated aim of the FIDIC Board? This is perhaps being a little disingenuous as the MDB harmonised edition has essentially been modified at the request of and to meet the requirements and needs of the world banks. Until such time as familiarity has this effect, remember that contractors will respond to any perceived imbalance of risk by pricing accordingly.


304. FIDIC has been invited to participate in the review process and it is represented by Managing Director Enrico Vink in doing so. Further details, and the proposed new procurement framework could be found at http://consultations.worldbank.org/consultation/procurement-policy-review-consultations. Currently, the proposed framework makes no specific mention of FIDIC. However this could well be because everything is currently expressed at a fairly high level. That said, it is clear that World Bank is aiming to ensure that it achieves a model that is more specially designed for achieving the World Bank goals (e.g. protecting donor countries, stamping down on corruption, transparency, sustainability objectives).

JOINT VENTURES

305. Given the size of most international projects, it is highly likely that the building and/or engineering side of the project will be carried out by a joint venture, of two or more parties. There are many reasons for this including:

(i) Spreading the risk;
(ii) Pooling resources and skills; and
(iii) Making use of local knowledge/required by local law.

306. In most parts of the world there is no requirement that foreign contractors enter into a joint venture with a local Contractor. Sometimes the Employer/client may exclude bids by joint ventures and require bidders to adopt a specific corporate form. Sometimes foreign bidders are only permitted from countries that grant reciprocity to home contractors.67 Local knowledge can be invaluable, e.g. local labour laws and tax regimes. Sometimes there will be quotas or other obligations to employ local labour.

307. Indeed, there are three key structures that are most commonly used for joint ventures (“JV vehicles”). These are:

(i) A limited liability company
(ii) A purely contractual cooperation agreement
(iii) A partnership or limited partnership

308. Partnerships and cooperation agreements are unincorporated JV vehicles, whereas the creation of a company is a corporate JV vehicle.

309. There is no strict legal definition of a joint venture under most civil and common law systems. The concept of the joint venture is fairly broad: two or more individuals or legal entities decide to join forces with a view to carry on a business or project. The joint venturers will share profit but not necessarily equally.

310. In practice, joint ventures are designed to fulfil a specific purpose for a limited period of time, for instance several companies joining as a consortium to bid for a project (in such cases the joint venture might be set up as a partnership), or are in the form of a registered corporate

67 Article 4 of the Swiss Regulations on Public Procurement.
vehicle with limited liability set up by the joint venturers to make direct investments and to carry on business on a more permanent basis.

311. Given that the term “joint venture” is vague, it can cover a number of different legal structures. It is therefore necessary to look carefully at the structure that is intended and plan accordingly. There are two alternatives: the “joint venture” is either run through a company structure (where the co-owners own the shares in the company), or the co-owners operate as a partnership.

**The unincorporated joint venture “a partnership”**

312. The simplest form of association is the “Contractual Cooperation Agreement”. This is an arrangement under which all the participants agree to associate as independent entities rather than shareholders in a company or partners in a legal partnership. This type of agreement is often called a consortium or cooperation agreement and is suitable where the parties wish to avoid the formality and permanence of a corporate vehicle.

313. The agreement will set out the rights and duties of participants, as between themselves and third parties. The duration of their legal relationship will also be derived from the provision of the JV agreement.

314. This agreement should set out the obligations and commitments of the individual partners and how a return on investment will be achieved. Even though no corporate vehicle is involved and the persons involved will not be partners in a legal sense, it is still possible for them to be exposed to claims and liabilities because of the activities of their co-participants on a contractual or quasi-contractual basis. Therefore an indemnity should be included in the agreement under which one party will indemnify the other for any losses that are caused through the actions of the co-participants.

315. Because this vehicle is an unincorporated JV, there are no added tax liabilities. Participants will be viewed as tax transparent, and will be required to include their share of any profits in their own personal tax return.

316. The unincorporated JV tends to be established through the formation of a partnership. It does not require the incorporation of the participants, and therefore it is not established as a separate legal entity for tax purposes. The participants will each act as agents and they shall be jointly and severally liable for any joint action they had taken in the name of the partnership.

317. The main advantage of this option is the low ongoing costs, as a consequence of avoiding the requirements laid on the incorporated companies. The disadvantage is still considerable as all the participants will be jointly and severally liable to the public for actions of other participants, provided that these actions had been taken on behalf of the partnership.

318. Therefore, the basic rules of partnership will apply. A partnership is a relationship that subsists between persons carrying on a business in common with a view to profit. If a partnership relationship arises, then the law of partnership applies (in particular the Partnership Act).
relationship is governed by the contract between the parties and the general law including the partnership.

319. A partnership deed usually governs the specifics of the partnership including things such as the objectives of the partnership, each party's contribution, each party's rights and obligations, and the rules setting down how the partnership will operate (including the management structure, the term, the distribution of profits, events of termination, and how to deal with disputes).

320. A number of points should be kept in mind:

(i) Each partner is jointly and severally liable for all the debts of the partnership, with no limited liability. Accordingly, a third party’s claim against a partnership can be enforced against any partner, leaving that partner to collect from the other partners if possible;

(ii) Generally, a partner who makes a commitment on behalf of the partnership binds the partners to perform that commitment as far as third parties are concerned (regardless of whether the partnership deed limits that authority or not); and

(iii) Each partner is a fiduciary to the other partners. Accordingly, a partner cannot obtain a personal profit from the use of property, information or opportunities which become available to it in the course of partnership activities without the consent of the other partners.

321. The major disincentive of creating a partnership is the liability faced by each individual partner. It is for this reason that the Limited Liability Partnerships Act (LLPA) 2000 was introduced, and created LLPs. Briefly, an LLP provides the participants with limited liability, whilst affording them the flexibility offered by a partnership structure.

322. However, LLPs differ from partnerships in a number of ways. Firstly, parties that deal with the LLP will contract and deal with the LLP as a distinct legal entity, hence any recourse will be against the LLP entity and assets, as opposed to the partners themselves. Forming an LLP does not, however, rule out any form of personal liability, for example liability for negligent misstatement will still attach to the errors of a partner.

The incorporated joint venture “a company”

323. The participants agree to establish a new and separate company, using a separate brand and possibly separate resources. The joint venture company will be a separate legal entity to the participants. The new entity will hold the assets of the company in order to supply the joint product or service. The parties operate through the company and have shares in the company in their respective portions. The assets of the company belong to the company, not to the shareholders, and the profits of the company are shared by the shareholders in proportion to their share.

324. In the UK, the provisions of the Companies Act, which impose obligations and restrictions on companies, apply to joint venture companies.
By virtue of the Companies Act, a joint venture company will also have a constitution which should give effect to the shareholders’ agreement. Joint venture companies also need detailed provisions dealing with shareholdings including pre-emptive rights on the issue or transfer or shares. For example a requirement may be that new shares in the company will be offered to shareholders pro-rata on a pre-emptive basis. A similar provision may exist for a party selling any of its shares.

The advantages of this option are considerable: the participants will see their liability limited to the amount that they have invested in the joint venture company.

Ownership and interests in the joint venture company may be transferred simply through the sale of shares, and a shareholders’ agreement will be needed by which the participants will be able to know clearly and exactly what their rights and obligations are in the joint venture.

The disadvantages mainly lie on the costs side. The new company will need to be set up in accordance with the Companies Act and will require management and direction separate from the participants (establishments and ongoing costs). This solution is often said to be less tax effective.

Contractual joint venture

There is a third form of joint venture which falls between the two. This is the contractual joint venture. It is very close to the unincorporated form. This type of arrangement is often described as a cooperation, collaboration or consortium agreement. No separate entity is formed; instead the parties agree to associate as independent contractors. The rights and duties of the parties derive solely from the provisions of the joint venture agreement.

It is important to avoid the situation where arrangements for a contractual joint venture constitute a partnership. In reality it is very difficult to do so. Relevant factors usually include profit/loss sharing and a common commercial purpose. The intention of the parties may be relevant but not necessarily conclusive. The main consequence of categorisation as a partnership is, as stated above, that each party will have joint and unlimited liability for the debts and obligations of the joint venture.

The advantages of a contractual joint venture include: few formalities are required to establish or terminate a contractual joint venture (i.e. no formal registration requirements), the arrangement is tax transparent as each party takes its own profits and losses directly and there is no transfer of assets, and there is no deemed responsibility for actions of the other party. This is in contrast to partnerships or companies where representatives will have the authority to bind the whole joint venture.

A disadvantage of this option is that there is no body of law that governs the operation of a contractual joint venture other than the contract itself. Every aspect of the operation therefore needs to be defined. As a result, this arrangement is not recommended for a situation where different ownerships are needed or the identity of the participants will change. Finally, as indicated above, parties must be careful to ensure that they are not liable for the acts and omissions of the other party, particularly if there is a risk that the relationship will amount to a partnership.
**How should the JV be documented?**

333. The relationship must be accurately and effectively defined at the outset. If this fundamental requirement is neglected and matters such as ownership and profit sharing, parties’ rights and obligations, management and decision-making, and dispute mechanisms are poorly dealt with, then there is a very real threat that irreconcilable disputes will occur, defeating the common purpose of the venture. Either form of arrangement will cover similar issues:

(i) Statement of joint venture activity and objectives this usually lists the general objectives of the venture with some degree of detail;

(ii) Conditions to the agreement (if any);

(iii) Term of the venture (i.e. how long will the relationship/investment last), including methods of termination;

(iv) Raising of initial capital and continuing capital;

(v) Ownership of interests and profit share;

(vi) Auditors/accountants these are usually appointed because of the potentially conflicting interests of the joint venture parties with regard to financial matters;

(vii) Decision-making the structure of the management committee or the board of directors (joint venture company) will need to be dealt with;

(viii) Confidentiality it may be worthwhile considering the requirement for a confidentiality agreement to be entered by the parties before any meaningful business or technical discussions in respect of the venture begin;

(ix) Default and dispute resolution.

**Incorporated or unincorporated?**

334. Amongst the factors to consider are the following:

(i) **Risk** the liability of shareholders within an incorporated joint venture is generally limited to the capital that they have invested in the company as shares. Accordingly, a third party cannot generally claim against a shareholder in an incorporated joint venture. This is seen as a major advantage that a joint venture company has over a contractual joint venture;

(ii) **Privacy** an unincorporated joint venture agreement is a private arrangement and therefore is not subject to public scrutiny like the constitution of an incorporated company;

(iii) **Familiarity** the nature of the business or the attitude of one or more parties may lead to a choice of incorporated entity. The framework provided by corporate law and protection available to shareholders may be preferred in practice as an additional safeguard to contractual rights;
(iv) **Accounting flexibility** partners may prefer an unincorporated venture allowing them to keep separate accounts and maintain their own accounting policies. When the participants are involved in a high risk venture, where losses or early losses are likely, there is no satisfactory way of passing the losses back to the participants from a company. However, losses made by a contractual joint venture can be channelled back to the participants for tax purposes and offset against their income. This is often seen as a major advantage of an unincorporated joint venture over a joint venture company;

(v) **Legislative requirements** under an unincorporated joint venture, parties are free from many of the restrictions of the Companies Act so that parties can incorporate whatever provisions they wish, to deal with the decision-making procedures, authorities, assignment of interest, defaults and other arrangements without the restrictions of such legislation;

(vi) **Transfer of interests** it is easier to transfer shares to incoming parties which is a big advantage of an incorporated joint venture. Because it tends to be specific as to the parties’ needs, a transfer of shares is unusual once the joint venture is fully operational; and

(vii) **Financing** if the parties want to use collective financing and grant security over the joint venture assets, a company can be an advantage. Also, partly paid-up shares can be issued as a way of securing further capital.

**Conclusion JVs**

335. There is a wide choice in terms of joint venture vehicles. An incorporated JV such as a company has the benefit of having an individual corporate identity. This is particularly useful when dealing with third parties such as project funders and local authorities. An incorporated JV vehicle also has the benefit of having a separate legal identity.

336. However, an unincorporated JV can offer more flexibility, and would be less onerous in terms of management and day-to-day responsibility. A contractual cooperation agreement allows the agreement of any terms and conditions that it wishes to, and would have the added benefit of having a definite time period. A partnership agreement would also allow a similar degree of flexibility; however the company may be exposed to liability for losses or debts should you choose any partnership vehicle other than a LLP.

**Conclusion**

337. World and MDB Bank projects are typically in developing countries. Therefore it is worth considering some of the risks that will typically be encountered, risks which potential tenderers, be they JV or otherwise, would do well to bear in mind. A major factor is political risk. This can be a major factor in developing countries and can add significant costs to the project. Typically, the host state will be involved, at least indirectly. Thus, the project cannot be treated simply as an ordinary commercial development. There will be an intermingling of commercial, legal and political considerations.
338. Indeed, does the project require government authorisation or at least state cooperation and support during operation? The government or its agencies will often be in a position to revoke authorisations, impose new taxes and even nationalise or expropriate the project. Is the institutional structure sufficiently clear, such that the relevant authorities can be identified and a decision or authorisation obtained which will bind the necessary authorities? Is the project one which is in tune with overall government policy and likely to be promoted?

339. Political risks vary, but include the following:

(i) Nationalisation;
(ii) Confiscation or ex-appropriation, with or without compensation;
(iii) Currency devaluation\(^{68}\) or adverse changes in exchange control regulation;
(iv) Import restrictions/quotas on fuel or equipment;
(v) Higher or selective taxes, duty or withholdings;
(vi) Political instability following changes in government;
(vii) Disputes between state and local governments or between government departments;
(viii) Corruption;
(ix) Risk of violence against expatriates and civilians;
(x) Cross-border risks restrictions on export licences for equipment or technology/blockades or embargoes; and
(xi) Land ownership issues particularly if there has been a recent war.
(xii) Must authorisation for the employment of foreigners be obtained? Will it be revoked?

340. Political risk insurance cover is available, although the cost is often high.

341. Agreements with government entities sometimes raise issues of validity and enforceability. Of these issues, the capacity of the relevant entity to enter into agreements and its potential rights to claim sovereign immunity from them are crucial. Individuals who negotiate and sign agreements must have the capacity to bind the government (or other) body that employs them. The government body with whom agreements are made must have the legal right to enter into the agreements. There must always be a clear understanding of exactly how far such capacity extends and if there are any limitations on the powers of the individuals and bodies concerned. In some jurisdictions (for example Saudi Arabia), government entities are prohibited from entering into arbitration agreements. Any project should be implemented under a transparent,

\(^{68}\) Many countries have currencies that are not generally regarded as stable over the long term. There may be a differential between official and market rates for conversion of the local currency to hard currency.
certain and enforceable legal framework. There must be a clear policy and implementation process.

342. Insurance must also be checked. Are there statutory levels of cover? Is the concept of co-insured beneficiaries recognised? What about subrogation? What authorisations are required in relation to insurance policies? What about the use of offshore insurers? Reinsurance?

343. What about the environment? Are environmental impact statements or consents/authorisations required? What are the penalties for non-compliance? What is the relevant regulatory authority? Is the project site in a specifically/specially protected area?

344. The importance of preparing the legal framework should not be underestimated. The introduction of a specific legal framework is to permit projects, together with a consistent and coherent legal basis for foreign investment, is a very important step.

345. However, ultimately, any major international project will involve an assessment of the risks involved. The final factor in assessing risks is the question of mitigation. Therefore it is imperative that you consider:

(i) The substantive effect of the local law;
(ii) The clarity of local laws and interpretation of contracts governed by local law;
(iii) The quality, reliability, independence and impartiality of the local courts; and
(iv) The enforceability of foreign judgments or arbitral awards through the local courts.

346. Accordingly, the advice of a local lawyer can be invaluable.

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