

# UNDERSTANDING THE FIDIC RED BOOK

## A CLAUSE-BY-CLAUSE COMMENTARY

### 2<sup>ND</sup> EDITION

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**SWEET & MAXWELL**

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## INTRODUCTION

1. The inception of this book was the intent to provide a practical text aimed at lawyers and those advising contractors and employers by addressing and reviewing the 1999 edition of the “Red Book”, published by the Fédération Internationale des Ingénieurs-Conseils (FIDIC). Although there are a number of works which very successfully address the FIDIC “suite” as a whole – and of course there is a wealth of distinguished contributions on very specific topics in essays and papers most notably found in the ICLR – surprisingly little commentary and review has taken place in respect of this edition in the format of clause by clause consideration of the provisions. In May 2005, as the first edition of this book was being finalised, FIDIC published the Multilateral Development Bank Harmonised edition of the Conditions of Contract. Then, after having sought reviews of the May 2005 version, FIDIC produced a second, amended version, of the MDB Conditions of Contract in March 2006. Further more modest amendments were issued in June 2010 and these latest changes are now addressed in this second edition.

2. In their original format, the familiarly termed FIDIC Conditions were the “*Conditions of Contract (International) for Works of Civil Engineering Construction*”. The first edition was published in August 1957 having been prepared on behalf of FIDIC and the Fédération Internationale du Bâtiment et des Travaux Publics (FIBTP). A subsequent edition was published in July 1969 recording a slight change of name of the FIBTP and the addition of the International Federation of Asian and West Pacific Contractors Associations as a sponsoring body, together with a supplementary section referable to clauses for dredging and reclamation work. This edition was reprinted in 1973 following the approval and ratification by two new sponsoring bodies, the Associated General Contractors of America, and the Inter-American Federation of the Construction Industry (Federación Interamericana de la Industria de la Construcción). The form of these editions of the FIDIC Conditions followed that of the English ICE Conditions of Contract and the 1973 version followed closely the fourth edition of the ICE Conditions, thus closing the provisions of the International Contract with specific terminologies and concepts referable to English Standard Form provisions and derivations. It is remarkable how little modification of an English domestic civil engineering contract was introduced into the FIDIC form which was promulgated for international use. Of the FIDIC second edition it was written; “*as a general comment, it is difficult to escape the conclusion that at least one primary object,*

*in preparing the present international contract was to depart as little as humanly possible from the English conditions*".<sup>1</sup>

3. The FIDIC form, as reflected in its third edition consisted of 71 General Conditions including a heading for the fluctuations clause and uncompleted heads for separate agreement by the parties in latter parts. These were referred to as "*Conditions of Particular Application*" but were suggestions for subjects upon which the parties were required to make their own agreements. As with the English ICE Conditions there was also a Form of Tender and Appendix, and a Form of Agreement. The FIDIC Conditions themselves contemplated the existence of drawings and specification and bills of quantities as contract documents. The role of the engineer was assumed, with functions including certification and other determinations, and inherently supposed impartiality of the engineer as between contractor and employer in relation to decision-making and certification. The form also followed the English basis of re-measurement with quantities treated as approximate together with the system of nomination of subcontractors. This influence of English construction practices and legal concepts was extraordinary in respect of an organisation founded in 1913 by France, Belgium and Switzerland and remaining essentially based in Continental Europe, with the United Kingdom not becoming a member until 1949 and the United States membership in 1958.

4. By the time of publication of the FIDIC third edition in March 1977, the English ICE Conditions had reached their fifth edition (1973), but the revision committee of FIDIC introduced changes that were regarded as minimal.<sup>2</sup> From the origins of the first three editions of the FIDIC "Red Book", which provided a standard form for use in many projects undertaken in the Commonwealth countries, the premise had derived of the detailed design being provided to the contractor by the employer or his engineer. The civil engineering basis for the FIDIC Conditions had derived from the anticipated infrastructure projects of the nature of roads, bridges, dams, tunnels and water and sewage facilities. Thus the standard terms in the Red Book were less than satisfactory for contracts where major items of plant and alike were manufactured away from site. Focussing on this aspect led to the first edition of the "Yellow Book" produced by FIDIC for mechanical and electrical works in 1963, with its emphasis on testing and commissioning and more suitable for the manufacture and installation of plant. The second edition was published in 1980.

5. Both the Red and Yellow Books were revised by FIDIC and new editions published in 1987. The fourth edition of the Red Book was the product of a committee which had been established in 1983 and whose terms of reference had been premised on change only where change was necessary; to maintain the basic role of the engineer; to pay close attention to specific topics such as bonds, risk, insurance, claims procedures and dispute procedure; and then to endeavour to update the language to be more understandable by those administering the contract on site. The fourth edition changed the title by the deletion of "International", reflecting a desire on the part of FIDIC that its form should be utilised domestically, albeit in domestic contracting where the effect of the law of the jurisdiction

<sup>1</sup> I.N. Duncan Wallace QC, *The International Civil Engineering Contract*, 1974.

<sup>2</sup> The FIDIC 3rd edn was commented upon in a supplement to the *International Civil Engineering Contract* by I.N. Duncan Wallace QC in 1980.



could give rise to different results from that which might otherwise have been intended by the continued English terminology and concepts.<sup>3</sup>

6. Noticeably the 1987 fourth edition introduced an express term which required the engineer to act impartially when giving a decision or taking any action which might affect the rights and obligations of the parties, whereas the previous editions had assumed this implicitly. In broad terms there was greater concentration on the allocation of risk, and with the significant addition of a ground for extension of time in the event of “*delay, impediment or prevention by the employer*”.<sup>4</sup> 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.

7. By this time FIDIC had responded to the increasing popularity of projects being procured on a design and build or turnkey premise. This resulted in the “Orange Book”, namely the *Conditions of Contract for Design-Build and Turnkey* published in 1995.<sup>5</sup>

8. The FIDIC Orange Book 1995 reflected a significant move away from the FIDIC forms which had adopted the traditional role of the engineer. Whilst the fourth edition of the Red Book had introduced the obligation upon the engineer to consult with the employer and contractor, with the intended consequence of making the employer more visible, the Orange Book dispensed with the engineer entirely and provided for the “Employer’s Representative”. The express requirement to be impartial was also relinquished, albeit that when determining value, costs or extensions of time the Employer’s Representative had to “*determine the matter fairly, reasonably and in accordance with the Contract*”.<sup>6</sup>

9. Further the somewhat archaic provision for the submission of 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.<sup>7</sup> In fact this replacement of the engineer’s decision with a Dispute Board was a reflection of an amendment to the FIDIC Red Book which the World Bank had instituted in its standard bidding documents, and it was this together with the move towards Dispute Resolution Boards in the International Arena which led to the FIDIC 1996 Supplement to the Red Book.

10. It was, however, in 1994 that FIDIC established its task group to update both the Red and the Yellow Books in the light of developments in the international construction industry, and also to have regard to the work done in

<sup>3</sup> Ali El Shalakany, “The Application of the FIDIC Civil Engineering Conditions in a Civil Code System” (1989) 6 I.C.L.R. 226; Frilet, “How Certain Provisions of the FIDIC Contract Operate under French Laws” (1992) I.C.L.R. 121.

<sup>4</sup> E.C. Corbett, FIDIC 4th edn. *A Practical Legal Guide* (1991); N.G. Bunni, *The FIDIC Form of Contract* (1991).

<sup>5</sup> Jaynes, “The New Colour in FIDIC’s Rainbow: The Trial Edition of the ‘Orange Book’” (1995) I.C.L.R. 367.

<sup>6</sup> For a view at an earlier stage, John Barber, “Rules of Conduct for the Engineer” (1988) 5 I.C.L.R. 290.

<sup>7</sup> Moulineaux, “Real Time Dispute Resolution: Updating FIDIC” (1995) I.C.L.R. 258; Seppälä, “The New FIDIC Provisions for a Dispute Adjudication Board” (1997) I.C.L.R. 444.

bringing about the preparation and publication of the Orange Book. The role of the engineer continued to be a topic upon which a nearly even balance of support or condemnation existed as to the requirement to act impartially in the circumstances of being employed and paid by the employer. Other aspects which the task group considered were the desirability that common definitions would be used in both Red and Yellow Books, and that the definitions which had been incorporated in the Orange Book would form a basis for the new standard forms and assist in harmonising the wording and thus eliminate the complexity that arises from differently formulated definitions. This aspect was reflected also in an attempt to utilise identical wording where considering the same topic in both documents. The group had also to balance the interests of familiarity with pre-existing terminologies and rendering the new documents more up to date. Equally the origins of the FIDIC forms in the contracts of the 19th- and early-20th-century English Building and Engineering Industry required to be simplified for the very reason that the FIDIC conditions were promulgated in English but in very many instances were being utilised by those whose language background was other than in English. This was especially important having regard to the intent that the new books would be suitable for use in both common law and civil law jurisdictions.<sup>8</sup>

11. One point that did become apparent to the task group was that the emphasis needed to move from the traditional aim of FIDIC forms towards civil engineering works of the nature of roads, bridges, dams and electrical and mechanical works of power generation and transmission equipment or hydro powered plants. Continuing development had led to more complexity and with projects requiring integration of different specialisms for which the existing forms were regarded as inadequate, albeit that the Orange Book had moved matters alone considerably. This gave rise to the emergence of the view that the nature of the forms should depend more upon the parties' assumption of responsibility rather than upon the type of work, as between civil work and electrical and mechanical work. The distinction thus became one between works designed by the employer or his representative and works designed by the contractor.

12. Test editions were promulgated in 1998 in order to benefit, from comment and enhance the user-friendly aim.<sup>9</sup> Following these test editions publication was achieved in 1999 and this distinction was reflected in the titles:

Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: The Construction Contract (the FIDIC Red Book 1999).

Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the Contractor – The Plant and Design/Build Contract (the FIDIC Yellow Book 1999).

In addition with a change of colour FIDIC simultaneously brought out Conditions of Contract for EPC/Turnkey Projects: the *EPC Turnkey Contract* (the FIDIC Silver Book 1999) and a *Short Form of Contract* (the Green Book).<sup>10</sup>

<sup>8</sup> From the presentation of John Bowcock, Chairman, FIDIC Contracts Committee in Tallinn, Estonia, March 1997.

<sup>9</sup> Booen, "FIDIC's Conditions of Contract for the Next Century: 1998 Test Editions" (1999) I.C.L.R., 5; Corbett, "FIDIC's New Rainbow – An Overview of the Red, Yellow, Silver and Green Test Editions" (1999) I.C.L.R. 39.

<sup>10</sup> The Silver Book is not considered further here, but it has been the subject of commentaries: Gaede, "The Silver Book: An Unfortunate Shift from FIDIC's Tradition of being Even-handed and of Focusing on the Best Interests of the Project" (2000) I.C.L.R. 477; Kennedy, "EIC Contractor's Guide

13. The developments have continued and in 2008, FIDIC introduced a new contract form, the Conditions of Contract for Design, Build and Operate Projects, which quickly became known as the Gold Book. The need for the DBO form arose out of recognition by FIDIC that for concession contracts in the transport and water/waste sectors, the market typically used the existing FIDIC Yellow Book 1999 with operations and maintenance obligations tagged on. FIDIC recognised that this was unsatisfactory and prepared the new form in order to achieve a degree of uniformity, and therefore it is hoped, a higher degree of certainty. Under the DBO form, the contractor (who, given the size of these projects, will typically be in the form of a joint venture or consortium) will be responsible for:

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

14. However, the contractor will have no responsibility for the financing and ultimate commercial success of the project. The FIDIC Gold Book 2008 adopted a number of different approaches to those used in the 1999 suite of contracts and a number of these are discussed and highlighted by way of comparison in the following chapters of this book.

15. The developments have continued and, in 2009, FIDIC published a test edition of its Conditions of Subcontract for Construction which was specifically designed for use with the 1999 FIDIC Red Book.<sup>11</sup> The formal version was released in October 2011, with only minor changes. The subcontract replaces the FIDIC Conditions of Subcontract for Works of Civil Engineering Construction, first edition 1994, albeit that it could quite clearly not have been designed for use with the 1999 Red Book. Again, in the chapters that follow we discuss some of the key features of the new subcontract.

16. Each of the 1999 contracts, as well as the 2008 Gold Book and the 2011 Subcontract, includes General Conditions together with guidance for the preparation of the Particular Conditions, and a Letter of Tender, Contract Agreement and Dispute Adjudication Agreements. Whilst the Red Book refers to works designed by the employer, this reflects the main responsibility for design and it is appropriate where the works include some contractor designed works whether civil, mechanical, electrical or construction work.

17. It is worthwhile to dwell upon the 1999 books, and in particular upon the Red Book for construction.<sup>12</sup> The reason for this consideration is that the Multilateral Development Bank Harmonised edition derives from and utilises the work and considerations that went into the terms of the 1999 books.

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to the FIDIC Conditions of Contract for EPC Turnkey Projects (The Silver Book)" (2000) I.C.L.R. 504; Henchie, "FIDIC Conditions of Contract for EPC Turnkey Projects – The Silver Book Problems in Store?" (2001) I.C.L.R. 41.

<sup>11</sup> It is also intended to be used in conjunction with the FIDIC Conditions of Contract for Construction, MDB Harmonised Edition or Pink Book. However, if this is the case both parties must take care to ensure that the subcontract has been amended to mirror the differences, which are highlighted in this book, between the Pink and Red Books.

<sup>12</sup> Wade, "FIDIC's Standard Forms of Contract – Principles and Scope of the Four New Books" (2000) I.C.L.R. 5; Booen, "The Three Major New FIDIC Books" (2000) I.C.L.R. 24.

18. The FIDIC Red Book 1999 has 20 clauses which are in reality chapters covering major topics by numerous sub-clauses. Clause 2 addresses the role of the employer, and interestingly, as well as reasonably, sub-cl.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*". 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. Further the employer is by sub-cl.2.5 required 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*".

19. Clause 3 addresses the position of the engineer, making it clear at the outset that unless otherwise stated "*Whenever carrying out duties or exercising authority, specified in or implied by the Contract, the engineer shall be deemed to act for the employer*". However, the express provision in the 1987 edition as to impartiality is foregone in favour of a provision that when the conditions provide that the engineer shall proceed in accordance with sub-cl.3.5 to agree or determine any matter:

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

It is questionable as to whether this provision in fact moves the engineer to any different position of that reflected in the earlier editions when matters were subject to the engineers "decision", Nevertheless the rights and obligations of the parties are not made dependent upon opinions of the engineer.<sup>13</sup>

20. Clause 4 covers the contractor's general obligations including the requirement that in respect of contractor designed works:

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

21. Despite cl.4 addressing "*The Contractor*", sub-cl.4.10 requires the Employer to have made available to the contractor for his information prior to the date for submission of the tender "*all relevant data in the employer's possession on sub-surface and hydrological conditions at the Site, including environmental aspects*", together with an obligation to make available all such data which comes into the employer's possession subsequently. The Contractor is however rendered "*responsible for interpreting all such data*". Interestingly under sub-cl.4.12, which addresses "*unforeseeable physical conditions*", before any additional cost is finally agreed or determined the engineer "*may also review whether other physical conditions in similar parts of the Works (if any) were more favourable than could reasonably*

<sup>13</sup> For a consideration of some of the difficulties presented by the position of the engineer. Niklisch, "The Role of the Engineer as Contract Administrator and Quasi-Arbitrator in International Construction and Civil Engineering Projects" (1990) 7 I.C.L.R. 322.



*have been foreseen when the contractor submitted the tender*". Thus there is to be a balance between "adverse" and "more favourable" physical conditions.

22. Clause 5 addresses Nominated Subcontractors, and the grounds upon which the contractor is given the opportunity to raise reasonable objection coincide neatly with the bases upon which nomination of subcontractors as a mechanism may be regarded as unsatisfactory.

23. Clauses 6 and 7 address the requirements for personnel, and for plant, materials and workmanship, incorporating at sub-cl.7.7 provision for the identification of the date when each item of plant and materials becomes the property of the employer. It is in cl.8 that provision is made for Commencement, Delay and Suspension and it contains the worthwhile requirement that the provision of programmes showing how the contractor proposes to execute the works is required to be supported by a report describing the methods which the contractor is to adopt. The terms as to entitlement to an extension of time are clear and unrelated to the formulation of any opinion for by sub-cl.8.4:

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

24. The imposition of damages for delay is by sub-cl.8.7 brought within the purview of the engineer for the purposes of incorporation into payment certificates, and it is no longer an exception to the deductions which the engineer is required to implement. Inevitably linked with cl.8 is cl.10 providing for procedures for certification of completion and for the employer's taking over. Sub-clause 10.2 sensibly addresses completion of parts of the works without the former reference to completion of substantial parts of the works.

25. Clause 12 deals with Measurement and Evaluation, and prescribes that a new rate or price "*shall be appropriate for an item of work if . . .*" the measured quantity of the item is changed by more than 10 per cent from the quantity in the bills of quantities, or the change in quantity multiplied by the rate exceeds 0.01 per cent of the accepted contract amount or the change in quantity directly changes the cost per unit quantity of the item by more than 1 per cent and the item is not specified as a "*fixed rate item*".

26. 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.

27. The financial aspects are addressed in cl.14 together with procedures for payment. Clauses 15 and 16 provide for termination by the employer and suspension and termination by the contractor, with cl.17 dealing with Risk and Responsibility.

28. Clauses 17 and 18 concern Risk and Responsibility, and Insurance.<sup>14</sup> As with the previous editions the contractor takes full responsibility for the care of

<sup>14</sup> These, as we discuss below, have been the subject of substantial change in the FIDIC Gold Book 2008 where the clauses have been re-ordered and renamed as follows: Clause 17 [Risk Allocation], Clause 18 [Exceptional Risks] and Clause 19 [Insurance]. FIDIC has said that its purpose in doing this was to follow the natural flow from the allocation through questions of responsibility and liability to insurance.



the works, materials and plant from the commencement date until the issue of the Taking-Over Certificate, and thus if any loss or damage occurs other than due to an "employer's risk" the contractor is required to rectify that at his own cost. The definition of "employer's risks" thus becomes critical, and represents circumstances in which control by either party is not feasible and events or circumstances caused by the employer whether directly or indirectly. The extent of the contractor's responsibility before taking over now covers the additional element of "goods", meaning the contractor's equipment, materials, plant and temporary works as well as "Contractor's Documents" meaning the calculations, computer programmes and other software, drawings, manuals, models and other documents of a technical nature supplied by the contractor. In respect of delay or cost incurred by the contractor in rectifying loss or damage due to an employer's risk the extent of recovery on the part of the contractor is balanced as between previous positions adopted in FIDIC forms. The result is an entitlement only to recover cost save in the circumstances of use or occupation by the employer or designed by the employer where the contractor is provided with an entitlement to "*reasonable profit in addition*". This reflects the nature of these two areas corresponding to default on the part of the employer.

29. Sub-clause 17.6 is a new provision as against the previous version of the Red Book. It is a limitation of liability on the part of the contractor. The clause excludes the liability of both contractor and employer "*for loss of use of any works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other party in connection with the contract*". This exclusion is expressly, other than specifically, provided for delay damages, cost of remedying defects, payment on and after termination, indemnities, the consequences of employer's risks, and intellectual and industry property rights. Further, the total liability of the contractor to the employer is limited in money terms to the sum resulting from the application of a multiplier to the Accepted Contract amount, for which the Appendix to Tender must provide.

30. Clause 19 is devoted to Force Majeure including its definition within sub-cl.19.3, namely meaning:

*"An exceptional event or circumstance:*

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

31. Kinds of such exceptional events or circumstances are listed. This is a new provision referable to the previous editions of the Red Book, albeit that under the fourth edition some of the relief was available to the contractor for events now brought within the umbrella of this new provision, which includes aspects relating to the effect of events and the continuation of performance. The event of *Force Majeure* must prevent a party from performing any of its obligations, and as such is by definition not as severe as an event that prevents the performance of all of them. Notice is required following awareness of the event or circumstance and

prevention from performance of an obligation on the part of the contractor by an event of *Force Majeure* may give rise to an extension of time and additional cost. It is only in the event of an execution of substantially all the works in progress being prevented for a continuous period or multiple periods that the termination is provided for.<sup>15</sup>

32. The provisions conclude with cl.20, Claims, Disputes and Arbitration. This provides procedure and regulation for, and regulation of, claims not solely for additional payment but also for extension of time. It imposes the requirement on the contractor to give notice as soon as practicable and not later than 28 days after the contractor became aware “*or should have become aware*” of the event or circumstance of the subject of the claim. Failure to give notice renders time not being extended and the contractor not entitled to additional payment. It is apparent that the thinking of the Task Group was that there should be notice of a claim within 28 days for it to be regarded as valid, reflecting upon the bona fides of a claim and the ordinary ability on the part of a contractor to know whether a claim situation has arisen and on what basis.<sup>16</sup> Under this condition in cl.20 disputes are to be adjudicated by a Dispute Adjudication Board, and it is in this area that there is a distinction in the 1999 Red Book from the system of Dispute Review Boards which was advocated by the World Bank.

33. As we discuss in the commentary below, this has been the subject of considerable discussion, and the route taken by the FIDIC Gold Book 2008 suggests that FIDIC is stepping back from making cl.20 a strict condition precedent such that the contractor might lose the right to put forward a genuine claim, simply because it has failed to meet a tight time limit.

34. The requirement to keep contemporary records has been maintained from the 1987 edition but the requirement making the contractor’s entitlement to payment contingent on the claim being verified by contemporary records has been dropped.<sup>17</sup> One novel feature of this provision in the FIDIC Red Book 1999 is the mandatory requirement upon the engineer or employer to respond to the contractor and to any supporting particulars as to the basis of the claim “*with approval, or with disapproval and detailed comments*”. A request for further particulars may be generated yet the employer or engineer “*shall nevertheless give his response on the principles of the claim within . . .*” the 42 days.

35. Sub-clause 4.2 specifies that the contractor shall provide a Performance Security where the amount has been specified in the Appendix to Tender, and the sub-clause continues with provisions for extending the security and, importantly, 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*”. Accompanying the 1999 Red Book are sample forms of security which need to be carefully considered on the parts of both an employer and the contractor at the earliest possible stage.

<sup>15</sup> For a comprehensive analysis of the topic with a comparative consideration of legal systems. Treitel, *Frustration and Force Majeure*, 2nd edn, 2004.

<sup>16</sup> Seppälä, “FIDIC’s New Standard Forms of Contract — Force Majeure, Claims, Disputes and Other Clauses” (2000) I.C.L.R. 235.

<sup>17</sup> And we discuss the contrasting approaches of the courts in the Falkland Islands and Trinidad & Tobago when faced with claims dealing with this point under the 1987 and 1999 Red Books in our discussion of cll 6 and 20 below.

36. The performance security is required to be issued by an entity approved by the employer “*and shall, be in the form annexed to the Particular Conditions or in another form approved . . .*”. Thus the employer needs to have reached a decision on the document to comprise the performance security and its wording at the stage of the preparation of tender documentation. With the 1987 fourth edition FIDIC provided two sample types of security comprising a Performance Guarantee and a Surety Bond. They were in conditional terms, co-extensive with the construction contract, and payable upon default. The desire for independence of the guarantee obligations and the assimilation of such guarantee obligations towards letters of credit allowed inextricably to the use of first or on-demand bonds.<sup>18</sup> The Performance Guarantee, the Advanced Payment Guarantee and the Retention Money Guarantee represent a similar form and a payment mechanism. Their differences reflect different functions. Their nature is that of an on-demand guarantee but one which is payable upon the submission of identified documentation by the beneficiary. This is the written demand, but with a required statement as to the breach of obligations under the contract and the respect in which the contractor is in breach. These securities derive from the guidance of the International Chamber of Commerce and the Uniform Rules published by that body.<sup>19</sup> Certainly the introduction of the ICC Uniform Rules is a major step in providing clarity and certainty in this difficult area.<sup>20</sup>

37. In general terms the first edition of the Rainbow series of 1999 was a welcome advance in clarity and in addressing areas of difficulty. The summary of the view of the European International Contractors Group was that the 1999 Construction Contract was an improvement on the fourth edition, albeit that the balance of the amendments would increase the risk to contractors, with the recognition that the new powers of the engineer could pose problems.<sup>21</sup> However, an experienced commentator’s view is that the new forms would gain their places as leading international standard forms with an indication that they had been well received at the World Bank, and “*thus there is a likelihood that they will be included in standard bidding documents or in lists of forms approved for use in projects supported by multilateral funding agencies*”.<sup>22</sup>

38. This was an extremely perceptive comment because the banking community had for many years adopted the FIDIC Conditions as part of their standard bidding documents to which the banks required their borrowers and aid recipients to adhere. Whilst the banks utilised the FIDIC Conditions, it was through the Conditions of Particular Application that the banks introduced the terms and provisions which they particularly required and by which means amendments were effected to the FIDIC General Conditions. Thus not only did the

<sup>18</sup> As described in *Edward Owen Engineering Ltd v Barclays Bank International Ltd and Umma Bank* (1978) QB 159, (CA) per Lord Denning M.R.

<sup>19</sup> Uniform Rules for Demand Guarantees (URDG, No. 458); 524 Uniform Rules for Contract Bonds (URCB No. 524). As discussed at sub-cl.4.2 below, the ICC updated its rules for Demand Guarantees on July 1, 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. As at October 2011, this had not yet been done.

<sup>20</sup> Bertrams, “The New Forms of Security in FIDIC’s 1999 Conditions of Contract” (2000) I.C.L.R. 367.

<sup>21</sup> “EIC Contractors Guide to the FIDIC Conditions of Contract for Construction (the new Red Book)” (2003) I.C.L.R. 53.

<sup>22</sup> Corbett, “FIDIC’s New Rainbow 1st Edition . . . An Advance?” (2000) I.C.L.R. 253.

procurement documents for a particular project require to repeat the amendments by this mechanism but there were inevitable differences between the amendments and conditions as between the banks. Those in charge of procurement at a number of Multilateral Development Banks (MDB) were well aware of the problems created by these and the benefits that might accrue from uniformity. It was as a result of this that these banks wished to harmonise their bid documents by the creation of a modified form of the FIDIC Conditions of Contract for Construction first edition 1999 in which the General Conditions would provide in agreed terminology the effects of what previously had been incorporated by amendment.

39. The resulting “harmonised edition” was the product of preparation by the FIDIC Contracts Committee and by a group of participating banks,<sup>23</sup> and following comments from those to whom the draft was circulated, it was in May 2005 that the first Harmonised edition of the 1999 Conditions was published. There have, as noted above, been two further versions, published in March 2006 and June 2010. As the contract is closely related to the FIDIC Red Book 1999, it has inevitably been entitled the Pink Book.

40. The Harmonised edition carries a belief that it will simplify the use of the FIDIC Conditions of Contract not only for the MDBs and their borrowers but also for others involved with project procurement including engineers, contractors and contract specialists. It is intended for use on MDB financed projects only. It recognises that despite the use of the Harmonised conditions which will reduce the number of additions and amendments in the Particular Conditions, nevertheless some special requirements will be generated by particular projects. It is for this reason that the Harmonised edition contains provision for particular conditions, and it also contains sample forms for Contract Data, Securities, Bonds, Guarantees and Dispute Board Agreements. The Harmonised edition is advanced on the basis that it follows FIDIC risk sharing principles, and whilst most of the amendments to reflect the harmonisation derived from the requirements of the banking community there are some minor changes introduced. There is however a significant change from the 1999 Red Book in connection with the dispute provisions contained in cl. 20.2 to 20.8, which FIDIC considers to be an improvement.

41. Accompanying the Harmonised editions of May 2005 and amended in March 2006 is a Supplement prepared under the guidance of the FIDIC Contracts Committee.<sup>24</sup> The Supplement provides information and guidance for the preparation of contracts using the MDB harmonised construction contract, based on the Construction Contract first edition 1999 and elements of the MDB Harmonised Master Procurement Document for Procurement of Works and User’s Guide that were published in the *World Bank Standard Bidding Document for Works and User’s Guide* May 2005.

<sup>23</sup> The original 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. The latter two banks are no longer involved, but the Council of Europe Development Bank and the European Bank for Reconstruction and Development are listed as participants in the June 2010 version.

<sup>24</sup> Comprising Christopher Wade, Nael Bunni, Axel-Volkmar Jaeger, Philip Jenkinson and Michael Mortimer-Hawkins, together with John Bowcock as special adviser and Christopher R. Seppälä as legal adviser.

42. The Supplement is a most useful document containing a section on Changes to the Construction Contract General Conditions. This summarises the changes that were made to the FIDIC Conditions. One of the most noticeable changes is the addition in sub-cl.3.1 in connection with the engineer's duties and authority whereby the following additional provision is included:

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

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

*Notwithstanding . . ."*

43. Most critical, however, in relation to the engineer is the matter of his authority. Under the FIDIC Red Book 1999 there is an express prohibition in sub-cl.3.1 in the following terms:

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

This is replaced in the Harmonised version by the following:

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

Certainly the view of contractors is that this is a retrograde step permitting unilateral alteration of the engineer's authority, and thus potentially impacting upon the balance of risk.<sup>25</sup> This is a view apparently endorsed by FIDIC who accept that some of the changes have tilted the balance of risk in favour of the Employer.<sup>26</sup> There are other notable features including the deletion of the four circumstances under which an employer is entitled to make a call under the performance security. There is no replacement, doubtless based on the view that the reference to the ICC Uniform Rules provides an adequate safeguard for the employer, the financing institutions and the contractor.

44. In addition, the thresholds for variation in quantities and values of items in the bill of quantities for the purposes of determining whether a build rate may be

<sup>25</sup> Appuhn and Eggink, "The Contractor's View on the MDP Harmonised Version of the New Red Book" (2006) I.C.L.R. 4.

<sup>26</sup> Christopher Wade, The FIDIC Contract Forms and the New MDB Contract, paper given at the ICC-FIDIC conference, 17-18 October 2005.



changed have been increased in the harmonised version. Another notable feature lies in the terms of cl.20 and the replacement of Dispute Adjudication Boards with Dispute Boards.

45. A further useful section comprises Words and Phrases replaced in the General Conditions.<sup>27</sup> Perhaps the most useful is the Clause-by-Clause comparison between the provisions of the General Conditions in the Construction Contract and those in the Harmonised edition which are set out side by side and with the amendments introduced by the latter specifically underlined.

46. This commentary had been prepared in the following way. First, the particular sub-clause has been set out in full. This is followed by an overview of the key features of that sub-clause. After that, we provide a detailed commentary explaining the effect and operation of the sub-clause. Where relevant we discuss case law and some of the problems encountered in practice. We set out any changes to be found in the 2010 Pink Book, and in previous, the amendments, and comment on the effect of those changes. Finally we have also highlighted some of the different approaches adopted by FIDIC in the Gold Book 2008 and commented upon some of the key features of the 2011 FIDIC Subcontract.

47. Where possible, we have sought to illustrate the likely operation and/or interpretation of the FIDIC provisions by reference to the jurisprudence and other learning from a range of different countries. However, the juridical basis of this commentary rests in English law, and it follows that the comments endeavour to interpret and reflect the contract according to the English rules of construction and interpretation. It must however be recognised that the English rules are relatively strict as against interpretation and application under other legal systems, whether in Continental Europe or under Arab Civil Codes. Not only is this a caveat but it is a positive requirement that it is the approach and application of the applicable law which will govern the ultimate meaning and effect of the terms used.<sup>28</sup> Nevertheless it is hoped that a commentary on this basis and in the format adopted will be useful to English and international readers alike, with the latter then able to give or obtain advice as to whether the relevant proper law of the contract would modify the English view.

<sup>27</sup> An example is the change from "Appendix to Tender" to "Contract Data".

<sup>28</sup> André-Dumont, "The FIDIC Conditions and Civil Law" (1988) 5 I.C.L.R. 43; Abrahamson, "Checklist for Foreign Laws, FIDIC, Forensic Context" (1988) 5 I.C.L.R. 266.