

Clause 1

Summary

Clause 1 sets out many of the boilerplate clauses within the Contract and provides a number of definitions which are used thereafter. The Clause has been substantially changed from the Red Book 4th edn with a raft of new clauses added.

Sub-Clause 1.3 deals with communications and states that approvals, certificates, consents and determinations shall not be unreasonable withheld or delayed.

The assignment provisions in Sub-Clause 1.7 have now changed so that restriction on assignment applies to both the Contractor and Employer.

Delayed Drawings and Instructions is dealt with at Sub-Clause 1.9. This was previously dealt with at Clause 6.4 of the Red Book 4th edn and it is unclear why such an important provision has now been rolled up in the General Provisions clause.

Origin of Sub-Clause

Similar provisions to those within Clause 1 of FIDIC 1999 are found within the Red Book 4th edn at Clause 1, 3, 5, 6, 9, 26 and 68

Cross Reference

The Definitions and General Provisions are found in every clause within FIDIC 1999.

Sub-Clause 1.1 Definitions

The definitions appear throughout FIDIC 1999. The definitions are important with regard to the Parties' obligations, insurance and ownership rights. The purpose of the definitions section is to ensure that there is consistency in the interpretation of the obligations of the parties.

The introductory words of the definition section state that words indicating persons or parties include corporations or other legal entities, except where the context requires otherwise. The main significance of this change is that the Engineer can now be a company.

Sub-Clause 1.1.1 – The Contract

“Contract” – the definition lists the different documentation making up the Contract in the same order as the order of the priority of documents contained at Sub-Clause 1.5. There is also provision for further documentation to make up the Contract, as further documents can be included in either the Contract Agreement or in the Letter of Acceptance.

“Contract Agreement” – an example of the Contract Agreement is contained within the Forms, found at the end of FIDIC 1999. The Contract Agreement can also include further documentation which will then form part of the Contract and therefore it is important that any further documentation is recorded correctly and easily identifiable. The use of the words “if any” within the definition reflects the fact that the Parties, naturally, may opt out of the need for a Contract Agreement should they wish. The Contract Agreement is reviewed in greater detail within the commentary on Sub-Clause 1.6 [Contract Agreement].

“Letter of Acceptance” – the Letter of Acceptance will only be construed as an acceptance if it is accepting the Letter of Tender and is signed by the Employer. As with most signed documents one must undertake some due diligence to ensure that who is signing the document on behalf of the Employer has the authority to do so. “It is important to ensure that the Letter of Acceptance matches the tender or, if there have been subsequent negotiations, an amended version of that tender. Otherwise, the Letter of Acceptance would be more like a counter-offer which would require a further acceptance from the Contractor before a contract was formed”¹.

The importance of the drafting of the Letter of Acceptance is further heightened by the fact that it is second only to the Contract Agreement in the priority of documents contained at Sub-Clause 1.5. The Contract Agreement should be reviewed in detail to make sure that it does not change any of the terms and conditions contained in the Letter of Acceptance (unless of course this is the intention) as if there is any discrepancy between the 2 documents the Contract Agreement will take priority.

The Letter of acceptance also acts as a trigger for the timings of certain activities. These are as follows:-

- Sub-Clause 1.6 [*Contract Agreement*] – the Contract Agreement must be entered into within 28 days after the Contractor receives the Letter of Acceptance

¹ FIDIC 4th A Practical Legal Guide page 44, Edward C Corbett

- Sub-Clause 4.2 [*Performance Security*] – the Contractor shall deliver the Performance Security to the Employer within 28 days after receiving the Letter of Acceptance
- Sub-Clause 8.1 [*Commencement of Work*] – unless otherwise stated in the Particular Conditions the Commencement Date shall be within 42 days after the Contractor receives the Letter of Acceptance
- Sub-Clause 14.7 [*Payment*] – the Employer shall pay to the Contractor the first instalment of the advance payment within 42 days after issuing the Letter of Acceptance or within 21 days after receiving the documents in accordance with Sub-Clause 4.2 [*Performance Security*] and Sub-Clause 4.2 [Advance Payment], whichever is the later.

Three of the four timings referred to above are dependent upon receipt of the Letter of Acceptance by the Contractor, perhaps a slightly trivial point but the Employer should most certainly ensure that the Contractor acknowledges receipt of the Letter of Acceptance, so that there are no arguments as to the date of receipt which will in turn affect the timings referred to above.

“Letter of Tender” – other than within the definitions, the Letter of Tender is only referred to at Sub-Clause 1.5 [*Priority of Document*] of the Conditions of Contract. There is a useful example of a Letter of Tender contained at the Forms section of FIDIC 1999. As with the Letter of Acceptance it is worth undertaking some due diligence on the person who has signed the Letter of Tender on behalf of the Contractor, to make sure that this person has the authority to do so.

The Contractor must ensure that all of the documents which it intends to form part of its Tender are attached to the Letter of Tender otherwise any such documents will not form part of the Contractor’s Tender. The Letter of Tender is ranked number 3 in the order of priorities but it is very likely that many of the documents attached to the Letter of Tender will not be superseded by documents contained in the Letter of Acceptance or Contract Agreement

Sub-Clause 1.1.2 Parties and Persons

“Party” – is a new definition to FIDIC 1999 and is used throughout the FIDIC 1999 in both singular and plural (“**Parties**”) form. Parties of course meaning both the Employer and the Contractor and does not include the Engineer.

“Employer” – the Employer is named in the Appendix to Tender. This definition has been

amended from the FIDIC 4th edition. The FIDIC 4th edition referred to the person named in Part II of the Conditions as opposed to the Appendix to Tender. The Employer includes the legal successors in title to the originally named Employer.

A successor in title is a term commonly used in relation to restrictive covenants and easements and means the successive owners of the titled land are bound by the said agreement. If the Employer owns the land on which the project has been constructed then a subsequent purchaser of the land will obtain with conveyance of the land all the rights under the Contract which the Employer possesses. Where, however, the Employer does not have title then the only way in which he can transfer rights to a third party is by assignment. An assignee is different to a successor in title. As detailed below at Sub-Clause 1.7, there has been a significant change to the assignment provisions so that a Contractor has sole discretion whether to agree to an assignment of the Employer's rights. This issue needs to be carefully considered by an Employer when deciding to progress with a project.

“Contractor” – refers back to the person named as the contractor in the Letter of Tender which has been accepted by the Employer. In many cases there is a substantial time lag between the date of the Letter of Tender and the Letter of Acceptance (12 months or more in many cases). Therefore, it is advisable that the Employer should carry out some due diligence on the named contractor in order to ensure that at the time the Contract is executed the Contractor has not changed its name on the company register etc. As with the definition of Employer, Contractor includes the legal successors in title.

“Engineer” – the key amendment to this definition when compared to the FIDIC 4th edition is the reference to the fact that the Engineer is also the person who has been notified to the Contractor as a replacement of the Engineer under Sub-Clause 3.4 [Replacement of the Engineer]. Unlike the FIDIC 4th edition, under Sub-Clause 3.4 the Employer is entitled to replace the Engineer subject to the Contractor not raising any reasonable objection, this issue is covered in more detail at Clause 3.

The Engineer is a *“person”*. This is defined in the introductory section of Clause 1.1 to include *“corporations and other legal entities, except where the context requires otherwise”*. If the Engineer is a company, an individual can be named but it is the company and not that individual who comprises the Engineer as defined. That person must have been both (i) appointed by the Employer, and (ii) named in the Appendix to Tender. This gives the Contract clarity and the Contractor certainty regarding whom he will be liaising with. However, as the provision is drafted in the past tense, it appears to conflict with the first sentence in Sub-Clause 3.1, which

states that, the “*Employer shall appoint the Engineer*”. It is clearly contradictory for the Employer to have a right to appoint at some future date an already appointed and named person.

There is provision for the Employer to replace the Engineer under Sub-Clause 3.4 in the same way that the 3rd edition and ICE 5th and 6th defined the “*Engineer appointed from time to time by the Employer*”. In the 4th edition (which provides for the Engineer to be a firm, corporation or other organisation having legal capacity) there was no such ability (see below). There is no provision for the Contractor to replace the Engineer under Sub-Clause 3.4. However, if the Contractor considers the Engineer’s staff to be incompetent, he may proceed to allege that their incompetence constitutes a breach of Sub-Clause 3.1.

“**Contractor’s Representative**” – is only found in the definition of Contractor’s Personnel (1.1.2.7), Sub-Clause 4.3 [*Contractor’s Representative*], Sub-Clause 6.9 [*Contractor’s Personnel*] and Sub-Clause 12.1 [*Works to be Measured*]. This is a new definition not previously contained in the FIDIC 4th Red Book edn.

It is advisable that the Contractor name the Contractor’s Representative in the Contract as any subsequent nomination will be subject to the Engineer’s approval. The FIDIC Guide Commentary also advises the Contractor to name alternates in its Tender in case the preferred representative becomes unavailable during the period of the validity of the Tender. The role of the Contractor’s Representative is more particularly described in Sub-Clause 4.3 [*Contractor’s Representative*].

“**Employer’s Personnel**” - includes the Engineer, his delegated staff and all other employees of the Employer and the Engineer. In addition the Employer is entitled to designate any other people as Employer’s Personnel. Sub-Clause 1.1.2.6 appears to have been drafted so as to avoid including other contractors working on the Site within the definition of Employer’s Personnel. It probably achieves this object but there is a degree of ambiguity. For example it is not immediately clear whether staff and labour of other contractors will be treated as Employer’s Personnel for the purposes of this definition. The same applies for other consultants on Site.

Employer’s Personnel have the benefit of the indemnities under Sub-Clause 17.1 and it would seem logical that these apply to all people who might suffer as a result of any act by the Contractor.

“**Contractor’s Personnel**” – includes all personnel whom the Contractor utilises on Site. The definition goes on to say “*who may include the staff... of each Subcontractor*”. The determining

factor as to whether or not an employee of a Subcontractor forms part of the Contractor's Personnel is quite simply whether or not this employee is being utilised on Site. If the answer is in the affirmative then the employee forms part of the Contractor's Personnel.

The term Contractor's Personnel is found within various Sub-Clauses within FIDIC 1999 and it is important for the Contractor to note that many of these Sub-Clauses hold the Contractor responsible for the actions of the Contractor's Personnel, as already stated above this may well include the employees of a Subcontractor.

By way of example under Sub-Clause 6.4 [*Labour Laws*], the Contractor must ensure that all Labour Laws applicable to the Contractor's Personnel are complied with and Sub-Clause 17.1 (b) (ii) [*Indemnities*] provides that the Contractor must indemnify the Employer from any loss or damage of any property if caused by the negligence, wilful act or breach of the Contract by the Contractor's Personnel.

From the above it is clear that the actions of, for example, an employee of a Subcontractor could cause the Contractor to be in breach of its obligations under the Contract. One way in which the Contractor could protect itself from any loss which may arise out of such a breach is to transpose the Contractor's obligations within the Contract into any sub-contract, so that the Subcontractor owes the same obligations to the Contractor as the Contractor does to the Employer.

Sub-Clause 15.2 (f) (ii) [*Termination by the Employer*] allows the Employer to terminate the Contract if the Contractor's Personnel offer a bribe, gift, gratuity, commission or other thing of value as an inducement or reward for doing amongst other things any action in relation to the Contract. So Contractors beware, a small bribe from a Subcontractor to customs to get his equipment through faster would give rise to a right to terminate for the Employer. The Contractor must also obtain insurance for the Contractor's Personnel against liability for claims, damages, losses and expense arising from injury, disease or death, see commentary on Sub-Clause 18.4 [*Insurance for Contractor's Proposal*].

“Subcontractor” – is any person named in the Contract as a subcontractor or any person appointed as a subcontractor for part of the Works. The advantage to the Contractor in naming as many Subcontractor's as possible in the Contract is that it will reduce the number of Subcontracts which the Contractor will have to obtain consent from the Engineer during the Works. If the Engineer were to reject a Subcontractor for a valid reason this may well delay the Works, by containing as many Subcontractors as possible in the Contract it will reduce the chances of such an event occurring.

“DAB” – the Dispute Adjudication Board is the standard procedure for dispute resolution. Although DAB’s were not contained in the FIDIC 4th edition they did appear in the Supplements to the FIDIC 4th edition and in the 1995 Orange Book. A dispute of any kind whatsoever between the Parties may be referred to the DAB. The DAB is made up of either 1 or 3 members, depending on what is stated in the Appendix to Tender, if the Appendix to Tender is silent on this issue and the Parties cannot agree on the number of DAB members then the DAB shall comprise of 3 members, see Sub-Clause 20.2 [*Appointment of the DAB*]. The make-up and significance of the DAB is commented on in detail at Clause 20.

“FIDIC” – this definition does not appear anywhere else within FIDIC 1999. As stated in the FIDIC Guide commentary the definition has been included in case the Contract may refer to it, with the President of FIDIC being named as the person resolving any disagreement under Sub-Clause 20.3 [*Failure to Agree DAB*] being a prime example of this.

Sub-Clause 1.1.3 Dates, Tests, Periods and Completion

“Base Date”- is a new definition and is referred to at Sub-Clauses 4.10, 13.7, 13.8, 14.15(e), 17.5(b)(ii), and 18.2 (final paragraph). It is used throughout the Contract as a cut-off date. For example, it is referred to as the date: (a) when the Employer has to provide information to the Contractor; (b) after which changes in legislation will entitle the Contractor to time and Cost; and (c) which exchange rates should be measured if not specified in the Appendix to Tender.

“Commencement Date” – is referred to in Sub-Clauses 1.1.3.3 and 8.1 [*Time for Completion*] and [*Commencement of Works*]. It is also used as a date on or from which the Contractor must carry out certain tasks such as proposing the Contractor’s Representative or providing a breakdown of each lump sum price in the Schedules.

“Time for Completion” - this is the contractual completion date as set out in the Contract subject to any extension of time under Sub-Clause 8.4 [*Extension of Time for Completion*], calculated from the Commencement Date. The Taking-Over Certificate must be issued by this date, failing which delay damages will be payable under Sub-Clause 8.7 [*Delay Damages*].

“Tests on Completion” - these tests are specified in the Contract or agreed by both Parties or instructed as a Variation, and will often include commissioning. The Tests on Completion are relevant to the Taking-Over of the Works under Sub-Clause 10.1 [*Taking Over of the Works and Sections*].

“Taking-Over Certificate” – No form is prescribed for this Certificate although there is proposed wording within the FIDIC Guide. Sub-Clause 10.1 states that the Taking-Over Certificate need only state the date on which the Works or Section were completed in accordance with the Contract.

“Tests after Completion” – these are the tests (if any) which need to be defined in the Employer's Requirements and which are carried out in accordance with the provisions of the Particular Conditions after the Works or a Section (as the case may be) are taken over by the Employer. These Tests are required to be carried out as soon as possible after Taking Over, in order to determine whether the Works (or a Section, if any) comply with specified performance criteria.

“Defects Notification Period” – this is defined in the FIDIC Guide as meaning the period specified in the Contract for notifying defects, calculated from the date on which the Works (or, possibly, a Section) are completed and Taken Over.

“Performance Certificate” - this is defined in the FIDIC Guide as meaning the certificate which is issued under the Contract when the specified certifier considers that the Contractor has performed all obligations under the Contract.

“day” – is defined as a calendar day and **“year”** means 365 days. This definition is unusual as many statutes define a ‘year’ by reference to calendar months rather than days so as to avoid problems with leap years. The FIDIC Guide states that time periods specified in years commence on the beginning of the day following the date of the act which constitutes the starting-point.

Sub-Clause 1.1.4 Money and Payment

“**Accepted Contract Amount**”- is defined as the amount accepted in the Letter of Acceptance for the Works and the remedying of any defects. The Contractor shall be deemed to have satisfied himself that the Accepted Contract Amount is sufficient to carry out all his obligations under the contract – see Sub-Clause 4.11. This is a new term used within FIDIC 1999 which is different to the Contract Price. While the Contract Price is subject to change due to the actual and correct quantities of work executed and Variations instructed, the Accepted Contract Amount stays static.

“**Contract Price**” - means the price defined in Sub-Clause 14.1 [*The Contract Price*]. There is significant change from the FIDIC Red Book 4th edn. Under that contract the Contract Price was “a fixed lump sum as stated in the Letter of Acceptance and the term does not include any adjustments to the contract price for variation, etc.” Under the FIDIC Red Book 4th edn the definition of Contract Price was therefore analogous to Accepted Contract Amount (see above). Under Sub-Clause 14.1 the Contract Price shall be “agreed or determined under Sub-Clause 12.3 [*Evaluation*] and be subject to adjustments in accordance with the Contract...”

“**Cost**” - the definition includes all expenditure reasonably incurred (or to be incurred) by the Contractor ... including overhead and similar charges, but does not include profit. Cost will therefore only be payable where the Contractor has (a) incurred expenditure or will incur it and (b) where that expenditure is reasonable. It may include overhead and similar charges but may not incur profit.

The wording of the Sub-Clause is very clear that the expenditure must be incurred in relation to the event where the Cost is claimed. This means that it will not always be possible for the Contractor to claim overhead and similar charges.² It does not follow that simply because an additional Cost is incurred the Contractor’s overhead will necessarily increase. An example is the situation where the Contractor claims under Sub-Clause 13.7 for a change in Cost resulting from a change in law. If the price of a commodity has increased as a result of an increase in taxes, the only consequences will be the requirements that the Contractor pay a larger amount and possibly finance a heavier cash-flow. There would be no reason to apply general overhead charges as the simple payment of an extra amount would not lead the Contractor to incur additional expenditure other than that amount.

² See, for example, Final Award in Case 12048 (2006), Seppälä C., ICC International Court of Arbitration Bulletin Vol. 23 No. 2, page 23

“Final Payment Certificate” - refers to the payment certificate issued under Sub-Clause 14.13 [*Issue of Final Payment Certificate*].

“Final Statement” - refers to the statement defined in Sub-Clause 14.11 [*Application for Final Payment Certificate*]. The Contractor is required under Sub-Clause 14.12 [*Discharge*] to submit a written discharge when submitting the Final Statement. The Final Statement is also referenced in Sub-Clause 14.14 [*Cessation of the Employer’s Liability*].

“Foreign Currency” - refers to the currency in which part (or all) of the Contract Price is payable, but not the Local Currency. There is only one other reference to Foreign Currency³ and this is at Sub-Clause 14.14 [*Currencies of Payment*].

“Interim Payment Certificate” - means a payment certificate issued under Clause 14 [*Contract Price and Payment*], other than the Final Payment Certificate. There are references to an Interim Payment Certificate at Sub-Clauses 16.1 and 16.2. If the Engineer fails to issue an Interim Payment Certificate within the period specified in Sub-Clause 14.6, the Contractor may notify the Employer that he will be suspending (or reducing the rate of) work on a stated date. Similarly if the Engineer fails to issue a Payment Certificate within 56 days after receiving a Statement and supporting documents the Contractor may, upon giving 14 days’ notice to the Employer, terminate the Contract.

“Local Currency” - there are two references to Local Currency within the Contract; one is in the definition of Foreign Currency and also at Sub-Clause 14.14 [*Currencies of Payment*].

“Payment Certificate” - references to the Final Payment Certificate and the Interim Payment Certificate arise throughout the Contract. However there are also references to the term Payment Certificate, which is intended to include either an Interim or Final Payment Certificate.

“Provisional Sum” - refers to Sub-Clause 13.5 [*Provisional Sums*] which explains the purpose and the use of Provisional Sums.

³ Sub-Clause 14.15 in fact refers to Foreign Currencies

“**Retention Money**” - is only referred to at Sub-Clause 14.3 [*Application for Interim Payment Certificates*] and Sub-Clause 14.9 [*Payment of Retention Money*]. The percentage of retention to be deducted should be stated in the Appendix to Tender with a limit. This limit is determined by reference to a percentage of the Accepted Contract Amount. Payment of the retention occurs when the Taking-Over Certificate has been issued and after the latest of the expiry dates of the Defects Notification Period.

“**Statement**” - refers expressly to a statement submitted by the Contractor as part of an application, under Clause 14 [*Contract Price and Payment*], for a payment certificate.

Sub-Clause 1.1.5 Works and Goods

The definition section has been re-ordered from the Red Book 4th edn so that it now reads in alphabetical order. It is important that when the tender documentation is being prepared that the wording mirrors the definitions within the Contract. The FIDIC Guide warns against using expressions such as: ‘Permanent Equipment’ or ‘Constructional Plant’.

“**Contractor’s Equipment**” – the definition is similar to that used in the FIDIC 4th edition. It refers to all apparatus, machinery, vehicles and other things required for the execution and completion of the Works. The list of apparatus, machinery, vehicles will shape the definition of “other things.” Where a genus can be found in the list of words preceding the word “other” then the *ejusdem generis* rule will apply. The basis of the *ejusdem generis* rule is that the word "other" is to be read as if it meant "similar" - see *Quazi v Quazi* [1980] AC 744, per Lord Diplock. There is a genus created by the words apparatus, machinery and vehicles so that Contractor’s Equipment will include things such as power tools but will not include stationery.

The definition of “Contractor’s Equipment” was criticised in *FIDIC 4th a Practical Legal Guide*⁴ as being circular with the definition of ‘Temporary Works.’ This leads to confusion as to what amounts to Temporary Works and what amounts to Contractor’s Equipment. For example, is a site hut part of the Contractor’s Equipment or Temporary Works? If it is the latter then a failure to mobilise in accordance with the programme may in fact be a ground for termination - see Sub-Clause 15.2(c)(i) and Clause 8.

⁴ EC Corbett, 1991, Sweet & Maxwell at page 46

“Goods” – This is a new Sub-Clause and is defined as including “Contractor’s Equipment, Materials, Plant and Temporary Works, or any of them as appropriate.” The draftsmen of FIDIC obviously found this new definition difficult because on occasion we see references to Plant and Goods. The inclusion of the phrase ‘Temporary Works’ does not always fit comfortably in the Contract. For example, at Sub-Clause 4.16 [*Transport of Goods*] reference is made to the giving of notice when “any major item of other Goods will be delivered to Site.” Whether one must look at the Temporary Works as a whole or the value of each part of the Temporary Works is unclear.

The word “Goods” is used in Sub-Clause 15.2. On termination by the Employer the Contractor is required to leave the Site and deliver any required Goods to the Engineer. The Employer or other contractor may then use these Goods to complete the Works. “The Employer shall then give notice that the Contractor’s Equipment and Temporary Works will be released to the Contractor at or near the Site.” The assumption is that Plant and Materials will have been used in the Works but this may not always be the case. There may be surplus materials on Site or the Plant which the Contractor has brought to Site may be rejected. The Employer should not be able to keep these Materials or Plant without payment.

“Materials” – are defined as being things (other than Plant) intended to form or forming part of the Permanent Works. It therefore appears that materials intended to form part of the Temporary Works are excluded from this definition.

“Permanent Works” – the definition is circular and unhelpful. Permanent Works are defined as being “the permanent works to be executed by the Contractor under the Contract.” This must be read in conjunction with the definition of Works and Temporary Works. In FIDIC 4th there was a specific reference to Plant in the definition of Permanent Works. This, however, has been removed in FIDIC 1999. The omission is not significant.

“Plant” – is defined as meaning apparatus, machinery and vehicles intended to form or forming part of the Permanent Works. There is therefore a distinction between what is ordinarily understood as being plant and the FIDIC definition. Plant is commonly understood to mean the apparatus, machinery and vehicles with which the Contractor will carry out the works. Under FIDIC 1999 this equipment is described as Contractor’s Equipment. Plant, in FIDIC 1999, refers to items like generators which form part of the Works.

“Section” – is defined as meaning a part of the Works specified in the Appendix to Tender as a Section (if any). Sections are therefore specifically identified parts of the Works whereas a part is either unspecified or a sub-division of a Section. The distinction between parts and Sections is important when considering the obligations relating to Taking-Over and delay damages. Taking-Over a Section will give relief from delay damages for that Section whereas Taking-Over a part will give rise to a reduction in the amount of delay damages claimable (see Sub-Clause 10.2 and 8.7).

“Temporary Works” – the definition is circular and unhelpful. Temporary Works is defined as meaning “all temporary works of every kind (other than Contractor’s Equipment) required on Site for the execution and completion of the Permanent Works and the remedying of any defects.” Regard should also be had to the definition of Goods, which includes Temporary Works. On termination by the Employer under Sub-Clause 15.2 the Contractor must leave the Temporary Works to the Employer.

The final paragraph of Sub-Clause 15.2 permits the Employer to sell the Contractor’s Temporary Works and the Contractor’s Equipment if a payment has not been made to the Employer after termination. This may be both legally and practically difficult especially where the Contractor does not own the equipment. This issue is considered further at Sub-Clause 4.17 [*Contractor’s Equipment*].

“Works” – is defined as meaning the Permanent Works and the Temporary Works, or either of them as appropriate. The completion of the Works is linked to the Time for Completion (Sub-Clause 8.2); and the expiry of the Defects Notification Period (Sub-Clause 11.1). The Contractor’s general obligations are also linked to the requirement to complete the Works (Sub-Clause 4.1), as is the Engineer’s obligation to measure the Works (Sub-Clause 12.1) and thus the Employer’s obligation to pay for the Works.

Sub-Clause 1.1.6 Other Definitions

“Contractor’s Documents” – refers to calculations, computer programs and other software, drawings, etc. supplied by the Contractor under the Contract. There is nothing within the General Conditions that stipulates which design documents need to be supplied. Sub-Clause 4.1 refers to the Contractor providing: “Plant and Contractor’s Documents specified in the Contract.” It is therefore anticipated that within the Specification or another document there will be a list of specific documents that the Contractor has to supply. It follows that not all calculations, computer programs etc. need to be supplied by the Contractor or are classified as Contractor’s Documents.

Sub-Clause 1.10 supports this conclusion as it refers to Contractor's Documents and other design documents.

“Country” – refers to the place where the Permanent Works are carried out; i.e. the Site. If the majority of the Works are going to be designed and manufactured in a country other than the place where the Permanent Works are to be constructed (and then shipped to that country) then the parties may wish to consider making amendments to the Contract. For example the *Force Majeure* provisions of the contract may need to be changed as their applicability is limited in certain cases to the Country.

“Employer's Equipment” – includes specified apparatus, machinery and vehicles (if any) made available by the Employer for the use of the Contractor in the execution of the Works. The General Conditions do not imply that the Employer will make any equipment available to the Contractor and if the Employer is to provide such equipment this must be specified elsewhere with the Contract. Reference should be made to Sub-Clause 4.20, which deals with the parties' responsibilities where Employer's Equipment is provided.

“Force Majeure” – the definition of Force Majeure refers simply to Clause 19. Force Majeure, as defined within FIDIC 1999, is much broader in scope than it would be under many national laws.

“Laws” – the definition of laws includes all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority.

The reference to “other laws” within the definition has to be interpreted subject to the *ejusdem generis* rule. *Ejusdem generis* is a rule of statutory interpretation that has been extended to the interpretation of contracts. The rule of interpretation applies where several words precede a general word - commonly lists of words. The meaning of the general words is restricted to the subjects or classes of the preceding words. The words “other laws” are therefore limited to meaning other statutory law and not case law. Sub-Clause 1.13 then deals with compliance with applicable Laws.

However, this restriction is unlikely to have any practical effect on the Contract. Reference must also be had to Sub-Clause 1.4, which states that the Contract is to be governed by the law of the country (or other jurisdiction) stated in the Appendix to Tender.

Laws, as defined within the definition section, are not restricted to a particular Country. The word ‘Laws’ is thereafter used in the General Conditions by reference to ‘applicable Laws’ or the ‘Laws of the Country.’ Applicable Laws may include the substantive law of the Contract as referred to in Sub-Clause 1.4, the law of the place of performance, the law of the place of domicile of the Contractor or any other applicable law depending on where the Plant and Goods are being manufactured and shipped. ‘Country’ is a defined term so that the Laws of the Country refer to the place where the Site (or most of it) is located.

If the parties choose a neutral law to govern their contractual arrangement they should check that there are not any clashes between that law and the ‘applicable Laws’ or the ‘Laws of the Country’.

“**Performance Security**” – refers to the security (or securities, if any) that are provided under Sub-Clause 4.2 [*Performance Security*].

“**Site**” – refers to the places where the Permanent Works are to be executed and to which Plant and Materials are to be delivered. It also refers to any other place which is specified in the Contract as forming part of the Site. One of the fundamental obligations under any construction contract is the Contractor’s right to possession and access to the Site, although possession need not be exclusive. Under English common law the Contractor is presumed to be granted a licence to occupy the Site in order to complete the Works: *H. W. Neville (Sunblest) Ltd v William Press & Son Ltd*.⁵ That licence can be terminated by the Employer if it gives a notice of termination under Clause 15⁶ and a court will only look behind such a notice in limited circumstances.⁷

⁵ (1981) 20 BLR 83

⁶ *Tara Civil Engineering Ltd v Moorfield Developments Ltd* (1989) 46 BLR 74. The case involved termination under clause 63 of the ICE 5th conditions but the principle would apply equally to termination under Clause 15 of FIDIC 1999.

⁷ *Wiltshier Construction (South) Ltd v Parkers Development Ltd* (1997) 13 Constr. LJ No 2 129

“**Unforeseeable**” – is referred to at various places throughout the Contract. The word ‘Unforeseeable’ is used not only in respect of events (see Sub-Clauses 4.12, 8.4(d), 8.5 and 17.3) but also in relation to Cost (see Sub-Clause 4.6). Unforeseeable is defined by reference to what is reasonably foreseeable by an experienced contractor at the date for submission of the Tender. A party that intends to rely on this provision will need to produce evidence of what could be foreseen at the time of the tender.⁸

The distinction between Unforeseeable events and Unforeseeable cost is important. For example, where the Contractor encounters adverse physical conditions under Sub-Clause 4.12 he need only show that these conditions were Unforeseeable. He does not need to show that the costs that flow from the event were also Unforeseeable. Once the Contractor has established that the event is Unforeseeable he can claim, under English law, all the costs which were a direct consequence of the Unforeseeable event, subject to any limitation on liability.⁹

In contrast any Cost resulting from an Instruction by the Engineer, which gives appropriate opportunities for other contractors to work on Site, will only be recoverable if it is Unforeseeable. As illustrated in the decision of the Privy Council in *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Engineering Co. Ltd. (The Wagon Mound)*¹⁰, the consequence which may flow from an event can be both foreseeable and unforeseeable. If such losses occur then the Contractor under Sub-Clause 4.6 would only be entitled to recover the Unforeseeable Cost and not all its costs.¹¹

“**Variation**” – is defined as meaning “any change to the Works” instructed or approved as a variation under Clause 13 [*Variations and Adjustments*]. The list of types of Variations at Sub-Clause 13.1 is therefore only indicative.

Sub-Clause 1.2 Interpretation

Sub-Clause 1.2 includes a number of boilerplate clauses. These are standard forms of wording for the interpretation and general operation of the contract, rather than for particular subjects. Boilerplate terms are an important part of a construction agreement. However, the parties who negotiate the contract rarely give sufficient attention to these particular provisions.

FIDIC 1999 states that “provisions including the word ‘agree’, ‘agreed’ or ‘agreement’ require the

⁸ *Obrascon Huarte Lain SA v Her Majesty’s Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) at para 26.

⁹ *Hadley v. Baxendale* (1854) 9 Exch. 341. In other countries the costs that may be recoverable could be more limited because of the way limitation of liability clauses are interpreted – see *Environment Systems Party Ltd v Peerless Housing Pty Ltd* [2008] VSCA 26

¹⁰ [1961] A.C. 388

¹¹ See also *Platform Home Loans Ltd v Oyston Shipways Ltd and Others* [1999] UKHL 10; [2000] 2 AC 190; [1999] 1 All ER 833; [1999] 2 WLR 518

agreement to be recorded in writing”. It was the intention of the FIDIC draftsmen that if the parties orally agree at a meeting on a particular course of action, for example the use of email for communication, but this is not written down it should not be binding. However, recent case law indicates that the courts are ready to construe an oral agreement as binding, especially where the parties act on that agreement: *Reveille Independent LLC v Anotech International*

The marginal words and other headings are not to be taken into consideration in the interpretation of the Conditions. However, often the conditions within FIDIC are placed within the context of headings or marginal notes and may be much wider in application than the parties think. The parties should consider in the Particular Conditions whether there are other boilerplate clauses that should be included. For example, the parties may wish to incorporate one or more of the following:

Entire Agreement Clause

“This Contract constitutes the entire agreement between the parties concerning its subject matter, and supersedes any previous accord, understanding or agreement, express or implied.”

No Waiver Clause

“In no event shall any delay, neglect or forbearance on the part of any party in enforcing any provision of this Contract be or deemed to be a waiver thereof or in any way prejudice any right of that party under this Contract.”

Non Reliance Clause

“Each party confirms that it has not relied upon any representation not recorded in this Contract inducing it to enter into this Contract.”

Severance Clause

“No clause, sub-clause or their relevant parts in this Contract may be held to be unenforceable or void except for the judgment of a court of competent jurisdiction. Should any clause, sub-clause or part thereof be so held to be unenforceable or void the remaining clauses, sub-clauses and their relevant parts shall remain in full force and effect to the extent that they are capable of remaining operative having taken account of the said court’s judgment.”

The parties may also wish to include a “Reasonable/Best Efforts Clause” or an “Exclusion of Third Party Rights” depending on the substantive law of the contract.

Sub-Clause 1.3 Communications

Sub-Clause 1.3 applies only to “approvals, certificates, consents, determinations, notices and requests”. Where the Conditions refer to any one of the above, then these have to be in writing. Writing is defined in Sub-Clause 1.2(d) to mean “hand-written, type-written, printed or electronically made, and resulting in a permanent record.” The written approval, certificate, consent etc. has then to be delivered “by hand (against receipt), sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in the Appendix to Tender.”

This definition could therefore lead to the absurd result that a notice etc. is recorded in writing by email but cannot be sent by email if email is not one of the agreed systems of electronic transmission as stated in the Appendix to Tender.

Given that email is now so commonly used for construction and engineering projects around the world it is hoped that this definition will be changed in any new editions of the FIDIC contracts.

Sub-paragraph (b) deals with the place to which the notices etc. should be sent. The Sub-Clause states that notices etc. etc. are to be sent to the “address for the recipient’s communications as stated in the Appendix to Tender”. There are two exceptions:

- a particular type of communication, and/or those from a particular author, may be required to be sent to a particular recipient (for example, communications are typically exchanged directly between resident staff on the Site); and
- irrespective of the normal address for an approval or consent, these types of communication will be binding if they are sent directly to the person or office which requested the approval or consent.

A party who fails to have regard to this provision may find that certain notices that it believes it has given are ineffective. For example, if a party serves a Notice of Termination under either Clause 15 or 16, such act may be considered to be ineffective if it is sent to the wrong address and may amount to a repudiatory breach of contract– see *Gulf Agri Trade Fzco v Aston Agro Industrial AG*.¹² Each case has to be considered on its own facts and by the substantive law of the contract. However, in the recent case of *Obrascon Huarte Lain SA v Her Majesty's Attorney*

¹² [2008] Int.Com.L.R. 06/06

*General for Gibraltar*¹³ Akenhead J stated at para 368:

“In line with the whole concept of a commercially realistic interpretation being put on what parties agree (see above), 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 final paragraph of Sub-Clause 1.3 states that certain communications are not to be unreasonably withheld or delayed. As stated in the FIDIC Guide: “The importance of this requirement, and the serious consequences of non-compliance, should not be under-estimated”. There is no definition of what constitutes “unreasonableness” when giving consent. English common law has however considered this phrase in the context of leases and the following principles derived from case law may be relevant when considering English law.

1. A party is not entitled to refuse his consent on grounds which have nothing whatsoever to do with the relationship of the parties in regard to the subject matter of the contract. Further, the reason for withholding consent must be something affecting the subject matter of the contract which forms the relationship between the parties, and it must not be something wholly extraneous and completely dissociated from the subject matter of the contract: *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513.
2. Where the requirements of the first principle are met, the question whether a party’s conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact: *Bickel v Duke of Westminster*.¹⁴
3. A party who refuses consent does not need to show that his conduct was right or justifiable, he has to show that it was reasonable. As Danckwerts LJ held in *Pimms Ltd v Tallow Chandlers Company*:¹⁵ “it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances ... Subject always to the first principle outlined above, I would respectfully endorse the observation of Viscount Dunedin in *Viscount Tredegar v Harwood* [1929] AC 72, 78 that one ‘should read reasonableness in the general sense’. There are few expressions more routinely used

¹³ [2014] EWHC 1028 (TCC) (16 April 2014)

¹⁴ [1977] QB 517

¹⁵ [1964] 2 QB 547, 564

by British lawyers than ‘reasonable’, and the expression should be given a broad, common sense meaning in this context as in others.”

See also *Iqbal v. Thakrar*¹⁶ and *Sargeant & Anor v Macepark (Whittlebury) Ltd.*¹⁷

When considering “unreasonable delay” regard should also be had to the Contractor’s programme for the Works. An Engineer cannot unilaterally specify a period of time for approvals, determinations or consents (say a period of 28 days) where none is set out in the Contract, if this would delay the Contractor. The Engineer must, in each case, consider all the surrounding circumstances when being asked to give an approval, determination, certificate or consent.

Sub-Clause 1.4 Law and Language

The parties should always specify the law of the contract because if they fail to do so the arbitrators will have to decide on conflict of law principles which law to apply. This can often be time consuming and complex and may result in a choice of law to which one party would object.

Under most legal systems the Parties are entitled to choose whatever law they prefer, but many Governments, when acting as Employer, insist on the use of their own national law. Domestic parties are likely to have a better understanding of their own legal system and thus gain an advantage if they are allowed to select their domestic legal system.

Although each legal system has its peculiarities, most systems reach broadly similar conclusions on contract interpretation. However a Party which is familiar with the legal system chosen has a definite advantage.

The choice of a particular system of law does not prevent the law of the country in which the works are taking place applying in certain respects. There are almost always certain domestic laws which are mandatory and which cannot be avoided. It is thus important, even if another system of law is chosen by the Parties to have the Contract reviewed by a local lawyer familiar with contract and construction law and to ask them to identify any mandatory local law which will have an effect on the way in which the Contract will be carried out.

¹⁶ [2004] EWCA Civ. 592

¹⁷ [2004] EWHC 1333

Some examples of local laws which may apply are the following:

In some jurisdictions

- an unpaid subcontractor has the right to claim payment direct from the Employer and the Employer has the right to recover the amount from the Contractor.
- the Employer has the right to reject a subcontractor chosen by the Contractor.
- a party is not bound to an arbitration clause unless the signatory to the contract has been specifically authorised to agree to arbitration.
- penalties may not be imposed for breaches of contract.
- parties are not permitted to limit their liability.

Regardless of the choices of law, regulatory provisions such as health and safety law will apply.

When a law, other than the domestic one, is chosen in the Contract, it is nevertheless common for the Contractor to enter subcontracts with local subcontractors using the local law. This may cause problems if the subcontract attempts to impose on the subcontractor provisions in the main contract which are interpreted differently under the domestic law. Although it is rare for there to be major problems it is normally best to ensure that subcontracts are made under the same law as the main contract.

It is also important to specify the language of communications – the fall-back position expressed in the Clause “the language in which the Contract (or most of it) is written”, will usually be enough to define the language, but may be ambiguous or uncertain if the Contract documents are not all in one language.

Sub-Clause 1.5 Priority of Documents

This order of priority within this Sub-Clause reflects the common sense proposition that a later document which is different from an earlier one is likely to reflect the true intention of the Parties. The Sub-Clause does not say precisely what the effect of the order of priority is. In terms of normal rules of contract interpretation the consequence of giving an order of priority to documents is to ensure that a provision higher in the order of priorities takes precedence over one lower. Thus the order of priority can have the effect that a qualification in the tender has the effect of altering the Contractor’s obligations or rights.

Despite this, it is common to find that there is an ambiguity or discrepancy in the documents

which cannot be resolved simply by considering which document has priority. The Engineer has the power to resolve this. The clause does not specify who may trigger this action nor, unusually, is there any notice provision.

There is no requirement in this Sub-Clause for either Party to bring any ambiguity or discrepancy to the notice of the other Party or of the Engineer. However under Sub-Clause 1.8 [*Care and Supply of Documents*] both parties are obliged to if they “become aware of any error or defect of technical nature in a document which was prepared for use in executing the Works” to give notice to the other Party (i.e. not specifically the Engineer). The reference to “defect of a technical nature” is clearly intended to distinguish this obligation from any obligation to draw attention to ambiguities or discrepancies between or within non-technical documents. However there will be instances where two technical specifications differ in some crucial respect and this will be both a defect of a technical nature and a discrepancy which will need to be resolved.

For these purposes it may be important to understand what amounts to an ambiguity and what amounts to a discrepancy. An ambiguity is a statement in the document which is capable of being understood in more than one sense. A discrepancy is conflict between two otherwise clear statements. In either case the Engineer’s decision may have a considerable effect on the burden undertaken by either the Contractor or the Employer or on their legal rights generally. The question may then arise as to what compensation either in money or time terms the Contractor may become entitled to. There is no cross-reference in this Clause to the Engineer’s Determination procedure in Sub-Clause 3.5. The Engineer thus has a wide discretion in making his decision and is not obliged to consult the parties. There is no cross-reference to Sub-Clause 8.4 and therefore there is no right to an extension of time. Thus all that remains is the slim possibility that the Contractor might be entitled to financial compensation.

It is unlikely that the Contractor will be entitled to financial compensation even if what he finds he has to do differs substantially from what he expected to do. This is because, by definition, an ambiguous provision could be read in more than one way and whichever way it is read that is what the Contractor has agreed to do. The same applies to discrepancies – by definition there must be two conflicting provisions in the Contract and the Contractor will generally not be able to prove that he agreed to perform one rather than the other.

Faced with this situation the best approach for the Contractor will be to attempt to persuade the Engineer that there was no ambiguity or discrepancy and that the (cheaper and quicker) course of action which the Contractor proposed to follow is in fact what the Contract requires. Such arguments can be difficult but they are sometimes successful.

It is probably arguable that if, on principles of contract interpretation, one result rather than the other would prevail, then there is in fact no ambiguity or discrepancy. Alternatively it could be argued that the Engineer is obliged to follow these principles. Whichever approach is adopted the Engineer is obliged to take into account the recognised principles of contract interpretation when interpreting the Contract. These principles differ between legal systems, the most significant difference being that under some systems the Engineer (or later the DAB or arbitrator) may take into account the pre-contract negotiations whereas under other systems he cannot.

In English law the principles relating to the interpretation of contracts were set out in a House of Lords judgment in 1998¹⁸ in which the rules are stated as follows:

“I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in *Prenn v Simmonds* [1971] 1 WLR 1381, 1384-1386 and *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989, is always sufficiently appreciated. The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarized as follows:

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything¹⁹ which would have affected the way in which the language of the document would have been understood by a reasonable man.

¹⁸ *Investors Compensation Scheme v West Bromwich Building Society* [1998]1 WLR 896

¹⁹ In *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 Lord Hoffmann qualified this statement.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax - see *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 2 WLR 945.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera SA v Salen Rederierna AB* [1985] 1 AC 191, 201:

"... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

A more recent English judgment, *Chartbrook Limited v Persimmon Homes Limited and others*,²⁰ confirms this approach and also considers the other methods which may be used to clarify the meaning of a contract where the Parties cannot agree on its meaning. Although it confirms that it is not permissible under English law to review the negotiations in order to discover the intention of the Parties, it is permissible to review them to see what the Parties must have intended by certain words used in the final agreement – sometimes people use words to mean something other than their normal meaning. An example given is where an agreement allowed a Party to

²⁰ Construction Industry Law Letter July/August 2009, 2729

terminate a two year contract at will after one year. This is an ambiguous statement because it could either mean that the right to terminate comes into effect and could only be used at the end of the first year, or that it could be terminated at any time after the end of that first year – i.e. at any time during the second year. In the particular case the documents showed that what the parties intended was that the contract could be terminated only at the end of the first year and that they did not intend that this right to terminate could take place at any time during the second year. In some circumstances it can be shown that what was written in the final contract is not what the parties actually agreed. In that case English law allows “rectification” – i.e. for the final agreement to be modified to reflect what the parties had actually agreed.

It is submitted that in exercising his power to clarify or issue an instruction, where there is an apparent ambiguity or discrepancy, the Engineer should consider these principles and not simply apply an arbitrary standard which seems fair to him at the time. However, what is clear is that the Engineer should not rectify the contract; however, the difference between interpretation and rectification is a fine line.²¹

A further principle which applies under English law and commonly under other systems of law is the *contra proferentem* rule. This rule was expressed in ICC Award No 7110²² as follows: “It is a general principle of interpretation widely accepted by national legal systems and by the practice of international arbitral tribunals, including ICC arbitral tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party (*contra proferentem*)...” Since, in the majority of cases the FIDIC contracts will have been caused by the Employer any ambiguity or discrepancy will normally have to be resolved against the Employer.

However this rule may be modified where the contract has been negotiated and particular terms have been inserted using drafting provided by the Contractor. In such cases where a party is seeking to rely on an exclusion or limitation of liability clause and there is an ambiguity the clause will be construed against the person relying on it: *Scottish Special Housing Association v Wimpey Construction UK Ltd* (1986) SLT 559. Even under other legal systems these observations provide useful guidance for interpretation. However there are entire legal textbooks devoted to the subject of contract interpretation²³.

²¹ *Marley v Rawlings & Anor* [2014] UKSC 2 at paras 39 to 42; and see Sir Richard Buxton *Construction" and Rectification after Chartbrook* [2010] CLJ 253; and Lewison K, *The Interpretation of Contracts* (5th ed (2011), para 9.03, footnote 67

²² 10 ICC Bull No 2 1999 at 1029 et seq

²³ see *The Interpretation of Contracts*, Sir Kim Lewison, (4th Edition, Sweet and Maxwell 2007)

Although there is, as stated above, normally no right for the Contractor or the Employer to receive compensation where an ambiguity is clarified or where the Engineer issues an instruction to resolve a discrepancy, there is one situation where the Contractor will feel entitled to some compensation. If the Contractor has carried out work relying on one part of the contract documents and the Engineer later decides that in fact he should have relied on another part of the documents and issues an instruction resolving the discrepancy and requiring the Contractor to remove the work he has done and replace it with other, there are clearly likely to be cost and time consequences.

The situation arises quite commonly where the discrepancy is as between the drawings and the Specification. Contractors tend to rely on the drawings more than on the Specification and indeed the Specification is often a more general printed document based on a standard form than the drawings which are very much specific to the particular works. If the order of priority has not been altered the Specification will take priority, so the Engineer will have no discretion. However if the Contractor has relied on one part of the Specification and another has a contradictory provision, the Engineer may later decide to issue the instruction for the Contractor to remove the work already done and replace it with work according to the part of the Specification he considers appropriate.

In this case the Contractor will almost certainly suffer delay and will certainly incur Cost, the question is who will have to pay for it? If the Engineer was under a duty to bring the discrepancy to the parties' attention and resolve it earlier the Contractor ought to be entitled to an extension of time and cost on the basis that the instruction should have been given earlier. If the Contractor was under an obligation to draw the Engineer's or the Employer's attention to a discrepancy, he will have to suffer the consequences of failing to do so. If neither Party was under any prior obligation the issue will probably depend on whether the Engineer's decision can be shown to be the appropriate one and the best for the Works and not one chosen on an arbitrary basis. If it is the best for the Works it will be hard for the Contractor to argue that he will be entitled to any additional payment. It is submitted that if either Party was aware of the discrepancy before the Contractor began work on one of the choices available it ought to notify the other. If it has failed to do so it should take the consequences.

It is sometimes argued that a clarification or instruction given under the Sub-Clause is in effect a variation and that compensation is due as would normally be in the case of a variation. Strictly speaking the clarification or instruction is a Variation since it substitutes one set of contractual obligations for one or more others. However the question remains whether this is a variation which entitles the Contractor to additional remuneration and extension of time – or indeed,

whether it is an omission which would entitle the Employer to reduce the price.

The issue has been argued both ways – Contractors arguing that the clarification is a variation for which they should be compensated and Employers the opposite but because the Contract is not clear it is difficult to predict which argument will succeed.

The argument for the Contractor will be that, whether or not the Engineer now perceives an ambiguity or discrepancy, it had priced the Works on the basis of a reading of the Contract which the Engineer has now used his powers to alter. If the Contractor can demonstrate this by reference to the Bill of Quantities, a rate breakdown or other solid evidence, this argument is likely to be successful. If, as is more usual, the Contractor does not have solid proof for this statement it may still succeed if the Tribunal is sympathetic to its position or believes what the Contractor says. The Contractor will point to Sub-Clause 3.3 [*Instructions of the Engineer*] which makes the general statement that an instruction may constitute a variation and that in that case Clause 13 [*Variations and Adjustments*] shall apply. Most if not all ambiguities or discrepancies will be the result of faulty drafting by the Employer or Engineer and it would be extremely unjust if the Contractor were obliged to carry the consequences

The Employer will argue that Sub-Clauses 1.5 and 1.8 make no provision for any form of compensation and do not even refer to the possibility that such a clarification or instruction may constitute a variation. It will point to the fact that where it is intended that an instruction should be capable of constituting a Variation the Sub-Clause will say so (see for example Sub-Clause 4.12 [*Unforeseeable Physical Conditions*]). Further whenever within the Contract it is intended that a change from the original proposals is intended to give the Contractor the right to compensation of any sort the Contract normally says so (see for example Sub-Clause 10.2 [*Taking Over Parts of the Works*]), Sub-Clause 8.8 [*Suspension of Work*]). Most importantly, however, what Sub-Clause 1.5 does is to place the risk of dealing with ambiguities and discrepancies on the Contractor and he should make some allowance for this risk in his pricing.

Sub-Clause 1.6 Contract Agreement

A clause similar to Sub-Clause 1.6 appeared in the Red Book 3rd edn and at clause 9 of the Red Book 4th edn.

The parties will have concluded a contract as soon as the offer comprised in the Tender, which may have been adjusted during negotiations, in unequivocally accepted by the Employer in his Letter of Acceptance. There is a subtle difference between the Red Book 4th edn clause 9 and Sub-

Clause 1.6. Under the Red Book 4th edn the Contractor was only required to execute the Contract Agreement if requested to do so. Under Sub-Clause 1.6 the parties shall enter into a Contract Agreement unless they agree otherwise.

In some countries a formal agreement is required by law or is highly advisable. The parties may also need to think about counter-signatures, ratification of the agreement, the stamp duty payable or other requirements of the law of the place where the works are to be executed.

It should be borne in mind that the Letter of Acceptance is used in the contract as the starting point for various periods of time. For example, the provision of the Performance Security is linked to the date of the Letter of Acceptance, rather than the Contract Agreement. Conflict and confusion could therefore be created if the law or practice applicable to the project dictated that a contract would only come into existence once the Contract Agreement had been signed. In those cases, relevant clauses should perhaps be amended to make the periods of time run from the signature of the Contract Agreement.

The Contract Agreement is to be based on the Form annexed to the Particular Conditions. This Form states that the following documents are deemed to form and be read and construed as part of the Contract Agreement. These documents are: the Letter of Acceptance; the letter of Tender, the Addenda nos; the Conditions of Contract; the Specification; the Drawings; and the completed Schedules. There is no provision within this Form to allow for further documents and if an Employer attempted to add further documents into the Contract Agreement after the Letter of Acceptance was sent this may give rise to a dispute.

There appears to be an inconsistency with the draft Form for the Contract Agreement and the definition of 'Contract' at Sub-Clause 1.1.1.1. The definition of 'Contract' refers to "further documents (if any) which are listed in the Contract Agreement or in the Letter of Acceptance." It is therefore envisaged that there may be further documents. However, such documents would have to be agreed and identified prior to the Letter of Acceptance having been sent and these documents ought to be referenced in Letter of Acceptance. It will often be too late for an Employer to try and include them for the first time in the Contract Agreement.

Sub-Clause 1.7 Assignment

A similar clause appeared at Clause 3 of the Red Book 4th edn; however, there has been one fundamental change. Sub-Clause 1.7 now applies to both parties, whereas in the Red Book 4th edn the restriction against assignment applied only to the Contractor. Under Sub-Clause 1.6

neither party may assign the whole or any part of the contract or any benefit or interest in or under the Contract. The wording used elides the concepts of novation and assignment. A novation relieves a party of his obligations under a contract whereas an assignment will pass a benefit. The distinction between novation and assignment was referred to by Collins M.R. in *Tolhurst v Associated Portland Cement*²⁴ at page 668.

“It is, I think, quite clear that neither at law or in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of the obligation to someone else. This can only be brought about by the consent of all three, and involves the release of the original debtor.”

FIDIC however have elected to treat assignment and novation in exactly the same way. However, there is an exception in relation to moneys due or to become due under the contract, which may be assigned, without consent, to a bank of financial institution as security.

Under English law, an assignment in its legal sense means a transfer of the rights of a party, or part of those rights, to another person who is a stranger to the contract. This may be done either by operation of law or by the act of the person originally entitled to those rights. A valid assignment will allow the stranger to the contract (the assignee) to sue upon the contract in respect of the rights assigned.

Assignment by Operation of Law

FIDIC 1999 does not attempt to address assignment by operation of law. In a number of specific circumstances, as defined by the applicable or local law, an assignment will operate by rule of law. An assignment may operate by statute, and statutory corporations may be set up to take over rights. Second an assignment may operate on death. Third, and most importantly for construction and engineering contracts, assignment may take place on bankruptcy. In this case the liability for non-personal contracts vests in the trustee in bankruptcy or administrator. Insolvency is not a breach of contract *per se* although under FIDIC the bankruptcy or insolvency of a party, or the making of an administrative order, is a ground for termination - see Sub-Clause 15.2(e) and 16.2(g).

²⁴ [1902] 2 KB 660

Distinguishing Between Benefit and Burden

As stated above, it is usual to distinguish between benefits and burdens when considering assignment. Under English law the benefit of a contract, in many situations, could be assigned without the agreement of the other party.²⁵ However, the burden of the contract could not be assigned. In *Nokes v Donacaster Amalgamated Properties*²⁶ it was clearly stated that a Contractor cannot assign his liability to complete the Contract. A burden could only be transferred by the agreement of the parties. Under Sub-Clause 1.6 the assignment of both benefit and burden (with one exception) needs the agreement of both parties.

An Assignment is Subject to Equities.

An assignee takes the benefit “subject to all rights of set-off and other defences which were available against the assignor” – *Roxburghe v Cox*.²⁷ An assignee of moneys due under a contract therefore takes this benefit subject to any claim by the debtor arising out of the contract; for example, the debtor may claim that the work is defective or in delay. This principle has been re-affirmed by the English House of Lords in *The Trident Beauty*²⁸ which deal with breaches in a contract for the carriage of goods by sea. Similarly if the right to payment of monies is subject to the issue of a certificate, as assignee of those moneys cannot insist on payment until the certificate is issued: *Lewis v Hoare*²⁹.

Unassignable Rights.

It is a fundamental principle of English Law that a person cannot assign a bare right to litigate and any such assignment is void. However the mere fact that an assignment would involve a right to litigate does not render it void so long as the assignment is an assignment of property, an interest in that property or a genuine commercial interest is shown. In *Circuit Systems Ltd v Zuken Redac* (1996)³⁰ an assignment of a right of action was attempted by a company in liquidation to its principal shareholder who applied for legal aid to fight the action. It was held that the assignment was a sham and void for champerty.

Assignments without Consent

²⁵ In some circumstances an assignment was not permitted; for example, where the contract was personal in nature.

²⁶ [1940] AC 1014

²⁷ (1881) 17 Ch D 520, 526.

²⁸ [1994] 1 WLR 1196

²⁹ (1881) 44 LT 66, 67.

³⁰ (1996) June 18 Supreme Court Practice News

Where an assignment occurs without the consent of one of the parties then the rights which have been assigned to the assignee will be unenforceable by the assignee. The assignor may, however, be permitted in limited circumstances to bring proceedings for the losses suffered by the assignee. The case of *Linden Gardens Ltd v Lenesta Sludge Disposals Ltd*³¹ involved the removal of asbestos from a building in Jermyn Street. Practical completion took place in 1980. In early 1985 more asbestos was found and the owners entered into a contract for its removal with new contractors. This contract was completed in August 1985. In December 1986 the owners transferred the whole of the building to new owners for its full market value and in January 1987 the original owners formally assigned to the new owners their claim in damages against the original contractors which had begun by writ in 1985 together with all other claims that they might have in respect of the property.

Further asbestos was found and the later contractors were added to the action as second defendants. The new owners were substituted as plaintiffs instead of the original owners. Both of the contractors objected to the assignment. There were provisions in the contract which prohibited the assignment without consent. Clause 17 of the JCT Conditions 1963 stated that the “Employer shall not without the written consent of the Contractor assign this contract”. The House of Lords held that this prohibition prevented the assignees from suing or recovering.

In *St Martins Property Corpn Ltd v Sir Robert McAlpine & Sons Ltd*³² the House of Lords was able to distinguish the *Lenesta Sludge* case. However, once again it was held that clause 17 of JCT 1963, which prohibited the assignment of the Contract including the rights of action without consent, was not to be construed as being against public policy. The assignee could therefore not recover the losses it had incurred in its own name. However, the House of Lord proceeded to state that this case was an exception to the rule that a claimant can only recover its own losses (i.e. under the privity of contract rule). The exception, the House of Lords said, arose if the contract was entered into for the benefit of a third party and then the assignor could recover the loss sustained by the assignee. Lord Brown-Wilkinson Stated:

“In my judgment the present case falls within the rationale of the exceptions to the general rule that a plaintiff can only recover damages for his own loss. The contract was for a large development of property which to the knowledge of both Corporation and McAlpine, was going to be occupied and possibly purchased, by third parties and not the Corporation itself. Therefore it could be foreseen that damage caused by a breach would

³¹ [1994] AC 85

³² [1994] AC 85

cause loss to a later owner and not merely to the original contracting party, Corporation. As in contracts for the carriage of goods by land, there would be no automatic vesting in the occupier or owners of the property for the time being who sustained the loss of any right of suit against McAlpine. On the contrary, McAlpine had specifically contracted that the rights of action under the building contract could not without McAlpine's consent be transferred to third parties who became owners or occupiers and might suffer loss. In such a case, it seems to me proper, as in the case of carriage of goods by land, to treat the parties as having entered into the contract on the footing that Corporation would be entitled to enforce contractual rights for the benefit of those who suffered from defective performance but who, under the terms of the contract, could not acquire any right to hold McAlpine liable for breach. It is truly a case where the rule provides 'a remedy where no other would be available to a person sustaining loss which under a rational legal system ought to be compensated by the person who caused it.'"

The House of Lords further stated that if the assignee is able to recover the losses by other means e.g. if there is a collateral warranty, then any action by way of the assignment would be estopped. It was further remarked that the assignee however had no power to force the assignor to bring the action - see also *Darlington BC v Wiltshier Northern Ltd*³³ and *Bovis International Inc v The Circle Limited*³⁴. The Contracts (Rights of Third Parties) Act 1999 would now cover the particular situation where a third party is identified in the contract and intended to benefit from the contract terms.

Sub-Clause 1.6, as stated above, makes a fundamental change, to the previous edition of the Red Book. The restriction on assignment applies to both parties and both parties have "the sole discretion" on whether to agree to the assignment. The wording "sole discretion" means that Sub-Clause 1.3 does not apply and either party may refuse consent, even unreasonably.³⁵ The FIDIC Guide only considers the assignment of the Contractor's rights and obligations when looking at this Sub-Clause, it does not address the situation where the Employer may need to assign its rights and obligations under the contract. The FIDIC Guide states:

"The Employer will typically have taken account of the Contractor's reputation and experience when deciding to enter into the Contract, even if there was no prequalification procedure. Having done so, the Employer may well be reluctant to agree to any assignment under Sub-Clause 1.7. If he is persuaded to do so, the Employer may only be

³³ [1995] 1 WLR 68

³⁴ (1995) 49 Con LR 12

³⁵ See Further Clause 3 of FIDIC 4th A Practical legal Guide, EC Corbett at page 71

prepared to agree subject to certain conditions. In particular, the Employer will wish to ensure that the Performance Security and other securities provided by the assigning Contractor will either be replaced or remain valid in respect of both the assigning Contractor's obligations and the new Contractor's obligations.”

However, there will be many contracts where the Employer will wish to assign its rights under the Contract. The Employer may for example want to sell its interest in the project to a third party; for example, a utility provider or manufacturer. An Employer that does this but does not (or cannot) assign the benefits and burdens of the construction contract will be in a difficult position. It is suggested that an Employer will need to amend this Sub-Clause of the Contract if it does not intend to use the plant when completed so that it can freely assign its interest in the project.

Sub-Clause 1.8 Care and Supply of Documents

As a result of the way ‘Contractor’s Documents’ are defined there are implications for the Contractor and Employer which are not often realised. The Contractor is required to provide the Employer with all the Contractor’s Documents, to keep them on Site and to give the Employer access to them at all reasonable times.

Contractor’s Documents are defined in Sub-Clause 1.1.6.1 as

“the calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature (if any) supplied by the Contractor under the Contract.”

It is not uncommon for the Contractor to fail to provide the Employer with some parts of this information – most particularly updates of its programme as required under Sub-Clause 8.3 [*Programme*] and contemporary records of claims as required under Sub-Clause 20.1 [*Claims, Disputes and Arbitration*]. The Employer (through the Engineer) is entitled to go the Contractor’s office and view this information and demand copies.

This power may be very useful to the Employer if there is a dispute as it effectively gives the Employer a power to demand that the Contractor produce a substantial part of its records. It is common in disputes for the Contractor to produce documents selectively – for example to cover up the fact that some delays which it claims were the responsibility of the Employer were in fact concurrent with more substantial delays caused by its own internal problems. By gaining access

to these records the Employer may be able to demonstrate that the delays are caused at least in part by the Contractor itself.

The Clause provides that if either Party becomes aware of any error or defect of a technical character they must promptly give notice to the other. This provision might be better placed in Sub-Clause 1.5 [*Priority of Documents*] – see the comments on its effects in the commentary on that Sub-Clause. It is clearly a limited obligation – the defect must be of a technical character, thus excluding for example ambiguities or discrepancies which are of a financial or legal nature.

Sub-Clause 1.9 Delayed Drawings or Instructions

This Sub-Clause sets out the circumstances in which the Engineer’s delay in issuing a variation or instruction may give the Contractor the right to an extension of time or financial compensation. The extension of time is available only if the Contractor gives notice that the works are likely to be delayed or disrupted if the necessary drawing or instruction is not issued by a certain date.

It is not uncommon for the Engineer to be late in issuing drawings or instructions – the fact that he is late being easily shown by reference to the Programme which ought to include a document release schedule. However mere lateness does not give rise to the right to a claim under this Sub-Clause.

A failure by the Engineer to give drawings or instructions on time is a breach of contract on the part of the Employer and may also be a ground for extension of time under Sub-Clause 8.4(e) i.e. it is a “delay, impediment or prevention caused by or attributable to the Employer ...”. Since it will also be a breach of Contract on the part of the Employer it may also entitle the Contractor to compensation by way of the Cost and reasonable profit caused by the delay or disruption. However, the main question is whether the delay has affected the completion for the purposes of Sub-Clause 10.1.

Sub-Clause 1.9 may, however, add something to the normal rights of claim for breach of contract and under Sub-Clause 8.4(e) because there is nothing to say that a notice cannot be given prior to the time when the design or instruction was initially programmed to be given. In the situation where, for some reason, the Contractor has discovered it needs drawings or instructions earlier than it had anticipated in the programme because of a planning error, or because it has managed to get ahead of programme, or, perhaps, has changed the sequence of works and requires drawings or instructions ahead of schedule, it may give notice under Sub-Clause 1.9 and, so long

as the amount of notice is reasonable, place an obligation on the Engineer to provide the drawings and instructions early. There was a suggestion arising out of some case law that the Contractor may not own the float to the project: *Glenlion Construction v The Guinness Trust*.³⁶ However, the *Glenlion case* was on a different form of contract and the better view is that when reading Sub-Clauses 8.2 and 8.4 together it is the Contractor who owns the float.³⁷

The Engineer might seek to argue that in giving information early, the Contractor is asking more than the Engineer is required to do under the Contract. Sub-Clause 8.3 provides that the “Employer’s Personnel shall be entitled to rely upon the programme when planning their activities.” However, so long as the Contractor gives reasonable notice of an early requirement it would be difficult to argue that it was not entitled to request drawings and instructions ahead of schedule.

Although the initial Contractor’s notice is required to state the nature and the amount of delay and disruption which may be caused by the late drawings or instructions and to give the Engineer a reasonable time in which to provide the necessary drawing or instruction, the amount of extension of time it may be entitled to is not tied to the Contractor’s initial demand. If the Engineer does not provide the drawing or instruction within the time stated, the Contractor is required to give a further notice and the extension of time is then calculated on the basis of the actual effects of the Engineer’s non-compliance. The extension of time is calculated by ascertaining the delay the Contractor is actually likely to suffer or actually suffers as a result of the Engineer’s non-compliance. Thus it is possible that the consequences of the Engineer’s delay will be different from those predicted by the Engineer and that the extension will be greater or smaller than the delay from the expiry of the Notice.³⁸ The Engineer would be wrong to refuse an extension on the ground that the forecast consequence had not materialised. He would also be wrong to tie the extension to the length of time he has been late in complying with the Notice.

There is scope for debate as to whether the requirements of Sub-Clause 1.9 would be satisfied by a programme marked up with the critical dates for information and annotated to provide the details required by the Sub-Clause. Whilst it is reasonably clear that this was not the intention of the draftsman, it is submitted that such a programme could be capable of complying with the

³⁶ (1987) 39 BLR 89

³⁷ See also Burr A., *Delay and Disruption on Construction Contracts* (2016) at page 113

³⁸ This could occur when the works are delayed into a period where winter working is prohibited or where there is then a clash with other contractors working on site.

Sub-Clause's requirements - see *London Borough of Merton v Leach*³⁹ for the position on an English standard form of contract.

The final paragraph of the Sub-Clause does not appear to be necessary in view of the fact that any extension of time and costs have to be assessed in accordance with Sub-Clause 20.1, which in itself would forestall an argument by a Contractor that Sub-Clause 1.9 gives the Contractor an entitlement to time and costs as a consequence of the late issue of drawings or instructions regardless of the cause of that late issue. However it puts beyond doubt the fact that if the Engineer's delay has in fact been caused in whole or in part by the Contractor's own errors and delays, this must be taken into account in calculating any extension of time or compensation.

Sub-Clause 1.10 Employer's Use of Contractor's Documents

This is a new Sub-Clause which was not previously in the Red Book 4th edn. The clause states that the Contractor retains the copyright in the Contractor's Documents and other design documents made by (or on behalf of) the Contractor. Copyright is a legal right given by a state to the maker of an original work. In this regard there are a number of questions regarding which law applies to a copyrighted work; is it the law of the contract, the law where the copyrighted work was made, or the law of the domicile of the maker? Copyright applies for a limited period of time. In most jurisdictions copyright arises upon fixation and does not need to be registered. Copyright owners have the right to exercise control over copying and other exploitation of the works for a specific period of time, after which the work is said to enter into the public domain. Copyright owners may license, transfer or assign their rights to others.

Copyright "does not subsist in ideas; it protects the expression of ideas, not the ideas themselves" *Baigent v Random House Group Ltd*⁴⁰. It follows that not every type of document or computer programme is subject to copyright. However, original designs may attract copyright.

Both Sub-Clause 1.10 and Sub-Clause 1.11 set out FIDIC's policy that the designers of the works should be able to retain the copyright in their designs. The clients are then given a right to use the designs for the purposes of the project.

This Sub-Clause relates to the Contractor's Documents, which are defined at Sub-Clause 1.1.6.1 to include calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature. There may therefore be some debate whether certain

³⁹ (1985) 32 BLR 51

⁴⁰ [2007] EWCA Civ 247

documents fall within the definition of “Contractor's Documents.” It should further be noted that this clause only refers to copyright rather than patented products. This may be something which the Employer may wish to address in the Particular Conditions.

The licence that is given to the Employer has specific limitations. It applies:

- only throughout the actual or intended working life of the relevant part of the Works;
- only to a person in proper possession of the relevant part of the Works to copy, use and communicate the Contractor's Documents for the purposes of completing, operating, maintaining, altering, adjusting, repairing or demolishing the Works; and
- in respect of computer programs and other software, permit their use on any computer on the Site and other places as envisaged in the Contract, including replacements of computers supplied by the Contractor.

The Contractor's consent (mentioned in the final paragraph) must be given in writing if the Contractor's Documents or other design documents are to be copied or communicated to a third party for purposes other than those permitted under this Sub-Clause. Consent is subject to Sub-Clause 1.3, which states that it shall not be unreasonably withheld or delayed.

It is relatively easy to think of situations where an Employer will or may breach copyright. For example, Sub-Clause 1.10(c) refers to “any computer on the Site ... including replacements of any computers supplied by the Contractor.” It therefore appears that if replacement computers aren't supplied by the Contractor, the Employer would not be able to install the Contractor's programs onto them. Similarly the list at Sub-Clause 1.10(b) does not refer to ‘replacement’ of a relevant part of the Works.

Where the project is a complex process plant or IT system then the Employer will need to give particular attention to this Sub-Clause.

Sub-Clause 1.11 Contractor's Use of Employer's Documents

Sub-Clause 1.11 deals with the rights of the Employer in respect of the documents he provides to the Contractor. The FIDIC Guide explains that the opening wording of this Sub-Clause; i.e. “As between the Parties” was included so that “other parties (such as the Employer's Personnel) may themselves retain intellectual property rights in respect of their designs, under their respective design contracts.”

The Employer's documents (including the Specification and Drawings) may only be given to third parties, except as is necessary for the purposes of the Contract, with the consent of the Employer. Once again consent must be given in writing and should not be unreasonably withheld or delayed (Sub-Clause 1.3).

Sub-Clause 1.12 Confidential Details

There is no general obligation of confidentiality under the Contract (though there is a proposed confidentiality provision – applying only to the Contractor in the proposed Particular Conditions). In the absence of such a provision there is no obligation on either party to keep any information confidential.

Like Sub-Clause 1.8, this Sub-Clause may be particularly useful to the Employer in the case of a dispute as it makes it clear that there are substantial limits on what can be treated by the Contractor as confidential and thus not available to a DAB or Arbitral Tribunal.

A common subject of dispute is whether the delays suffered by the Contractor are the result of its own problems or breaches or the result of matters for which it is entitled to an extension of time. Contractors are naturally reluctant to disclose their own problems and the Engineer may not be aware of them.

However there is an obligation for the Contractor to proceed in accordance with the Sub-Clause 8.4 programme – the only exceptions being where it is prevented by the Employer, or by events which entitle it to an extension of time. If the Contractor is in fact in delay, the Engineer is therefore entitled under Sub-Clause 1.12 to demand information from the Contractor of its resources and its own internal problems in order to verify that the Contractor is not delayed through its own breaches. It can demand this information both at the time the delays are being incurred and during the dispute process.

Sub-Clause 1.13 Compliance with Laws

The obligation relates to all applicable Laws – Laws being defined in Sub-Clause 1.1.6.5 to mean:

“all national (or state) legislation, statutes, ordinances and other laws, and regulations and by-laws of any legally constituted public authority.”

This definition is not restricted to the laws of the country in which the permanent Works are

carried out and the potential number of laws which might apply is therefore very substantial.

The definition is therefore intended to be very far reaching. In countries with substantial state ownership (particularly of utilities) it will be particularly far-reaching. For example many state owned authorities and utilities set out their internal rules in regulations and by-laws and these will be treated as Law for the purpose of this provision. Many such organisations have their own internal procedures relating to such things as health and safety, working hours, access to property, internal permits and permissions and the authority of officials to give orders and they are often described as regulations or by-laws.

It is also possible that in some jurisdictions a privately owned company providing public services (e.g. water, electricity or transport) will be regarded as a public authority and empowered to make relevant regulations and by-laws. Such regulations and by-laws may expand such contractual obligations of the Contractor as are expressly set out in the Contract.

The Contractor is obliged also to pay all taxes, duties and fees required by the Laws. Unfortunately it is often not easy for the Contractor to find out in advance what such taxes duties and fees will be. In some jurisdictions some local authorities are entitled by law to levy fees on goods passing through their jurisdiction. In many countries wages or charges (for example demurrage) are set by law or regulation. If that is the case it is probably arguable that an increase in these costs as a result of a change in the law will entitle the Contractor to compensation under Sub-Clause 11.7 (see below).

Unless the Contractor is very familiar with the local environment he may not be able to predict the level of his responsibility and would be wise to attempt to persuade the Employer to incorporate into the Contract an agreement to indemnify the Contractor from such charges except to the extent they are specifically mentioned in the Contract.

A certain amount of protection is provided for the Contractor by Sub-Clause 2.2 which requires the Employer to provide reasonable assistance to the Contractor at the Contractor's request in obtaining copies of laws of the Country in which the Permanent Works are being carried out and which are not readily available and in obtaining permits licences or approvals as required under Sub-Clause 1.13. This right will obviously be of no assistance if the laws the Contractor needs to know about are those of another country.

In the sort of circumstances outlined above the Contractor should assume that there are laws of which he does not know and which are (almost by definition) not readily available. The

Contractor should, at the commencement of the Contract (and also when he becomes aware that others Laws may exist), request copies of all applicable Laws of the Country, making it clear that it also wants all by-laws and regulations of all relevant public authorities.

Since the obligation under Sub-Clause 1.12 is incorporated into the Contract as one of the Contractor's obligations any delay or cost incurred in compliance with such law will not be treated as one giving rise to an extension of time or compensation. However where an applicable Law conflicts with a requirement under the Contract, the Employer should not, it is submitted, be entitled to deny the Contractor payment of any costs consequent upon the variation on the grounds that the Contractor had undertaken to conform with local regulations and therefore should not be entitled to further payment for doing so. The Contractor has undertaken that he will conform with the local law in the execution of the Works. He is not undertaking that the Works as designed so conform. It would, it is submitted, place intolerable burdens upon tenderers if they had to check the design for compliance.

Under Sub-Clause 13.7, the Contract Price has to be adjusted to take account of any increase or decrease in Costs resulting from any change in legislation applicable in the Country where the Permanent Works are being carried out (see discussion under Sub-Clause 13.7). This does not detract from the Contractor's obligation to obey all applicable laws, but will mean that costs resulting from changes to those laws will be compensated and any delay or disruption caused by them should result in an extension of time. This would entitle the Contractor to compensation where (for example) the costs of permits is increased by changes to the Law or where Laws fixing wages or other charges are amended to provide for increases. However this additional payment will not be available where the change of legislation causing the cost increase occurred outside the Country.

In some extreme circumstances the applicable Law, or a change to the Law, may make it impossible for the Contractor to perform some or all of the Works in accordance with the Contract without acting illegally. In these circumstances he would be in breach of Sub-Clause 1.13 if he complied with his contractual obligation and would therefore be excused from his contractual obligation. In the absence of an agreement between the Parties or a (paid) variation to cater for the circumstances, Sub-Clause 19.7 will apply and the Contractor may be discharged from his obligations. (See discussion under Sub-Clause 19.7).

An example of a situation where illegality may prevent the Contractor complying with the Contract can arise when part of the Engineer's design is found to conflict with applicable Law. If the discrepancy is found before the work is executed, the Contractor can seek a variation of the

design so that the Works conform with the applicable Law.

If the illegality is discovered after the element of the Works are complete, the Contractor will be in breach of Contract but as a result of a design which the Employer has provided him. Should the Employer wish the illegality to be remedied it would again be the Employer's responsibility to meet the Costs and time consequences.

Another area of difficulty that frequently occurs is when delays and costs are incurred as a result of the rules and regulations of the various utilities whose pipes and cables pass under or are connected to the works. The design of the works is normally the Engineer's concern, but liaison with the utility companies is the Contractor's responsibility. In many countries, the procedure for re-routing, for example, a telephone cable may be a long and bureaucratic process. Under previous FIDIC forms, severe delay of this sort would qualify as "special circumstances" entitling the Contractor to an extension of time. However the 1999 edition does not include this general let out provision and unless the utility can be considered identical with the Employer (which is possible in some circumstances where the Employer and the utility are both State owned – see the commentary under Sub-Clause 8.4) the mere fact that the utility has delayed in re-routing the utilities will not entitle the Contractor to an extension of time. The risk of such delay falls on the Contractor.

It may be arguable in some circumstances, however, that delays caused by utility companies have deprived the Contractor of access to or possession of the Site and that the Contractor is entitled to an extension of time under Sub-Clause 2.1 (see discussion under that Sub-Clause).

An interesting question arises when the Employer is an arm of the government of the country in which the project is sited and the utility concerned is also government-owned. Thus, the Contractor could be dealing with the Ministry of Public Works as Employer and the Ministry of Telecommunications in relation to the relocation of a cable. A Contractor will seek to argue that delays caused by the Ministry of Telecommunications fall within the ambit of "delay, impediment or prevention caused by or attributable to the Employer" under Sub-Clause 8.4(e). The answer lies within the administrative law of the country in which the project takes place. If the government can be said to be "one and indivisible" so that the two Ministries are merely manifestations of the same legal person, the Contractor may well succeed. In civil code countries, with legal systems based on the French model, a contract with a ministry would normally be an administrative contract and the doctrine of *Fait du Prince* could apply: this would make an act of one arm of government a potential ground for claim under a contract with another as the state is not regarded as comprising separate entities but as a single whole.

The boundary between the Contractor's duty of conformity with applicable Laws on the one hand and the Employer's responsibility for "planning, zoning or other permission" on the other hand, is likely to cause difficulty. The Employer is required to indemnify the Contractor from any consequences of its (the Employer's) failure to obtain such permission. Thus if the regulation or by-law of which the Contractor is in breach is one which requires permission before the Contractor is entitled to carry on some activity, the risk of breach lies with the Employer, not the Contractor. The term "or other permission" is thus an important one and unfortunately is not defined in the Contract. If, for example, a local authority has the power to impose a charge before the Contractor is entitled to commence building or uses a particular road or facility this can probably best be described as a charge for a permission – and thus be the responsibility of the Employer. On the other hand where the charge is described as a tax (perhaps for the use of a quarry or for a refuse disposal area), it has the same effect; yet it might not be correct to describe it as a permission. Indeed in some places the right to build is subject to payment of an infrastructure charge, whereas in others the right to build is subject to obtaining of a permit in return for a similar fee. The description can make a major difference. Such semantic differences should not make a difference to the liabilities of the Parties but it can be seen that they may do so. A well-advised Contractor, faced with having to make payments which are effectively made in order to receive permission to carry on activities, will not make the payment without first protesting to the Employer that it is in fact obtaining a permit which the Employer is required to obtain. This will set the basis for a claim under the Contract.

Sub-Clause 1.14 Joint and Several Liability

The effect of this provision is that each Contractor, member of a joint venture, consortium or other unincorporated group is fully liable not only for its own elements of the Contract but also for those of the other members. This can be particularly burdensome for a member which has undertaken a smaller than average proportion of the overall obligations – the rewards will be proportionately smaller but the risks will be as high as for the other larger participants. Since the Employer gains considerable extra security as a result of this joint and several obligation it is likely that if it commences any arbitration proceedings it will name each of the members as Respondents so that it can have an award enforceable against each of them. This carries the risk of increased costs as the separate members may decide to have separate legal teams. Clearly there should be arrangements within the group of Contractors to ensure that the smaller members are indemnified by the larger and that, as between themselves, each member only bears responsibility for its share of any claim. Further, if there are any legal proceedings they will be represented by one set of lawyers.

The Sub-Clause has no application to incorporated joint ventures and the shareholders in such incorporated contracting vehicles will have no joint and several liability.

From an Employer's point of view it is thus usually preferable that a Contractor be an unincorporated joint venture rather than an incorporated one. This is usually made clear in the invitation to tender. The issue for contractors is more complex as there may be regulatory, taxation and accounting issues which make it difficult to establish an incorporated vehicle. However it can be seen that strictly from a contracting point of view it is probably better to incorporate than not.

Sub-Clause 1.14(c) prevents the Contractor altering its composition or legal status without the prior consent of the Employer. This Sub-Clause is solely aimed at preventing changes to the structure of the joint venture. However, Employers will also be concerned where, as is quite common, the share of the Works allocated to each member is altered. The Employer may have chosen the particular grouping of contractors in order to get the special expertise of one of its members. Indeed the Contract may have only been awarded because of the track record of one of the members. Clause 1.14(c) does not prevent the Contractor grouping passing the share of the work which the specialised experienced contractor originally intended to do to a less experienced member. Indeed it is common for joint ventures to be formed between an inexperienced and an experienced contractor merely to use the "CV" of the experienced contractor to meet the pre-qualification requirements and with no intention of the experienced contractor carrying out the share of the work originally indicated. While Sub-Clause 1.14(c) would prevent the experienced contractor withdrawing entirely from the joint venture or consortium (this would represent a change in its composition), so long as the experienced contractor remains nominally a member there is nothing the Employer can do about it.

With this in mind Employers will be well advised to alter this Sub-Clause to prohibit changes to work share within the joint venture or consortium without the prior consent of the Employer.

Where the Employer does have a right under Sub-Clause 1.14(c) to prevent a change to the composition or legal status of the joint venture, it must not unreasonably withhold or delay its consent (see Sub-Clause 1.3).

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