

## Clause 17: Care of the Works and Indemnities

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**This Clause has been substantially re-worked. The content of the former Clause 17.6 [*Limitation of Liability*] has been removed to Clause 1.15.**

The Clause 17 Care of the Works obligations under the 1999 edition were useful as a statement of allocation of responsibility, but of limited significance in that many of the obligations imposed on the Contractor in respect of its responsibility for care of the Works and the liability once responsibility had passed to the Employer were also capable of being regulated under Sub-Clause 7.6 [*Remedial Work*] (prior to completion) and under Clause 11 [*Defects Liability*] (after completion). Despite considerable changes this position remains.

Where, after completion, the Contractor is reluctant to meet his responsibilities, the temptation for the Engineer to use his Clause 11 powers is now increased because, while action by the Engineer under Clause 17 (formerly on the basis of a “request”) now has to be through a Variation, a similar result can be achieved by an instruction under Clause 11. As can be seen from the commentary on Clause 13, and also below, the use of Variations is fraught with potential problems.

The Contractor’s Care of the Works responsibility is substantially reduced compared with that under the 1999 edition because it does not now include any loss or damage caused by the Employer or Engineer.

The Contractor and Employer indemnities relating to personal injury and property claims, which were formerly applicable in respect of all relevant claims, now only apply to third party claims.

### Responsibility and Liability for the Care of the Works

The first two Sub-Clauses of Clause 17 deal respectively with Responsibility for and Liability for Care of the Works.

The term “*care of the Works*” is nowhere defined, but its meaning should be able to be understood from the two sub-clauses. Under 17.1, the responsibility entails rectifying any loss or damage which occurs during the period for which the Contractor is responsible. Following this period, the Contractor is liable for any loss or damage caused by it to the Works – either in this period or as a result of something which occurred during the period during which the Contractor was responsible.

Thus “*care of the Works*” seems to entail repair during the period of responsibility (which itself involves taking the necessary steps to avoid the need for such repair) and liability for loss or damage during the period subsequent.

The period during which the Contractor has the responsibility for the care of the works generally expires at the Date of Completion or earlier termination, although it is extended for the care of any work which is outstanding on the date of completion until it is completed. This would cover rectification of defects and snagging lists.

The concept of Date of Completion is clear in respect of Sections or the Works as a whole thanks to the definition of Date of Completion in Sub-Clause 1.1.24. It means that the date will either be that stated in the TOC, a deemed completion date under Sub-Clause 10.1 or a deemed taking over date under Sub-Clause 10.2 and 10.3. The last sentence of the first paragraph of Sub-Clause 17.1 passes the responsibility to the Employer if a TOC for a

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Section or a Part is issued or deemed to be issued. In respect of Parts, Sub-Clause 10.2 does not provide for the deemed issue of a TOC but does provide for a deemed taking over and a passing of responsibility to the Employer. It would have been helpful if Sub-Clause 17.1 had cross-referred to Sub-Clause 10.2.

However, Sub-Clause 10.3 deals with interference with tests on completion and provides that, where the Contractor is delayed by such interference, then, subject to the Contractor having given notice, the Employer shall be deemed to have taken over the Works or a Section when the Works or Section would otherwise have been completed. There is thus a deemed taking-over but no deemed issue of a TOC. It is clear that such a deemed taking over was not intended under Sub-Clause 10.3 to be the equivalent of a deemed TOC as Sub-Clause 10.3(c) requires the Engineer to issue a TOC. Thus it is possible that there will be no TOC or deemed TOC under Sub-Clause 10.3. Unlike Sub-clause 10.2 there is no express provision for passing of responsibility to the Employer. It is therefore possible that the passing of responsibility will be delayed or (in the event that the Engineer does not issue a TOC) may not occur at all.

It should be noted that the third sentence of the first paragraph passes responsibility on the date of issue of the TOC – sometimes a date later than the Date of Completion, so there appears to be an internal inconsistency within this first paragraph.

Sub-Clause 17.1 thus has the effect (subject to the above issues) of defining the period of the Contractor's responsibility and the start of the Employer's responsibility.

### **Employer's Responsibility**

Once the Contractor ceases to be responsible for the care of the Works, responsibility shifts to the Employer. The Sub-Clause does not explain the consequences of this, but by analogy with the consequences of responsibility for the Contractor, it seems as though it becomes the Employer's responsibility to protect against and repair loss or

damage, once it occurs on its watch. The Employer will probably be ill-equipped for this task (especially if only a Section or Part has been taken over). The consequences will be considered below in relation to the Employer's remedies set out at the end of Sub-Clause 17.2

### **Liability**

Sub-Clauses 17.1 and 17.2 draw a boundary between a period during which the Contractor is responsible and when it becomes merely liable. This is a concept many lawyers will find difficult to grasp, because responsibility usually implies liability. However, it is clear that this is the draftsman's intention. The distinction seems to lie in the scope of the responsibility laid out in Sub-Clause 17.1 by comparison with the scope of liability laid out in Sub-Clause 17.2. Under 17.1 the responsibility entails repairing loss or damage, whereas under Sub-Clause 17.2 there is no strict definition. In general legal terms, liability might mean an obligation to repair but it would also mean paying damages consequent.

In making the distinction between responsibility and liability, Sub-Clauses 17.1 and 17.2 also largely absolve the Contractor from liability under Sub-Clause 17.1 (except to the extent that responsibility for repair can be regarded as a liability).

Quite why it this is necessary to set out a basis of liability in Clause 17, is not clear. The period of Contractor liability coincides with the Defects Notification Period which has a comprehensive code for Contractor liability.

Sub-Clause 17.2 opens with a paragraph which imposes liability on the Contractor where it causes damage after the issue of a TOC, including where the loss or damage resulted from something which occurred before the TOC. What it specifically does not do is impose liability for loss or damage which occurred before the TOC.

It should be noted that the period of liability begins with the issue of TOC. According to the definition of TOC in Sub-Clause 1.1.81 a TOC includes a

deemed TOC so there may, as outlined above, be situations where the liability is delayed or does not come into effect. However, more importantly, there may be a gap between passing of responsibility (Date of Completion) and commencement of liability (TOC). This is because a TOC is normally dated later than the date of completion included in it. During this period the Employer will have responsibility, but the Contractor will have neither responsibility, nor, at least under Sub-Clause 17.2, liability<sup>2</sup>.

Assuming that responsibility is different from liability, the Contractor will not benefit from the cap on liability set out in Sub-Clause 1.15, should the cost of repairs during the period of responsibility, exceed the limits on liability set out therein.

### Consequences of Liability

If the Contractor is liable, as opposed to responsible, it is no longer required under Clause 17 to remedy the loss or damage. Sub-Clause 17.2 does not say what is to happen. However, since this situation occurs after the Completion, Clause 11 [Defects after Taking Over] applies. The Contractor can be obliged to repair defects or damage. Sub-Clause 11.2 provides that the Contractor will bear the cost in a limited range of circumstances, all of which can be said to be “caused by the Contractor” but which is certainly not a comprehensive list of such causes. There may thus be situations where the Contractor has caused a loss or damage and is thus liable under Sub-Clause 17.2, but would not be liable under Sub-Clause 11.2 for this cost. Presumably the remedy for the Employer lies in a claim for damages.

It is thus possible that, after TOC, but not before, the Contractor will be liable for damages resulting from loss or damage caused by it to the Works. Such damages will be rather limited as, in

<sup>2</sup> An act of negligence on the Contractor’s part would probably create liability in this period, as does the Defects Notification Period (which begins on Completion) but it is a pity that there is such a lacuna.

accordance with Sub-Clause 1.15 [*Limitation of Liability*] there is no liability “for loss of use of any Works, loss of profit, loss of any contract or any other indirect or consequential loss”.

### Excluded Events

Sub-Clause 17.2 excludes the Contractor from liability caused by a list of events. Several of these are included by reference to Sub-Clause 18.1 [*Exceptional Events*].

One of the 1999 events has been removed from the list (pressure waves caused by aircraft or other aerial devices travelling at supersonic speeds) and the following have been added:

- (a) Interference with any right of way, light, air water or other easement which is the unavoidable result of the execution of the Works in accordance with the Contract.
- (b) Faults in the design which an experienced contractor exercising due care would not have discovered<sup>3</sup>.
- (c) Rebellion, terrorism, revolution, insurrection military or usurped power, riot commotion or disorder and the encountering of munitions of war are no longer limited to events within the country.
- (d) Strike or lockout.
- (e) Natural Catastrophes such as earthquake, tsunami, volcanic activity, hurricane or typhoon.
- (f) any act or default of the Employer or Engineer and use or occupation by the Employer of any part of the Permanent Works unless otherwise specified in the Contract.

<sup>3</sup> Such faults also give the Contractor the right under Clause 1.9 to a Variation, time and money. However the test in 1.9 takes account of cost and time. It is not clear whether the omission of this qualification in Clause 17.2 is intended to have any effect on the way the exemption applies.

There must be circumstances in which the sort of interference referred to in (a) is a result of Contractor choice – through its design but it would seem that once the design (prepared by the Contractor) causes interference when carried out, the risk shifts to the Employer. It is in any case difficult to see how such interference could influence care of the Works while the Contractor remains responsible, nor how it relates to damage to the Works once responsibility has passed to the Employer.

This list is expressed to extend to Sub-Clause 17.2 liability, but, if the distinction between responsibility and liability is as effective as is apparently intended, would not extend to the period when the Contractor is merely responsible. This would be a departure from the 1999 edition philosophy. Perhaps to overcome this problem, Sub-Clause 17.1 makes the responsibility for care applicable “*except as stated in Sub-Clause 17.2.*”

Although the second paragraph of Sub-Clause 17.2 begins with the words “*The Contractor shall have no liability whatsoever ... for loss or damage ... caused by any of the following events ...*”, the subjection of Sub-Clause 17.1 to 17.2 is presumably intended to mean that in this sentence “*liability*” includes “*responsibility*”, whatever is intended elsewhere in Clause 17. This conclusion is bolstered by sub-paragraph 17.2(ii) which is part of a provision (discussed below) which provides for a sharing of liability where the loss or damage to the Works is caused by a combination of one of the excluded events with “*a cause for which the Contractor is liable*”. One of the remedies where this occurs is EoT. Since, after TOC, EoT is irrelevant, it seems that here too, “*liability*” is intended to mean the same as “*responsibility*”.

The provisions of Sub-Clause 7.6 [*Remedial Work*] also confirm this position. Sub-Clause 7.6 allows the Engineer, prior to TOC, to order the repair or remedy works in various situations. The Contractor does not have to bear the cost where there is an Exceptional Event, so this sub clause reflects the same policy as appears to be reflected in

the above conclusions. If excluded events in Sub clause 17.2 were not to apply during the Contractor’s period of responsibility there would be an inconsistency.

However, if the excluded events are to be applied in full to the period of Contractor responsibility, this raises questions about the meaning of the words in Sub-Clause 17.1:

*“If any loss or damage occurs to the Works, Goods or Contractor’s Documents during the period when the Contractor is responsible for their care from any cause whatsoever except as stated in Sub-Clause 17.2 [Liability for the Care of the Works], the Contractor shall rectify the loss or damage at the Contractor’s risk and cost, so that the Works, Goods or Contractor’s Documents (as the case may be) comply with the Contract.”*

If the list of excluded events is taken out and, when it is noted that the last item in the list is any act or default of the Employer or Engineer, all that seems to be left of the Contractor’s responsibility is loss or damage caused by the Contractor. This happens to be the same test as for liability under Sub-Clause 17.2. The words “*from any cause whatsoever*” appear to have rather limited meaning. They certainly apply to acts by the Contractor, by third parties unrelated to the contract and to the less extreme external events, such as normal climatic problems, but beyond that the responsibility is quite limited. The final scope will depend on what is meant by the incorporation of some of the Exceptional Events from Sub-Clause 18.1. But, even then, Sub-Clause 7.6, which, in circumstances where the Contractor does not spontaneously repair loss or damage, allows the Engineer to require it to do so at its cost does not impose the costs on the Contractor when Exceptional Events are the cause.

Thus, before Completion, the Contractor’s responsibility is probably limited to loss or damage caused by itself, by unrelated third parties and by non-exceptional climatic events and, after TOC, its liability is limited to events caused by itself.

## Incorporation of Exceptional Events

Sub-Clause 17.2 includes in the list of excluded events “*any of the events or circumstances listed under sub-paragraphs (a) to (f) of Sub-Clause 18.1 [Exceptional Events].*”

The next paragraph of Sub-Clause 17.2, however, then goes on to state:

*“Subject to Sub-Clause 18.4 [Consequences of an Exceptional Event], if any of the events described in sub-paragraphs (a) to (f) above occurs and results in damage to the Works ... the Contractor shall promptly give a Notice to the Engineer.”*

Sub-Clause 18.4 deals with the situation where an Exceptional Event has caused the Contractor delay or Cost. Sub-Clause 18.4 is, itself, subject to the requirements of Sub-Clause 18.2 [Notice of an Exceptional Event] which requires the Contractor to give notice where it “*is or will be prevented from performing any obligations under the Contract*”. This is a more limited application of Exceptional Event than is intended by Sub-Clause 17.2. By definition those events do not prevent the Contractor performing its obligations. They may impose additional cost on it if there are repairs to be carried out or there is a delay, but that is different from “prevention”. Perhaps the subjugation of this paragraph of Sub-Clause 17.2 is only intended to apply in those very limited circumstances where the Contractor is entirely prevented from meeting its obligations. It may be intended to make it plain that in these circumstances, there is no alternative required under Sub-Clause 17.2 of attempting to do the impossible. It will also be applicable where the Exceptional Event prevents the Contractor performing its responsibilities or meeting its liabilities for a limited period. Contractors will need to be very careful to meet their notice obligations under Sub-Clause 18.2 and to not to rely on Sub-Clause 17.2 for all their Cost and time recoveries.

When reference is made to Sub-Clause 18.1, it can be seen the Exceptional Events list in (a) to (f) and

incorporated into Sub-Clause 17.2 by paragraph (e) is not a comprehensive list of Exceptional Events but only a series of examples. In Sub-Clause 18.1, each one is made subject to conditions 18.1(i) to (iv) – i.e. they must be (i) beyond a Party’s control; (ii) the Party could not reasonably have provided against before entering into the Contract; (iii) having arisen, such Party could not reasonably have avoided or overcome; and (iv) is not substantially attributable to the other Party. It then goes on to state:

*“An Exceptional Event may comprise but is not limited to any of the following events or circumstances provided that conditions (i) to (iv) are satisfied.”*

Thus, one can conclude that the examples (a) to (f) have to be read subject to (i) to (iv). If that is the case it is also arguable that 18.1 as a whole was intended to be imported (which is the case under Sub-Clause 7.6).

Thus, there are three possibilities:

1. The examples in Sub-Clause 18.1 are included on a stand-alone basis.
2. They are subject to the pre-conditions in 18.1 (i) to (iv)
3. The whole of 18.1 is in fact incorporated which would allow other Exceptional Events to apply.

The third seems unlikely, but possible. It is really impossible to be sure which of (1) and (2) applies.

Item 17.2(d) sets a standard for an exception for the operation of forces of nature which is different from that which would be applied if it were an Exceptional Event. Unforseeability is dated by reference to the Base Date (28 days before submission of tender) whereas the Exceptional Events test applies at any time up to the entry into the Contract. This test in this sub-clause is also different from that in Sub-Clause 8.5 should the Contractor apply for an extension of time.

## Variation

The 4th paragraph of Sub-Clause 17.2 provides that if one of the excluded events has, in the Contractor's view, been the cause of damage to the works the Contractor may give a notice to the Engineer who may then instruct what is to be done. This will then be treated as a Variation.

This has the odd result that the Contractor will have a right to object for one or more of the reasons set out in Sub-Clause 13.1. The first of these is that *"the varied work was Unforeseeable having regard to the scope and nature of the Works described in the Employer's requirements."* Given that the event will have been one of the excluded risks, this will often be the case.

This provision only applies in the case of damage – not loss – in contrast to all other references in the two Sub-Clauses. It is easy to envisage a loss situation. For example, material stored on site may be stolen. The Contractor's computer server may be damaged, leading to loss of important data. There seems to be no remedy in this situation.

The Contractor may not wish to give such a Notice. If a TOC has been issued and the damage is not caused by the Contractor it will have neither responsibility or liability. Event before that, the effect of the excepted events is to exclude all responsibility or liability, so it will be entitled to sit on its hands and do nothing. If it sees a financial advantage in doing nothing it will be entitled to act accordingly. Sub-Clause 8.5(c) already entitles the Contractor to EoT for adverse climatic conditions. Sub-clause 8.5(e) already entitles the Contractor to an extension of time where the delay is caused by the Employer or Engineer. If the Works have been completed, responsibility will have moved to the Employer unless the damage is caused by the Contractor, so 8.5(e) may again apply if the Employer is not remedying the problems.

If the Contractor does give a Notice and the Engineer is then required to issue an instruction, he/she may be faced with a difficult decision. The damage may be a result of a combination of

Contractor's responsibility/liability. An instruction can hardly apportion this. It is not clear how the Engineer is to cope with this.

It would have been better if either the Contractor or the Employer could have given the Notice or if the Engineer was given an entitlement to issue an instruction with the cost and time consequences to be sorted out later. This is the position under Sub-Clause 7.6 which overlaps with Sub-Clauses 17.1 and 17.2 in that there may be need for repair during the period of responsibility. There will be circumstances under which the Engineer prefers to make use of his/her powers under Sub-Clause 7.6 (although it should be noted that the valuation method under Sub-Clause 7.6 may be less favourable to the Employer than that under Sub-Clause 13.3.1 in respect of a Variation). It is also the case under Sub-Clause 11.1 [*Completion of Outstanding Work and Remedying Defects*] where the Contractor's obligation is triggered by a Notice.

Where responsibility has shifted to the Employer (especially where a Section or Part has been taken over), the Employer may be ill-equipped to repair any loss or damage not covered by the Contractor's liability and may wish to rely on its right to vary under Sub-Clause 13.1 (which applies at any time up to the issue of the TOC for the Works as a whole and will thus apply after a Section or Part is complete) or its rights under Clause 11 [*Defects after Taking Over*]. There may be circumstances where it prefers to use the Sub-Clause 13.1 power directly rather than relying on the power in Sub-Clause 17.2.

## Contrast with the 1999 Edition

The equivalent 1999 provision gave the power to the Engineer to *"require"* such work to be done. Once the Contractor had done what it was required to do, it could claim compensation. The term *"require"* sounds rather loose, but it works and makes sense. The use of the term *"instruction"*, though no doubt intended to create clarity, requires reference to be made back to Sub-Clause 3.5. Whereas the equivalent in the 1999 edition (3.3)

allowed an instruction to be given for the execution of the Works or remedying of defects, the 2017 equivalent is limited to the execution of the Works. This probably makes no difference if the instruction is given during the period before TOC, or even during the snagging period. However, it is clear from Sub-Clause 11.1 that there is a distinction, during the DNP, between defects, the remedy of which would undoubtedly be part of the execution of the Works and damage, which is not necessarily. Thus, if there is damage caused by one of the excluded risks, occurring during the DNP, the Employer will need to use his powers under Clause 11, rather than under Clause 17. There is room for confusion when a DNP has started for a Section or a Part and the whole of the Works is not yet complete as during this period both the Engineer and the Employer will have functions running in parallel. This will be particularly confusing if there is a suggestion that damage is a result of something caused by the Contractor prior to TOC.

### Shared Liability

The final paragraph of Sub-Clause 17.2 deals with the possible situation where the loss or damage results from a combination of the excluded events and a cause for which the Contractor is liable. As noted above this seems to be intended to read “responsible or liable”. The Contractor is then entitled to a proportion of EoT or Cost to the extent that the excluded events contributed. This assumes that the Contractor will rectify the loss or damage and then make a claim, but, as noted above, it may not be responsible/liable to rectify any element arising from the Exceptional Events. The provision is, however a useful one in that it will encourage the Contractor to act on its own initiative and attempt to recover any relevant cost or EoT later. It is a pity that it does not provide for this remedy even where the cause is entirely a result of one of the Exceptional Events.

### Indemnities

As discussed below, the majority of the indemnity provisions have been significantly diminished in

effect, in that they are now limited to situations where the party claiming the indemnity is being pursued by a third party. The consequences of this change are discussed below in the section on Indemnities by Contractor (17.4) but they apply to all of Sub-Clause 17.3, 17.4 and 17.5 and have a consequential impact on Sub-Clause 17.6.

Indemnities by the Contractor and by the Employer were formerly included together in the 1999 edition. There are now two sub clauses dealing with them and a third dealing with shared indemnities.

As can be seen from the analysis below the scope of the indemnities has shrunk substantially and the Sub-Clauses are not likely to be much utilised.

### Indemnities relating to Intellectual and Industrial Property Rights (17.3)

The Clause is closely based on that in the 1999 edition. However, there are four changes:

- The indemnity only applies to third party claims and;
- an express inclusion of legal fees and expenses, and;
- the Contractor is entitled to be indemnified where his alleged infringement was a result of his carrying out a Variation and;
- The Contractor is no longer required to indemnify the Employer where a claim arises from the proper use of the Works.

### Indemnities by the Contractor (17.4)

These indemnities relate to injury to persons and damage to property other than the Works. Similar indemnities applied under the 1999 edition. However, both the Contractor and Employer indemnities are now limited to “*third party*” claims etc.

The intention is presumably to prevent either party claiming against the other in respect of injury or damage caused to their own staff or property. The

inclusion of the reference to “*third party*” represents a considerable change to the contract’s risk profile. For example, in the case of the personal injury indemnity, if an employee of the Employer or the Engineer under the 1999 Edition was killed in circumstances where he or she was carrying out duties in relation to the Works, but the Contractor was not in any way at fault, the Contractor would nonetheless have been held responsible. However, that employee is “*Employer’s Personnel*”, not a third party, and therefore the 2017 edition does not make the Contractor responsible. The only claims now covered by the indemnity will be those where a third party is entitled to claim against the Employer. Under English law this might be the case where the Employer has responsibility as the occupier or has strict liability under worker injury legislation.

In the case of property damage, the indemnity (as before) only applies to damage of property other than the Works, but is again limited to third parties. In this case it is limited to loss attributable to **fault** of the Contractor, its Personnel, their agents and anyone directly or indirectly employed by them. There may be circumstances where an Employer has strict liability against a third party for property damage and will wish to recover it from the Contractor. If the fault is that of the Contractor, its personnel or agents, this remains a useful provision. However, the previous provision enabled the Employer to claim against the Contractor for damages it, its Personnel and agents suffered as a result of the fault of the Contractor, Contractor’s Personnel and agents. This right now seems to be excluded. This will not make a great deal of difference where the fault is that of the Contractor itself. However, where the fault is that of a subcontractor or agent, the Employer will now have to identify the party responsible and pursue him or her. Where the victim is a member of the Employer’s Personnel or an agent, they will have to pursue the claim themselves.

There may be “*third parties*” who are closely involved with the Works. For example, in the not-uncommon situation where the owner of the structure being built is not the Employer, claims

initiated against the Employer by the owner may be covered by the indemnity.

It is not clear why this change was necessary.

An error in the equivalent provision in the Gold Book (where the provisions have considerable similarity) has been corrected. The word “*or*” at the end of Sub-Clause 17.4(b)(i) has been replaced with “*and*”.

### Indemnities by Employer (17.5)

Again, the indemnity is limited to third party claims.

The Employer’s indemnity for personal injury only applies where there has been fault on the part of the Employer, its Personnel and agents. It does not apply where the injury is the result of one of the Employer’s risks.

Under the 1999 edition (in addition to a situation where it was at fault) the Employer indemnified the Contractor against personal injury on the basis that they were difficult or impossible to insure for injury:

- i. resulting from the Employer’s right to have permanent works executed over under in or through any land and to occupy this land for the permanent works,
- ii. which is the unavoidable result of the Contractor’s obligations to execute the Works and remedy any defects and
- iii. resulting from something covered by a clause listed in Sub-Clause 17.3 [*Employer’s Risks*].

None of these indemnifications now apply in respect of personal injury. (i) and (iii) are excluded in any event because they are (as they were) Employer’s risks and a policy decision seems to have been taken to exclude Employer’s risks from the Employer’s indemnity. If it is indeed difficult or impossible to insure these risks, it is difficult to see why they have been removed from the Employer’s indemnity.



The 1999 edition did not include any Employer's indemnity for property damage. The new indemnity for property damage (other than the Works) does not apply where the Employer has caused the damage through fault (for which it would be liable anyway, though not on the basis of indemnity) but does apply where one of the Employer's risks is the cause. Thus, where fault is involved the Employer is absolved from indemnification, but it is liable where one of the no-fault events caused the claim.

This is again limited to third parties, so would only apply if such third party had a claim against the Contractor resulting from one of these events. This again would only seem to be possible where the Contractor is under some form of strict liability.

### **Fitness for Purpose**

Clause 17.4 now contains the following Contractor's indemnity which needs to be carefully considered. Unlike the other Contractor indemnities, it does not only relate to third party claims.

*"The Contractor shall also indemnify and hold harmless the Employer against all acts, errors or omissions by the Contractor in carrying out the Contractor's design obligations that result in the Works (or Section or Part or major item of Plant, if any), when completed, not being fit for the purpose(s) for which they are intended under Sub-Clause 4.1 [Contractor's General Obligations]"*

This (which originated in a slightly narrower form in the Gold Book) represents a significant change to the way in which the Contractor's fitness for purpose obligation has been treated. On a free-standing basis, a breach of the fitness for purpose obligation under 4.1 would normally lead to a liability based on consequences, rather than cause and thus whether the Contractor has been negligent or not in failing to achieve its obligations will be irrelevant. Its only excuse might be if the failure to achieve fitness for purpose was caused by an Employer act.

<sup>4</sup> This is a warranty that the completed works will be in accordance with the documents forming the Contract.

The indemnity is limited to design obligations which result in the Works not being fit for purpose, so is much narrower than the fitness for purpose obligation in Clause 4.1. Further it is an indemnity limited to circumstances where the failure is a result of acts, errors or omissions on the part of the Contractor whereas the fitness for purpose obligation is not so qualified. Thus, unlike the normal situation in respect of a fitness for purpose obligation, the burden of proof is shifted to the Employer to demonstrate that the indemnity applies because of such acts errors or omissions. Rather than rely on this rather limited indemnity, it seems likely that Employers, faced with a product which is not fit for purpose, will rely on their rights to claim damages for breach of Clause 4.1 or 5.3<sup>4</sup>, require remedy under Clauses 7.6 [*Remedial Work*] and 11 [*Defects after Taking Over*] and any Performance Guarantee or make a claim for damages for breach rather than under the indemnity. It is therefore very difficult to see what this fitness for purpose indemnity is intended to achieve.

When it was included in the draft of the Yellow Book circulated for comment the draft included an indemnity similar to the one now included and with no cap on damages. This drew considerable adverse comment including from many contractor's associations who, in a joint letter stated:

*"If the current wording is allowed to stand, it will impose a major additional risk upon international contractors and, in the case of major infrastructure works or plants, the losses that may be recovered could easily run into billions of euro and lead to insolvency, as claims under the indemnity will be uninsurable".*

Although the language of the originally drafted indemnity has changed this does not seem in itself to have made a significant difference. However, the general limits of liability are now allowed to apply. Despite the Contractors' warning the indemnity is required to be insured.

### Shared Indemnities (17.6)

This is a new provision (developed from that in the Gold Book) which purports to protect both the Contractor and the Employer against the full force of the indemnity obligations imposed. The effect is very different for the Contractor from that for the Employer.

Where the claim under one of the indemnities is by the Employer against the Contractor but one or more of the events listed in 17.2 (a) to (f) has contributed to the damage which the Contractor is required to indemnify the Employer, the liability is to be reduced proportionately to its effect. Whether it is necessary to state this is arguable as Sub-Clause 17.2 already says that the Contractor shall have no liability by way of indemnity if any of the Employer's risks are the cause.

17.2 (a) to (f) cover every fault of the Employer and also include the no-fault events which were formerly called "*Employer's Risks*" and are now "*Exceptional Events*". Thus, the indemnity given by the Contractor will be reduced to the extent one of these events applies. This makes sense but the Sub-Clause is unclear as to whether the exception to Employer's liability included in the opening paragraph to the list (a-f) in Sub-Clause 17.2 is intended to apply.

The indemnity already covers cases where the Employer has been negligent, wilful or has breached the contract.

It is hard to see what is left to apportion. Where the claim under one of the indemnities is against the Employer the value of its indemnity is to be reduced proportionately to the extent that any event for which the Contractor is responsible under Sub-Clause 17.1 may have contributed to the loss. Sub-Clause 17.1 describes the Contractor's responsibility up to Completion or Termination as "*full*". This responsibility continues after Completion in respect of any outstanding work. It would therefore seem that the "*proportionate*"

deduction up to Completion or Termination is 100%. It may be less after Completion, but this seems unlikely as any event likely to lead to the need for indemnification will most likely arise in respect of outstanding elements of the Works. The effect of the Sub-Clause therefore seems to be to absolve the Employer almost entirely from responsibility for its personal injury and property indemnification responsibilities, limited as they already are.



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<sup>5</sup> The contents of this article should not be treated as legal advice. Please contact the lawyers at Corbett & Co before acting on or relying upon anything stated in this article.