Clause 14

Summary

Clause 14 deals with all aspects of payment. It also deals with the Statement at Completion, the Final Payment Certificate, Discharge and Cessation of the Employer's Liability.

The Clause provides that this is a re-measurement contract and that the quantities stated in the Bill of Quantities are estimated. There is provision for an advance payment to be made to the Contract. Applications for Interim Payment Certificates are made monthly and these must be supported by documents and a report on progress. Unless the amount assessed is less than the minimum amount set out in the Appendix to Tender, the Engineer has 28 days to issue an Interim Payment Certificate, which states the amount the Engineer fairly determines to be due. The Employer thereafter has an obligation to pay the amount certified, in the currencies named in the Appendix to Tender. In the event that payment is not received the Contractor can claim financing charges compounded monthly.

Fifty per cent of the retention monies are paid when the Taking-Over Certificate is issued. Where there are Sections then a proportion is paid. The balance of retention is paid on the expiry of the latest Defects Notification Period or, where there are Sections, a proportion at the expiry of the Defects Notification Period for that Section. Within 84 days of receiving the Taking-Over Certificate the Contractor submits a Statement at Completion. This must include an estimate of all sums which the Contractor considers due.

Within 56 days of receiving a Performance Certificate, the Contractor submits a Final Statement. The Contractor must also submit with the Final Statement a written discharge which confirms that the total of the Final Statement represents full and final settlement of all moneys due. The Engineer then issues to the Employer a Final Payment Certificate. The Contract states that the Employer shall have no liability to the Contractor except to the extent that the Contractor has included an amount expressly for that matter in the Final Statement and also the Statement at Completion.

Origin of clause

Sub-Clauses 14.1(c) and 14.1(d) of the FIDIC Red Book 1999 are based on Clause 55 and Sub-Clause 57.2 of the FIDIC Red Book 4th edition respectively. Sub-Clause 14.15 is based on Clause 72 of the FIDIC Red Book 4th edition.

Sub-Clauses 14.3 and 14.5 - 14.14 of the FIDIC Red Book 1999 have their origins in Clause 60 of the FIDIC Red Book 4th edition. There was no similar provision in the

FIDIC 3rd edition and it was suggested in that edition that detailed provisions relating to payment should be drafted by the Parties.

Sub-Clauses 14.2 and 14.4 of the FIDIC Red Book 1999 are new. However, an Advance Payment was one of the suggested Conditions of Particular Application within the FIDIC Red Book 4th edition.

Cross-references

Reference to Clause 14 is found in the following clauses:

Sub-Clause 1.1.4.2	Definitions – Contract Price
Sub-Clause 1.1.4.4	Definitions – Final Payment Certificate
Sub-Clause 1.1.4.5	Definitions – Final Statement
Sub-Clause 1.1.4.7	Definitions – Interim Payment Certificate
Sub-Clause 1.1.4.9	Definitions – Payment Certificate
Sub-Clause 1.1.4.11	Definitions – Retention Money
Sub-Clause 1.1.4.12	Definitions – Statement
Sub-Clause 2.4	Employer's Financial Arrangements
Sub-Clause 13.6	Daywork
Sub-Clause 16.1	Contractor's Entitlement to Suspend Work
Sub-Clause 16.2	Termination by Contractor
Sub-Clause 18.2	Insurance for Works and Contractor's Equipment
Sub-Clause 20.2	Appointment of the Dispute Adjudication Board
Clause 6	Payment – of the General Conditions of Dispute Adjudication Agreement

Sub-Clause 14.1 - Contract Price

Sub-Clause 14.1(a) states that this Contract is not a lump sum contract but a measurement contract. The Guidance for the Preparation of Particular Conditions states that lump sum contracts may be suitable if the tender documents include details which are sufficiently complete for construction and for Variations to be unlikely. From the information supplied in the tender documents, the Contractor can prepare any other details necessary, and construct the Works, without having to refer back to the Engineer for clarification or further information. Further design by the Contractor (under sub-paragraphs (a) to (d) of Sub-Clause 4.1) is not precluded. However, these Conditions would be inappropriate if significant design input by the Contractor is required. In those cases, FIDIC's other forms may be more appropriate: see FIDIC's Conditions of Contract for Plant and Design-Build (the FIDIC Yellow Book 1999) or Conditions of Contract for EPC/Turnkey Projects (the FIDIC Silver Book 1999). For a lump sum contract, the tender documents should include a schedule of payments (see Sub-Clause 14.4), and any drawings required for construction may be specified as being Contractor's Documents. The Specification should describe the procedures under which the Contractor submits

these Documents for the Engineer to approve. The Guidance gives the following example clause for a lump sum contract:

- *"Delete Clause 12 [Measurement and Evaluation]*.

- *Delete the last sentence of Sub-Clause 13.3 and substitute: "Upon instructing or approving a Variation, the Engineer shall proceed in accordance with Sub-Clause 3.5 to agree or determine adjustments to the Contract Price and to the schedule of payments under Sub-Clause 14.4. These adjustments shall include reasonable profit, and shall take account of the Contractor's submissions under Sub-Clause 13.2 if applicable."*

- *Delete sub-paragraph (a) of Sub-Clause 14.1 and substitute: "(a) the Contract Price shall be the lump sum Accepted Contract Amount and be subject to adjustments in accordance with the Contract;"*

Unless otherwise provided in the Particular Conditions, the Contract Price is agreed and determined in accordance with the measurement provisions in Sub-Clause 12.3 [*Evaluation*] and is subject to further adjustment (primarily under Clause 13 [*Variations & Adjustments*]) as the Contract proceeds.

The Contract Price is defined at Sub-Clause 1.1.4.2 to be *"the price defined in Sub-Clause 14.1 [The Contract Price], and includes adjustments in accordance with the Contract"*. The Contract Price is expressly subject to adjustments in accordance with the Contract. Primarily, such adjustments will be found in Clause 13 [*Variations and Adjustments*] but will also include automatic changes in the quantities, i.e. *"automatic variations"* where a change in quantity is simply due to the inaccuracy of the Bill of Quantities and for which no Engineer's Instruction is necessary. Therefore, the Contract Price is not fixed. Some commentators have questioned whether damages arising from claims for breach of contract should properly be included in the Contract Price. FIDIC Contracts: Law and Practice[1] asserts that this has implications for both security and tax payable on the Contract Price, as in some legal jurisdictions tax is not payable on awards for damages or settlement of proceedings commenced.

In the FIDIC Red Book 4th edition, Contract Price was defined as the sum stated in the Letter of Acceptance. In this edition it is the Accepted Contract Amount which is defined by reference to the amount accepted in the Letter of Acceptance – see Sub-Clause 1.1.4.1. The Accepted Contract Amount must be distinguished from the Contract Price. The Accepted Contract Amount is fixed, but the Contract Price will change as a result of Variations and other adjustments.

In the FIDIC Red Book 1999, the Contract Price is agreed and determined in accordance with the measurement provisions in Sub-Clause 12.3. Sub-Clause 12.3 requires the

[1] FIDIC Contracts: Law and Practice by Ellis Baker, Ben Mellors, paragraph 6.17.

Engineer to agree or determine the Contract Price in accordance with Sub-Clause 3.5 [*Determinations*] by evaluating each item of work, applying the measurement agreed or determined in accordance with Sub-Clauses 12.1 and 12.2 and the appropriate rate or price for the item.

Sub-Clause 14.1(b) provides that the Contractor is obliged to bear the costs of all taxes, duties and fees. This is repeated in Sub-Clause 1.13 [*Compliance with Laws*]. Unless otherwise stated in the Particular Conditions time and costs are recoverable only to the extent they amount to changes in legislation under Sub-Clause 13.7. The Contractor is obliged to give notice of such.

The Guidance for the Preparation of Particular Conditions provides the following example clause where the Contractor is to be exempt from paying duties:

> *"All Goods imported by the Contractor into the Country shall be exempt from customs and other import duties, if the Employer's prior written approval is obtained for import. The Employer shall endorse the necessary exemption documents prepared by the Contractor for presentation in order to clear the Goods through Customs, and shall also provide the following exemption documents: (describe the necessary documents, which the Contractor will be unable to prepare).*
>
> *If exemption is not then granted, the customs duties payable and paid shall be reimbursed by the Employer.*
>
> *All imported Goods, which are not incorporated in or expended in connection with the Works, shall be exported on completion of the Contract. If not exported, the Goods will be assessed for duties as applicable to the Goods involved in accordance with the Laws of the Country.*

However, exemption may not available for:

> *(a) Goods which are similar to those locally produced, unless they are not available in sufficient quantities or are of a different standard to that which is necessary for the Works; and*
>
> *(b) any element of duty or tax inherent in the price of goods or services procured in the Country, which shall be deemed to be included in the Accepted Contract Amount.*
>
> *Port dues, quay dues and, except as set out above, any element of tax or duty inherent in the price of goods or services shall be deemed to be included in the Accepted Contract Amount".*

The Guidance for the Preparation of Particular Conditions provides the following example clause where the Contractor is to be exempt from paying taxes:

"Expatriate (foreign) personnel shall not be liable for income tax levied in the Country on earnings paid in any foreign currency, or for income tax levied on subsistence, rentals and similar services directly furnished by the Contractor to Contractor's Personnel, or for allowances in lieu. If any Contractor's Personnel have part of their earnings paid in the Country in a foreign currency, they may export (after the conclusion of their term of service on the Works) any balance remaining of their earnings paid in foreign currencies.

The Employer shall seek exemption for the purposes of this Sub-Clause. If it is not granted, the relevant taxes paid shall be reimbursed by the Employer".

Sub-Clause 14.1(c) states that the Bill of Quantities and other Schedules provide only estimates of the quantities of the Works the Contractor is required to execute, and for the purpose of Clause 12 [*Measurement and Evaluation*] unless otherwise stated in the Particular Conditions. As in Clause 55 of the FIDIC Red Book 4th edition the quantities are not to be taken as the actual and correct quantities – and this confirms that this Contract is intended to be re-measurement. However, if the final measurement results have changed by more than 10% (i.e less than 90%, or more than 110%), of the quantity stated in the Bill of Quantities included in the Contract, the criteria in Sub-Clause 12.3(a)(i) is satisfied and either Party should consider whether the criteria in Sub-Clause 12.3 paragraphs (a)(ii) to (iv) have also been satisfied, in which case a new rate or price will be appropriate. Therefore, a Contractor might argue for a new rate or price where the Bill of Quantities is inaccurate, and the Engineer may exercise his discretion in determining the rate or price of an item. Errors in the Bill of Quantities will be automatically corrected in the measurement and valuation process. Employers must always perform a mathematical check of the prices in the tender to ensure that "errors" have not crept into the Bill of Quantities in order to obtain a more competitive price. It should be made clear to all tenderers that other last-minute adjustments in tenders to achieve a competitive price, e.g. less 1.5% or less £100,000 are not acceptable. A formal Variation is not required for this process and changes made in this way have been given the tag of "automatic variation".

In ***National Highways Authority of India v Som Datt Builders – NCC - NEC (JV & Ors) (29 August 2007)*** the High Court of Delhi considered the FIDIC Red Book 4th edition, and the consequences of the quantities of soil reinforcing geogrid / geotextile material exceeding those set out in the Bill of Quantities. The issue was whether this material should be paid at the contract rates (as asserted by Som Datt) or at a newly negotiated rate (as asserted by the Highways Authority). Whilst the case primarily concerned the interpretation of Clause 51 [*Alterations, Additions and Omissions*] reliance was placed on Sub-Clause 55.1 which states, *"The quantities set out in the Bill of Quantities are the estimated quantities for the Works, and they are not to be taken as the actual and correct quantities of the Works to be executed by the Contractor in fulfilment of his obligations under the Contract"*. Sanjay Kishan Kaul, J found that it was an ordinary increase in quantities to be paid at the contract rate and not as a Variation. The decision was appealed by the Highways Authority in ***National***

Highways Authority of India v Som Datt Builders – NCC - NEC (JV & Ors) (17 November 2009)[2]. The geogrid / geotextile material as originally estimated in the Bill of Quantities had been exceeded by nearly three times. There had been no instruction from the Engineer. The Highways Authority considered that a Variation existed and that as the actual quantities had exceeded the tolerance limits set out in the Contract, the Engineer was entitled to seek a renegotiation of the rate for the additional quantities. Som Datt disagreed that there had been a Variation and that any renegotiation was required. The Court found for the Highways Authority and overturned the earlier decision.

Note: there are also various cases in the High Court of Delhi considering whether a Contractor was entitled to a price adjustment on items of work referred to in the Bill of Quantities under Sub-Clauses 60.1(d) and Clause 70 of the FIDIC Red Book 4th edition. See for example, National ***Highways Authority of India v Unitech - NCC Joint Venture (30 August 2010)***[3], ***M/S JSC Centrodostroy v M/S National Highways Authority (5 September 2013)***[4], and ***National Highways Authority v MS KMC-RK-SD JV (22 October 2013)***[5].

Sub-Clause 14.1(d) is based on Sub-Clause 57.2 of the FIDIC Red Book 4th edition. Under this Sub-Clause the Contractor is obliged to provide the Engineer with a proposed breakdown of each lump sum price in the Schedules (within 28 days of the Commencement Date) unless otherwise stated in the Particular Conditions. The breakdown does not bind the Engineer, who may or may not take it into account when preparing the Payment Certificates, but he would be expected to discuss any queries or changes with the Contractor. As with the FIDIC Red Book 4th edition its purpose and effect is to reduce the scope for argument as to the proportion of items included in the Schedules as lump sums which should be included in each Variation so that the payments reasonably reflect the distribution of the lump sums over the period of the Contract. The Contractor will wish to be paid in full for the item at the earliest possible moment.

Sub-Clause 14.2 - Advance Payment

The Employer is obliged to provide an advance payment for mobilisation as detailed in the Appendix to Tender, in exchange for the Contractor's guarantee. It is expressed either as a sum or as a percentage of the Accepted Contract Amount. The advance payment is repaid through percentage reductions in Payment Certificates. If the advance payment is not repaid correctly, the whole of the outstanding balance immediately becomes due and payable by the Contractor to the Employer.

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[2] FAO(OS) No. 427 of 2007.

[3] FAO(OS) No.338/2010 & CM No.8828/2010.

[4] O.M.P. 855/2013.

[5] O.M.P. No. 1043/2013.

Advance payment is not a defined term. It is a payment made by the Employer to the Contractor in advance of the Works by way of an interest free loan to cover the costs of mobilisation. Its purpose is to ease the Contractor's cash flow. Although provision for advance payment was given at Clause 60 of the Suggested Conditions of Particular Application under the FIDIC Red Book 4th edition, this is a new provision in the FIDIC Red Book 1999.

The total advance payment (expressed either as a sum or as a percentage of the Accepted Contract Amount), the number and timing of instalments (if more than one), and the applicable currencies and proportions, must be stated in the Appendix to Tender.

If the total advance payment is not specified in the Appendix to Tender this Sub-Clause does not apply, but if the Contractor is not to receive advance payment it is good practice to strike through this clause and insert *"not applicable"* in the relevant part of the Particular Conditions.

The advance payment is repaid through percentage deductions in Payment Certificates. These percentages must be provided in the Appendix to Tender. If no percentages are stated in the Appendix to Tender, deductions start in the Payment Certificate in which the total of all certified interim payments (excluding the advance payment and deductions and repayments of retention) exceeds 10% of the Accepted Contract Amount less Provisional Sums. The deductions will be made at 25% of the amount of each Payment Certificate (excluding the advance payment and deductions and repayments of retention) in the currencies and proportions of the advance payment, until the advance payment has been repaid. The rate of deduction for the repayments should be checked to ensure that repayment is achieved before completion. According to the Guidance for Preparation of Particular Conditions these percentages are based on the assumption that the total advance payment is less than 22% of the Accepted Contract Amount.

In exchange for the advance payment the Contractor must give a guarantee. FIDIC gives an example form at Annex E. The guarantee must be issued by an entity and from within a jurisdiction approved by the Employer and in the form either annexed to the Particular Conditions or approved by the Employer. This is a more stringent condition than in the more recent MPA Harmonised Edition (the FIDIC Pink Book 1999) where the guarantee need only be issued by a *"reputable bank or financial institution"* which may be selected by the Contractor. The guarantee should take into account the law by which it will be governed and be drafted by lawyers familiar with such. The Contractor must ensure that the guarantee is valid and enforceable until the advance payment has been repaid by the Contractor as indicated in the Payment Certificates. The ease of enforceability of guarantees varies considerably between jurisdictions and therefore the choice of law applicable to the guarantee is worth careful consideration. It does not necessarily need to be the same as the governing law of the FIDIC contract.

If the terms of the guarantee specify an expiry date (which might be required by the issuing entity), and the advance payment has not been repaid 28 days prior to that expiry

date, the Contractor must extend the validity of the guarantee until the advance payment has been repaid. An expiry date should therefore take into account possible delays to completion. If the Contractor fails to extend the guarantee the Employer may call upon it for the unpaid balance. The 28 days is specified to allow the Employer a reasonable period in which to make the necessary arrangements for the call. The Employer may then proceed on the basis that the advance has been repaid by the guarantor.

The Engineer may only issue an Interim Payment Certificate for the first instalment after:

- he receives a Statement (plus supporting documentation) from the Contractor under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] detailing the amount which the Contractor considers himself to be entitled; and

- the Employer receives (i) the Performance Security in accordance with Sub-Clause 4.2 [*Performance Security*] and (ii) the guarantee in the amounts and currencies equal to the advance payment.

If, following receipt of this information, the Engineer fails to issue the Interim Payment Certificate, the provisions of Clause 16 [*Suspension and Termination by Contractor*] apply.

Sub-Clause 14.7(a) provides for payment of the first instalment of the advance payment on the later of either:

- 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 14.2 [*Advance Payment*].

The Employer will be aware that this payment is to be made and initiate arrangements for making prompt payment. If the Engineer fails to pay, the provisions of Clause 16 [*Suspension and Termination by Contractor*] apply. Delay in payment by the Engineer might delay mobilisation. If payment is made but mobilisation is slow the Employer might query the use of the monies.

If the advance payment has not been repaid prior to the issue of the Taking-Over Certificate for the Works or prior to termination under Clause 15 [*Termination by Employer*], Clause 16 [*Suspension and Termination by Contractor*] or Clause 19 [*Force Majeure*] (as the case may be), the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Employer.

Sub-Clause 14.3 - Application for Interim Payment Certificates

The Contractor is obliged to provide the Engineer with copies of a monthly Statement, in an approved form. This must detail the amounts to which the Contractor considers

himself to be entitled, together with supporting documents including a report on progress. There is no definition of the term *"supporting documentation"* and so this may be open to dispute. It is not clear, for example, whether the supporting documentation would be considered to be incomplete if the progress report was included but was not complete.

The Statement must list the estimated contract value of the Works, together with specified amounts of money to be added or deducted to the estimated contract value (as applicable), in the order prescribed.

This Sub-Clause is similar to Sub-Clause 60.1 of the FIDIC Red Book 4th edition. It starts the mechanism for payment. It is in the Contractor's interest to comply as soon as he is able because as soon as he does the sooner he is paid.

The Contractor is obliged to submit six copies of a Statement to the Engineer monthly, in a form approved by the Engineer (preferably in advance and incorporated into the Contract documents) together with supporting documents. The timing of the first Statement for the work executed will depend on the progress of the Works, and will occur when the net amount due to be paid exceeds the minimum amount of Interim Payment Certificate stated in the Appendix to Tender.

Unlike the FIDIC Red Book 4th edition there is no express provision for the Statement to be signed by the Contractor.

It is prudent for the Contractor to send the Statement and supporting documents in a way which requires a receipt, e.g. recorded delivery, because Sub-Clause 14.7 requires the Employer to make payment of the sum certified by the Engineer within 56 days from the date the Engineer receives the Statement and supporting documents.

The Statement must show *"in detail"* the amounts to which the Contractor considers himself to be entitled, and attach all supporting documents including the report on the progress during this month in accordance with Sub-Clause 4.21 [*Progress Reports*]. Whilst there may be argument as to whether the Contractor has shown sufficient detail, as discussed in the commentary on Sub-Clause 14.7 below, the trigger for payment is the Engineer's receipt of the Statement and supporting documentation.

The Statement must include the following items, as applicable (and expressed in the currencies in which the Contract Price is payable) <u>in the precise order listed</u>:

(a) The estimated contract value of the Works executed and the Contractor's Documents produced up to the end of the month (including Variations but expressly excluding the items described below). Sub-Clause 14.4 [*Schedule of Payments*] assists with the calculation of the estimated contract value. There is no requirement for the Works to have been properly executed or executed in accordance with the Contract. Works are defined to include both Permanent Works and Temporary Works. Permanent Works are defined to be *"executed by*

the Contractor under the Contract". Temporary Works are defined as required *"for the execution and completion of the Permanent Works"*. Included in the estimated contract value will be Works which have been measured in accordance with Clause 12 [*Measurement and Evaluation*] and an estimate of the value of the Works which have not yet been certified by the Engineer. The estimated contract value must be calculated with reference to Sub-Clause 14.4 [*Schedule of Payments*].

(b) Any amounts to be added and deducted for changes in legislation and changes in cost, in accordance with Sub-Clause 13.7 [*Adjustments for Changes in Legislation*] and Sub-Clause 13.8 [*Adjustments for Changes in Cost*].

(c) Any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Appendix to Tender to the total of the above amounts, until the amount retained by the Employer reaches the limit of Retention Money (if any) stated in the Appendix to Tender.

(d) Any amounts to be added and deducted for the advance payment and repayments in accordance with Sub-Clause 14.2 [*Advance Payment*].

(e) Any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.5 [*Plant and Materials intended for the Works*].

(f) Any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [*Claims, Disputes and Arbitration*]. The *"or otherwise"* has been added to the corresponding paragraph of the FIDIC Red Book 4th edition. Therefore, claims for breach of contract, in tort (for example, negligence or misrepresentation), in equity (for example, for breach of good faith) should also be detailed in the Statement, otherwise they may be barred. It would be incorrect for a Contractor to assume that this Statement automatically constitutes formal notice of a claim. Notice of a Contractor's Claim must be given under Sub-Clause 20.1 describing in detail the event or circumstance giving rise to the claim rather than merely the amount to which the Contractor considers himself entitled under this Sub-Clause. However, if the claim were described in detail in the Statement, it is at least arguable that it might constitute satisfactory notice.[6]

[6] In ***ICC Case 5634 (1989) - Final Award,*** in an unspecified location, the arbitral tribunal considered whether a claim for damages should be valued and certified under Clause 60(5) of the FIDIC 3rd edition (as amended). Clause 60(2)(b) required the Monthly Statement to set out: *"Any amounts to which the Contractor considers himself entitled in connection with all other matters for which provision is made under the Contract including any Temporary Works or Constructional Plant for which separate amounts are included in the Bills of Quantities."*. The arbitral tribunal found that a claim for damages for breach cannot properly be said to be a matter *"for which provisions is made under the Contract"*. Quite apart from the general context of this paragraph, there was a significant contrast between the words *"under the Contract"* and the wider languages used in the opening sentence of Clause 67.

(g) The deduction of amounts certified in all previous Payment Certificates.

The stipulated order in which the interim payment application is to be calculated is important. For example, price escalation under Sub-Clause 13.8 is calculated before the cost of materials on Site as this will naturally include for inflation as any invoiced cost will be the cost current at the date of purchase of the materials.

The list does not include any amounts to be added for Provisional Sums under Sub-Clause 13.5 or any amount to be added and deducted for electricity, water and gas under Sub-Clause 4.19.

It is not necessary to have a Statement for any amounts which have been certified by the Engineer but not paid by the Employer. The Contractor should confirm the Certificates which have been paid and the due dates for unpaid Certificates. The Contractor is entitled to finance charges for delayed payments without formal notice or certification under Sub-Clause 14.8 [*Delayed Payment*] but a prudent Contractor would have a calculation of any finance charges due under Sub-Clause 14.3(f).

The Engineer will not certify any payment until the Employer has received and approved the Performance Security under Sub-Clause 14.6 [*Issues of Interim Payment Certificates*]. This approval must not be unreasonably withheld or delayed under Sub-Clause 1.3 [*Communications*].

Sub-Clause 14.4 - Schedule of Payments

This Sub-Clause assists with the calculation of the estimated contract value required under Sub-Clause 14.3(a). If the Contract includes a schedule of payments then, unless otherwise stated, the instalments listed in the schedule of payments will be the estimated contract values. If the Contract does not include a schedule of payments, the Contractor shall submit non-binding estimates of the payments which he expects to become due during each quarterly period.

A schedule of payments is not compulsory, but it allows the Parties to plan their cash flow (and in that respect is similar to Sub-Clause 14.3 of the FIDIC Red Book 4th edition).

The schedule of payments is not a defined term. It might be based on (i) calendar months, or (ii) on actual progress, i.e. defined milestone events. If the instalments are not defined by reference to the actual progress achieved in executing the Works, and if actual progress is found to be less than that on which this schedule of payments was based, then the Engineer may proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine revised instalments, which will take account of the extent to which progress is less than that on which the instalments were previously based. It is only in these circumstances that the Engineer is permitted to revise a payment schedule.

If the Contract does not include a schedule of payments, the Contractor must submit non-binding estimates of the payments which he expects to become due during each quarterly period so that the Employer may plan his finances accordingly. Unless otherwise stated, this can be assumed to be January-March, April-June, July-September and October-December. The first estimate must be submitted 42 days after the Commencement Date.

There is no prescribed form for the estimate, so if the Employer requires certain details they should be specified in the Particular Conditions.

Neither Party is bound by the Contractor's estimates. However, revised estimates are required at quarterly intervals, until the Taking-Over Certificate has been issued for the Works.

Sub-Clause 14.5 - Plant and Materials Intended for the Works

This Sub-Clause provides for the payment for Plant and Materials which are not yet fixed, but either en-route to Site or delivered and properly stored on Site. It therefore takes into account Plant and Materials which have been allocated to the Works but are not yet incorporated into the Works. This minimises the Contractor's financing costs. The sums previously paid in respect of materials are automatically deducted in the Interim Payment Certificate once the materials have been incorporated into the Works. Firstly, the value of the materials on Site recorded at Sub-Clause 14.3(e)[7] is reduced by the amount of materials used up. Secondly, the 80% paid is taken into account as a sum paid in Sub-Clause 14.3(g). There is no possibility of duplication.

Importantly, this Sub-Clause only applies if the relevant Plant and Materials are listed in the Appendix to Tender, where there is no schedule of payments to specify the instalments in which payment is to be made (i.e. where Sub-Clause 14.4 [*Schedule of Payments*] has been deleted), and where it is not otherwise excluded in the Contract.

Plant is defined in Sub-Clause 1.1.5.5 as *"the apparatus, machinery and vehicles intended to form or forming part of the Permanent Works"* and Materials at Sub-Clause 1.1.5.3 as *"things of all kinds (other than Plant) intended to form or forming part of the Permanent Works, including the supply-only materials (if any) to be supplied to the Contractor under the Contract".*

There are two lists of relevant Plant and Materials – (i) those for payment when they are shipped, and (ii) those for payment when they are delivered to Site.

If (i) there are lists of relevant Plant and Materials in the Appendix to Tender, (ii) the Contractor has kept satisfactory records, and (iii) the Contractor has submitted a Statement of the costs of acquiring and delivering the Plants and Materials to Site (with evidence), then the Engineer may consider any amount to be added or deducted for Plant and Materials in a Contractor's application for an Interim Payment Certificate

[7] Previously considered in Sub-Clause 60.1(c) of the FIDIC Red Book 4th edition.

under Sub-Clause 14.3 [*Application for Interim Payment Certificate*] and shall *"determine and certify each addition"*[8]. There is no provision for disagreement in compliance with these requirements. It is not clear, for example, who determines whether the Contractor's records are satisfactory.

The amount to be included in the Interim Payment Certificate must be 80% of the cost of the Plant and Materials as determined by the Engineer. This *"cost"* is to include delivery to the Site although, for the items shipped and en-route to the Site (under paragraph (b)), such delivery may not be complete until after the Payment Certificate has been issued. It must take into account the documents mentioned in this Sub-Clause and the contract value of the Plant and Materials. This *"contract value"* is their value in accordance with the Contract, i.e. the applicable part of the Contract Price as defined in Sub-Clause 14.1(a). The expression *"contract value"* is also used in Sub-Clause 14.3(a), and Sub-Clause 14.4.

The same currencies will apply as those in which payment will become due when the contract value is included Sub-Clause 14.3 [*Application for Interim Payment Certificates*]. At that time, the Payment Certificate shall include the applicable reduction which shall be equivalent to, and in the same currencies and proportions as, this additional amount for the relevant Plant and Materials.

The Contractor must provide a bank guarantee in a form and issued by an entity approved by the Employer in respect of Plant and Materials listed for payment when shipped. The guarantee should be in the amounts and currencies equal to the amount due under this Sub-Clause. The guarantee may be in a similar form to the form referred to in Sub-Clause 14.2 [*Advance Payment*] and must be valid until the Plant and Materials are properly stored on Site and protected against loss, damage or deterioration. Consequently, if any interim payment expressly includes an amount for Plant or Materials which are not on Site, payment of such amount may be withheld unless and until the Contractor provides the guarantee.

Sub-Clause 1.3 requires approvals to be given in writing and not unreasonably withheld. The reasonableness of withholding an approval will depend upon the extent to which the guarantee and the guarantor, which issued it, comply with any requirements specified in the Particular Conditions. If the security is *"in a similar form to the form referred to in Sub-Clause 14.2"*, the Employer cannot insist upon a more onerous form.

The Plant and Materials shipped must *"be in accordance with the Contract"* whereas those delivered to Site must *"appear to be in accordance with the Contract"*. Plant and Materials shipped and en-route to the Site do not have to *"appear"* to be in accordance with the Contract, because they may not have been inspected by the Engineer. Therefore, the Contractor has to provide security in the form of a guarantee,

[8] Note: there is no express reference to Sub-Clause 3.5 [*Determinations*].

because the shipped Plant and Materials may not become the Employer's property until the time defined in Sub-Clause 7.7 [*Ownership of Plant and Materials*].

It is worth noting that escalation is not applied to payments for materials brought onto Site under Sub-Clause 14.5. This is for two reasons. Firstly, the Contractor is entitled to be paid 80% of *"cost"*, namely the invoiced cost of the materials. This payment naturally includes for inflation as the invoiced cost will be the cost current at the date of the purchase of the materials. Secondly, Sub-Clause 14.3 stipulates the order in which the interim payment application is to be calculated. Escalation is calculated before the cost of materials on Site is to be claimed.

Sub-Clause 13.8 defines "Pn" as *"the adjustment multiplier to be applied to the estimated contract value in the relevant currency of the work carried out in period "n", this period being a month unless otherwise stated in the Appendix to Tender"*. Sub-Clause 14.3(a) also refers to the *"estimated contract value of the Works"* and specifically excludes Sub-Clause 14.3(e). Sub-Clause 14.3(e) is *"any amounts to be added and deducted for Plant and Materials in accordance with Sub-Clause 14.5 [Plant and Materials intended for the Works]"*. Therefore, only the value of the executed works is to be included in the formula governing Price Adjustment under Sub-Clause 13.8. Price Escalation under Sub-Clause 13.8 will be applied to the value of the executed works for the relevant month (which will include the cost of the incorporated plant and materials but not the stockpiled plant and materials).

The result is that the Contractor may gain an advantage over the months between the time the materials are purchased and the time they are incorporated into the Works. Of course, if prices fall during that period, the Employer could benefit. That is the way the contract works and should be taken into account by an Employer deciding whether to operate Clause 14.5, just as it will be taken into account by contractors bidding for work.

Sub-Clause 14.6 - Issue of Interim Payment Certificates

This Sub-Clause is a development on Sub-Clause 60.2 and Sub-Clause 60.4 of the FIDIC Red Book 4th edition. Once (i) the Employer has received and approved the Performance Security, and (ii) the Engineer has received a Statement with supporting documentation, the Engineer must issue to the Employer an Interim Payment Certificate (with supporting particulars) stating the amount which the Engineer *"fairly determines"* to be due strictly in accordance with the terms of the Contract. Presumably this may be a positive or negative amount. There is no express provision for a copy to be sent to the Contractor, and there is no provision for the Engineer to give reasons and/or an explanation of any difference between the Interim Payment application (Statement) and the Interim Payment Certificate (for example, why any amount is withheld). Further, there is no provision for the Engineer to be requested to amend his Statement if, for example, there are errors in it. If the Contractor is not satisfied with the figure he will need to give notice under Clause 20 [*Claim, Disputes and Arbitration*].

Where the Engineer has received the Statement and supporting documentation, but the Employer has not received the Performance Security, the Engineer cannot issue the Interim Payment Certificate. It is only after the Performance Security has been received that the Engineer is obliged to issue an Interim Payment Certificate.

In the English case of ***Honeywell International Middle East Ltd v Meydan Group LLC***[9] Meydan alleged that an arbitration award was procured by perjury because it was falsely asserted in the arbitration that Honeywell had provided Meydan with the relevant performance security under the Contract. Meydan denied that the Performance Security was provided, and that until the Performance Security was provided, nothing was due under the Contract. Under Sub-Clause 14.6 no payment could be certified in the absence of Meydan having received the Performance Security. It was alleged that Honeywell made a deliberately false claim when it said that the original document had been delivered to Meydan on 20 May 2010, because it was not delivered at all. It was also alleged that the document provided referred to Meydan LLC not Meydan Group LLC. Mr Justice Ramsay concluded that Meydan did not participate in the arbitration and therefore did not raise these matters there (but could have) so that the arbitral tribunal would have been able to decide whether or not the Performance Security was sent to Meydan. Meydan did not, at the relevant times during the performance of the Contract, refuse to make payment to Honeywell on the basis that the Performance Security had not been provided. Further there do not appear to have been any requests for the Performance Security which, if it had not been provided and Meydan had been insisting that it should have been provided, would have been expected. It is correct that the document which Honeywell says enclosed the Performance Security was not sent until May 2010 and that does not appear to have been of concern to Meydan at the time. As set out in ***Dicey, Morris and Collins*** at 16-151 it is necessary to show either that the evidence of fraud was not available to the party alleging it at the time of the arbitration hearing or, if perjury is alleged, that the evidence for it is so strong that it would reasonably be expected to be decisive at the hearing: see ***Westacre*** at 309. In the present case the allegation by Meydan necessarily amounts to an allegation that the letter and the attached performance security were forgeries. That was something which Meydan could evidently have asserted in the arbitration at the time and it had the evidence available to say that if it had wanted to. The mere assertion by Meydan of alleged perjury based on Mr Sulaiman's evidence did not amount to evidence that is so strong that it would reasonably have been expected to have been decisive at the hearing. The evidence that the document was sent and that the attached performance security issued by HSBC was genuine, is very strong evidence that the Performance Security was obtained from HSBC and that on that basis it is strong evidence that it would have been sent to Meydan at the time. Mr Sulaiman does not give evidence himself that Meydan did not receive, only that he did not see it and he would have expected to have seen it. On that basis Mr Jutice Ramsay did not consider that Meydan could raise a point on fraud or perjury on an application to enforce which they could have, but did not, raise in the arbitration. Nor did he consider that the evidence of perjury was so strong that it would reasonably have been expected to be decisive at the arbitration hearing.

[9] [2014] EWHC 1344 (TCC).

If the Engineer fails to issue the Interim Payment Certificate within 28 days of receipt of the Statement and supporting documents (including the progress report under Sub-Clause 4.21) the Contractor may give 21 days' notice and then suspend or reduce the rate of work, under Clause 16 [*Suspension and Termination by the Contractor*]. If the Engineer has still failed to issue the Interim Payment Certificate after 56 days from receipt of the Statement and supporting documents, the Contractor may proceed to terminate the Contract (which in effect means 28 days after failure to issue the Interim Payment Certificate). However, termination is not to be exercised lightly as the consequences of doing so wrongly may be severe under the governing law. It would of course be totally unjust for a Contractor to suspend or reduce the Work or terminate the Contract for lack of an Interim Payment Certificate, where the Employer had not received the Performance Security.

If the Employer has received the Performance Certificate, an Interim Payment Certificate can only be withheld in the following circumstances.

Firstly, where before issuing the Taking-Over Certificate for the Works, the amount of the Interim Payment Certificate would be less than the minimum amount of Interim Payment Certificates stated in the Appendix to Tender. Where this happens, the Engineer must give notice to the Contractor. However, the Engineer should not endeavor to minimise certification, and decline to certify whenever he is entitled to do so. Withholding of certification may not be to either Party's benefit.

Secondly, if anything supplied or work done by the Contractor is not in accordance with the Contract, the cost of rectification or replacement may be withheld until rectification or replacement has been completed. Further, if the Contractor was, or is, failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld until the work or obligation has been performed. Although the Retention Money retained under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] may be sufficient to cover the withheld amounts, the withholdings described are not limited to the amount of Retention Money retained. The *"contract value"* of the item (as described in Sub-Clause 14.3(a)) is typically the value prescribed by the Contract less the anticipated cost of making it comply with the Contract. If an item of work is so non-compliant that its contract value is zero, there would typically be no payment due and therefore nothing from which a deduction for withholding may be affected.

The Engineer may correct or modify any Payment Certificate that should properly be made to any previous Payment Certificate. The term *"that should properly be made"* is open to interpretation. Although the title of the Sub-Clause only mentions Interim Certificates, the last sentence of the Sub-Clause expands the provision to allow the Engineer to make any correction or modification that should be made to any previous Payment Certificate. Whilst it could be argued that the provision might mean that the Final Payment Certificate could be corrected or modified, such an interpretation would be inconsistent with Sub-Clauses 1.1.4.4 [*Final Payment Certificate*], 14.11

[*Application for Final Payment Certificate*] and 14.13 [*Issue of Final Payment Certificate*].

A Payment Certificate is not deemed to indicate the Engineer's acceptance, approval, consent or satisfaction. This discourages:

- the Employer from withholding an interim payment if he feels entitled to withhold acceptance, approval, consent or satisfaction; and

- the Contractor from relying upon certificates or payments as evidence of acceptance, approval, consent or satisfaction in respect of paid work.

Once the Interim Payment Certificate is issued the Employer is bound by it. He must make payment in full, irrespective of any entitlement to compensation arising from any claim which the Employer may have against the Contractor. If the Employer considers himself entitled to claim against the Contractor, notice and particulars must first be submitted under Sub-Clause 2.5 [*Employer's Claims*]. The Employer's entitlement is then to be agreed or determined in accordance with Sub-Clause 3.5, and incorporated as a deduction in a Payment Certificate. This procedure, as prescribed in Sub-Clause 2.5 (notice, particulars, and agreement or determination), may require less time than the 28-day period given in the first paragraph of Sub-Clause 14.6 in which the Engineer is obliged to issue an Interim Payment Certificate.

As well as the contractual mechanisms, the laws and doctrines of the relevant governing law must also be considered, and this is particularly so when regarding the withholding of payment.

It should be noted that in UK construction contracts the terms of the ***Housing Grants, Construction and Regeneration Act 1999*** (HGCRA) as amended by the ***Local Democracy, Economic Development and Construction Act 2009*** (LDEDC) apply. The Act provides that a party to a UK construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

Further, as stated by Robert Knutson[10], *"Distinction must be made between contractual rights to withhold sums said to be due (as found in this Sub-Clause) and rights which exist at Common Law"*. He continues, *"Rights said to exist at Common Law exist primarily by virtue of the operation of the doctrines of set-off and abatement. Whilst the law in this area is probably unnecessarily complicated, it is certainly true to say that the right to set-off must be distinguished from the right to counterclaim if a dispute arises. Set-off (like abatement) is an absolute defence which exists by virtue of the operation of the law and could normally be raised very late in the day … While it may be easy to assert that contractual mechanisms should work in accordance with their terms and of course to be effective should be operated exactly in accordance with the*

[10] FIDIC An Analysis of International Construction Contracts, page 67.

clause in question, the existence of this doctrine creates a threat, under English law, the contractual payment provisions will be frustrated in the face of a set-off claim."

In ***ICC Case 11813 (2002) - Interim Award***, in London, an arbitral tribunal was asked to consider the FIDIC Yellow Book (Test Edition 1998) and whether the Respondent was entitled to set-off amounts which it claimed from the First Claimant against the amounts of unpaid certified sums due to the First Claimant. The Claimant argued that the Respondent had no right to set-off as a matter of law. Reliance was placed on a number of provisions of the Contract which, it was argued, determine that the agreement between the Parties was a "pay and then fight" contract and that any rights of set-off were effectively excluded. It was accepted by both Parties that English law was the proper or substantive law of the Contract. It is a well-established principle of English law that rights of common law and equitable set-off are not excluded in the absence of a clear contractual intention otherwise. This principle was confirmed in the English case of ***Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd***[11] in particular in the judgments of Lords Diplock and Salmon and Viscount Dilhorne. The arbitral tribunal stated that the principles enunciated in ***Gilbert-Ash*** are particularly appropriate for application in an international construction contract of the present sort, where parties from different nationalities operate under a contract in a foreign language. In such circumstances, the arbitral tribunal said it would be most reluctant to conclude that a party accepts the exclusion or extinction of rights of set-off - which could involve very substantial sums - based on anything other than obvious and precise language, putting the parties on clear notice that such an extinction would occur. The Claimant relied on a number of different provisions in the Contract as assertedly excluding any right of set-off by the Respondent, in particular, Sub-Clauses 2.5, 14.6, 14.7, 20.4 and 20.6. However, the arbitral tribunal concluded that for purposes of the summary application none of these provisions had been shown to satisfy the ***Gilbert-Ash*** standard. For example, Sub-Clause 14.6 permits, but does not require, the Engineer to adjust what would otherwise be certified to reflect defects and other contractual failures to perform. Further, Sub-Clause 14.6 does not, expressly or at all, purport to exclude the Employer's rights of set-off. Also, Sub-Clause 14.7 provides that the Employer is required to *"pay to the Contractor ... (b) the amount certified in the Final Payment Certificate within 56 days after the Engineer receives the [Clause 14.3] Statement and Supporting documents..."* Although there are no express words permitting any set-off, equally there are no words excluding any set-off. Absent such an exclusion, the arbitral tribunal found that the test of ***Gilbert-Ash*** was not satisfied and there was no basis for concluding that the parties meant to exclude common law set-off rights. Therefore, the arbitral tribunal concluded that there was no express language excluding set-off in the test edition of the FIDIC Yellow Book 1998. Set-off was therefore permitted as a defence to the claim.

In the case of ***Sedgman South Africa (Pty) Limited & Ors v Discovery Copper Botswana (Pty) Limited***[12], the Supreme Court of Queensland analysed the meaning of

[11] [1974] AC 689.
[12] [2013] QSC 105.

Sub-Clause 14.6 in an amended FIDIC Silver Book 1999, in particular, the words *"Payments due shall not be withheld …"*. Sedgman contracted to design and construct parts of the Boseto Copper Project in Botswana for Discovery Copper. Sedgman applied for an interim payment of US$20 million. Amended Sub-Clause 14.6 required Discovery Copper to give notice within 7 days [rather than the standard 28 days] if they disagreed with any items in the application (Statement). Discovery Copper failed to give the notice and did not contest the application until 14 days later. Sedgman applied to the Court for payment of the sum claimed. The Court dismissed Sedgman's application for payment, holding that there was a genuine dispute and that Sedgman's interpretation of the contract was incorrect. The Court held that: *"This contract did not entitle the applicants to be paid the sum which they now claim, simply from the fact that there was no response to their interim claim within the period of seven days stipulated in the contract."*. McMurdo J considered the words *"Payments due shall not be withheld"* at Sub-Clause 14.6 and stated that they were *"different from saying that a payment will become due if a notice of disagreement is not given"* as Sedgman contended. He said: *"The alternative view [...] is that it does not make a payment due. Rather, it governs payments which, by the operation of another term or terms, have [already] become due."*. If Sedgman were correct, the operation of the contractual clauses to determine claims and Variations could otherwise be displaced by the operation of Sub-Clause 14.6. If the Contractor included a claim in his application for payment which was inconsistent with, for example, a Dispute Adjudication Board's decision, and the Employer did not notify disagreement, the outcome would be that Dispute Adjudication Board's decision would be displaced.

In ***County Government of Homa Bay v Oasis Group International and GA Insurance Limited (2017)***[13], among other things, the High Court of Kenya at Migori considered the status of Interim Payment Certificates. Oasis's claim was mainly based on the fact that works were undertaken, and Interim Payment Certificates were prepared and approved by the Government's consultants who then forwarded them to the Government for payment, but rather than pay them in full the Government chose to make part payments thereof. The claim was for the balances of the amounts contained in the Interim Payment Certificates. The Government argued that the Interim Payment Certificates were not the final agreed and approved payments but remained subject to verification and approval by the Government even though the same were forwarded to it by its Consultant. Unfortunately, due to a procedural error in the exhibiting of evidence (i.e. the Interim Payment Certificates) the court was unable to reach a decision on this matter. However, Judge A.C.Mrima said, *"I wish to state that even upon the consideration of the IPCs, this Court would have agreed with the Plaintiff that the IPCs are not the finally agreed payments and are subject to verification by the Plaintiff. (See General Condition 14 of the General Conditions of Contract for Construction as adopted by the International Federation of Engineers and Consultants (FIDIC))."*.

[13] CIVIL CASE NO. 13 OF 2015.

Sub-Clause 14.7 - Payment

This Sub-Clause has been developed from Sub-Clause 60.10 of the FIDIC Red Book 4th edition. Provision is now expressly made for payment in instalments.

The first instalment of the **advance payment** must be paid by the Employer 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 14.2 [*Advance Payment*], whichever is later. When entering into the Contract, the Employer will typically be able to calculate the amount of this first payment and should immediately initiate arrangements for making prompt payment.

The amount certified in each **Interim Payment Certificate** must be paid by the Employer within 56 days after the Engineer receives the Contractor's Statement and supporting documents. Arguably, even if the Engineer does not certify, the time for payment still expires 56 days after receipt of the Contractor's Statement and supporting documentation and the Employer can open himself up to termination if he does not pay. The Employer will have the cash flow estimate provided by the Contractor under Sub-Clause 14.4 as a forewarning.

The amount certified in the **Final Payment Certificate** must be paid by the Employer within 56 days after the Employer receives the Payment Certificate.

The Employer is obliged to pay these sums without any deduction. If the Employer considers himself entitled to claim against the Contractor, notice and particulars must first be submitted under Sub-Clause 2.5 [*Employer's Claims*], subject to the exceptions listed. The Employer's entitlement is then to be agreed or determined, and maybe incorporated as a deduction in the Contract Price and Payment Certificates. This procedure may require less time than the 28 days specified in Sub-Clause 14.6 [*Issue of Interim Payment Certificates*]. The clear intention is to ensure that the Contractor is paid whatever is certified, when it is certified, with disputes to be considered later, i.e. pay now argue later.

Payment of the amount due in each currency must be made into the bank account, nominated by the Contractor, in the payment country (for this currency where there is more than one payment country) specified in the Contract. For each of the currencies of payment, a *"payment country"* may have been specified, which might be the country of the currency of payment. Only the number of currencies in which payment is to be made therefore limits the number of bank accounts nominated. Alternatively, all payments may have been specified as being made into the Contractor's bank in his country. When pricing their tenders, tenderers will take account of the option to specify a payment country, and of the periods for payment. Longer periods for payment increase the Contractor's financing costs, so tenderers would wish to increase their prices accordingly.

If payment is delayed the Contractor may be entitled to financing charges under Sub-Clause 14.8 [*Delayed Payment*] (as well as his entitlement to payment), calculated for a period, which is deemed to commence on the date for payment specified in Sub-Clause 14.7, irrespective of the date on which any Interim Payment Certificate is issued. For example, if the Certificate is a week late, the Contractor will be entitled to financing charges under Sub-Clause 14.8 unless the Employer manages to accelerate his procedures and comply with Sub-Clause 14.7.

If the Employer fails to comply with these requirements, then the Contractor may give 21 days' notice and then suspend or reduce the rate of the work under Clause 16 [*Suspension and Termination by Contractor*]. The Contractor may then proceed to terminate the Contract if payment is not received within 42 days of the due date.

The Parties may agree for different periods for payment to apply. If so, the Guidance for the Preparation of Particular Conditions provides that the Sub-Clause may be amended as follows, "*In sub-paragraph (b) of Sub-Clause 14.7, delete '56' and substitute '42'".*

If the country/countries of payment need to be specified, details may be included in a Schedule.

In the case of ***General Earthmovers Limited v Estate Management and Business Development Company***[14], the High Court of Trinidad and Tobago was asked to consider an application by Estate Management to set aside a default judgement relating to the non-payment of two Interim Payment Certificates. Estate Management referred to errors in the Interim Payment Certificates relating to a reduction in the scope of works and a lack of agreement in respect of additional works. Judgement was set aside because there was a realistic prospect of success.

In ***Construction Associates (Pty) Ltd v CS Group of Companies (Pty) Ltd***[15] *(13 June 2008)* the High Court of Swaziland was asked to consider non-payment of Construction Associates' Final Payment Certificate. Construction Associates sought summary judgement. CS Group argued that: (i) the Parties were obliged to refer the matter to arbitration before referring to a court of law, (ii) Construction Associates had been overpaid, (iii) Construction Associates had overcharged the Employer in respect of the Bill of Quantities, and (iv) the quality of Construction Associates' workmanship was poor. The court discussed the following: (i) the architect/Engineer is the agent of the Employer when issuing the certificates, (ii) the Employer is bound by the acts of his agent, (iii) the Employer cannot dispute the validity of a payment certificate merely because it has been given negligently or the architect/Engineer has used his discretion wrongly, (iv) the Employer is bound to pay the sum certified, v) the fact that the amount of the certificate is so payable does not mean that the Employer is left without a remedy if the architect/Engineer, in an interim certificate, has certified in respect of defective

[14] [2007] TTHC 50 (6 November 2007)
[15] CIVIL CASE NO. 3026/06

work or has certified too large an amount. In relation to CS Group's claims the court held that: i) there was no "dispute" between the parties, therefore parties were not obliged to refer the matter to arbitration prior to the court, ii) the Works were inspected prior to the issue of Interim Payment Certificates, therefore there was no overcharging, and iii) the alleged defects in the workmanship were not identified. The court referred to the FIDIC guidance on Bill of Quantities as follows: *"According to the NOTES ON DOCUMENTS. FOR CIVIL ENGINEERING CONTRACTS by FIDIC at page 38, "Bill of Quantities means a list of items giving identifying descriptions and estimated quantities of work comprised in the execution of the works to be performed. The objects of the Bill of Quantities are: (i) enable tenders to be prepared efficiently and accurately and facilitate the comparison of tenders when received; and (ii) when the contract has been awarded, to provide the basis for the valuation of work executed and to assist in the fixing of prices for varied or additional work." (my underlining)".*

In the case of ***Bosch Munitech (Pty) Ltd v Govan Mbeki Municipality***[16], Govan paid Bosch in respect of five interim payments issued between October 2013 and April 2014 but refused to pay amounts claimed in eight certificates issued between April 2014 and October 2014. Following Govan's refusal to pay, Bosch elected to terminate the alleged contract. Bosch considered that it was entitled to all the amounts payable under the outstanding interim payment certificates, as well as the release of retention held under the contract. The South African court was asked to consider the formation of the contract and incorporation of the FIDIC Red Book 1999 General Conditions of Contract. The Court held that no contract was formed between the Parties. It stated: *"This court has some sympathy with [Bosch]. It is clear from the evidence that both parties proceeded in good faith on the supposition that a contract had been concluded. The real problem resulting in the termination of the project was that funding was not available. The project was not properly budgeted for by [Govan*]. *Both parties engaged in efforts to acquire funding from alternative sources. All correspondence between the engineer and [Bosch] was conducted on the assumption that a contract existed. At no stage prior to this application did [Govan] inform [Bosch] that it was of the view that no valid contract existed. Sight must not be lost on the fact that the Bid Adjudication Committee approved [Bosch's] bid, but for a more limited scope of work, and directed that an award be made to it. Moreover, [Govan] offered no explanation for the steps it took beyond the expiration of the validity period, and the payments it made before April 2014, from which [Bosch] legitimately inferred that [Govan] considered itself bound by the contract supported by the signatures of Mr Mahlangu and Mr Mtshali on Annexure SM1. While it is still debateable whether a valid contract ever came into existence, [Govan's] silence and its conduct led [Bosch] bona fide to assert a cause of action which ultimately has proved to be unsustainable on the basis alleged … I am of the view that [Govan's] conduct falls short of the standard of ethical dealing one might legitimately expect of an organ of government in a constitutional state."*

16 (88360/2014) [2015] ZAGPPHC 1096; [2015] 4 All SA 674 (GP) (17 September 2015).

Sub-Clause 14.8 - Delayed Payment

This Sub-Clause sets out the consequences of delayed payment in much more detail than Sub-Clause 60.10 of the FIDIC Red Book 4th edition.

If payment is not received by the Contractor by the due date, this Sub-Clause gives the procedure for calculating financing charges.

Financing charges are not defined. They are commonly understood to be damages for breach of contract - the reimbursement of interest which has been incurred as a consequence of wrongfully delayed payment. It has been suggested that the term *"financing charges"* may have been adopted in this version rather than the term *"interest"* adopted in the FIDIC Red Book 4th edition to avoid offence to Sha'aria countries. The relevant governing law relating to interest may therefore be pertinent. As Robert Knutson[17] explains, *"It is worthwhile to record that the phrase "financing charges" is a legal term of art in England and may be, because of the complicated case law referred to above, distinguished from the concept of interest as damages for late payment. In Minter v WHTSO (1980) 13 BLR 1, financing charges for late payment of Variations for disturbed progress was recoverable as "direct loss and expense""*.

The distinction between financing charges and interest may be relevant not least of all because a Dispute Adjudication Board is only empowered to *"decide upon the payment of financing charges"* under Clause 8f of the Dispute Adjudication Board Procedural Rules in the Annex to the FIDIC 1999 edition. There is no express provision for the Dispute Adjudication Board to award interest. If there was no financing in fact, would there be no right to financing charges and/or interest?

The financing charges are compounded monthly on the amount unpaid during the period of delay. The date on which the Interim Payment Certificate is issued is not relevant when calculating these financing charges. Financing charges are calculated for a period which is *"deemed to commence on the date for payment specified in Sub-Clause 14.7"*. The FIDIC Contracts Guide states, *"This period applies even if no Interim Payment Certificate is issued, although it would then be difficult to establish the amount to which the rate is to be applied. If the Certificate is a week late and the Employer accelerates his procedures and complies with Sub-Clause 14.7, the Contractor will not be entitled to financing charges"*.

The Contractor is entitled to these financing charges without being required to give formal notice or certification. There is no time limit for payment and no express provision for interest on the financing charges if payment is delayed. The FIDIC Contracts Guide suggests that it may be preferable for financing charges to be included in the Contractor's Statement under Sub-Clause 14.3(f) for accounting purposes.

[17] FIDIC An Analysis of International Construction Contracts, page 68.

Financing charges are to be calculated at the annual rate of 3% above the discount rate of the central bank in the country of the currency of payment. This might become complicated if payments are due in several different currencies. Further, there may or may not be something called a discount rate in the country in question and there could be more than one rate identified as a possible candidate. The Guidance for the Preparation of Particular Conditions provides that if this rate is considered inappropriate when the tender documents are being prepared, a new rate may be defined in the Particular Conditions. Alternatively, the actual financing charges could be claimed and paid, taking account of local financing arrangements.

Robert Knutson[18] suggests that if Sub-Clause 14.8 is deleted, The Late Payment of Commercial Debts (Interest) Act 1998 may apply under English law.

Note: Sub-Clause 14.8 [*Delayed Payment*] deals only with a failure to receive payment under Sub-Clause 14.7 [*Payment*]. It does not deal with the withholding of retention monies without good reason under Sub-Clause 14.3 [*Application for Interim Payment Certificates*] and 14.9 [*Payment of Retention Money*].

For further provisions relating to delayed payment, see for example Sub-Clauses 16.1 [*Contractor's Entitlement to Suspend Work*], and 16.2 [*Termination by Contractor*].

Sub-Clause 14.9 - Payment of Retention Money

Retention Money is retained under Sub-Clause 14.3(c) and is released under this Sub-Clause in instalments. It is outside the normal Interim Payment process.

The first part of the Retention Money is released when the Taking-Over Certificate is issued under Clause 10 [*Employer's Taking Over*] (as in Sub-Clause 60.3 of the FIDIC Red Book 4th edition). If it is issued for the whole of the Works, 50% of the Retention Money must be certified by the Engineer for payment to the Contractor. However, if it is issued for a Section and/or part of the Works, under Sub-Clause 10.1 [*Taking Over of the Works and Sections*] and/or Sub-Clause 10.2 [*Taking Over of Parts of the Works*] respectively, it is now calculated at 40% of the proportion calculated by dividing the estimated contract value of the Section or Part by the estimated final Contract Price. Only 40% (not 50%) of this proportion is stated as being released at this stage. If half is released, there might be very little left (of the half of Retention Money) to be released on completion of the Works, because of Variations.

The date on which each Section is completed is to be stated in its Taking-Over Certificate. On this date, the Defect Notification Period commences, the duration of which is to be stated in the Appendix to Tender. No prescribed time limits are given for the payment of the balance of the Retention Money. The balance of the Retention Money is merely to be released *"promptly"* after the latest of the expiry dates of the Defects Notification Period. If a Taking-Over Certificate was issued for a Section, a

[18] FIDIC An Analysis of International Construction Contracts, page 67.

proportion of the second part of the Retention Money shall be certified and paid promptly after the latest of the expiry dates of the Defects Notification Period for the Section. This proportion shall be 40% of the proportion calculated by dividing the estimated contract value of the Section by the estimated final Contract Price.

The FIDIC Contracts Guide states that the word *"promptly"* suggests that it would not be appropriate to await the next application under Sub-Clause 14.3 [*Application for Interim Payment Certificates*]. It also states that the phrase *"latest of the expiry dates"* is used, because of the possibility of a Defect Notification Period (which is not the last to commence) being extended under Sub-Clause 11.3 [*Extension of Defects Notification Period*] and becoming the period with the latest expiry date.

In ***ICC Case 15789 (2010) - Final Award***, in an Eastern European capital city, a sole arbitrator was asked to consider the correlation between an extended 5-year warranty period (comprising of a 1-year Defects Liability Period plus an additional 4-years running from expiry of the Defects Liability Period) and payment of the Retention Money under an amended FIDIC Red Book 4th edition form of contract. A minimum 5-year warranty period was required under local law. The sole arbitrator decided as follows: *"94. Contractual agreements of the Parties comply with the requirements of the Act on Public Works when in Clause 9 of the Contract Agreement states the Warranty Period to 60 months [sic], and do not act contra provisions of this Act when in Annex 2 to the Contract Agreement Appendix to Tender they agree on the split of the warranty period to 12-month (basic) Defects Liability Period and 48-month (additional) Warranty Period, which in total represent the 60-month warranty period, requested by the law. 95. With respect to the mentioned, the Retention Money can be released at any time post accomplishment of the Work with contractually agreed conditions. 96. It is a purpose of the Retention Money to provide guarantee to the contractor that in case the works will not be finished in compliance with qualitative parameters, so that the hand-over and take-over will not be confirmed by the engineer and the builder will not be willing to remove all declared defects, such finances can be used to employ third persons to remove such defects of Work (visible at the hand-over). 97. Without a doubt, the time period for release of the Retention Money can be shorter than the warranty period. 98. As reasoned above, release of the Retention Money prior the lapse of the whole Warranty Period is not in conflict with the Act on Public Works; neither circumvents nor contravenes the purpose of law. 99. The division of the Warranty Period into two parts (regardless how they are called - split/additional), where after the lapse of the first one the Retention Money will be paid, is possible."*. Therefore, release of the Retention Money upon expiry of the 1-year Defects Liability Period was compatible with the 5-year warranty period.

The Engineer may withhold the estimated cost of any work which remains to be executed under Clause 11 [*Defects Liability*]. This entitlement applies to any release of Retention Money but is typically of greatest importance at the latest of the expiry dates of the Defect Notification Periods. In order to protect the Employer's interests, the amount withheld should be sufficient to cover the cost of another contractor completing the work but must be reasonable and not penalise the Contractor.

It has been suggested that disputes regarding the return of the retention would be less likely if the Employer were prepared to accept a guarantee in lieu of retention. If part of the Retention Money is to be released and substituted by an appropriate guarantee, an additional Sub-Clause may be added, such as this given in the Guidance for the Preparation of Particular Conditions:

> *"When the Retention Money has reached three-fifths (60%) of the limit of Retention Money stated in the Appendix to Tender, the Engineer shall certify and the Employer shall make payment of half (50%) of the limit of Retention Money to the Contractor if he obtains a guarantee, in a form and provided by an entity approved by the Employer, in amounts and currencies equal to the payment.*
>
> *The Contractor shall ensure that the guarantee is valid and enforceable until the Contractor has executed and completed the Works and remedied any defects, as specified for the Performance Security in Sub-Clause 4.2, and shall be returned to the Contractor accordingly. This release of retention shall be in lieu of the release of the second half of the Retention Money under the second paragraph of Sub-Clause 14.9."*

An acceptable form(s) of guarantee should be included in the tender documents, annexed to the Particular Conditions: an example form is provided in the Guidance for the Preparation of Particular Conditions at Annex F.

There is no express provision dealing with the withholding of Retention Money without good reason, which is not an uncommon occurrence.

Sub-Clause 14.10 - Statement at Completion

This is an amended version of Sub-Clause 60.5 of the FIDIC Red Book 4th edition.

Within 84 days (i.e. 12 weeks) after receipt of the Taking-Over Certificate for the Works, the Contractor is obliged to submit to the Engineer six copies of a Statement at completion with supporting documents. Time runs from receipt of the Taking-Over Certificate, not from the date stated in the Taking-Over Certificate or from issue of the Taking-Over Certificate as stated in the FIDIC Red Book 4th edition. However, there is no sanction provided if the time limit is not met, which suggests that the time period should be treated as directory rather than mandatory. It is usually in the Contractor's interest not to delay submittal of the Statement and supporting documents.

The Taking-Over Certificate is defined as the certificate issued under Clause 10 [*Employer's Taking Over*].

The Statement at completion must be in accordance with Sub-Clause 14.3 [*Application for Interim Payment Certificates*]. As pointed out in the FIDIC Contract Guide, it must therefore have supporting documents which shall include the detailed progress report

complying with Sub-Clause 4.21 [*Progress Reports*], unless all the reports required by the Contract have already been submitted. The Statement at completion must show:

(a) The value of all work done in accordance with the Contract up to the date stated in the Taking-Over Certificate. This revised wording clarifies the ambiguity of the use of the word *"final"* in the FIDIC Red Book 4th edition.

(b) Any further sums which the Contractor considers are currently due. This is not limited to claims under the Contract, so might include claims for breach of contract or arguably for claims in tort, for example, for negligence or misrepresentation.

(c) An estimate of any other amounts (to be shown separately in the Statement) which the Contractor considers will become due to him under the Contract in the future.

Note that the Statement at completion is one basis of the Cessation of Employer's Liability specified in Sub-Clause 14.14 and encourages the early settlement of financial aspects. The FIDIC Contracts Guide suggests that the Contractor should prepare the Statement at completion with these aspects in mind and include amounts or estimates for every payment for which the Contractor considers the Employer has a liability, including all claims and potential claims, even though it is initially only processed like other interim Statements, i.e. certified in accordance with Sub-Clause 14.6 [*Issue of Interim Payment Certificates*].

Sub-Clause 14.11 - Application for Final Payment Certificate

This is similar to Sub-Clause 60.6 of the FIDIC Red Book 4th edition.

56 days (8 weeks) after receiving the Performance Certificate, the Contractor must submit to the Engineer six copies of a draft final statement with supporting documents in detail in a form approved by the Engineer. The time limit starts to run from issue of the Performance Certificate, not issue of the Defects Liability Certificate as stated in Sub-Clause 60.6 of the FIDIC Red Book 4th edition. However, there is no sanction provided if the time limit is not met which suggests that it should be treated as directory rather than mandatory.

The Performance Certificate is defined as the certificate issued under Sub-Clause 11.9 [*Performance Certificate*]. It is issued following expiry of the Defects Notification Periods or as soon thereafter as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects.

The draft final statement must show both:

(a) the value of all work done in accordance with the Contract; and

(b) any further sums which the Contractor considers to be due to him under the Contract or otherwise. The *"or otherwise"* is an addition to the FIDIC Red Book

4th edition, and therefore clarifies that this Sub-Clause contemplates monies due, for example, for breach of contract and in tort (negligence, misrepresentation etc.).

Note also Sub-Clause 14.14(b) [*Cessation of Employer's Liability*].

If the Engineer disagrees with or cannot verify any part of the draft final statement, the Contractor is obliged to provide such further information as the Engineer reasonably requires and make such changes in the draft as agreed between them. The Contractor must then prepare and submit to the Engineer the Final Statement as agreed.

However, following discussions between the Engineer and the Contractor, if it becomes evident that a dispute exists, the Engineer must deliver to the Employer (with a copy to the Contractor) an Interim Payment Certificate for the agreed parts of the draft final statement, and those sums must be paid. The draft final statement remains open until the dispute is finally resolved under Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] or Sub-Clause 20.5 [*Amicable Settlement*]. There is no provision for an interim draft final statement.

If the dispute is resolved under Sub-Clause 20.4 or 20.5 the Contractor will prepare and submit to the Employer (with a copy to the Engineer) a Final Statement in accordance with the outcome. If there is a delay in payment of the Interim Payment Certificate and it is not paid 56 days after the Engineer receives the [Final] Statement and supporting documents in accordance with Sub-Clause 14.7 [*Payment*], the Contractor is entitled to financing charges under Sub-Clause 14.8 [*Delayed Payment*].

There is no express provision in the event that the dispute is not resolved under Sub-Clause 20.4 or 20.5. The FIDIC Contracts Guide suggests that it would probably need to be resolved under Sub-Clause 20.6 [*Arbitration*]. After resolution by arbitration, which may be considerably later, there may be no need for a Final Statement, so Sub-Clause 14.11 does not require it to be prepared. The only necessary documentation may have been prepared or defined by the arbitrator(s).

If there is no Final Statement, Sub-Clause 14.12 [*Discharge*], Sub-Clause 14.13 [*Issue of Final Payment Certificate*] and sub-paragraph (a) of Sub-Clause 14.14 [*Cessation of Employer's Liability*] cannot apply.

It is essential that, to the extent there is a Final Statement, all the Contractor's claims are recorded in it. The Final Statement is one basis of the Cessation of Employer's Liability specified in Sub-Clause 14.14 and encourages the early settlement of financial aspects. The Contractor should therefore prepare this Statement with these aspects in mind and include amounts or estimates for every payment for which the Contractor considers the Employer has a liability, including all claims and potential claims, even though it is initially only processed like other interim Statements.

In ***ICC Case 19105 (2014) - Procedural Order***, in Bucharest, Romania, a sole arbitrator was asked to allow new claims to be introduced in to an ongoing arbitration after the main arbitration hearing had taken place. The arbitrator declined to do so. The new claims concerned the Claimant's right to repayment of the outstanding balance of the Retention Money under a 1999 edition of the FIDIC forms of contract. There was a question during the main arbitration hearing as to whether the Engineer had issued the necessary certification. After the main arbitration hearing had taken place, the Final Payment Certificate was issued by the Engineer. The Claimant then sought permission to submit a new claim for revision of the Final Payment Certificate because: (i) the Final Payment Certificate included an entry ... named *"Deduct amount as per FIDIC Sub-Clause 2.5"* and the said amount corresponded to the net total amount certified for payment in the Final Payment Certificate; (ii) the Parties were in disagreement about the meaning of *"deduct(ion)"*; (iii) claims deriving from the Final Payment Certificate fall under the scope of Sub-Clause 20.6; (iv) the Final Payment Certificate should be revised in the arbitration since it interferes with it and contradicts the arbitrator's findings; and (v) the arbitrator had jurisdiction over the new claim *"since the matters to be revised are overlapping the claims already brought in this arbitration"*. The arbitrator declined to admit the new claim into the arbitration on the basis that the arbitration had come to its very end and the connection, between the new claim and the claims to be decided in the Final Award, was not strong enough to justify now a reopening of the proceedings.

Sub-Clause 14.12 - Discharge

This discharge is similar to that provided for in Sub-Clause 60.7 of the FIDIC Red Book 4th edition.

With the Final Statement, the Contractor must submit a written discharge confirming the Final Statement represents full and final settlement of all moneys due to the Contractor *"under or in connection with the Contract".* Thus, it only takes effect once all outstanding claims have been satisfied. The wording is more restrictive to that in Sub-Clause 14.11 [*Application for Final Payment Certificate*] where the Final Certificate must show further sums the Contractors thinks is due to him *"under the Contract or otherwise"*.

As the Final Certificate takes no account of an Employer's right to delay damages, it is possible that payment of the sum stated in the Final Certificate will not take place. In such circumstances, question whether the discharge would be effective?

The discharge should be submitted in the same way as the Final Statement, i.e. to the Employer with a copy to the Engineer.

This Sub-Clause must be read with Sub-Clauses 11.10 and 14.14. Sub-Clause 11.10 [*Unfulfilled Obligations*] provides that the Parties remain liable for the fulfilment of any obligation which remains unperformed after the Performance Certificate has been issued, and for the purposes of determining the nature and extent of unperformed

obligations, the Contract is deemed to remain in force. Sub-Clause 14.14 [*Cessation of Employer's Liability*] provides that the Employer remains liable for sums in the Final Statement and the Statement at Completion, in respect of his indemnification obligations, and in respect of his liability in any case of fraud, deliberate default or reckless misconduct. The Employer gives to the Contractor indemnities in, for example, Sub-Clauses 1.13 [*Compliance with Laws*], 4.2 [*Performance Security*], 5.2 [*Objection to Nomination*], 17.1 [*Indemnities*], and Clause 5 of the Appendix – General Conditions of Dispute Adjudication Agreement.

A prudent Contractor will word the discharge so as to provide for the discharge to become effective when the final payment has been received and all bonds and guarantees returned, otherwise the discharge will become effective immediately. For example, the discharge may state the effective date of the discharge is the date when the Contractor has received the Performance Security (i.e. the security for proper performance under Sub-Clause 4.2 [*Performance Security*] which is returnable to the Contractor 21 days after receipt of the Performance Certificate) and the outstanding balance of this total.

Brian Totterdill[19] suggests, *"If parts of the draft Final Statement are eventually settled in arbitration then the Contractor does not seem to have to submit a Final Statement and hence would not submit a discharge. The submissions to the arbitration tribunal would normally cover any amounts which the Contractor considers to be due"*. Query whether the same could be said in respect of a Dispute Adjudication Board decision which becomes final and binding?

Sub-Clause 14.13 - Issue of Final Payment Certificate

This is similar to Sub-Clause 60.8 of the FIDIC Red Book 4th edition.

28 days after receiving the Final Statement and written discharge in accordance with Sub-Clause 14.11 [*Application for Final Payment Certificate*] and Sub-Clause 14.12 [*Discharge*], the Engineer must issue to the Employer, the Final Payment Certificate for payment. There is no express provision requiring it to be copied to the Contractor. The time limit is important because if the Contractor fails to submit an application within it, the Engineer will issue the Final Payment Certificate for such amount as he fairly determines to be due. Under Sub-Clause 1.3 [*Communications*], certificates must not be unreasonably withheld or delayed.

If the Contractor has not applied for a Final Payment Certificate in accordance with Sub-Clause 14.11 [*Application for Final Payment Certificate*] and Sub-Clause 14.12 [*Discharge*], the Engineer will request the Contractor to do so.

The Final Payment Certificate must state both:

[19] FIDIC Users' Guide: A Practical Guide to the 1999 Red and Yellow Books at pages 251-252.

(a) the amount which is finally due; and

(b) the balance (if any) due from the Employer to the Contractor or from the Contractor to the Employer, after giving credit to the Employer for all amounts previously paid by the Employer and for all sums to which the Employer is entitled.

Unlike Sub-Clause 60.8 of the FIDIC Red Book 4th edition, sums which the Employer is due are not limited to those under the Contract.

Sub-Clause 14.13(a) is widely drafted and might include any additions or deductions that have become due under Sub-Clause 3.5 [*Determinations*], and any additions or deductions that have become due under the Contract or otherwise (i.e. for breach of Contract or in tort, equity etc.) The Employer must pay the Contractor the amount certified in the Final Payment Certificate within 56 days after the Employer receives this Payment Certificate under Sub-Clause 14.7(c) [*Payment*] failing which the Contractor might be entitled to financing charges.

It is worth noting that, under the governing law, the issue of the Final Payment Certificate may be relevant to limitation and when a cause of action arises. In the English case of ***Henry Boot Construction Ltd v Alstom Combined Cycles Ltd***[20], the Court of Appeal considered (among other things) whether under the ICE Conditions of Contract (6th edition)[21] (i) the Contractor's right to receive payment for the value of work done and materials supplied arose upon the work being done and the materials being supplied, or only upon the issue of the certificate, and (ii) if the latter, whether it arose once and for all as soon as the Contractor was entitled to have the sum certified in an interim certificate, or whether the Contractor had a continuing right to have the sum certified in subsequent certificates, and in particular the final certificate, so that (where the sum was not certified) each failure to certify in accordance with the contract gave rise to a new cause of action. The Court of Appeal held on the first issue that on a true construction of the contract, certificates were a condition precedent to the Contractor's right to payment and not merely evidence of the Engineer's opinion, i.e. the right to payment arose when a certificate was issued or should have been issued and not earlier, such as when the work was done, or the materials supplied. However, it did not follow from this that the absence of a certificate was a bar to the right for payment, because the Engineer's decision in relation to certification was not conclusive of the rights upon the Parties and could be reviewed by an arbitrator or the court (relying on the English case of ***Beaufort Developments Ltd v Gilbert Ash Ltd***[22]). The Court of Appeal held on the second issue that as the nature of the exercise the Engineer had to perform in relation to an interim payment certificate, and a final payment certificate is so different, a failure of the Engineer to comply with the interim payment obligations

[20] [2005] BLR 437 CA.
[21] The FIDIC Red Book was originally derived from the English ICE Conditions of Contract (4th edition), and the FIDIC and ICE forms tracked each other through successive editions for a number of years.
[22] [1999] 1 AC 266.

could not start time running in respect of a cause of action based on the failure of the Engineer to comply with the final certificate obligations.

Sub-Clause 14.14 - Cessation of Employer's Liability

The Employer is not liable to the Contractor for anything under or in connection with the Contract or execution of the Works, in the same way as Sub-Clause 60.9 of the FIDIC Red Book 4th edition.

If the Contractor is not happy with anything under, or in connection with, the Contract or execution of the Works, he must include an amount expressly for it (a) in the Final Statement, and (b) in the Statement at Completion described in Sub-Clause 14.10 [*Statement at Completion*] (except for matters or things arising after the issue of the Taking-Over Certificate for the Works). This notification is in addition to that required under Sub-Clause 20.1.

The Contractor should also include all future cost of Dispute Adjudication Board proceedings and arbitration in the Final Statement or Statement at Completion.

It is a surprising provision in its obvious bias against the Contractor. The relevant governing law may therefore be pertinent. As stated by Robert Knutson[23], unfair contract terms' arguments (such as the Unfair Contract Terms Act (1977) in England) may be invoked, and the exclusionary aspects of the Clause will probably be considered *contra proferentem.*

This Sub-Clause is difficult to read with Sub-Clause 11.10 [*Unfulfilled Obligations*] which seeks to preserve liabilities which the Contractor cannot enforce unless expressly provided for in the Final Statement or Statement at completion under this Sub-Clause.

New to this addition and for the avoidance of doubt, it is now expressly provided that the Employer's liability under his indemnification obligations, or the Employer's liability in any case of fraud, deliberate default or reckless misconduct by the Employer, is not limited. These are not terms of art under English law and the words would have to be construed according to their ordinary meaning. As stated by Robert Knutson[24], *"As many failures by an Employer to pay are in my experience a result of honest differences of opinion with Contractors it would remain to be seen if deliberate but honest failure to pay would be barred. On its face the word "deliberate" makes no distinction between honest and somehow fault based failures to pay, but the word "default" implies a failure to comply with a contractual obligation, perhaps simply through reckless neglect"*.

The Employer gives to the Contractor indemnities in, for example, Sub-Clauses 1.13 [*Compliance with Laws*], 4.2 [*Performance Security*], 5.2 [*Objection to Nomination*],

[23] FIDIC An Analysis of International Construction Contracts, pages 68-69.
[24] FIDIC An Analysis of International Construction Contracts, page 69.

17.1 [*Indemnities*], and Clause 5 of the Appendix – General Conditions of Dispute Adjudication Agreement.

The Contractor's liability ceases in accordance with Sub-Clause 11.9 [*Performance Certificate*], save for unfulfilled obligations under Sub-Clause 11.10 [*Unfulfilled Obligations*].

Sub-Clause 14.15 - Currencies of Payment

Rates of exchange were provided for in Sub-Clause 72 of the FIDIC Red Book 4th edition.

In this edition, currencies in which payment is to be made should be expressly stated in the spaces provided in the Letter of Tender and the Appendix to Tender.

If all payments are to be made in one named currency, this Sub-Clause becomes inapplicable, subject to any Particular Conditions. The FIDIC Guidance for the Preparation of Particular Conditions provides the following example clause for a single currency contract:

> *"The currency of account shall be the Local Currency and all payments made in accordance with the Contract shall be in Local Currency. The Local Currency payments shall be fully convertible, except those for local costs. The percentage attributed to local costs shall be as stated in the Appendix to Tender".*

If payment is to be made in more than one currency, or if different currencies are specified in the Letter of Tender and Appendix to Tender, this Sub-Clause (in the absence of any agreement between the Parties) provides for the currencies in which payments are to be made.

- Where the Accepted Contract Amount (i.e. the amount accepted in the Letter of Acceptance for the execution and completion of the Works and the remedying of any defects) is expressed in Local Currency only (i.e. the currency of the Country in which the Site is located) but is to be made partly or wholly in other currencies, agreed proportions and rates of exchange must be given in the Appendix to Tender.

- Payments for damages specified in the Appendix to Tender will be made in the currencies and proportions specified in the Appendix to Tender.

- Other payments to the Employer by the Contractor will be made in the currency in which the sum was expended by the Employer, or in such currency as may be agreed by both Parties.

- When an amount payable by the Contractor to the Employer in a particular currency exceeds the sum payable by the Employer to the Contractor in that currency, the Employer may recover the balance of this amount from the sums otherwise payable to the Contractor in other currencies.

The rates of exchange are fixed in the Appendix to Tender. There is no provision for change in the rates of exchange, which is a risk area for both Parties. If rates of exchange are to be adjusted to allow for currency fluctuations, then provision should be made for such in the Particular Conditions.

If no rates of exchange are stated in the Appendix to Tender, they will be those prevailing on the Base Date and determined by the central bank of the Country.

By Victoria Tyson