Commentary

3–004 The first line of the 2017 sub-clause is identical to the 1999 version but the remainder of the sub-clause has been newly drafted to clarify that an Engineer can be a legal entity under the 2017 edns.

The Engineer is not a party to the Contract. Indeed, the Engineer is not defined as a Party at Sub-Cl.1.1.60 of the Red and Yellow Books. Nevertheless, he is appointed by the Employer and effectively acts as his agent.

The significant change in the 2017 edns is that it is made explicit that the Engineer can be a legal entity. If the Engineer is to be a legal entity, further requirements are imposed:

(a) A natural person employed by the Engineer must be appointed and authorised to act on behalf of the Engineer under the Contract.
(b) The Engineer must give a Notice to the Parties of the natural person appointed and the natural person's authority will not take effect until both Parties have received the Notice.
(c) A Notice must also be given for any replacement or for the revocation of the authority of the natural person.

The 1999 edns were silent as to the qualifications and experience that an Engineer must possess. The 2017 edns specify that an Engineer must have the qualifications, experience and competence to perform the role of Engineer under the Contract and must also be fluent in the ruling language of the Contract.

3.2 Engineer's Duties and Authority

3–005 *"Except as otherwise stated in these Conditions, whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall act as a skilled professional and shall be deemed to act for the Employer.*

The Engineer shall have no authority to amend the Contract or, except as otherwise stated in these Conditions, to relieve either Party of any duty, obligation or responsibility under or in connection with the Contract.

The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the consent of the Employer before exercising a specified authority, the requirements shall be as stated in the Particular Conditions. There shall be no requirement for the Engineer to obtain the Employer's consent before the Engineer exercises his/her authority under Sub-Clause 3.7 [Agreement or Determination]. The Employer shall not impose further constraints on the Engineer's authority.

However, whenever the Engineer exercises a specified authority for which the Employer's consent is required, then (for the purposes of the Contract) such consent shall be deemed to have been given.

Any acceptance, agreement, approval, check, certificate, comment, consent, disapproval, examination, inspection, instruction, Notice, No-objection, record(s) of meeting, permission, proposal, record, reply, report, request, Review, test, valuation, or similar act (including the absence of any such act) by the Engineer, the Engineer's Representative or any assistant shall not relieve the Contractor from any duty, obligation or responsibility the Contractor has under or in connection with the Contract."

OVERVIEW OF KEY FEATURES

3–006
- Except as otherwise stated, the Engineer must act as a skilled professional when carrying out duties or exercising authority specified in or implied by the Contract. The Engineer will be deemed to act for the Employer when doing so.
- The Engineer has no authority to amend the Contract or, unless stated in the Conditions, to relieve either Party of any duty or obligation owed under the Contract.
- For certain further acts, specified authority is required and the requirements for obtaining the consent of the Employer will be stated in the Particular Conditions.
- Whenever the Engineer exercises a specified authority for which the Employer's consent is required, such consent is deemed to have been given for the purposes of the Contract.
- Neither any act nor omission by the Engineer, Engineer's representative or any assistant shall relieve the Contractor of any obligation or responsibility under the Contract.

Commentary

3–007 The first paragraph of the sub-clause is new and imposes a standard that the Engineer must adhere to when carrying out duties or exercising authority under the Contract. Under English law, the requirement to act as a "skilled professional" would represent a requirement that the Engineer exercised reasonable skill and care. As McNair J stated, "The test is the standard of the ordinary skilled man exercising and professing to have that special skill."[1]

The 2017 edns retain the provision that the Engineer has no authority to amend the Contract. However, a further prohibition has been added. The second paragraph ends by stating that, unless otherwise stated in the Conditions, the Engineer has no authority to relieve either Party of any duty, obligation or responsibility arising under the Contract.

[1] *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582. This also mirrors the obligation in the 2017 White Book that the Consultant exercises the reasonable, skill, care and diligence to be expected from a Consultant experienced in the provision of such services for projects of similar size, nature and complexity.

The Engineer is free to exercise the authority specified or to be necessarily implied from the Contract. For certain acts, specified authority is required and the requirements to obtain this are to be included in the Particular Conditions. The sub-clause explicitly states that the Engineer is not required to obtain the Employer's consent before exercising his authority under Sub-Cl.3.7.[2]

The 1999 edns required the Employer to undertake not to impose further constraints on the Engineer's authority, "except as agreed with the Contractor." The 2017 edns contain a redrafted sentence that requires the Employer not to impose further constraints on the Engineer's authority. There is no provision to agree with the Contractor to impose any such constraints.

The fourth paragraph of the sub-clause is identical to the previous edns and provides that consent will be deemed to have been given when the Engineer exercises a specified authority for which the Employer's consent is required.

The final paragraph represents an extended version of Sub-Cl.3.1(c) of the 1999 edns. The 2017 edns provide a more exhaustive list of acts that do not relieve the Contractor of any obligation under the Contract, i.e. "acceptance," "agreement," "comment," "disapproval, "record(s) of meeting", and "permission." The new sub-clause also makes clear that it is not simply acts or omissions of the Engineer that do not relieve the Contractor of responsibility but also acts or omissions by the Engineer's Representative or any assistant.

The final line of the sub-clause has also been amended. The previous version ended by stating that the Contractor was not relieved of any responsibility, including errors, omissions, discrepancies and non-compliances. These examples have been removed from the 2017 edns that instead specify that the Contractor will not be relieved from any duty, obligation or responsibility. This is sufficiently broad to capture the examples contained in the 1999 edns and makes clear that any act or omission by the Engineer (or the Engineer's Representative or assistant) will not affect the contractual obligations imposed on the Contractor.

3.3 The Engineer's Representative

3–008 *"The Engineer may appoint an Engineer's Representative and delegate to him/her in accordance with Sub-Clause 3.4 [Delegation by the Engineer] the authority necessary to act on the Engineer's behalf at the Site, except to replace the Engineer's Representative.*

The Engineer's Representative (if appointed) shall comply with sub-paragraphs (a) and (b) of Sub-Clause 3.1 [The Engineer] and shall be based at the Site for the whole time that the Works are being executed at the Site. If the Engineer's Representative is to be temporarily absent from the Site during the execution of the Works, an equivalently qualified, experienced and competent replacement shall be appointed by the Engineer, and the Contractor shall be given a Notice of such replacement."

[2] This wording has been introduced to try and deal with a typical amendment made to the 1999 edns that an Engineer had to obtain the specific approval of the Employer before making a determination under Sub-Cl.3.5, giving sub-contractor consent under Sub-Cl.4.2, giving approval to the Contractor's documents under Sub.Cl.5.2, agreeing anextension of time under Sub-Cl.8.4, or instructing Cl.13 variations.

OVERVIEW OF KEY FEATURES

3–009

- The Engineer may appoint an Engineer's Representative and delegate to them the authority necessary to act on the Engineer's behalf at the site, except the authority to replace the Engineer's Representative.
- The Engineer's Representative must be:
  - (a) a natural person:
  - (b) a professional engineer with suitable qualifications, experience and competence;
  - (c) fluent in the ruling language; and
  - (d) based at the Site for the whole time that the Works are being executed at the Site.

Commentary

3–010 The Engineer's Representative was removed from the 1999 edns but has been reintroduced into the 2017 edns. The Engineer's Representative must be based at the Site for the whole time the Works are being executed and must comply with the same requirements as an Engineer under sub-paras (a) and (b) of Sub-Cl.3.1. This new sub-clause reflects the reality that on many projects, the actual Engineer, is represented on Site by colleagues.[3]

If the Engineer's Representative is to be temporarily absent from the Site during the execution of the Works, the Engineer must appoint an equivalent replacement and a Notice of such replacement must be given to the Contractor

3.4 Delegation by the Engineer

3–011 *"The Engineer may from time to time assign duties and delegate authority to assistants, and may also revoke such assignment or delegation, by giving a Notice to the Parties, describing the assigned duties and the delegated authority of each assistant. The assignment, delegation or revocation shall not take effect until this Notice has been received by both Parties. However, the Engineer shall not delegate the authority to:*

(a) act under Sub-Clause 3.7 [Agreement or Determination]; and/or
(b) issue a Notice to Correct under Sub-Clause 15.1 [Notice to Correct].

[3] There are instances of the Engineer not visiting Site at all, which are hopefully isolated or merely anecdotal tales.

Assistants shall be suitably qualified natural persons, who are experienced and competent to carry out these duties and exercise this authority, and who are fluent in the language for communications defined in Sub-Clause 1.4 [Law and Language].

Each assistant, to whom duties have been assigned or authority has been delegated, shall only be authorised to issue instructions to the Contractor to the extent defined by the Engineer's Notice of delegation under this Sub-Clause. Any act by an assistant, in accordance with the Engineer's Notice of delegation, shall have the same effect as though the act had been an act of the Engineer. However, if the Contractor questions any instruction or Notice given by an assistant, the Contractor may by giving a Notice refer the matter to the Engineer. The Engineer shall be deemed to have confirmed the assistant's instruction or Notice if the Engineer does not respond, within 7 days after receiving the Contractor's Notice, reversing or varying the assistant's instruction or Notice (as the case may be)."

OVERVIEW OF KEY FEATURES

3–012
- The Engineer can delegate functions to assistants and revoke such delegation by giving a Notice to the Parties, describing the assigned duties and the delegated authority of each assistant.
- The Engineer cannot delegate the authority to act under Sub-Cl.3.7 (Agreement or Determination) or issue a Notice to Correct under Sub-Cl.15.1.
- Assistants must be suitably qualified natural persons, experienced and competent to carry out the duties required and must be fluent in the language for communications.
- Each assistant can only issue instructions to the Contractor to the extent defined by the Engineer's Notice of delegation.
- The Contractor can question any Notice or instruction given by an assistant by giving a Notice referring the matter to the Engineer.
- The Engineer will be deemed to have confirmed the assistant's instruction or Notice if the Engineer does not respond within seven days of receipt of the Contractor's Notice, reversing or varying the assistant's instruction or Notice.

Commentary

3–013 The 2017 edns introduce a more formal notice requirement. The previous version of the sub-clause only required the assignment, delegation or revocation to be in writing. The 2017 edns require the Engineer to give a Notice and to specify the assigned duties and the delegated authority of each assistant.

The previous edns provided that an assistant could be a resident engineer or independent inspectors. This sentence has been removed from the 2017 edns. The 2017 sub-clause does not provide any examples of persons that may fulfil the role. However, the Guidance to the Special Provisions states that the Employer's

assistants may include design engineers, other construction professionals, technicians, inspectors, specialist independent engineers and/or inspectors appointed to monitor and review the execution of the Works.

The requirements for a person to be an assistant have been slightly enlarged. The 2017 sub-clause specifies that the assistant must be suitably qualified, a natural person, sufficiently experienced and competent to perform the role as well as fluent in the language for communications defined in Sub-Cl.1.4.

The Engineer remains unable to delegate the authority to make a determination and under the 2017 edns is also prohibited from issuing a Notice to Correct under Sub-Cl.15.1.

Assistants are limited to issuing instructions in compliance with the Engineer's Notice of delegation and any act in accordance with such Notice will be as if the act had been performed by the Engineer.

In the 2017 edns there is no longer a provision specifying that any failure to disapprove any work, Plant or Materials will not constitute approval and therefore not prejudice the right of the Engineer to reject such work, etc. This is likely because Sub-Cl.3.2 provides that the absence of any disapproval by an assistant does not relieve the Contractor from any duty, obligation or responsibility arising under the Contract.

The process for objecting to an instruction of an assistant has also become more prescribed. Under the previous Sub-Cl.3.2(b), the Contractor was to refer a matter to the Engineer who would promptly confirm, reverse or vary the instruction. Under the 2017 edns the Contractor is to give a Notice referring the matter to the Engineer. The Engineer is then deemed to have confirmed the instruction if the Engineer does not respond, within seven days of receipt of the Notice, reversing or varying the instruction.

3.5 Engineer's Instructions

3–014 *"The Engineer may issue to the Contractor (at any time) instructions which may be necessary for the execution of the Works, all in accordance with the Contract. The Contractor shall only take instructions from the Engineer, or from the Engineer's Representative (if appointed) or an assistant to whom the appropriate authority to give instruction has been delegated under Sub-Clause 3.4 [Delegation by the Engineer].*

Subject to the following provisions of this Sub-Clause, the Contractor shall comply with the instructions given by the Engineer or the Engineer's Representative (if appointed) or delegated assistant, on any matter related to the Contract.

If an instruction states that it constitutes a Variation, Sub-Clause 13.3.1 [Variation by Instruction] shall apply.

If not so stated, and the Contractor considers that the instruction:

(a) constitutes a Variation (or involves work that is already part of an existing Variation); or

(b) does not comply with applicable Laws or will reduce the safety of the Works or is technically impossible

the Contractor shall immediately, and before commencing any work related to the instruction, give a Notice to the Engineer with reasons. If the Engineer does not respond within 7 days after receiving this Notice, by giving a Notice confirming, reversing or varying the instruction, the Engineer shall be deemed to have revoked the instruction. Otherwise the Contractor shall comply with and be bound by the terms of the Engineer's response."

OVERVIEW OF KEY FEATURES

3–015

- The Contractor is obliged to comply with instructions given by the Engineer, the Engineer's Representative or delegated assistant on any matter related to the Contract, subject to the further provisions of the sub-clause.
- If an instruction states that it constitutes a Variation, Sub-Cl.13.3.1 applies.
- If the Contractor considers that the instruction:

  i. constitutes a variation;
  ii. involves work that is already part of an existing variation;
  iii. does not comply with applicable Laws;
  iv. will reduce the safety of the Works; or
  v. is technically impossible;

  the Contractor must immediately and before commencing any work related to the instruction give a Notice to the Engineer with reasons.
- The Engineer is to give a Notice confirming, reversing or varying the instruction within seven days of receipt of the Contractor's Notice or the Engineer will be deemed to have revoked the instruction. Otherwise the Contractor has to comply with and be bound by the terms of the Engineer's response.

Commentary

3–016 The 2017 edns no longer contain references to the Engineer issuing additional or modified drawings. The sub-clause only refers to instructions.

The new sub-clause also attempts to achieve greater certainty with regards to variations. The 1999 edns provided that, if an instruction constituted a variation, Cl.13 that dealt with variations applied. Under the 2017 books, Sub-Cl.13.3.1 only applies if an instruction states that it is a variation.

In the event that an instruction is not expressly stated to be a variation, the Contractor under the 2017 edns has a new right to "immediately" and "before commencing any work" give a Notice to the Engineer if it considers that one of the five circumstances described in the sub-clause is applicable. This enables a Contractor to challenge what it views as the imposition of variations. It has

however been noted that the choice of the word "immediately" is problematic.[4] The natural and ordinary meaning of the word "immediately" would suggest that the Contractor has to give a Notice at once or instantly. The inclusion of the word is therefore likely to lead to Employers claiming that a Notice was provided too late.

The Engineer is to respond within seven days of receiving the Notice by giving a Notice confirming, reversing or varying the instruction. If the Engineer fails to respond within the prescribed time, the instruction is deemed to be revoked. The short time frame within which the Engineer is to respond and the deeming provision is therefore in the Contractor's favour. If the Engineer does respond, the Contractor is bound by the terms of the response.

The sub-clause does not fully set out the process to follow if the Contractor is adamant that the work is a Variation but the Employer/Engineer disagrees and refuses to issue a Variation instruction. In those circumstances, if all persons were to comply with the sub-clause, the Engineer would issue the instruction, the Contractor would serve a Notice stating that the instruction constituted a variation and the Engineer would serve a Notice in response confirming the instruction. The sub-clause states that the Contractor will comply with and be bound by the terms of the Engineer's response and so must continue with the work in order to avoid being in breach of contract. The Contractor would then have to pursue a Claim under Cl.20, which is not mentioned in the sub-clause. Contractors may well be unsatisfied with this new procedure since the practical reality is that they enjoy the greatest negotiating power before the works commence when the Employer is keen for the works to progress.

3.6 Replacement of the Engineer

3–017 *"If the Employer intends to replace the Engineer, the Employer shall, not less than 42 days before the intended date of replacement, give a Notice to the Contractor of the name, address and relevant experience of the intended replacement Engineer.*

If the Contractor does not respond within 14 days after receiving this Notice, by giving a Notice stating an objection to such replacement with reasons, the Contractor shall be deemed to have accepted the replacement.

The Employer shall not replace the Engineer with a person (whether a legal entity or a natural person) against whom the Contractor has raised reasonable objection by a Notice under this Sub-Clause.

If the Engineer is unable to act as a result of death, illness, disability or resignation (or, in the case of an entity, the Engineer becomes unable or unwilling to carry out any of its duties, other than for a cause attributable to

[4] F. Gillion and M. Cottrell, "New FIDIC Yellow Book (2017): A Case of When More (Words) Mean Less (Clarity)?" [2017] I.C.L.R. 349.

the Employer) the Employer shall be entitled to immediately appoint a replacement by giving a Notice to the Contractor with reasons and the name, address and relevant experience of the replacement. This appointment shall be treated as a temporary appointment until this replacement is accepted by the Contractor, or another replacement is appointed, under this Sub-Clause."

OVERVIEW OF KEY FEATURES

3–018
- The Employer must give a Notice of an intention to replace the Engineer not less than 42 days before the intended date of replacement.
- If the Contractor does not respond within 14 days after receiving the Notice, by giving a Notice stating an objection to the replacement, the Contractor will be deemed to have accepted the replacement.
- If the Contractor raises a reasonable objection by a Notice against the proposed replacement, the Employer must find someone else.

Commentary

3–019 Under the 2017 edns the Employer must still give 42 days' notice and is unable to appoint a person against whom the Contractor has raised reasonable objection.

However, if the Contractor does wish to object, it must now do so within 14 days of receiving the Employer's Notice indicating an intention to replace the Engineer. If the Contractor fails to adhere to this deadline then he will be deemed to have accepted the replacement.

The final paragraph of the 2017 edns is completely new and caters for situations where the Engineer becomes unable to fulfil his duties. If the Engineer is a natural person and is unable to act as a result of death, illness, disability or resignation, the Employer can immediately appoint a replacement by giving a Notice to the Contractor.

Interestingly, if the Engineer is an entity that becomes unable or unwilling to carry out any of its duties, the Employer can immediately appoint a replacement by giving a Notice, unless the Engineer is unwilling to act due to a cause attributable to the Employer. The reference to "other than for a cause attributable to the Employer" is only contained in the brackets that deal with the situation where the Engineer is an entity. A plain reading of the sub-clause would therefore suggest that if the Engineer is a natural person and resigned due to a cause attributable to the Employer, the Employer could still immediately appoint a replacement. It seems unlikely that the draftsmen intended to permit this outcome.

The sub-clause ends with an important reminder that any such immediate appointment is to be treated as temporary and will only become permanent when the Contractor accepts the appointment or another replacement is appointed.

3.7 Agreement or Determination

3–020 *"When carrying out his/her duties under this Sub-Clause, the Engineer shall act neutrally between the Parties and shall not be deemed to act for the Employer.*

Whenever these Conditions provide that the Engineer shall proceed under this Sub-Clause to agree or determine any matter or Claim, the following procedure shall apply:

3.7.1 Consultation to reach agreement

The Engineer shall consult with both Parties jointly and/or separately, and shall encourage discussion between the Parties in an endeavour to reach agreement. The Engineer shall commence such consultation promptly to allow adequate time to comply with the time limit for agreement under Sub-Clause 3.7.3 [Time limits]. Unless otherwise proposed by the Engineer and agreed by both Parties, the Engineer shall provide both Parties with a record of the consultation.

If agreement is achieved within the time limit for agreement under Sub-Clause 3.7.3 [Time limits] the Engineer shall give a Notice to both Parties of the agreement, which agreement shall be signed by both Parties. This Notice shall state that it is a "Notice of the Parties' Agreement" and shall include a copy of the agreement.

If:

(a) no agreement is achieved within the time limit for agreement under Sub-Clause 3.7.3 [Time limits]; or

(b both Parties advise the Engineer that no agreement can be achieved within this time limit

whichever is the earlier, the Engineer shall give a Notice to the Parties accordingly and shall immediately proceed under Sub-Clause 3.7.2 [Engineer's Determination].

3.7.2 Engineer's Determination

The Engineer shall make a fair determination of the matter or Claim, in accordance with the Contract, taking due regard of all relevant circumstances.

Within the time limit for determination under Sub-Clause 3.7.3 [Time limits], the Engineer shall give a Notice to both Parties of his/her determination. This Notice shall state that it is a "Notice of the Engineer's Determination", and shall describe the determination in detail with reasons and detailed supporting particulars.

3.7.3 Time limits

The Engineer shall give the Notice of agreement, if agreement is achieved, within 42 days or within such other time limit as may be proposed by the Engineer and agreed by both Parties (the "time limit for agreement" in these Conditions), after:

The Contract does not actually set out a date as to when the Contractor may commence work. Instead a 14-day[1] notice period is provided for. Although the notice period of the Commencement Date provided for by Sub-Cl.8.1 may seem tight, the Contractor knows that the Commencement Date will be within a 42-day window from the date that the Letter of Acceptance is received. The Contractor is required to start the Works (which include the design element) as soon as is "reasonably practical".

The Letter of Acceptance is defined by Sub-Cl.1.1.51 as being a formal letter signed by the Employer signifying acceptance of the Contractor's Letter of Tender.

If the formalities required by Sub-Cl.1.1.51 are not observed, the parties are thrown back on the Contract Agreement itself.[2] The Contract procedure provided for by the FIDIC terms and conditions does not envisage there being a letter of intent and both parties to the Contract should understand the potential pitfalls if a letter of tender is issued which could be interpreted as a letter of intent. Those potential pitfalls arise because the Commencement Date is the precursor of a number of events.

The actual date of the Commencement Date is of some importance as it is the trigger for a number of dates and actions that the Contractor and (to a lesser extent) the Employer must take:

(i) The Time for Completion, set out in more detail at Sub-Cl.8.2, is calculated from the Commencement Date. In accordance with the Contract Data[3] this period should be calculated in days.

(ii) The time for access to the site, set out in more detail in Sub-Cl.2.1,[4] is also calculated in the number of days from the Commencement Date.

(iii) By Sub-Cl.4.2 the Contractor must, if required by the Contract, provide the Performance Security within 28 days of receiving the Letter of Acceptance.

(iv) The Contractor, as required by Sub-Cl.4.3, must, unless the Contractor's Representative is named in the Contract, before the Commencement Date, submit to the Engineer for consent, details of the proposed Contractor's Representative.

(v) By Sub-Cl.4.7.2, if the Contractor finds an error in any item of reference, Notice of the error must be given to the Engineer within the date set out in the Contract Data. This date is calculated from the Commencement Date.

[1] It is a seven-day period under the 1999 Contract.

[2] Sub-Cl.1.1.1.50 also provides that if there is no such Letter of Acceptance, the expression "Letter of Acceptance" means the Contract Agreement, and the date of issuing or receiving the Letter of Acceptance means the date of signing the Contract Agreement.

[3] Particular Conditions Part A.

[4] See comments under Sub-Cl.2.1 about the importance of the date access to site is given and the typical problems an Employer may face in providing access.

(vi) Under Sub-Cl.4.8, within 21 days of the Commencement Date and before commencing any construction on the Site, the Contractor must submit to the Engineer for information a health and safety manual which has been specifically prepared for the Works, the Site and other places where the Contractor intends to execute the Works.[5]

(vii) The Sub-Cl.4.9 QM System must be submitted to the Engineer within 28 days of the Commencement Date.

(viii) By Sub-Cl.8.3, the Contractor must submit the initial programme within 28 days of receiving the Commencement Date Notice.

(ix) The first Sub-Cl.20 Progress Report must cover the period up to the end of the first month following the Commencement Date.

(x) By Sub-Cl.14.4, 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 period of three months. The first estimate shall be submitted within 42 days after the Commencement Date.

(xi) Under Sub-Cl.16.2(e), if the Contractor does not receive a Notice of the Commencement Date within 180 days after receiving the Letter of Acceptance, then this is a ground for termination under Cl.16.

(xii) By Sub-Cl.17.3, the Contractor takes full responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued.

(xiii) By Sub-Cl.19.2.1, the Contractor shall insure and keep insured in the joint names of the Contractor and the Employer from the Commencement Date until the date of issue of the Taking-Over Certificate for the Works.

One potential initial problem is that although the Time for Completion might have started to run on the Commencement Date, the date the Contractor is due to obtain access might be a significant number of days after the Commencement Date. Whilst lead-in times can be used profitably, the Contractor should check that there is no discrepancy with the intended programme, as he might have difficulties in arguing that he is entitled to an extension of time in accordance with Sub-Cl.8.4(e).

By Sub-Cl.1.1.25, "day" means calendar and not working day. This therefore includes weekends. With both these dates, it is suggested that the parties should try and agree the actual calendar date in order to avoid any potential disagreement over the day on which these two key events are to take place. It is critical that the commencement and end dates are clearly identified and established to avoid uncertainty.

The Contract does not say what will happen if the Engineer is not able to give at least 14 days' notice of the Commencement Date such that it falls within the

[5] This manual is in addition to any other similar document required under applicable health and safety regulations and laws.

42-day period defined by Sub-Cl.8.1 or if the Employer is not able to give access to the Contractor within the defined period. Obviously it would be open for the Contractor and Employer to agree the changed periods. However, given the mandatory words of this sub-clause, it is submitted that the giving of a late notice would be a breach of contract such that the Contractor might well be entitled to consider the Contract to be at an end.

Sub-Clause 16.2(f) provides that if the Contractor does not receive a Notice of the Commencement Date under Sub-Cl.8.1 within 84 days after receiving the Letter of Acceptance, then the Contractor shall be entitled to give a Notice giving intention to terminate.

By Sub-Cl.1.1.86 (Yellow Book), the Time for Completion, is calculated from the Commencement Date. Therefore, a Contractor need not seek an extension of time if the Notice of the Commencement Date is late.

However, as noted above, the final paragraph of Sub-Cl.8.1 requires the Contractor to commence execution of the Works "as soon as reasonably practicable" and to carry out those works with "due expedition and without delay". These phrases are not defined in the Contract, however the over-riding obligation on the Contractor is to complete his Works within the Time for Completion of the Works. Therefore, strictly it might be considered that these terms are not required. Where a Contract includes an express obligation for a contractor to complete the works by a specified date then, in most common law jurisdictions a term will not be implied that the Contractor is to proceed regularly and diligently or with due expedition with those works. Without these words, all the Contractor has to do is plan the works as he sees fit, provided that he completes the Works as required by the Contract.[6] In this there is a similarity with the civil code approach. Article 877 of the UAE Civil Code requires a Contractor to complete the contracted works in accordance with the conditions of contract. This is similar to a requirement for the Contractor to complete contractual works by the agreed time for completion.

However, the fact that these express terms have been included within Sub-Cl.8.1 means that in theory even if the Contractor does complete in time, if it can be shown that there has been a breach of Contract because the Contractor has not proceeded with due expedition, then the Employer will:

(i) potentially be able to terminate the Contract under Cl.15; and
(ii) provided he can establish a loss, have available a potential remedy of damages.[7]

To take one example, in the case of *Hounslow v Twickenham Garden Developments*[8] it was said that even where the Contractor is well ahead with the Works,

[6] *GLC v Cleveland Bridge & Eng Co Ltd* (1984) 34 B.L.R. 50.
[7] If, for example, the Employer has made arrangements of which the Contractor is aware, which are dependent on the regular progress of the Works, then the Employer might well suffer a loss if the Contractor's poor performance means that he has to re-organise those arrangements.
[8] [1970] 7 B.L.R. 89.

he was not to be allowed to slow down so that the work is completed on time. Instead the Contractor remained under an obligation to continue to proceed regularly and diligently.

The more usual phrase to be found in construction contracts is the obligation on the Contractor to proceed "regularly and diligently". It is suggested that the obligation to proceed with "due expedition" is likely to have a similar meaning.

Some guidance on the obligation to proceed regularly and diligently was provided in the case of *West Faulkner Associates v London Borough of Newham*[9] where Simon Brown LJ commented:

> "Taken together the obligation upon the contractor is essentially to proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works steadily towards completion substantially in accordance with the contract requirements as to time, sequence and quality of work."

The judge then conceded that:

> "Beyond that I think it impossible to give useful guidance. These are after all plain English words and in reality, the failure of which clause 25(1)(b) speaks is, like the elephant, far easier to recognise than to describe."

If no time period for completion is contained within the Contract Data, then under English law a term will be implied by s.14 of the Supply of Goods and Services Act 1982 that the Contractor's obligation is to complete the Works within a reasonable time. However, a delay on its own is not a failure to proceed regularly and diligently.

The case of *Vivergo Fuels v Redhall Engineering Solutions*[10] provides a useful insight into how a court is likely to evaluate whether there has been a failure to proceed regularly and diligently. In that case Ramsey J viewed a lack of productivity as being *"the best evidence"* of a failure to proceed regularly and diligently. Nevertheless, he also noted that the failure to provide a proper programme (and one in accordance with their contractual obligations) *"undoubtedly"* resulted, in that case, in an inability to *"proceed continuously, industriously and efficiently with appropriate physical resources so as to progress the works towards completion"*.

A similar provision can be found in art.687 of the Qatar Civil Code:

> *"1 The Contractor must perform the work in accordance with the conditions recorded in the contracting contract and within the period agreed upon, If*

[9] [1992] 71 B.L.R. 6. The obligation must be expressly set out and is unlikely to be implied: *Leander Construction Ltd v Mulalley and Co Ltd* [2011] EWHC 3449 (TCC).
[10] [2013] EWHC 4030 (TCC).

there are no conditions, or a period has not been agreed upon, the Contractor must perform the work in accordance with recognised principles and within a reasonable period required by the nature of the work while observing the custom of the trade;"

The UAE Civil Code does not contain such a specific provision.[11] That said, art.877 of the UAE Civil Code notes that where there are defects, "if it is possible to make good the work it shall be permissible for the employer to require the contractor to abide by the conditions of the contract and to repair the work within a reasonable period" which suggests that the concept is recognised within the UAE.

Under Sub-Cl.18.3, there is a duty on the Contractor to use all reasonable endeavours to minimise delay caused by Exceptional Risks. There is no other similar obligation contained in the FIDIC Form. Under typical civil law, the absence of an explicit duty to mitigate in such jurisdictions suggests that there is no express obligation upon the Contractor to mitigate delay where they are entitled to an extension of time. This is not the case under common law jurisdictions where there is a duty both to minimise any loss suffered by taking reasonable steps to ensure that, where possible, the loss does not increase, and to not take unreasonable steps which may increase the loss. If a party fails to take steps to mitigate its loss, the damages it recovers may be adversely affected as a Tribunal may only award a sum which takes into account steps which could have been taken to mitigate loss, but which have not been taken.

In addition if no time period for completion is contained then, under common law principles, time will be said to be at large and the Employer will not be entitled to deduct Delay Damages as set out in Sub-Cl.8.8. Time at large is a common law concept, which is not found under civil law. Under the common law, time will be at large if the Employer prevents the Contractor from completing the Works by the time required under the Contract and that contract does not provide for an extension of time in respect of the employer acts of prevention.[12] In these circumstances, a contractor will be under an obligation to complete the works within a reasonable time. The House of Lords decision in *Percy Bilton v GLC*,[13] noted as follows:

1. The general rule is that the main contractor is bound to complete the work by the date of completion stated in the contract. If he fails to do so, he will be liable for liquidated damages to the employer.

[11] Although, art.246(2) states that: "(2) The contract shall not be restricted to an obligation upon the contracting party to do that which is (expressly) contained in it, but shall also embrace that which is appurtenant to it by the law, custom, and the nature of the transaction." It may be possible to argue that principle of completing a project within a reasonable time is appurtenant (or customary) within the construction industry.

[12] *Multiplex Constructions UK Ltd v Honeywell Control Systems Ltd* [2007] EWHC 447 (TCC). As will be seen, Sub-Cl.8.4(e) of the FIDIC Form does provide for an extension of time entitlement.

[13] (1982) 20 B.L.R. 1. See also *Peak Construction v McKinney* (1970) 1 B.L.R. 114.

2. That is subject to the exception that the employer is not entitled to liquidated damages if by his acts or omissions he has prevented the main contractor from completing his work by the completion date.
3. The general rules may be amended by the express terms of the contract.

In the UAE, although the concept of time at large is not recognised, Lord Fraser's second point is addressed by art.390 of the Civil Code which enable the court to vary the amount of any delay damages and thereby take into account any act of default or prevention by the employer. There is also caselaw which establishes that:

"It is established—in the jurisprudence of this court—that the contractor is not bound by the delay fine agreed upon in the contractor contract, if it is proven that the breach of the contractor's obligation to complete the works within the time limit specified in the contract is due to reasons related to the employer or to a cause beyond the control of the contractor."[14]

There then remains the question as to what constitutes a reasonable time. Where no time period is specified and a contractor has been selected through the competitive tender process, then a court would be likely to take an objective view based on how the reasonable contractor in the actual circumstances would have carried out the works. If time is at large (i.e. where there is no identified date for completion) following an act of prevention or breach by the Employer, then the original completion date provides good but not conclusive evidence. It is not conclusive because one needs to take account of not only the fact that a contractor would be expected to have planned the works in order to achieve the original completion date but also of the delay and/or disruption caused by the breach or act of prevention.

Thus, in *British Steel Corp v Cleveland Bridge & Eng Co*,[15] Goff J (as he then was) said:

"I have first to consider what would, in ordinary circumstances, be reasonable time for the performance of the relevant services; and I have then to consider to what extent the time for performance by BSC [the Contractor] was in fact extended by extraordinary circumstances outside their Control."

Alternatively, the Court of Appeal[16] quoted with approval the following definition given by HHJ Seymour QC in a situation where he said that the question as to whether a reasonable time has been exceeded is:

[14] Dubai Court of Cassation, Petition No.310/2009. For a more thorough review of this topic see: S. Lord Hill, "The Concept of 'time at large' in the United Arab Emirates" (2017) Vol.12(2) *Construction Law International*.

[15] [1981] 24 B.L.R. 100.

[16] *Peregrine Systems Ltd v Steria Ltd* [2005] EWCA Civ 239.

"a broad consideration, with the benefit of hindsight, and viewed from the time at which one party contends that a reasonable time for performance has been exceeded, of what would, in all the circumstances which are by then known to have happened, have been a reasonable time for performance. That broad consideration is likely to include taking into account any estimate given by the performing party of how long it would take him to perform; whether that estimate has been exceeded and, if so, in what circumstances; whether the party for whose benefit the relevant obligation was to be performed needed to participate in the performance, actively, in the sense of collaborating in what was needed to be done, or passively, in the sense of being in a position to receive performance, or not at all; whether it was necessary for third parties to collaborate with the performing party in order to enable it to perform; and what exactly was the cause, or were the causes of the delay to performance. The list is not intended to be exhaustive."[17]

However, under the FIDIC conditions, the proper operation of the extension of time Sub-Cl.8.5, should ensure that time does not become at large and that the Contractor's obligation remains to complete within a specified time.

The MDB Harmonised edn 2010

8–005 Whilst this edition deals primarily with the 2017 FIDIC Form, it is worth noting the different approach of the 2010 Pink Book which includes the following:

"Except otherwise specified in the Particular Conditions of Contract, the Commencement Date shall be the date at which the following precedent conditions have all been fulfilled and the Engineer's instruction recording the agreement of both Parties on such fulfilment and instructing to commence the Work is received by the Contractor:

(a) signature of the Contract Agreement by both Parties, and if required, the approval of the Contract by relevant authorities of the Country;
(b) delivery to the Contractor of reasonable evidence of the Employer's financial arrangements (under Sub-Cl.2.4 [Employer's Financial Arrangement]);
(c) except if otherwise specified in the Contract Data, possession of the Site given to the Contractor together with such permission(s) under (a) of Sub-Cl.1.13 [Compliance with Laws] as required for the commencement of the Works;
(d) receipt by the Contractor of the Advance Payment under Sub-Cl.14.2 [Advanced Payment] provided that the corresponding bank guarantee has been delivered by the Contractor; and if

[17] *Astea (UK) Ltd v Time Group Ltd* [2003] EWHC 725.

(e) the Engineer's instruction is not received by the Contractor within 108 days from his receipt of the Letter of Acceptance, the Contractor shall be entitled to terminate the Contract under Sub-Cl.16.2 [Termination by Contractor]."

These amendments are, on the one-hand, of some benefit to the Contractor. The Project cannot commence unless: the Contract Agreement has been signed by both parties, the Contractor has in its possession reasonable proof that the Employer can fund the works, and the Contractor has received any advanced payments that it was entitled to.

All these conditions are stated to be conditions precedent. Significantly, the Contractor has the option of terminating the contract in accordance with Sub-Cl.16 if no instruction is received.

On the other hand, the actual time of the commencement date is probably less clear under the MDB Form. Under the 1999 Form, there was a 42-day window. Now there appears to potentially be a 180-day window as there is no Commencement Date until the Engineer's Instruction has been received by the Contractor.

8.2 Time for Completion

8–006 *"The Contractor shall complete the whole of the Works, and each Section (if any), within the Time for Completion for the Works or Section (as the case may be), including completion of all work which is stated in the Contract as being required for the Works or Section to be considered to be completed for the purposes of taking over under Sub-Clause 10.1 [Taking Over the Works and Sections]."*

OVERVIEW OF KEY FEATURES

8–007
- The Contractor shall complete the whole of the contract works within the time for completion for the Works or Section.
- The obligation to complete includes the passing of any Tests on Completion and the completion of all works stated in the Contract as being necessary for the purpose of taking over under Sub-Cl.10.1.

Commentary

8–008 This is one of the few sub-clauses left unchanged between 1999 and 2017, Sub-Cl.8.2 sets out the time within which the Contractor must complete the Works. If the Contractor fails to do this, they may become liable for the payment of delay damages to the Employer.

The Time For Completion of the Works will be inserted in the Contract Data. It is calculated from the Commencement Date as defined in Sub-Cl.8.1. The Contract Data provides for the Time for Completion to be expressed in days (and

according to Sub-Cl.1.1.25 that means calendar not working days). It is suggested that for certainty, the parties should agree a calendar date.

By Sub-Cl.1.1.86 (Yellow Book), the "Time for Completion" means the time for completing the Works or a Section of the Works as stated in the Contract Data taking into account any extension under Sub-Cl.8.5, calculated from the Commencement Date.

The Works (or Section of the Works) will not be complete until all the necessary Tests on Completion (as defined within Cl.9) have been successfully carried out and all the Work required for the issuing of a Taking Over certificate as provided for by Cl.10 has been completed.

The reference to the completion of the Works means the completion of all the Permanent Works and the Temporary Works as set out in the Contract. Provided these are adequately described, all the parties to the Contract will understand what work needs to be carried out.

However, care is required when talking about sectional completion. Section is defined by Sub-Cl.1.1.76 (Yellow Book) as being a part of the works specified in the Contract Data as a Section (if any). Therefore, it is important that an appropriate description of any Section is set out in the Contract Data. This description should include a separate Time for Completion of that Section together with details of the Delay Damages[18] which may be allowable for a failure to meet the stated Time for Completion. If there is any doubt, then it is likely, under both common and civil law jurisdictions that that doubt would be resolved in favour of the Contractor, the Employer being the party who put the words or description which is in doubt forward.[19]

As discussed at Sub-Cl.4.24 above, many contracts provide for milestones. These are different to and not covered by the reference to Sections in Sub-Cl.8.2. A milestone is a completed stage in a project defined in the contract as a marker point. For example, triggering an entitlement to payment when the foundations are installed or the roof is complete. If formal milestones, by which we mean, the Contractor is to be required to complete a part of the project by an agreed milestone date, are to be part of the Contract, then additional or supplemental provisions will be required which must clearly define what makes up the milestone in question.

8.3 Programme

8–009 *"The Contractor shall submit an initial programme for the execution of the Works to the Engineer within 28 days after receiving the Notice under Sub-Clause 8.1 [Commencement of Works]. This programme shall be prepared using programming software stated in the Employer's Requirements (if not stated, the programming software acceptable to the Engineer). The Contractor*

[18] This topic is described in more detail within Sub-Cl.8.8.
[19] See the contra proferentum rule and art.266(1) of the UAE Civil Code.

shall also submit a revised programme which accurately reflects the actual progress of the Works, whenever any programme ceases to reflect actual progress or is otherwise inconsistent with the Contractor's obligations.

The initial programme and each revised programme shall be submitted to the Engineer in one paper copy, one electronic copy and additional paper copies (if any) as stated in the Contract Data, and shall include:

(a) the Commencement Date and the Time for Completion, of the Works and of each Section (if any);
(b) the date right of access to and possession of (each part of) the Site is to be given to the Contractor in accordance with the time (or times) stated in the Contract Data. If not so stated, the dates the Contractor requires the Employer to give right of access to and possession of (each part of) the Site;
(c) the order in which the Contractor intends to carry out the Works, including the anticipated timing of each stage of design,[20] preparation and submission of Contractor's Documents, procurement, manufacture, inspection, delivery to Site, construction, erection, installation, work to be undertaken by any nominated Subcontractor (as defined in Clause 4.5 [Nominated Subcontractors]), testing, commissioning and trial operation;[21]
(d) the Review periods under Sub-Clause 5.2.2 [Review by Engineer], and periods for Review for any other submissions specified in the Employer's Requirements or required under these Conditions;
(e) the sequence and timing of inspections and tests specified in, or required by, the Contract;
(f) for a revised programme: the sequence and timing of the remedial work (if any) to which the Engineer has given a Notice of No-objection under Sub-Clause 7.5 [Defects and Rejection] and/or the remedial work (if any) instructed under Sub-Clause 7.6 [Remedial Work];
(g) all activities (to the level of detail specified in the Employer's Requirements), logically linked and showing the earliest and latest start and finish dates for each activity, the float (if any), and the critical path(s);
(h) the dates of all locally recognised days of rest and holiday periods (if any);
(i) all key delivery dates of Plant and Materials;
(j) for a revised programme and for each activity: the actual progress to date, any delay to such progress and the effects of such delay on other activities (if any); and
(k) a supporting report which includes

[20] The Red Book has the additional words "(if any)".
[21] Commissioning and trial operation are features of the Yellow and not the Red Book.

(i) a description of all the major stages of the execution of the Works;
(ii) a general description of the methods which the Contractor intends to adopt in the execution of the Works;
(iii) details showing the Contractor's reasonable estimate of the number of each class of Contractor's Personnel, and of each type of Contractor's Equipment, required on the Site, for each major stage of the execution of the Works;
(iv) if a revised programme, identification of any significant change(s) to the previous programme submitted by the Contractor; and
(v) the Contractor's proposals to overcome the effects of any delay(s) on progress of the Works.

The Engineer shall Review the initial programme and each revised programme submitted by the Contractor and may give a Notice to the Contractor stating the extent to which it does not comply with the Contract or ceases to reflect actual progress or is otherwise inconsistent with the Contractor's obligations. If the Engineer gives no such Notice:

- *within 21 days after receiving the initial programme; or*
- *within 14 days after receiving a revised programme,*

the Engineer shall be deemed to have given a Notice of No-objection and the initial programme or revised programme (as the case may be) shall be the Programme.

The Contractor shall proceed in accordance with the Programme, subject to the Contractor's other obligations under the Contract. The Employer's Personnel shall be entitled to rely on the Programme when planning their activities.

Nothing in any programme, the Programme or any supporting report shall be taken as, or relieve the Contractor from any obligation to give, a Notice under the Contract.

If, at any time, the Engineer gives a Notice to the Contractor that the Programme fails (to the extent stated) to comply with the Contract or ceases to reflect actual progress or is otherwise inconsistent with the Contractor's obligations, the Contractor shall within 14 days after receiving this Notice submit a revised programme to the Engineer in accordance with this Sub-Clause."

OVERVIEW OF KEY FEATURES

8–010

- The Contractor shall submit a detailed time programme to the Engineer no later than 28 days after receiving the Notice of the commencement of Works under Sub-Cl.8.1.

- The Contractor must submit revised and updated programmes when the original programme becomes out-of-date and inconsistent with actual progress.
- The programme software used should be as specified in the Employer's Requirements.
- The minimum programme requirements are set out in sub-paras (a)–(k) but every programme shall include:

(i) the sequence in which the Contractor intends to carry out the work;
(ii) details of access dates, as well as key delivery dates, required by the Contractor;
(iii) details of any stage of work to be carried out by a nominated subcontractor;
(iv) details of the sequence and timing of any inspections and tests;
(v) supporting details of the methods the Contractor intends to use;
(vi) full logic links including a critical path; and
(vii) a supporting report including a description of the major elements of the proposed work and an estimate of the number of personnel and equipment required.

- If the Engineer believes that the programme does not comply with the Contract, the Engineer should give Notice to the Contractor within 21 days (for the initial programme) or 14 days (for any revised programme).
- If the Engineer fails to give such a notice, the programme shall be the Programme and the Contractor shall proceed in accordance with that Programme.
- The Employer's Personnel are entitled to rely upon the programme when planning their activities.
- If the Engineer considers that a programme fails to comply with the Contract or is inconsistent with actual progress, he may give due Notice to the Contractor.
- If the Engineer gives such a Notice, the Contractor must submit a revised programme to the Engineer within 14 days.
- Nothing in the Programme shall constitute a Notice of Claim as required by Sub-Cl.20.2.

Commentary

8–011 Sub-Clause 1.1.66 (Red Book) defines the Programme as meaning the detailed time programme submitted by the Contractor to which the Engineer has given, or is deemed to have given, a Notice of No-Objection. By using the new wording, no-objection, FIDIC have avoided any suggestion that the Engineer has formally "approved" the programme. Under Cl.14 of the old Red Book FIDIC, 4th edn, programmes were submitted for approval to the Engineer. This is not quite the case here. However, the Engineer is able to give Notice to the Contractor if he considers that the programme does not comply with the Contract. Therefore, the Engineer should be careful to remember that it will accordingly be open to the

- It is the responsibility of the Contractor to pay all taxes and other fees as required.
- Any quantity set out in the Bill of Quantities or other schedule is an estimated figure only.
- It is the responsibility of the Contractor to submit, within 28 days after the Commencement Date, a non-binding breakdown of each lump sum price shown in any schedule.

Commentary

14–004 The amount the Contractor is going to be paid and the timing of that payment is of fundamental importance to both Contractor and Employer alike. Indeed, the Special Provisions note that the procedures and timing for making payments should be checked to ensure that they are acceptable to both the Employer and any financing institution the Employer may be using to fund the project. They continue that consideration should be given to the amount and timing of payment(s) to the Contractor, especially as tenderers will take account of the interim payment procedures when preparing their tenders. The manner in which the payment is made is traditionally dependent on the precise wording of the contract.[1]

Under the Code of Hammurabi[2] the rule was as follows:

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

Thus, the amount to be paid was clear and, given that the punishment for violating most of the provisions of the Code was death, it might be presumed that most builders were paid, provided the house was constructed properly. However, the rule does not say when the payment has to be made.

Under Sub-Cl.1.1.13, the Contract Price is stated to be the price defined in Sub-Cl.14.1. This is slightly misleading as this sub-clause immediately cross-refers to the mechanism set out in Sub-Cl.12.3 whereby the Engineer will either agree or determine the Contract Price.

Sub-paragraph (b) reconfirms the requirement detailed in Sub-Cl.1.13 that the Contractor must comply with the law of the contract and pay any taxes or other duties. Where sub-paragraph (b) does not apply, the Special Provisions suggest examples of sub-clauses dealing with the payment of duties or taxes. Obviously, it is the responsibility of the Contractor to ensure that the Contractor fully understands any tax and excise laws of the country where the project is based prior to the commencement of the Contract, ideally prior to submitting the tender. That said, the Contractor has some protection as from Sub-Cl.13.6 it appears that

[1] Although in the UK, s.109 of the 1998 Housing Grants, Construction and Regeneration Act, as amended by Pt 8 of the Local Democracy, Economic Development and Construction Act 2009 now gives most contractors the right to payment by instalments.

[2] King Hammurabi ruled the kingdom of Babylon from 1792 to 1750 BC.

if the tax rates go up (or as occasionally happens go down) the Contract Price will be adjusted accordingly.

The final sub-paragraph requires the Contractor to submit a breakdown of every lump sum price. This needs to be done quite promptly, within 28 days of the Commencement Date. However, this will serve as no more than a guide to the Engineer as the sub-paragraph expressly makes clear that the Engineer is not bound by it.

As noted above, the FIDIC Red Book is a *"measure and value"* contract. Thus, a number of the measurement and payment sub-clauses in the standard Red Book form, for example Sub-Cl.14.1(a), would be inappropriate for contracts let on a lump sum basis. With lump sum contracts, such as the Yellow Book, the contract sum is fixed, subject to the correction of any errors and adjustment to the scope of the works by way of a variation or change order. With the measure and value contract, the Contractor is paid the actual value of the works carried out—the valuation being based on the Bill of Quantities or if applicable the Schedules.

There is small scope for confusion as it could be argued that strictly re-measurement contracts are the equivalent of lump sum contracts in that the rates for the work are fixed and thus the individual rates for each element in the Bill of Quantities or other schedules are also individual lump sums in their own rights. In other words, while the Contractor is to be paid for the items as eventually carried out and measured, he will be paid the rate upon which his original tender was based. That is not the case here as sub-para.(c) confirms that Bills of Quantities are estimated only and will thus remain to be calculated. In fact, if the quantities change substantially, then arguments might be raised that the rate should be varied because of the substantial change in the quantities, resulting in a change to the nature of the works.

FIDIC say that lump sum contracts may be suitable if the tender documents include details which are sufficiently complete for construction and for significant 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. However, if there is going to be a significant design input then the Yellow (or perhaps Silver) Book should be used. If the lump sum form is to be adopted, the Special Provisions recommend the following amendments:

> *"Delete the second paragraph of Sub-Clause 8.5 [Extension of Time for Completion].*
>
> *Delete Clause 12 [Measurement and Valuation].*
>
> *Under Sub-Clause 13.3.1 [Variation by Instruction]:*
>
> *- in sub-paragraph (c) delete the words 'by valuing the Variation in accordance with Clause 12 [Measurement and Valuation], with supporting particulars (which shall include identification of any estimated quantities and, if the Contractor incurs or will incur Cost as a result of any necessary modification to the Time for Completion, shall show the additional payment (if any) to*

which the Contractor considers that the Contractor is entitled)' and replace with:

'with supporting particulars. Whenever the omission of any work forms part (or all) of a Variation, and if:

the Contractor has incurred or will incur cost which, if the work had not been omitted, would have been deemed to be covered by a sum forming part of the Accepted Contract Amount; and

the omission of the work has resulted or will result in this sum not forming part of the Contract Price this cost may be included in the Contractor's proposal (and, if so, shall be clearly identified). If the Parties have agreed to the omission of any work which is to be carried out by others, the Contractor's proposal may also include the amount of any loss of profit and other losses and damages suffered (or to be suffered) by the Contractor as a result of the omission'; and

- in sub-paragraph (ii): delete the words '(including valuation of the Variation in accordance with Clause 12 [Measurement and Valuation] using measured quantities of the varied work)' and replace with:

'and the Schedule of Payments (if any)'.

Delete sub-paragraph (a) of Sub-Clause 14.1 and replace with:

'(a) the Contract Price shall be the lump sum Accepted Contract Amount and be subject to adjustments in accordance with the Contract;'.

Delete sub-paragraph (c) of Sub-Clause 14.1 and replace with:

'(c) any quantities which may be set out in a Schedule are estimated quantities and are not to be taken as the actual and correct quantities of the Works which the Contractor is required to

execute; and'".

In the 2010 Pink Book, the following sub-clause has been added:

"Notwithstanding the provisions of sub paragraph (b), Contractor's Equipment, including essential spare parts therefore, imported by the Contractor for the sole purpose of executing the Contract shall be exempt from the payment of import duties and taxes upon importation."

This introduces a potentially significant exception to the Contractor's liability to pay taxes and other duties.

14.1 The Contract Price (Yellow Book)

14–005 *"Unless otherwise stated in the Particular Conditions:*

(a) the Contract Price shall be the lump sum Accepted Contract Amount and be subject to adjustments, additions (including Cost or Cost Plus Profit to which the Contractor is entitled under these Conditions) and/or deductions in accordance with the Contract;

(b) the Contractor shall pay all taxes, duties and fees required to be paid by the Contractor under the Contract, and the Contract Price shall not be adjusted for any of these costs, except as stated in Sub-Clause 13.6 [Adjustments for Changes in Laws];

(c) any quantities which may be set out in a Schedule are estimated quantities and are not to be taken as the actual and correct quantities of the Works which the Contractor is required to execute; and

(d) any quantities or price data which may be set out in a Schedule shall be used for the purposes stated in the Schedule and may be inapplicable for other purposes.

However, if any part of the Works is to be paid according to quantity supplied or work done, the provisions for measurement and valuation shall be as stated in the Particular Conditions. The Contract Price shall be valued accordingly, subject to adjustments in accordance with the Contract."

OVERVIEW OF KEY FEATURES

14–006

- The Contract Price shall be the lump sum Accepted Contract Amount as adjusted.
- The Contract Price will not be adjusted in respect of the taxes, duties and fees that have to be paid by the Contractor.
- Any estimated quantities are not to be taken as the actual quantities of the Works the Contractor must carry out.
- If any work is to be paid according to quantity supplied or work done, then provisions for measurement and valuation shall be set out in the Particular Conditions.

Commentary

14–007 As noted above, Cl.14 provides the basis for the FIDIC payment regime. It duly sets out when the amounts due are to be paid out by the Employer. The timing of payment is primarily a commercial matter and it is important that both parties are content with the proposed procedures.

Under Sub-Cl.1.1.12, the Contract Price is stated to be the price defined in Sub-Cl.14.1. The Yellow Book is a lump sum contract, which means that the contract sum is fixed, subject to the correction of any errors and adjustment to the scope of the works by way of a variation or change order. With the measure and value contract, such as the Red Book, the Contractor is paid the actual value of the works carried out—the valuation being based on the Bill of Quantities or if applicable the Schedules. As the Special Provisions note, with lump sum contracts, the Contractor takes the risk of changes in cost arising from the Contractor's design.

In the Singapore case of *Goh Eng Lee Andy v Yeo Jin Kow*[3] the court had to decide whether a lump sum contract was a feature of a design and build contract. The judge held that:

> "In my view, a 'design and build' contract, in the absence of any terms to the contrary, necessarily incorporates a lump sum contract. A 'design and build' contract and a lump sum contract have in common the feature that the contractor has to do all that is necessary to achieve the contractual scope of works without an adjustment in price."

Kannan Ramesh JC also made reference to the position of a contractor concerning claims for additional payments under a design and build contract as set out by Chow Kok Fong in *Law and Practice of Construction Contracts (Volume 1)*[4]:

> "In most situations, ['design and build' contracts] will operate as a fixed price or 'lump sum' contract. The contractor is only entitled to claim for additional payments where it is demonstrated that the works, as defined in the project brief or client's requirements, have been varied or where there has been breach of the obligations by the owner and, as a result of which, the contractor had to incur additional expense."

Whilst the wording and meaning of the FIDIC Form, whether Red or Yellow here, is clear, the case of *Mascareignes Sterling Co Ltd v Chang Cheng Esquares Co Ltd*[5] an appeal from the Supreme Court of Mauritius provides a warning as to what can happen if the Parties do not follow the rules and processes laid down by the contract in question.

Here, one of the key issues was the nature of the contract itself. CCE conceded that the contract had been a lump sum contract but submitted that the parties had altered it by their conduct into a measure and value contract. The arbitrator had said that MSC was aware during the contract that interim valuations had been issued based on measure and value. Further, the arbitrator accepted CCE's evidence that MSC had radically redesigned the building compared with that which it had proposed when the parties entered into the contract. The changes included the alteration of the height of each basement, a change to the grade of concrete, an increase in the number of lift shafts from two to three and changes in their size, thickness and height, and changes to the floor area and height of the building.

The evidence of the QS was that: (a) the parties had agreed priced bills of quantities, (b) rates had been agreed for works not defined in the bills of

[3] [2016] SGHC 110.
[4] 4th edn (London: Sweet & Maxwell, 2012), para.2.41.
[5] [2016] UKPC 21.

quantities, (c) when preparing interim valuations, his staff measured the works carried out by CCE, and (d) when preparing the final account, he was required to measure items of work because of the extent of the changes to the scope of the works.

What the QS did in preparing the interim valuations resulted in part from the absence of an architect to operate the process of interim certification under the contract and in part from the changes that MSC was making at the time to both the design of the building and the allocation of work. Lord Hodge commented that there was, in the view of the Privy Council Board:

> "more scope for flexibility in valuing additional or substituted work in a lump sum contract than the parties have submitted. Work which is not expressly or impliedly included in the work for which the contracted lump sum is payable is extra work."

Finally, Parties should note that the Special Provisions also provide examples of a number of additional sub-clauses that may be required as follows:

- If payment for any part of the Works is to be made on the basis of measurement, that part must be defined in the Contract.
- If the Contractor is not required to pay import duties on Goods it imports into the Country, an additional sub-clause should be added and sub-para.(b) amended.
- If expatriate staff are exempted from paying local income tax, an additional sub-clause should be added and sub-para.(b) amended.

14.2 Advance Payment

"If no amount of total advance payment is stated in the Contract Data, this Sub-Clause shall not apply. **14–008**

After receiving the Advance Payment Certificate, the Employer shall make an advance payment, as an interest-free loan for mobilisation and design. The amount of the advance payment and the currencies in which it is to be paid shall be as stated in the Contract Data.

14.2.1 *Advance Payment Guarantee*

The Contractor shall obtain (at the Contractor's cost) an Advance Payment Guarantee in amounts and currencies equal to the advance payment, and shall submit it to the Employer with a copy to the Engineer. This guarantee shall be issued by an entity and from within a country (or other jurisdiction) to which the Employer gives consent, and shall be based on the sample form included in the tender documents or on another form agreed by the Employer (but such consent and/or agreement shall not relieve the Contractor from any obligation under this Sub-Clause).

The Contractor shall ensure that the Advance Payment Guarantee is valid and enforceable until the advance payment has been repaid, but its amount may be progressively reduced by the amount repaid by the Contractor as stated in the Payment Certificates.

If the terms of the Advance Payment Guarantee specify its expiry date, and the advance payment has not been repaid by the date 28 days before the expiry date:

(a) the Contractor shall extend the validity of this guarantee until the advance payment has been repaid;
(b) the Contractor shall immediately submit evidence of this extension to the Employer, with a copy to the Engineer; and
(c) if the Employer does not receive this evidence 7 days before the expiry date of this guarantee, the Employer shall be entitled to claim under the guarantee the amount of advance payment which has not been repaid.

When submitting the Advance Payment Guarantee, the Contractor shall include an application (in the form of a Statement) for the advance payment.

14.2.2 *Advance Payment Certificate*

The Engineer shall issue an Advance Payment Certificate for the total advance payment within 14 days after:

(a) the Employer has received both the Performance Security and the Advance Payment Guarantee, in the form and issued by an entity in accordance with Sub-Clause 4.2.1 [Contractor's Obligations] and Sub-Clause 14.2.1 [Advance Payment Guarantee] respectively; and
(b) the Engineer has received a copy of the Contractor's application for the advance payment under Sub-Clause 14.2.1 [Advance Payment Guarantee].

14.2.3 *Repayment of Advance Payment*

The advance payment shall be repaid through percentage deductions in Payment Certificates. Unless other percentages are stated in the Contract Data:

(a) deductions shall commence in the IPC in which the total of all certified interim payments in the same currency as the advance payment (excluding the advance payment and deductions and release of retention moneys) exceeds ten percent (10%) of the portion of the Accepted Contract Amount payable in that currency less Provisional Sums; and
(b) deductions shall be made at the amortisation rate of one quarter (25%) of the amount of each IPC (excluding the advance payment and deductions and release of retention moneys) in the currencies and proportions of the advance payment, until such time as the advance payment has been repaid.

If the advance payment has not been repaid before the issue of the Taking-Over Certificate for the Works, or before termination under Clause 15 [Termination by Employer], Clause 16 [Suspension and Termination by Contractor] or Clause 18 [Exceptional Events] (as the case may be), the whole of the balance then outstanding shall immediately become due and payable by the Contractor to the Employer."

OVERVIEW OF KEY FEATURES

14–009

- Provided the Contractor submits a guarantee, which must remain valid until the lump sum is repaid to obtain the advance payment, the Employer shall make an advance payment for mobilisation.
- The advance payment is an interest-free loan.
- The total advance payment shall be stated in the Contract Data.
- If the advance payment has not been repaid 28 days prior to the expiry date, the Contractor must extend the validity of the guarantee. If the Contractor fails to do this, the Employer can make a claim under the guarantee.
- The advance payment is re-paid through percentage deductions in the payment certificates, which commence when the total of certified interim payments exceeds 10 per cent of the accepted contract amount less any provisional sums.
- If the advance payment has not been repaid before the issue of the Taking-Over Certificate for the Works, or before termination under either Cll.15, 16 or 18, then the whole of the outstanding balance shall immediately become due and repayable to the Employer.

Commentary

14–010

This sub-clause has been substantially re-written, although the basic intent remains the same. Advance payment is not a defined term under the Contract. These payments (sometimes known as mobilisation advance payments) are advances of money made by the Employer to the Contractor both in anticipation of and for the purpose of completion of the Works. They provide up-front funds to the Contractor assist with the initial mobilisation costs. Where an advance payment is provided for the supply of equipment and other mobilisation costs, an Advance Payment Guarantee will almost always be required.

The right to an advance payment is not automatic. The key to this sub-clause is that if the proposed advance payment is not set out in the Contract Data, then it will not apply. The suggestion of an advance payment accords with the sentiments set out in the Special Provisions which when commenting upon Sub-Cl.14.1 recommend that Employers take the following into account:

"When writing the Particular Conditions consideration should be given to the amount and timing of payment(s) to the Contractor. A positive cash flow is

clearly of benefit to the Contractor, and tenderers will take account of the interim payment procedures when preparing their tenders."

The advance payment mentioned here is to be interest free and its purpose is expressly stated to assist with mobilisation. Under the terms of the 2010 Pink Book, the words "and cash flow support" have been added to follow "mobilisation" in the first paragraph. This reinforces, in contractual terms, one of the benefits to the Contractor of the advance payment.

However, the Employer is under no obligation to make any advance payment, until the Contractor has submitted a guarantee which conforms with the requirements of this sub-clause. Thus, the Employer knows that its loan will be protected. Annexe E provides an example form of advance payment guarantee: this is in the form of an on-demand bond.[6] Under the 2010 Pink Book, it is made clear that the guarantee shall be issued by a "reputable bank or financial institution selected by the" Contractor. These words arguably give the Contractor a little more flexibility as they replaced the words which appear in both the 1999 and 2017 Forms requiring the guarantee to be issued by an entity from a country approved by the Employer.

If it is intended to pay the advance payment in instalments, then the number and timing of the advance payments should also be stated in the Contract Data. If the number and timing of such instalments is not set out, then the advance payment must be made in one go. The timing of the payments is governed by Sub-Cl.14.7(a). If not otherwise agreed, the first instalment is to be paid within 21 days after receipt of the Advance Payment Certificate.

The sub-clause also sets out the provisions for re-payment. Re-payment commences, unless agreed otherwise, when the certified sums reach 10 per cent (or 30 per cent in the 2010 Pink Book) of the Accepted Contract Amount. The Contractor should factor in the impact of the timing, and in particular consider the cash flow implications, of the repayments. The Contractor must also remember that the advance payment guarantee remains valid until the repayments are at an end, albeit that the amount of the guarantee can be progressively reduced to reflect the repayments already made. Hence, the scheme of the proposed payments is something which should be made clear in the advance payment guarantee.

Sub-Clause 14.5 provides another optional form of advance payment in relation to Plant and Materials.

If the Contractor does not extend the validity of the Advance Payment Guarantee, where it will expire before the advance payment has been repaid, then a new provision has been added to the 2017 Form, enabling the Employer to make a call on the guarantee.

If the Contract is subject to termination, then the advance payment is stated to be "immediately due and payable". However, this is not the same as immediately

[6] See Sub-Cl.4.2 for further discussion about bonds and guarantees. A copy of Annexe E can be found at Appendix [3].

repayable. Whatever form the termination takes, there will be some form of final accounting, and the "advance payment" sum that stands to be recovered will be a credit in the Employer's balance column. Again, the 2010 Form seems to have greater protection for the Employer as the final part of the sub-clause notes that the advance payment does not become immediately due and payable where there is a termination under Sub-Cl.15.5, namely Termination for Convenience.

14.3 Application for Interim Payment

14–011 *"The Contractor shall submit a Statement to the Engineer after the end of the period of payment stated in the Contract Data (if not stated, after the end of each month). Each Statement shall:*

(a) be in a form acceptable to the Engineer;
(b) be submitted in one paper-original, one electronic copy and additional paper copies (if any) as stated in the Contract Data; and
(c) show in detail the amounts to which the Contractor considers that the Contractor is entitled, with supporting documents which shall include sufficient detail for the Engineer to investigate these amounts together with the relevant report on progress in accordance with Sub-Cl.4.20 [Progress Reports].

The Statement shall include the following items, as applicable, which shall be expressed in the various currencies in which the Contract Price is payable, in the sequence listed:

(i) the estimated contract value of the Works executed, and the Contractor's Documents produced, up to the end of the period of payment (including Variations but excluding items described in sub-paras (ii)–(x) below);
(ii) any amounts to be added and/or deducted for changes in Laws under Sub-Cl.13.6 [Adjustments for Changes in Laws], and for changes in Cost under Sub-Cl.13.7 [Adjustments for Changes in Cost];
(iii) any amount to be deducted for retention, calculated by applying the percentage of retention stated in the Contract Data to the total of the amounts under sub-paras (i), (ii) and (iv) of this sub-clause, until the amount so retained by the Employer reaches the limit of Retention Money (if any) stated in the Contract Data;
(iv) any amounts to be added and/or deducted for the advance payment and repayments under Sub-Cl.14.2 [Advance Payment];
(v) any amounts to be added and/or deducted for Plant and Materials under Sub-Cl.14.5 [Plant and Materials intended for the Works];

(vi) any other additions and/or deductions which have become due under the Contract or otherwise, including those under Sub-Cl.3.7 [Agreement or Determination];

(vii) any amounts to be added for Provisional Sums under Sub-Cl.13.4 [Provisional Sums];

(viii) any amount to be added for release of Retention Money under Sub-Cl.14.9 [Release of Retention Money];

(ix) any amount to be deducted for the Contractor's use of utilities provided by the Employer under Sub-Cl.4.19 [Temporary Utilities]; and

(x) the deduction of amounts certified in all previous Payment Certificates."

OVERVIEW OF KEY FEATURES

14–012

- The Contractor must submit, if not agreed otherwise, on a monthly basis, the agreed number of copies of its application for interim payment. At least one must be a hard or paper copy and another a soft or electronic version.
- The application for interim payment must include the progress report prepared in accordance with Sub-Cl.4.20.
- It is a further requirement that the application includes the detailed supporting information set out at sub-paras (i)–(x).

Commentary

14–013 This sub-clause provides for a monthly payment cycle, which is initiated by the Contractor submitting to the Engineer detail of the amount that it considers it is entitled to be paid. This interim payment will either be calculated by reference to the estimated value of the executed works (Sub-Cl.14.3(i)) or by the Schedules of Payment, if they form part of the Contract (Sub-Cl.14.4).

As noted above, the requirement imposed by Sub-Cl.4.20 to provide detailed monthly progress reports amounts to a pre-condition of payment. This link between payment and the delivery of a monthly report has presumably been inserted because of the particular importance to the Employer of being kept up-to-date with progress.

By virtue of Sub-Cl.14.7(b)(i), the time within which the Employer must pay the amount certified does not start to run until the Engineer has received the Contractor's statement and all supporting documents.

Therefore, the Contractor should take steps to ensure that there is no room for doubt as to the date the application is delivered. It may also be sensible for the Contractor to agree with the Engineer the form, detail and format of the submission. The application must be submitted in accordance with the details required by sub-paras (i)–(x). These have been expanded from the 1999 Form and are:

(i) Current estimated contract value.

(ii) Any adjustments due to legislative changes or cost fluctuations.
(iii) The retention amount.
(iv) The advance payment.
(v) Amounts for Plant and Materials.
(vi) Amount of Contractor claims or deductions for Employer claims, including those due under Sub-Cl.3.7 determinations.
(vii) Any amounts to be added for Provisional sums.
(viii) Any amounts to be added for release of retention.
(ix) Any amounts to be deducted for the Contractor's use of utilities.
(x) Deduction of amounts previously certified.

It is therefore important that the Contractor is in a position to provide all that is required by this sub-clause on a regular basis. Any delay to the application will delay payment.

14.4 Schedule of Payments

14–014 *"If the Contract includes a Schedule of Payments specifying the instalments in which the Contract Price will be paid then, unless otherwise stated in this Schedule:*

(a) the instalments quoted in the Schedule of Payments shall be treated as the estimated contract values for the purposes of sub-paragraph (i) of Sub-Clause 14.3 [Application for Interim Payment];

(b) Sub-Clause 14.5 [Plant and Materials intended for the Works] shall not apply; and

(c) if:

(i) these instalments are not defined by reference to the actual progress achieved in the execution of the Works; and

(ii) actual progress is found by the Engineer to differ from that on which the Schedule of Payments was based,

then the Engineer may proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine revised instalments (and, for the purpose of Sub-Clause 3.7.3 [Time limits], the date when the difference under sub-paragraph (ii) above was found by the Engineer shall be the date of commencement of the time limit for agreement under Sub-Clause 3.7.3). Such revised instalments shall take account of the extent to which progress differs from that on which the Schedule of Payments was based.

If the Contract does not include a Schedule of Payments, the Contractor shall submit non-binding estimates of the payments which the Contractor expects to become due during each period of 3 months. The first estimate shall be submitted within 42 days after the Commencement Date. Revised estimates shall be submitted at intervals of 3 months, until the issue of the Taking-Over Certificate for the Works."

OVERVIEW OF KEY FEATURES

14–015

- The Contract may include a Schedule of Payments detailing provisions for payment by instalments.
- If the schedule is included, the instalments must be estimated contract values defined by reference to actual progress.
- If the Contract does not include a schedule, then the Contractor shall submit non-binding estimates of the payments which he expects to become due.
- The first estimate must be submitted within 42 days after the Commencement Date, with revised estimates every three months.

Commentary

14–016 It is quite likely that the majority of this sub-clause will not be required, as it only takes affect if the Contract provides that interim payments are to be made in accordance with a specific Schedule of Payments. The contractual scheme as set out at Sub-Cl.14.3 is for payments to be monthly.

The final paragraph will however apply regardless. It requires the Contractor to provide a quarterly estimate of the amount of payment it anticipates. This is not binding and it may at first be thought to be rather unnecessary especially as there is (and can be) no sanction for the provision of inaccurate estimates. This first provision which appeared in the 1999 Suite, replaced the requirement for cash-flow estimates to be found at Sub-Cl.14.3 of the old Red Book, FIDIC, 4th edn. It should serve as a valuable guide as to the forthcoming expenditure and so will be of some assistance to those monitoring the cash-flow of both the Employer and Contractor.

14.5 Plant and Materials Intended for the Works

14–017 *"If no Plant and/or Materials are listed in the Contract Data for payment when shipped and/or payment when delivered, this Sub-Clause shall not apply.*

The Contractor shall include, under sub-paragraph (v) of Sub-Clause 14.3 [Application for Interim Payment]:

- *an amount to be added for Plant and Materials which have been shipped or delivered (as the case may be) to the Site for incorporation in the Permanent Works; and*
- *an amount to be deducted when the contract value of such Plant and Materials is included as part of the Permanent Works under sub-paragraph (i) of Sub-Clause 14.3 [Application for Interim Payment].*

The Engineer shall proceed under Sub-Clause 3.7 [Agreement or Determination] to agree or determine each amount to be added for Plant and Materials if the following conditions are fulfilled (and, for the purpose of Sub-Clause 3.7.3 [Time limits], the date these conditions are fulfilled shall be the

date of commencement of the time limit for agreement under Sub-Clause 3.7.3):

(a) the Contractor has:

(i) kept satisfactory records (including the orders, receipts, Costs and use of Plant and Materials) which are available for inspection by the Engineer;

(ii) submitted evidence demonstrating that the Plant and Materials comply with the Contract (which may include test certificates under Sub-Clause 7.4 [Testing by the Contractor] and/or compliance verification documentation under Sub-Clause 4.9.2 [Compliance Verification Systems]) to the Engineer; and

(iii) submitted a statement of the Cost of acquiring and shipping or delivering (as the case may be) the Plant and Materials to the Site, supported by satisfactory evidence;

and either:

(b) the relevant Plant and Materials:

(i) are those listed in the Contract Data for payment when shipped;

(ii) have been shipped to the Country, en route to the Site, in accordance with the Contract; and

(iii) are described in a clean shipped bill of lading or other evidence of shipment, which has been submitted to the Engineer together with:

- *evidence of payment of freight and insurance;*
- *any other documents reasonably required by the Engineer; and*
- *a written undertaking by the Contractor that the Contractor will deliver to the Employer (prior to submitting the next Statement) a bank guarantee in a form and issued by an entity to which the Employer gives consent (but such consent shall not relieve the Contractor from any obligation in the following provisions of this sub-paragraph), in amounts and currencies equal to the amount due under this Sub-Clause. This guarantee shall be in a similar form to the form described in Sub-Clause 14.2.1 [Advance Payment Guarantee] and shall be valid until the Plant and Materials are properly stored on Site and protected against loss, damage or deterioration;*

or

(c) the relevant Plant and Materials:

(i) are those listed in the Contract Data for payment when delivered to the Site, and

(ii) have been delivered to and are properly stored on the Site, are protected against loss, damage or deterioration, and appear to be in accordance with the Contract.

The amount so agreed or determined shall take account of the evidence and documents required under this Sub-Clause and of the contract value of the Plant and Materials. If sub-paragraph (b) above applies, the Engineer shall have no obligation to certify any payment under this Sub-Clause until the Employer has received the bank guarantee in accordance with sub-paragraph (b)(iii) above. The sum to be certified by the Engineer in an IPC shall be the equivalent of eighty percent (80%) of this agreed or determined amount. The currencies for this certified sum shall be the same as those in which payment will become due when the contract value is included under sub-paragraph (i) of Sub-Clause 14.3 [Application for Interim Payment]. At that time, the Payment Certificate shall include the applicable amount to be deducted which shall be equivalent to, and in the same currencies and proportions as, this additional amount for the relevant Plant and Materials."

OVERVIEW OF KEY FEATURES

14–018

- This sub-clause will only apply if lists of relevant Plant and Materials are listed in the Contract Data for payment.
- The Engineer will only certify additions for Plants and Materials for payment if the Contractor's records are satisfactory and the Contractor has submitted evidence that the relevant Plant and Materials comply with the Contract and/or the Compliance Verification Systems and an undertaking to provide a written guarantee in similar form to the Advance Payment Guarantee.
- The additional amount to be certified will be up to 80 per cent of the Engineer's determination of the cost of the additional plant and materials.
- Payment will be made in the same currency as for the rest of the contract.

Commentary

14–019 This is another optional sub-clause in that it will not apply if a Schedule of Payments has been adopted, as provided for in Sub-Cl.14.4(b), or if the lists of Plant and Materials are not set out in the Contract Data. Its purpose is to deal with payment for plant and materials which are being delivered to site. It acts as a further form of advance payment, in the sum of 80 per cent of the Engineer's valuation of the Plant and Materials in question. Thus, this is another sub-clause designed to assist the Contractor's cash-flow by keeping his financing costs low. As with Sub-Cl.14.2, if an advance payment is going to be made, a guarantee must be provided by the Contractor.

If this sub-clause is to operate, the Contractor must take care to keep the necessary records outlined in order to satisfy the requirements listed in the sub-paragraph. It is for the Engineer to determine whether or not those requirements have been satisfied.

14.6 Issue of IPC

"No amount will be certified or paid to the Contractor until: **14–020**

(a) the Employer has received the Performance Security in the form, and issued by an entity, in accordance with Sub-Clause 4.2.1 [Contractor's obligations]; and
(b) the Contractor has appointed the Contractor's Representative in accordance with Sub-Clause 4.3 [Contractor's Representative].

14.6.1 The IPC

The Engineer shall, within 28 days after receiving a Statement and supporting documents, issue an IPC to the Employer, with a copy to the Contractor:

(a) stating the amount which the Engineer fairly considers to be due; and
(b) including any additions and/or deductions which have become due under Sub-Clause 3.7 [Agreement or Determination] or under the Contract or otherwise,

With detailed supporting particulars (which shall identify any difference between a certified amount and the corresponding amount in the Statement and give the reasons for such difference).

14.6.2 Withholding (amounts in) an IPC

Before the issue of the Taking-Over Certificate for the Works, the Engineer may withhold an IPC in an amount which would (after retention and other deductions) be less than the minimum amount of IPC (if any) stated in the Contract Data. In this event, the Engineer shall promptly give a Notice to the Contractor accordingly.

An IPC shall not be withheld for any other reason, although:

(a) if any thing supplied or work done by the Contractor is not in accordance with the Contract, the estimated cost of rectification or replacement may be withheld until rectification or replacement has been completed;
(b) if the Contractor was or is failing to perform any work, service or obligation in accordance with the Contract, the value of this work or obligation may be withheld until the work or obligation has been performed. In this event, the Engineer shall promptly give a Notice to the Contractor describing the failure and with detailed supporting particulars of the value withheld; and/or
(c) if the Engineer finds any significant error or discrepancy in the Statement or supporting documents, the amount of the IPC may take account of the extent to which this error or discrepancy has prevented or prejudiced proper investigation of the amounts in the

Statement until such error or discrepancy is corrected in a subsequent Statement.

For each amount so withheld, in the supporting particulars for the IPC the Engineer shall detail his/her calculation of the amount and state the reasons for it being withheld.

14.6.3 Correction or modification

The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate. A Payment Certificate shall not be deemed to indicate the Engineer's acceptance, approval, consent or Notice of No-objection to any Contractor's Document or to (any part of) the Works.

If the Contractor considers that an IPC does not include any amounts to which the Contractor is entitled, these amounts shall be identified in the next Statement (the "identified amounts" in this paragraph). The Engineer shall then make any correction or modification that should properly be made in the next Payment Certificate. Thereafter, to the extent that:

(a) the Contractor is not satisfied that this next Payment Certificate includes the identified amounts; and
(b) the identified amounts do not concern a matter for which the Engineer is already carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination].

the Contractor may, by giving a Notice, refer this matter to the Engineer and Sub-Clause 3.7 [Agreement or Determination] shall apply (and, for the purpose of Sub-Clause 3.7.3 [Time limits], the date the Engineer receives this Notice shall be the date of commencement of the time limit for agreement under Sub-Clause 3.7.3)."

OVERVIEW OF KEY FEATURES

14–021

- The Engineer must make a fair determination of the amount due to the Contractor.
- The interim payment certificate must be issued within 28 days of receiving the Contractor's payment Statement.
- The interim payment certificate can be withheld in three circumstances only:
  - (i) if the Employer has not received and approved the Performance Security;
  - (ii) The Contractor has not appointed the Contractor's Representative; or
  - (iii) if, prior to issuing the taking over certificate, the amount to be certified would be less than the minimum amount of the interim payment certificate stated in the Contract Data.

- Where work is carried out which is not in accordance with the Contract, the costs of rectification work may be withheld until the work is carried out.
- If the Engineer gives Notice to the Contractor that it is failing to perform any obligation in accordance with the Contract, then the value of this work may be withheld until the work has been carried out:
  - (i) if the Engineer finds a significant error or discrepancy, the amount certified may take into account the extent to which this discrepancy has prevented proper investigation of the sums claimed.
- Payment certificates will not be deemed to indicate the Engineer's approval of any work that has been carried out:
  - (i) if the Contractor disagrees with the amounts certified, then these amounts must be "identified" in the next payment application for consideration by the Engineer. If the Contractor remains dissatisfied then the Contractor may by Notice refer the matter for determination by the Engineer under Sub-Cl.3.7.

Commentary

14–022

Sub-Clause 14.6 starts off by confirming the requirement expressed in Sub-Cl.4.2 that the Contractor must provide Performance Security and appoint the Contractor's Representative before the Employer is under any obligation to make payment. The sub-clause thereafter concentrates on the question of payments and, more significantly, the right, if any, for payment to be withheld.

The sub-clause confirms that the Engineer must determine how much the Contractor is due "fairly". If the Contractor disputes the sum certified in one IPC it must identify and explain the areas of dispute in the next payment application. This procedure is new to the 2017 Form. At this stage there is no dispute. Both the Engineer and Contractor are acting as required by the Contract. It is only if the Engineer, after consideration of the identified issues, still certifies a sum that the Contractor is dissatisfied with that a dispute will arise. The Contractor must then request a determination under Sub-Cl.3.7.

The Engineer has 28 days after receiving a Statement and the correct supporting documents to issue an IPC to the Employer. A copy must also be given to the Contractor.

If the Engineer fails to certify in accordance with Sub-Cl.14.6 then Sub-Cl.16.1 gives the Contractor the option of giving notice of an intention to suspend the Works. The only time an Engineer can withhold an IPC is before the issue of the Taking-Over Certificate for the Works, but only in an amount which would (after retention and other deductions) be less than the minimum amount of the IPC (if any) stated in the Contract Data.

Under Sub-Cl.14.7, the Employer "shall pay" to the Contractor the amount certified. The Employer is therefore bound by that certification. The introduction of Sub-Cl.2.5 in the 1999 Form (now Sub-Cl.20.2 in the 2017 version) was in order to provide the Employer with a mechanism to make claims against the

Contractor and thereby try and prevent the Employer from summarily withholding payment. If the Engineer determines that the Employer has a valid claim and is entitled to payment for that claim, then the amount will be deducted from the next interim certificate issued after the determination has been made.

That said, the sub-clause in sub-paras 14,6,2(a), (b) and (c) sets out the limited circumstances where payments may be withheld. The Employer should note that the exceptions in sub-paras (b) and (c) are dependent on the appropriate notice being given by the Engineer. These circumstances are slightly confusing in that they refer to failures to perform which are the very items that an Employer would expect to withhold payment for but which at the same time are the very items which the 1999 Employer claims mechanism to be found at Sub-Cl.2.5 had been set up to deal with. In reality, these should not, in any event, be a separate withholding issue. If work has been carried out which is contrary to the Contract, it will presumably be valued at a reduced price, or even nil, by the Engineer.

The Engineer should take note that where deductions are being made, for each amount so withheld, in the supporting particulars for the IPC, the Engineer shall detail his calculation of the amount and state the reasons for it being withheld. This is an attempt to ensure that the payment and certification provisions comply with the requirements of payment legislation such as the UK Housing Grants, Construction and Regeneration Act.

The importance of the last paragraph should not be neglected. Its purpose serves both to prevent the Employer from asserting a right to withhold on the basis of an interim certificate and the Contractor from asserting that the interim certificate represents approval for work which has been carried out.

The standard wording of Sub-Cl.14.6 of the FIDIC Subcontract adopts the pay-when-paid principle in terms of payment by the Contractor to the Subcontractor and the Contractor is not under an obligation to pay the Subcontractor if either the amounts set out in the Subcontractor's Statement are not certified by the Engineer (Sub-Cl.14.6(b)) or not paid by the Employer (Sub-Cl.14.6(c)). In a number of common law jurisdictions pay-when-pay arrangements are not permitted[7] and the FIDIC Subcontract contains an alternative clause in the Guidance Notes which deals with this scenario.

14.7 Payment

14–023 *"The Employer shall pay to the Contractor:*

(a) the amount certified in each Advance Payment Certificate within the period stated in the Contract Data (if not stated, 21 days) after the Employer receives the Advance Payment Certificate;

[7] For example, the 1998 Housing Grants, Construction and Regeneration Act, as amended by Pt 8 of the Local Democracy, Economic Development and Construction Act 2009 which prohibits pay-when-paid clauses except where a payer is not paid because of another payer's insolvency.

(b) the amount certified in each IPC issued under:

(i) Sub-Clause 14.6 [Issue of IPC], within the period stated in the Contract Data (if not stated, 56 days) after the Engineer receives the Statement and supporting documents; or

(i) Sub-Clause 14.13 [Issue of FPC], within the period stated in the Contract Data (if not stated, 28 days) after the Employer receives the IPC; and

(c) the amount certified in the FPC within the period stated in the Contract Data (if not stated, 56 days) after the Employer receives the FPC.

Payment of the amount due in each currency shall be made into the bank account, nominated by the Contractor, in the payment country (for this currency) specified in the Contract."

14.8 Delayed Payment

14–024 *"If the Contractor does not receive payment in accordance with Sub-Clause 14.7 [Payment], the Contractor shall be entitled to receive financing charges compounded monthly on the amount unpaid during the period of delay. This period shall be deemed to commence on the expiry of the time for payment specified in Sub-Clause 14.7 [Payment], irrespective (in the case of sub-paragraph (b) of Sub-Clause 14.7) of the date on which any IPC is issued.*

Unless otherwise stated in the Contract Data, these financing charges shall be calculated at the annual rate of three percent (3%) above:

(a) the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or

(b) where no such rate exists at that place, the same rate in the country of the currency of payment, or

(c) in the absence of such a rate at either place, the appropriate rate fixed by the law of the country of the currency of payment.

The Contractor shall by request be entitled to payment of these financing charges by the Employer without:

(i) the need for the Contractor to submit a Statement or any formal Notice (including any requirement to comply with Sub-Clause 20.2 [Claims For Payment and/or EOT]) or certification; and

(ii) Prejudice to any other right or remedy."

OVERVIEW OF KEY FEATURES

14–025

- The Employer must make payment to the Contractor in accordance with the timescales set out in sub-paras (a)–(c).
- Payment is to be made into the bank account as chosen by the Contractor, as specified in the Contract.

1.6 *"Term of the DAAB" means the period starting on the Effective Date (as defined in Sub-Clause 2.1 below) and finishing on the date that the term of the DAAB expires in accordance with Sub-Clause 21.1 [*Constitution of the DAAB*] of the Conditions of Contract.*

1.7 *"Notification" means a notice in writing given under the GCs, which shall be:*

(a) (i) a paper-original signed by the DAAB Member or the authorised representative of the Contractor or of the Employer (as the case may be); or

(ii) an electronic original generated from the system of electronic transmission agreed between the Parties and the DAAB, which electronic original is transmitted by the electronic address uniquely assigned to the DAAB Member or each such authorised representative (as the case may be);

(b) delivered by hand (against receipt), or sent by mail or courier (against receipt), or transmitted using the system of electronic transmission under sub-paragraph (a)(ii) above; and

(c) delivered, sent or transmitted to the address for the recipient's communications as stated in the DAA Agreement. However, if the recipient gives a Notification of another address, all Notifications shall be delivered accordingly after the sender receives such Notification.

Commentary

22–002 Stating the obvious, you cannot have a DAAB without there being an agreement to regulate their appointment and there being rules to guide the DAAB process.

When FIDIC were working on the 2nd edn of the Rainbow Suite, there was much discussion about whether or not the DAB Rules, as they then were, should continue to be published as part of the FIDIC Contract Book, as they were with the 1999 edn. The alternative would be to incorporate the Rules by reference to an on-line version kept on the FIDIC website. Given the increasing focus on dispute avoidance, which FIDIC is embracing, it was thought possible that were would be a need to revisit the Rules more frequently than the Contract itself. Keeping the Rules separate would give FIDIC the flexibility to do that.

However, when the question was posed to the audience at the DRBF Conference in Sofia in November 2016,[2] the overwhelming view was in favour of keeping the DAB Rules as a part of the FIDIC Contract Book. The main reason for this being that it made (what have become) the DAAB Rules a more integral

[2] The Dispute Resolution Board Foundation (*www.drb.org*) is an excellent source of information and experience about the avoidance and resolution of disputes via Dispute Boards of every type.

part of the Contract and so it was more likely that the parties would sign up to the DAAB; or at least it would be more difficult for one party to decline to do so.[3]

Keeping the rules as part of the printed agreement certainly keeps the DAAB process at the forefront of anyone working under the 2017 edn. However, maintaining the DAAB rules as part of the printed FIDIC Contract is not sufficient of itself to incorporate and set up the DAAB.

The DAAB is not constituted until the DAA Agreement, as defined in Sub-Cl.1.3 here, is signed. As stated below, the DAA Agreement will not take effect until all parties (the Employer, Contractor and DAAB Member(s)) have signed the DAA Agreement, regardless of whether it is in the FIDIC Form or some other format.

Under the 2017 2nd edn, FIDIC's preference is for the use of a standing DAAB. The real benefit of the DAAB comes from it being constituted at the commencement of the Contract, so that its members will be able to visit the site regularly and be familiar not just with the project but with the individual personalities involved. This helps the DAAB to become an effective dispute resolution mechanism which can add "real-time" project value. Akenhead J in the English case of *Mi-Space (UK) Ltd v Lend Lease Construction (EMEA) Ltd*,[4] albeit in relation to a Dispute Review Board, explained that:

> "DRBs have become quite common on very substantial infrastructure type projects around the world, many of them involving hundreds of millions of dollars or more. They often comprise three members, one being chairman, who will keep a weather eye on the project as it goes along, with more or less regular meetings at the site. One of the main ideas of having DRBs is that they can look at disputes as they emerge and make recommendations to the parties with a view to "nipping in the bud" such incipient disputes. Obviously, for each contract which provides for a DRB, one needs to analyse what its terms of reference are and contractually what its functions are to be."

There are several well-established types of Dispute Board's. The most widely used are:

- *Dispute Resolution Boards ("DRBs")*
  DRBs make non-binding recommendations about disputes arising during a project. The DRB, usually a panel of three experienced reviewers, takes in all the facts of a dispute and makes recommendations on the basis of those facts and the board's own expertise.

[3] In 2007, the Government of Abu Dhabi, the Abu Dhabi Executive Affairs Authority, acquired a licence from FIDIC in 2005 to prepare and publish an amended version of the FIDIC Red Book 1999. That amended version kept the use of the ad hoc DAB. However, that did not mean that the DAB provisions were used; indeed more typically in the MENA region as a whole, they are deleted.

[4] [2013] EWHC 2001 (TCC).

- *Dispute Adjudication Boards*
  Here DABs issue decisions which must be implemented immediately and, unlike DRBs, the decision is binding on the parties unless revised by an amicable settlement or arbitration/litigation.

- *Combined Dispute Boards ("CDBs")*
  CDBs are a hybrid between the DRB and DAB, whereby CDBs are empowered to issue recommendations but also, if one party requests and no other party objects, temporarily binding decisions. CDBs can create some uncertainty and there is no provision for CDBs in the FIDIC DAA Rules.

FIDIC's preference is for the middle option,[5] albeit that the DAAB, if all the Parties agree, has the option of making an Informal Decision which takes the DAAB closer to the DRB approach.

Sub-Clause 21.1 deals with the constitution or establishment of the DAAB making it clear that the Parties should jointly appoint the members of the DAAB within the time stated in the Contract Data (or if not stated, 28 days) after the date the Contractor receives the Letter of Acceptance. Therefore, it is important that the Parties give early and careful consideration to the appointment of the DAAB. Getting the process right can be challenging. Identifying, agreeing upon and appointing individuals with the appropriate skills and experience can be time-consuming. Ideally, the Parties will co-operate and work together to co-ordinate the selection of the DAAB members and Chair with the specific requirements of the particular project in mind. Issues to consider range from the appropriate skills, experience and qualifications that may be required to more simple issues like the potential availability of the proposed DAAB members for a project which might last a number of years.

Another reason why FIDIC have set out a requirement for a prompt timetable was illustrated by Decision 4A 124/2014, a decision of the Swiss Supreme Court.[6] This is what happened when the Parties tried to set up a DAB:

- On 6 June 2006 the parties entered into a contract, based on the FIDIC Red Book.
- In March 2011, the Contractor notified the Owner of its intention to refer to a claim for EUR 21 million to a DAB.
- It was not until 2 May 2011 that both parties had appointed their respective adjudicators.
- In October 2011, the prospective chair of the DAB was provisionally agreed. However, no formal appointment was made, because the DAB Agreement was not itself agreed.

[5] And the NEC, in the NEC 4 Form.

[6] As the case relates to an appeal from a decision of an arbitration tribunal, the decision is redacted, although it is believed that the dispute in question arose out of the rehabilitation of the road from Brasov to Sibiu in Romania.

- In March 2012, the prospective chairman disclosed a conflict of interest.
- A further chairman was not agreed until 14 June 2012. That second prospective chair requested that the parties produce a draft agreement by letter dated 2 July 2012.
- On 27 July, the Contractor filed a request for arbitration with the ICC and a three-member Tribunal was appointed, the seat of the arbitration being in Geneva.
- On 13 September 2012, the prospective chair of the DAB circulated a draft DAA. On 18 October 2012, the Owner suggested some changes and invited the Contractor to sign the Dispute Adjudication Agreement.
- The Contractor replied the following day noting that as the DAB was still not in place some 18 months after it had first tried to initiate proceedings, it had initiated the arbitration procedure to protect its rights.
- The Owner challenged the jurisdiction of the Arbitration Tribunal on the failure of the Contractor to follow the DAB procedure required by the contract.

This is not the first time that an Employer has acted in this way.[7] The Swiss Supreme Court was not impressed and noted that:

> "From a general point of view, it must be emphasized at the outset that the DAB system established by FIDIC was conceived above all with a view to constituting a permanent DAB and not an ad hoc DAB, the idea being to facilitate speedy disposition of the disputes arising during the performance of the project without jeopardizing its continuation and having disputes decided by specialists appointed at the beginning of the contract and able to follow its implementation from the beginning to the end. Yet in the case at hand, the benefit expected from such a procedure was never on the agenda. There is an ad hoc DAB for the constitution of which no time limit had been agreed and the implementation of which started on March 10, 2011, namely after the completion of the work encompassed in Contracts 5R8 and 5R9, if one considers that the pertinent acceptance certificates were issued on June 23, and December 15, 2010, respectively. The DAB contemplated was more similar to an arbitral tribunal of first instance rather than an actual DAB, considering that it would intervene so late in the development of the contractual relationships and even after they were extinguished, when the respective positions of the parties were already fixed and the opponents doubtlessly irreconcilable.
>
> Therefore, even though it was proscribed by the General Conditions in principle, its implementation may no longer have been absolutely necessary in view of the economy of the system because it was unlikely that it would avoid

[7] If such a situation does occur, the Party seeking the appointment of a DAAB should take care to go through all the potential steps of appointing a DAAB, inviting the other Party to be a part of the process and keeping a careful record.

the initiation of the arbitral procedure reserved by Sub-Clause 20.6 of the General Conditions. Seen in this perspective, the Appellant's will to obtain a DAB decision no matter what appears questionable at the very least."

FIDIC have tried to circumnavigate this problem through the introduction of Sub-Cl.21.2. This deals with what happens when there is a failure to appoint a DAAB. Although the sub-clause sets out a procedure to be followed and results in there being a DAAB Agreement which the Parties and DAAB member "shall be deemed to have signed", Parties would be advised to take legal advice as to whether this is sufficient to ensure that any Decision of the DAAB, appointed in such circumstances, is duly enforceable or not.

Rule 1.2 makes it clear that that the DAA Agreement between the Employer, Contractor and DAAB shall incorporate by reference the General Conditions of Dispute Agreement. Thus, any term to be found in the DAA Agreement which is defined in the main FIDIC Form will have that meaning, unless specifically stated elsewhere. The following commentary deals with both the Agreement and those DAA Rules.

22–003 **2 General Provisions**

2.1 The DAA Agreement shall take effect:

(a) in the case of a sole-member DAAB, on the date when the Employer, the Contractor and the DAAB Member have each signed (or, under the Contract, are deemed to have signed) the DAA Agreement; or
(b) in the case of a three-member DAAB, on the date when the Employer, the Contractor, the DAAB Member and the Other Members have each signed (or under the Contract are deemed to have signed) a DAA Agreement.

(the "Effective Date" in the GCs).

2.2 Immediately after the Effective Date, either or both Parties shall give a Notification to the DAAB Member that the DAA Agreement has come into effect. If the DAAB Member does not receive such a notice within 182 days after entering into the DAA Agreement, it shall be void and ineffective.

2.3 The employment of the DAAB Member is a personal appointment. No assignment of, or subcontracting or delegation of the DAAB Member's rights and/or obligations under the DAA Agreement is permitted.

Commentary

22–004 The DAA Agreement does not take effect until everyone (Employer, Contractor and DAAB Member(s)) has signed the agreement and an appropriate notice has

been sent to the Members. This is important, as it can be seen that if no notice is received within six months then the Agreement is void.

The appointment of a DAAB member is a personal appointment. You cannot select a consultancy firm and the DAAB Member cannot pass the appointment (or duties) over to a colleague.

The Agreement will continue until it is terminated, in accordance with Cl.7 below or until the Contractor issues a written discharge in accordance with Sub-Cl.14.12. If a Member wishes to resign, he must give 70 days' notice. This lengthy notice period is presumably designed to give time to find a replacement.

3 Warranties **22–005**

3.1 The DAAB Member warrants and agrees that he/she is, and will remain at all times during the Term of the DAAB, impartial and independent of the Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel (including in accordance with Sub-Clause 4.1 below).

3.2 If, after signing the DAA Agreement (or after he/she is deemed to have signed the DAA Agreement under the Contract), the DAAB Member becomes aware of any fact or circumstance which might:

(a) call into question his/her independence or impartiality; and/or
(b) be, or appear to be, inconsistent with his/her warranty and agreement under Sub-Clause 3.1 above the DAAB Member warrants and agrees that he/she shall immediately disclose this in writing to the Parties and the Other Members (if any).

3.3 When appointing the DAAB Member, each Party relies on the DAAB Member's representations that he/she is:

(a) experienced and/or knowledgeable in the type of work which the Contractor is to carry out under the Contract;
(b) experienced in the interpretation of construction and/or engineering contract documentation; and
(c) fluent in the language for communications stated in the Contract Data (or the language as agreed between the Parties and the DAAB).

Commentary

This is a very important clause. **22–006**

By Cl.3, the members of the DAAB warrant that they are impartial, independent and will disclose anything which might happen to cast doubt on that. This point is discussed below in more detail at Cl.4 which sets out, at length, the obligations of impartiality of the DAAB members.

This disclosure must be prompt. It is also an on-going obligation. If circumstances change, the DAAB member in question must make an immediate disclosure.

Clause 3 also serves as a reminder to the DAAB members that the Parties are relying upon each individual's representation that they have the relevant experience to understand, interpret and, if necessary, analyse the work being carried out on the project in question.

22–007 **4 Independence and Impartiality**

4.1 Further to Sub-Clauses 3.1 and 3.2 above, the DAAB Member shall:

(a) have no financial interest in the Contract, or in the project of which the Works are part, except for payment under the DAA Agreement;
(b) have no interest whatsoever (financial or otherwise) in the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel;
(c) in the ten years before signing the DAA Agreement, not have been employed as a consultant or otherwise by the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel;
(d) not previously have acted, and shall not act, in any judicial or arbitral capacity in relation to the Contract;
(e) have disclosed in writing to the Employer, the Contractor and the Other Members (if any), before signing the DAA Agreement (or before he/she is deemed to have signed the DAA Agreement under the Contract) and to his/her best knowledge and recollection, any:
(i) existing and/or past professional or personal relationships with any director, officer or employee of the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel (including as a dispute resolution practitioner on another project),
(ii) facts or circumstances which might call into question his/her independence or impartiality, and
(iii) previous involvement in the project of which the Contract forms part;
(f) not, while a DAAB Member and for the Term of the DAAB:
(i) be employed as a consultant or otherwise by, and/or
(ii) enter into discussions or make any agreement regarding future employment with the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel, except as may be agreed by the Employer, the Contractor and the Other Members (if any); and/or
(g) not solicit, accept or receive (directly or indirectly) any gift, gratuity, commission or other thing of value from the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel, except for payment under the DAA Agreement.

Commentary

22–008 The 1999 FIDIC Guide suggests that each Party should aim to appoint:

> *"a truly independent expert with the ability and freedom to act impartially, develop a spirit of team work within the DAB, and make fair unanimous decisions."*

This is in line with the Objectives set out at Procedural Rule 1.1 which says that the objective of the DAAB rules are:

> *"(a) to facilitate the avoidance of Disputes that might otherwise arise between the Parties; and*
> *(b) to achieve the expeditious, efficient and cost effective resolution of any Dispute that arises between the Parties."*

All seven sub-paragraphs here focus on the DAAB members' impartiality and neutrality. This impartiality is the key to the success of the DAAB procedure. These obligations run throughout the project. Procedural Rule 6.2 reinforces this by requiring that the members of the DAAB shall "act, fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case."

Clause 4 provides a clear statement of what might prevent a DAAB member from being "impartial and independent." Under common law, case-law tends to draw a distinction between "actual bias", which will depend on the facts and "apparent bias", for which the test was stated by Lord Hope in the case of *Porter v Magill*[8] to be:

> "The question is whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

For example, the UK House of Lords[9] ruled that Lord Hoffman ought to have declared his links to Amnesty International before sitting in judgment on the question of the extradition of General Pinochet. By failing to do so, although there was no question that he actually was biased, he could not be seen to be impartial. Lord Hope explained some of the characteristics of the fair-minded observer in the case of *Helow v The Secretary of State for the Home Department*[10]:

[8] [2001] UKHL 67.
[9] *R v Bartle and the Commissioner of Police for the Metropolis, Ex P. Pinochet* (House of Lords, 24 March 1999).
[10] [2008] UKHL 62.

"The observer who is fair-minded is the sort of person who always reserves judgment on every point until she has seen and fully understood both sides of the argument. She is not unduly sensitive or suspicious . . . . Her approach must not be confused with that of the person who has brought the complaint . . .

Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographical context. She is fair-minded, so she will appreciate that the context forms an important part of the material which she must consider before passing judgment."

Alternatively, as Coulson J, as he was then,[11] said:

"In *Lanes Group plc v Galliford Try Infrastructure Ltd* [2011] EWCA Civ 1617, Jackson LJ noted that the fair-minded observer must be assumed to know all relevant publicly available facts; must be assumed to be neither complacent nor unduly sensitive or suspicious, must be assumed to be perspicacious, and must be able to distinguish between what is relevant and what is not relevant. Moreover, he must be able to decide what weight should be given to the facts that are relevant. Jackson LJ noted that there were conceptual difficulties in creating a fictional character, investing that character with this ever growing list of qualities and then speculating about how such a person would answer the questions before the Court. He said the obvious danger was that the Judge would simply project on to that fictional character his or her personal opinions. However, he accepted that the approach involving the fair-minded observer was established by high authority and was therefore the exercise that had to be undertaken in cases where apparent bias was alleged."

In the case of *Cofely Ltd v Bingham & Knowles Ltd*,[12] the claimant made an application for the removal of the Arbitrator during the course of the arbitration under s.24 of the Arbitration Act 1996 (power of the court to remove an arbitrator).[13] Cofely relied upon Rule 3 of the *CIArb Code of Professional and Ethical Conduct for Members (October 2000)* which states that:

[11] *Paice v MJ Harding (t/a MJ Harding Contractors)* [2015] EWHC 661 (TCC).
[12] [2016] EWHC 240.
[13] Whilst, of course, the DAAB members do not fulfil the same functions as arbitrators, the obligations set out here conform with the much more detailed IBA guidelines on Conflict of Interest in International Arbitration, first published in 2005.

"Both before and throughout the dispute resolution process, a member shall disclose all interests, relationships and matters likely to affect the member's independence or impartiality or which might reasonably be perceived as likely to do so."

The question was raised about the professional relationship between the Arbitrator and Knowles who were acting for one of the parties. Over the past three years the Arbitrator had acted as adjudicator or arbitrator 25 times (out of a total of 137) on cases involving Knowles as either a party or the representative of a party. This represented 18 per cent of his appointments and 25 per cent of his income. It was also found that he had held in favour of Knowles, or the party with which Knowles was involved, on 18 of the 25 occasions (i.e. 72 per cent). This together with the Arbitrator's "defensive" approach to providing this information, was sufficient to establish the requisite grounds for removal.

Strictly this case does not fall under any of the items listed in Cl.4. as the perceived relationship was with the firm instructing one of the parties, not the party itself. However, the prudent potential DAAB member ought to realise that the "context" of the position as a whole would call for at least early-disclosure. Adopting a transparent approach would mean that all parties were well aware of the potential issue. More often than not, parties are content to proceed, in any event.

The need for impartiality is one reason why Procedural Rule 7.2 states that the DAAB shall not express any opinions on merits during any hearing. It should also be noted that Procedural Rule 7 does place a potential limit on the right to make representations. Here the DAAB is empowered with the discretion to proceed with a hearing in the absence of a Party, if it is satisfied that the Party in question did receive proper notice of the hearing. Thus, a Party cannot subsequently complain if it chooses not to turn up to a hearing convened by the DAAB. That is not acting impartially.

5 General Obligations of the DAAB Member **22–009**

5.1 The DAAB Member shall:

(a) comply with the GCs, the DAAB Rules and the Conditions of Contract that are relevant to the DAAB's Activities;
(b) not give advice to the Employer, the Contractor, the Employer's Personnel or the Contractor's Personnel concerning the conduct of the Contract, except as required to carry out the DAAB's Activities;
(c) ensure his/her availability during the Term of the DAAB (except in exceptional circumstances, in which case the DAAB Member shall give a Notification without delay to the Parties and the Other Members (if any) detailing the exceptional circumstances) for all

meetings, Site visits, hearings and as is necessary to comply with sub-paragraph (a) above;

(d) become, and shall remain for the duration of the Term of the DAAB, knowledgeable about the Contract and informed about:

(i) the Parties' performance of the Contract;

(ii) the Site and its surroundings; and

(iii) the progress of the Works (and of any other parts of the project of which the Contract forms part) including by visiting the Site, meeting with the Parties and by studying all documents received from either Party under Rule 4.3 of the DAAB Rules (which shall be maintained in a current working file, in hard-copy or electronic format at the DAAB Member's discretion); and

(e) be available to give Informal Assistance when requested jointly by the Parties.

Commentary

22–010 Clause 5 continues with the theme of independence and impartiality. The giving of advice to one party, as referred to at Sub-Cl.5.1(b), would be a clear breach of this. It is also one reason why all communications with the DAAB must be copied to the other Party.

Clause 5 also lays stress on the need for the DAAB member to be prepared to devote sufficient time to the project to become conversant with it and be prepared to provide opinions where required. By Sub-Cl.5.1(d) the DAAB member must become and remain for the duration of the DAAB, knowledgeable about the contract and informed about the Parties' performance, the Site and its surroundings, and the progress of the Works. The acceptance of the DAAB Appointment will of course signify an agreement to do this. A DAAB member cannot just sit back and wait to be called upon to resolve a dispute. A larger commitment is required. DAAB members are required to be proactive and if necessary adopt an inquisitorial style of investigation, requesting documents from the Parties.

Potential DAAB members must therefore take time to consider whether they will be able to make themselves available and denote the appropriate time to the project. Some projects will last for a number of years. Some projects will involve considerable travel, to remote areas.

Some idea of the likely time commitment can be found from the Procedural Rules, which suggest at Rules 3.2(b) and (c) that there should be site visits at intervals of not less than 70 and not more than 140 days. The DAAB must then prepare a report on what it has done during the visit. DAAB members should also be provided with copies of the Contract documents, progress reports and any other documents pertinent to the performance of the Contract.

Consideration of the DAAB Rules will show just how wide the potential powers of the DAAB are. By Rule 5.1(d), the DAAB can appoint experts although this must be done with the agreement of the Parties.

If it is necessary to appoint an expert, the DAAB would do well to follow the transparent approach required in the UK for domestic adjudication, not only by

sharing the expert advice received but by giving the Parties a chance to consider and comment upon it. As explained by HHJ Seymour[14]:

> "If and in so far as [the adjudicator], or anyone else, may have thought . . . that an adjudicator could, subject only to giving the parties to the relevant adjudication advance notice that he was going to seek technical or legal advice, obtain that advice and keep it to himself, not sharing the substance of it with the parties and affording them an opportunity to address it, it seems to me that he or she has fallen into fundamental error. It is absolutely essential, in my judgment, for an adjudicator, if he is to observe the rules of natural justice, to give the parties to the adjudication the chance to comment upon any material, from whatever source, including the knowledge or experience of the adjudicator himself, to which the adjudicator is minded to attribute significance in reaching his decision."

By Rule 5.1(g), the DAAB may make use of their own specialist knowledge. If the DAAB has been carefully appointed, this is what the Parties might actually want. In a Scottish domestic adjudication case, Lord Glennie explained a little further how this should be done. Again transparency and the importance of not leaving things to the last minute are key[15]:

> " . . . it is incumbent upon him to provide the parties with a full explanation of his intended approach, the nature of the experience he brings to bear relevant to the particular matters, and the conclusions of fact or law to which that experience drives him, all in sufficient detail and at a time which enables them to comment sensibly and on an informed basis.
>
> What that time is will, again, depend on the circumstances. In adjudications, time is short, and a party cannot expect to be indulged as he might be in arbitration or ordinary litigation. Equally, however, the imminence of the final date for reaching a decision cannot be an excuse for not providing adequate time for comment. That simply emphasises the importance of the adjudicator raising such issues promptly. In some cases, where there have been witnesses of fact who might have been able to give relevant evidence had they been asked, it may by a certain time simply be too late to open up a wholly new area of fact, however many days are given to the parties for comment on the proposed findings, without providing the opportunity for the parties to introduce further evidence as well as submissions. Even at a late stage, this may be possible, though further extension of time may be required . . . ."

There is the requirement at sub-para.(e) that the DAAB members will be available to provide Informal Assistance as and when required by both Parties.

[14] *RSL (South West) Ltd v Stansell Ltd* [2003] EWHC 1390 (TCC).
[15] *SGL Carbon Fibres Ltd v RBG Ltd* [2011] CSOH 62.

Informal Assistance is defined at Sub-cl.1.5 of the DAAB General Conditions as being the assistance given by the DAAB when "jointly" requested by the Parties pursuant to Sub-Cl.21.3. The FIDIC Contract is clear that if the Parties do not agree to make a joint request, then no Informal Assistance can be given.

Sub-Clause 21.3, discussed in more detail above, is a good example of the steps introduced by FIDIC to encourage Dispute Avoidance. It provides that the Parties may jointly request[16] (in writing, with a copy to the Engineer) that the DAAB: "provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract." The sub-clause also gives the DAAB the option to invite the Parties to make such a joint request.

Although, FIDIC do not provide any further Guidance, art.17.2 of the 2015 the ICC Dispute Board Rules suggests that:

> "The informal assistance of the DB may take the form of a conversation among the DB and the Parties; one or more separate meetings between the DB and any Party with the prior agreement of all of the Parties; informal views given by the DB to the Parties; a written note from the DB to the Parties; or any other form of assistance that may help the Parties resolve the Disagreement."

The concept of Informal Assistance was introduced by the 2008 Gold Book. In many respects, it is a natural extension of the DAAB's role. If you have a permanent DAAB that is meeting on a regular basis, this may already provide an opportunity for informal discussions. However, DAAB should take care to abide by the relevant case law when providing Informal Assistance. In the case of *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*,[17] an adjudicator at the request of the Parties tried to resolve the dispute through mediation. This was unsuccessful but during the process the Adjudicator learnt about a number of without prejudice offers. As result HHJ Lloyd QC said that the Adjudicator's conduct meant that this was a case of "apparent bias" in that he appeared to lack impartiality. The potential dilemma posed by the concept of Informal Assistance can be demonstrated by the judge's comments in his decision:

> "There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking."

However, as the FIDIC Guide to the Gold Book said:

[16] At any time save for during when the Engineer is acting under Sub-Cl.3.7 to agree or determine an issue.

[17] [2001] B.L.R. 2007: an adjudication carried out in accordance with the Housing Grants, Construction and Regeneration Act 1996, not under the FIDIC Rules.

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

6 General Obligations of the Parties **22–011**

6.1 Each Party shall comply with the GCs, the DAAB Rules and the Conditions of Contract that are relevant to the DAAB's Activities. The Employer and the Contractor shall be responsible for compliance with this provision by the Employer's Personnel and the Contractor's Personnel, respectively.

*6.2 Each Party shall cooperate with the other Party in constituting the DAAB, under Sub-Clause 21.1 [*Constitution of the DAAB*] and/or Sub-Clause 21.2 [*Failure to Appoint DAAB Member(s)*] of the Conditions of Contract, without delay.*

6.3 In connection with the DAAB's Activities, each Party shall:

(a) cooperate in good faith[18] with the DAAB; and
(b) fulfil its duties, and exercise any right or entitlement, under the Contract, the GCs and the DAAB Rules and/or otherwise in the manner necessary to achieve the objectives under Rule 1 of the DAAB Rules.

6.4 The Parties, the Employer's Personnel and the Contractor's Personnel shall not request advice from or consultation with the DAAB Member regarding the Contract, except as required for the DAAB Member to carry out the DAAB's Activities.

6.5 At all times when interacting with the DAAB, each Party shall not compromise the DAAB's warranty of independence and impartiality under Sub-Clause 3.1 above.

6.6 In addition to providing documents under Rule 4.3 of the DAAB Rules, each Party shall ensure that the DAAB Member remains informed as is necessary to enable him/her to comply with sub-paragraph (d) of Sub-Clause 5.1 above.

Commentary

This straightforward Condition confirms that the Employer, Contractor and DAAB "shall" comply with the DAA Agreement. This includes the requirement **22–012**

[18] For a discussion of good faith under common and civil law: Sir R. Jackson, "Does Good Faith Have Any Role in Construction Contracts" SCL Paper 207, *www.scl.org.uk* [Accessed 10 September 2018].

that the Contractor and Employer shall be responsible for ensuring that their respective personnel comply too. By Sub-Cl.1.1.31 (Red Book), the Engineer is part of the Employer's Personnel. Given their pivotal role on the project, the Engineer will often have an important role to play in assisting the DAAB, including providing the documents required by the Parties to provide under Sub-Cl.6.6 here.

Once again, Sub-Cl.6 lays stress on the need for impartiality. Sub-Clause 6.5 explicitly states that the Contractor and Employer shall not compromise the DAAB's independence. By Sub-Cll.6.4 and 6.43, the Contractor and Employer are, in effect, agreeing here not to try and encourage a Member to break the obligations set out in condition 4. For example, neither can request private advice.

22–013 **7 Confidentiality**

7.1 Subject to Sub-Clause 7.4 below, the DAAB Member shall treat the details of the Contract, all the DAAB's Activities and the documents provided under Rule 4.3 of the DAAB Rules as private and confidential, and shall not publish or disclose them without the prior written consent of the Parties and the Other Members (if any).

7.2 Subject to Sub-Clause 7.4 below, the Employer, the Contractor, the Employer's Personnel and the Contractor's Personnel shall treat the details of all the DAAB's Activities as private and confidential.

7.3 Each person's obligation of confidentiality under Sub-Clause 7.1 or Sub-Clause 7.2 above (as the case may be) shall not apply where the information:

(a) was already in that person's possession without an obligation of confidentiality before receipt under the DAA Agreement;
(b) becomes generally available to the public through no breach of the GCs; or
(c) is lawfully obtained by the person from a third party which is not bound by an obligation of confidentiality.

7.4 If a DAAB Member is replaced under the Contract, the Parties and/or the Other Members (if any) shall disclose details of the Contract, the documents provided under Rule 4.3 of the DAAB Rules and previous DAAB's Activities (including decisions, if any) to the replacement DAAB Member as is necessary in order to:

(a) enable the replacement DAAB Member to comply with sub-paragraph (d) of Sub-Clause 5.1 above; and
(b) ensure consistency in the manner in which the DAAB's Activities are conducted following such replacement.

Commentary

22–014 Whilst it might be generally assumed as a matter of commercial dealings that DAAB proceedings will be both private and confidential, without Sub-Cl.7 this would not be the case.

By private, Cl.7 means that other or third parties who are not a party to the DAA Agreement, cannot attend any hearings or play any part in the process. Confidentiality is key regarding the parties' and DAAB's obligation to each other not to disclose information concerning the DAAB activities to third parties.

There are different aspects to confidentiality. Sub-Clause 7.3(a) recognises that different types of information and documentation can be created and/or become available during the DAAB process. What is the status of pre-existing documentation? It might involve parties other than the parties to the DAAB Agreement, but it might already be in either the public domain, or certainly a wider domain, depending on the extent of its circulation on what might be a complex widespread construction project.

If there is a DAAB hearing, what about witnesses? They might not be parties to the DAA Agreement, although are likely to be a member of the Contractor's or Employer's Personnel. If experts are instructed, it is important to ensure that any contract or letter of engagement includes a confidentiality obligation.

Questions may also arise concerning whether any confidentiality should attach to DAAB proceedings if they are challenged in the local courts.[19] DAAB Members should remember that in many jurisdictions, arbitrators are liable if they disclose arbitration information without consent. For example, the Dubai International Finance Centre ("DIFC") has rules that require that all information relating to arbitral proceedings be kept confidential, except where disclosure is required by order of the DIFC Court.

Whilst the DAAB process is confidential, Sub-Cl.21.6 confirms that any decision of the DAAB shall be admissible in evidence in the arbitration. However, although the DAAB decision can be used in any arbitration, the DAAB members cannot either act as arbitrator or be called as a witness. The extent to which an arbitral tribunal would find a decision of the DAAB to be persuasive is difficult to judge. Certainly, the members of the DAAB would be able to make use of their own specialist knowledge. The DAAB would have the advantage of being contemporary and it should also benefit from the members' knowledge of the project. Against that, a DAAB decision has to be produced in 84 days. Ultimately this is a matter for the Arbitral Tribunal.

[19] This may be a rare occurrence since FIDIC provides for disputes to be finally challenged through ICC Arbitration.