

INTRODUCTION

THE GENERAL NATURE OF STANDARD FORM CONTRACTS

- Standard form contracts are created by committees which seek to represent a variety of interests, and
- They always represent a kind of compromise.

We speak of Model Contract forms as if they were law and, in a sense they are. When two parties, an employer and a contractor, agree to a contract form, they adopt it as if it were to be a written law defining the relationship between them.

Standard forms save a lot of writing and drafting work, of course, but they are more valuable than that.

- Firstly, they are not subject to the urgent pressures of an imminent project, so may be crafted with care.
- Secondly, as they remain the same for reasonably long periods of time, any uncertainties of meaning are likely to be ironed out, either by decisions of courts or by revisions to the text.

As a consequence, the parties to a long standing standard form contract can be reasonably confident that it will be predictable and will deal sensibly with most of the contingencies that one might experience.

Whenever a new standard form contract is introduced there may be some cause for anxiety as and until it becomes tried and tested and proves itself through use to be an effective, balanced rule-book. The pedigree or stable form from which the rule-book derives can however go a long way towards allaying those fears, particularly where the rule-book retains much of what has already been previously tried and tested.

The purpose of the standard form is :-

- to define the contractual relationship between the parties, setting out their responsibilities one to another and,
- insofar as is practical, allocating the risks associated with the project between the parties.

There is one thing I would ask you to bear in mind, especially if you are of a mind to vary any of the provisions of a standard form contract. It is this: it is always best if the risks of a project are borne by the party best able to know and manage them, and hence the party best able to take the necessary measures to manage the risk and to take action as and when a problem arises during the course of the project. Many instances of litigation result from attempts to shift the risk away from the party who would bear that risk more naturally.

There is one more cause of litigation or dispute, often unnecessary, to which I would call your attention. In complex contracts, there is usually **someone** whose task it is to authorise payment or to make decisions during the course of the work. That task requires that **someone** to exercise judgement. Where there is a question about whether for example "something is due", that judgement needs to be exercised sensibly. In the end, where there is a dispute, the judge or the arbitrator will decide on the balance of probabilities, whether one party is more likely to be right than the other. There will be a practical standard of proof. Too many formal disputes arise because the person responsible tries to insist upon proof beyond what is necessary - scientific proof, if you like, rather than use his or her common sense.

In consequence the contract mechanisms are only as good as the individuals entrusted with operating the processes instituted by the contract. The choice of individual can therefore be as important as the choice of contract.

In the context of the Green Form, the employer is entrusted with taking initial decisions in respect of proposals related to operating processes forwarded by the contractor. The employer, or his representative should thus take as sensible approach to the exercise of judgement for the mutual benefit of the project and not simply be guided by personal interests. However, if the judgement is challenged the gauntlet is passed to the adjudicator. The adjudicator should be selected with care and be an individual that both parties trust and in whose abilities they both have confidence.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

FOREWORD TO THE GREEN FORM BY FIDIC

These Conditions of Contract have been prepared by the Federation Internationale des Ingenieurs-Conseils (FIDIC) and are recommended for engineering and building work of relatively small capital value. However, depending on the type of work and the circumstances, the Conditions may be suitable for contracts of greater value. They are considered most likely to be suitable for fairly simple or repetitive work or work of short duration without the need for specialist sub-contracts.

The main aim has been to produce a straightforward flexible document which includes all essential commercial provisions and which may be used for all types of engineering and building work with a variety of administrative arrangements. Under the usual arrangements for this type of contract, the Contractor constructs the Works in accordance with design provided by the Employer or by his representative (if any). However, this form may also be suitable for contracts which include, or wholly comprise, contractor-designed civil, mechanical and/or electrical works.

In addition, the Employer has a choice of valuation methods. Furthermore, although there is no reference to an impartial Engineer, the Employer may appoint an independent Engineer to act impartially, should he wish to do so.

The form is recommended for general use, though modifications may be required in some jurisdictions. FIDIC considers the official and authentic text to be the version in the English language.

The intention is that all necessary information should be provided in the Appendix to the Agreement, the latter incorporating the tenderer's offer and its acceptance in one simple document. The General Conditions are expected to cover the majority of contracts. Nevertheless, users will be able to introduce Particular Conditions if they wish, to cater for special cases or circumstances. The General Conditions and the Particular Conditions will together comprise the Conditions governing the rights and obligations of the parties.

To assist in the preparation of tender documents using these Conditions, Notes for Guidance are included. These Notes will not become one of the documents forming the Contract. Finally, applicable Rules for Adjudication are also included.

The attention of users is drawn to the FIDIC publication "Tendering Procedure", which presents a systematic approach to the selection of tenderers and the obtaining and evaluation of tenders.

COMMENTARY

Minor Works : The Short or Green Form FIDIC contract forms the fourth of the contracts that make up the 1999 FIDIC Rainbow (so named after the colour of the covers adopted by FIDIC, namely Red, Yellow, Silver and Green) suite of contracts, aimed primarily at minor works. The question that arises is "What amounts to major and minor works?"¹

Edward Corbett sheds some light on the aims and intentions of the draftsman in respect of the Short Form Contract,² stating :-

"The Green Book started out as a minor works form but evolved, not least when dredging contractors said that large value but simple contracts for dredging and reclamation might also be appropriate for the form. It is contained in 15 clauses on 10 pages of large print, the task group having made every effort to keep the language and concepts simple.

- *A similar overall risk philosophy has been adopted as for the Red and Yellow Books.*
- *The contract price would normally be a lump sum.*
- *Contractor's design is briefly catered for at clause 5, such design having a fitness for purpose obligation. The employer retains responsibility for his specification and drawings.*
- *A combined offer and acceptance form of agreement is provided as a somewhat optimistic guide to good procurement practice.*
- *A long list of employer's risks gathers into one place (clause 6.1) all events that give rise to an entitlement to additional time and money.*
- *An early warning provision (clause 10.3) replaces any specific sanction for failure to give notices:*

¹ Peter Boen, draftsman of the three major books in the FIDIC Rainbow Suite states that the Green Form was originally intended for contracts below the value of \$US 0.5 but it was subsequently realised that it could also be of value to some contracts of larger values. *International Construction Law Review* 16 Pt. 1 (1999) 5 - 26

² *International Construction Law Review* 16 Pt. 1 (1999) 39-46

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

"To the extent that the Contractor's failure to notify results in the Employer being unable to keep all relevant records or not taking steps to minimise any delay, disruption, or Cost ... the Contractor's entitlement to extension to the Time for Completion or additional payment will be reduced."

- *Early suspension for non-payment after seven days' notice, clause 12.2.*
- *Eight-week adjudication before a single adjudicator with interim binding effect, clause 15.*

It is understood that there are no plans for a Red Book sub-contract so it may be that the Short Form has a dual life as a subcontract. It should be said, however, that it was not drafted with this in mind and this writer, at least, has not worked out what pitfalls might exist in any attempt to use the form in that way."

Whilst the contract may therefore be suitable for larger uncomplicated contracts, the corollary of this is that it might equally be unsuitable for smaller value but complex contracts and the use of the Red Book might thus be advised.

Sub-contracts : The suggestion that the Green Form could act as a useful vehicle for subcontracting has been widely canvassed as noted by Edward Corbett above. It should be noted however, that the contract is aimed at making a fair distribution of risks between an employer / developer and main contractor, two relatively evenly matched personalities. Whilst the likelihood, for instance, of the contractor having his program disrupted because of access problems is very low, since in most cases he will have exclusive control of the site for the most part, sloppy programming is a major cause of disruption, delay and loss of access for subcontractors. Commencement and completion dates are far less cut and dried in sub-contracting. When it comes to acceptance of work in sub-contracting, the main contractor is often looking over his shoulder to ensure that the employer raises no complaints and in the event that a complaint is raised the contractor will seek to pass liability on to the subcontractor. It is therefore submitted that a number of adjustments may be needed to the contract before it is employed in the sub-contract sector,

Contract Administrator : A significant innovation, from the perspective of FIDIC is that the contract does away with the role of the Civil Engineer as contract administrator (3.1. employer's representative is not a contract administrator, but rather a senior employee or agent of the employer). The aim is simplicity, with the central role of determination being played by the adjudicator. As will be seen later, the Red and the Yellow Books preserve the role of the Civil Engineer but the Silver EPCT Turnkey Contract again omits the office of contract administrator, though for different reasons from the Green Book, namely because risk is by enlarge transferred to the contractor, so that there is no role for the administrator to fulfil.

The Four Contracts : The principal contract within this suite of contracts is :-

- the Red Book, *The Construction Contract*, more completely *the Conditions of Contract for Building and Engineering Works Designed by the Employer*. It followed a previous book, which was intended for civil engineering works alone, still called by some "The Old FIDIC Red Book". As mentioned above, three other books were published at the same time, namely :-
- The Yellow Book, *The Plant and Design/Build Contract* or the *Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor*.
- The Silver Book, *the EPC/Turnkey Contract*, or the *Conditions of Contract for EPC/Turnkey Contracts*. EPC stands for Engineering, Procurement and Construction, where the entire project is created by the Contractor as a turnkey project, and
- The *Short Form of Contract*, often abbreviated to *The Short Form*, essentially for minor works where the full detail of the major forms would be inappropriate and the procedures clumsy or even unworkable in the time available.

Previously, there were separate contracts for civil works and for mechanical and electrical works. I would ask you to note that the individual books in the present suite are differentiated, not by the class of works, but by the relationship between the contractor and employer. That was a new departure in 1999, and distinguishes these forms from a number of others, produced by more or less specialist institutions. FIDIC has published a Guide to the Red, Yellow, and Silver books.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Conditions : Perhaps the first thing to note about the standard form, the Red Book, is that it envisages two kinds of Conditions of Contract:

- The General Conditions, as printed in the book, and
- Particular Conditions for the project in hand

The short form contract also makes use of and incorporates as an integral part of the contract, particular conditions.

Guidance : There is a valuable section of 20 pages of guidance on the preparation of Particular Conditions and related matters in the Red Book. Careful completion of Particular Conditions is probably as important as adopting the General Conditions in the first place.

The guidance includes forms of bond and guarantee as well as guidance on detailed terms and suggestions for clauses, which might usefully be amended for special purposes.

The Short Form Contract likewise contains notes of guidance. In this commentary, for ease of study and analysis, the notes of guidance feature immediately after each provision, not at the end of the contract.

Conclusions : The task of a commentary is to seek out areas of ambiguity within the document that is to be commented upon and to highlight areas which deserve greatest attention by the user. It is inevitable that in a document of the complexity that the FIDIC Green Form represents and in the light of the many critical factors that impact upon the parties to construction contract, that some ambiguity will present itself and further that the choice of weighting given to the interests of one or other of the parties will form the subject matter of debate. The aim of producing a short, straightforward document, set out in simple non-technical, universal language likewise has meant that cryptic phrases have prevailed over more extended dialogue, leaving the reader on times with less to get hold of than might be wished.

However, when all that is said and done the FIDIC draftsmen must be congratulated for having produced a succinct and user-friendly contract that addresses the central issues involved in the construction contract relationship. It is therefore with great sadness that we have to record that Peter Boen, the central architect of the FIDIC Rainbow Suite, and adviser on the Green Form has recently passed away. His contribution to the development of universal construction contracting practice and dispute resolution cannot be over-emphasised and his presence will be sorely missed.

The Tender Process.

The Agreement document (set out in three parts, namely “Agreement, OFFER and AGREEMENT + Appendix”), set out below envisages some sort of tender process, though it would equally be possible for the contract to be brokered directly with one party only.

The agreement + appendix represents the tender document. The offer is set out as a standard pro-forma with gaps to fill in. Note in particular the statement that “The Contractor understands that the Employer is not bound to accept the lowest or any offer received for the works.”

The effect of this clause, arguably, is to ensure that the approach to potential contractors is a mere invitation to treat as opposed to an actual tender. This clause enables the Employer to reject arbitrarily any offer, and specifically mentions not being bound to accept the lowest offer, in the hope of encouraging best value tenders and bypassing the problem of “bid low claim high”.³ Similar provisions have been adopted in the UK to enable government contractors to ensure “Best Value” and to avoid the problems encountered on the Channel Tunnel Project where contractors successfully bid for contracts at uneconomically low prices. When they failed to perform they were able to force uplifts on the employer who needed to avoid damaging disruption to the works.

There is no provision in the agreement for the document to be executed as a deed. It appears that the draftsmen anticipate the Contract to be a simple under hand document. Employers should be aware of the differences in terms of limitation of liability under UK Law between underhand documents (6 years) and deeds (12 years). Parties can specify a deed if deemed appropriate.

³ Compare the application of the concept of collateral contracts in relation to tenders and auctions under English Law, see **Spencer v Harding ; Harvela Investments Ltd v Royal Trust Company of Canada Ltd** which is difficult to apply..

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Agreement

The Employer is of
.....

The Contractor is of
.....

The Employer desires the execution of certain Works known as
.....

OFFER

The Contractor has examined the documents listed in the Appendix which forms part of this Agreement and offers to execute the Works in conformity with the Contract for the sum of

..... (in words)

..... (in figures) (.....)

or such other sum as may be ascertained under the Contract.

This offer, of which the Contractor has submitted two signed originals, may be accepted by the Employer by signing and returning one original of this document to the Contractor before

..... (date)

The Contractor understands that the Employer is not bound to accept the lowest or any offer received for the Works.

Signature: Date:

Name: Authorised to sign on behalf of (*organization name*):

Capacity:

ACCEPTANCE

The Employer has by signing below, accepted the Contractor's offer and agrees that in consideration for the execution of the Works by the Contractor, the Employer shall pay the Contractor in accordance with the Contract. This Agreement comes into effect on the date when the Contractor receives one original of this document signed by the Employer.

Signature: Date:

Name: Authorised to sign on behalf of (*organization name*):

Capacity:

COMMENTARY

This part of the contract deals the incorporation into the contract of the contract specifications detailed in the following Appendix, which even if not attached to the contract, become an integral part of that contract. As such they may not be unilaterally altered at a subsequent date. Any amendment will be subject to any procedures set out in the contract for bringing about an amendment or by mutual consent.

Since the contractor confirms by signing that he is aware of the information in the documents cross-referenced by the Appendix, subsequent allegations of ignorance of the contents are precluded. The contractor cannot assert that he did not realise the contract specified XYZ etc. It is therefore imperative that the contract is thoroughly read and understood in advance of signing. Any doubts should be expressed in advance and modifications introduced if necessary. Verbal assurances from the employer will not do since it is the written word that takes priority here.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

APPENDIX

This Appendix forms part of the Agreement.

[Note: with the exception of the items for which the Employer's requirements have been inserted, the Contractor shall complete the following information before submitting his offer.]

Item	Sub-Clause	Data
.....
Documents forming the Contract listed in the order of priority	1.1.1	
Document (delete if not applicable)		Document Identification
(a) The Agreement .....		.....
(b) Particular Conditions .....		.....
(c) General Conditions .....		.....
(d) The Specification .....		.....
(e) The Drawings .....		.....
(f) The Contractor's tendered design		.....
(g) The bill of quantities .....		.....
(h) .....		.....
(i) .....		.....
Time for Completion	1.1.9 ....	..... days
Law of the Contract	1.4	Law of the Country*
Language	1.5 ....	.....
Provision of Site	2.1	On the Commencement Date *.....
Authorised person	3.1	
Name and address of Employer's representative (if known)	3.2 .	.....
Performance security (if any):		
Amount	4.4 ....	.....
Form	4.4 ....	..... (details)

* Employer to *amend* as appropriate

COMMENTARY

It is crucial that the cross-referenced documents are clearly identified and that the contractor has received, read and thoroughly assimilated contents before signing. Jurisdiction over disputes arising out of the contract, the governing law and language of the contract are critical issues that are very often given insufficient thought by the parties. Any amendments to the Conditions of Contract, normally carried out by an attached appendix should be clearly indicated here.

Note that 3.2. provides “*The appointee may be named in the Appendix, or notified by the Employer to the Contractor from time to time. The Employer shall notify the Contractor of the delegated duties and authority of this Employer’s representative.*”

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Item	Sub-Clause	Data
.....
Requirements for Contractor's design (if any)	5.1	Specification Clause No's
Programme		
Time for submission	7.2	Within 14 days of the Commencement Date.
Form of programme	7.2	.....
Amount payable due to failure to complete	7.4	..... per day up to a maximum of 10%* of sum stated in the Agreement
Period for notifying defects	9.1 & 11.5	365 days * calculated from the date stated in the notice under Sub-Clause 8.2
Variation procedure		
Daywork rates	10.2	..... (details)
Valuation of the Works*		
Lump sum Price	11.1 .....	..... (details)
Lump sum price with schedules of rates	11.1 .....	..... (details)
Lump sum price with bill of quantities	11.1 .....	..... (details)
Remeasurement with tender bill of quantities	11.1 .....	..... (details)
Cost reimbursable	11.1 .....	..... (details)
Percentage of value of Materials and Plant	11.2	Materials .....80%* Plant .....90%*

* Employer to amend as appropriate

COMMENTARY

The sub-clauses in the Conditions of Contract cross-referenced in the centre column provide further detail on how to deal with each of the issues and should therefore be fully considered by both parties before completing the specifications required in this form. Note that the percentages provided here are a default mechanism and can be altered at this stage by the employer. If the contractor wishes an amendment he has to persuade the employer of the value of such an alteration.

7.4 specifies a liquidated damage provisions : Whilst there may be circumstances where other breach of contract give rise to damages at large, that apart it is important to pitch the pre-estimated figure in the contract carefully to ensure a fair allocation of risk and liability. The capping on the figure should ensure that the specified amount does not become unreasonable and hence a penalty clause, though that could occur if the 10% cap were to be raised too high.⁴

9.1 & 11.5 – defects are limited to the notification period, which directly impacts on the availability of subsequent claims for latent defects.

⁴ For the meaning of genuine pre-estimate of loss see **Dunlop Pneumatic Tyres Ltd v New Garage Ltd** [1915] AC 79 where Lord Dunedin delivered the following guidelines in deciding if damages are a penalty:

- a) The essence of a penalty is a payment of money stipulated 'in terrorem' of the offending party: the essence of liquidated damages is a genuine pre-estimate of loss.
- b) If the sum is extravagant in comparison with the greatest loss that could be proved to have flowed from the breach.
- c) If the breach is non-payment of money and the sum stipulated is greater than the sum which ought to have been paid.

For a review the difficulties of establishing what a penalty means see **Philip Hong Kong Ltd v Attorney General of Hong Kong** 1993, which established that a party seeking to have a clause invalidated as a penalty must normally do more than show that the clause might if upheld compel the contract breaker to pay significantly more to the innocent party than he would otherwise without the clause have had to pay in damages.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Item	Sub-Clause	Data
Percentage of retention	11.3 .....	..... 5%
Currency of payment	11.7 .....	.....
Rate of interest	11.8 .....	..... % per annum
Insurances	14.1	
.....		
Type of cover*	Amount of cover¹	Exclusions*
.....
The Works, Materials, Plant and fees	The sum stated in the Agreement plus 15%	.....
Contractor's Equipment	Full replacement cost	.....
Third Party injury to persons and damage to property .....		.....
Workers		.....
Other cover*		.....
Arbitration		
Rules	15.3	UNCITRAL Arbitration Rules* .....(details)
Appointing authority	15.3	President of FIDIC or his nominee* .....(details)
Place of Arbitration	15.3	The Country*

*Employer to *amend* as appropriate

COMMENTARY

Contrary to the trend to move away from the provision of a retention facility, ⁵ because it is the cause of many unnecessary disputes, and because of the tendency of retentions to be treated as a source of profit rather than as an assurance against problems, which can adequately be dealt with by bonds and guarantees etc, the FIDIC Short Form retains the facility, though the percentage may be adjusted or even completely negated.

The question of currency is an important one, particularly when conversion rates are unreliable and in flux. It is difficult to predict what the rate might be at some time in the future when the time for payment arises. Disputes as to time for assessment, viz when the work is done, or when work is certified for payment or when payment is due or actually made are common.

The obligation is on the contractor to maintain insurance cover for the benefit of BOTH parties.

Even if the provisions of Condition 15 as to the dispute resolution process are made in an annex, note that details of such changes should also be provided in this section of the Appendix. Amendment is important if the parties wish to ensure that the dispute is settled by an other dispute resolution service provider, perhaps with local provision rather than by proceeding to Paris etc. Express reference to an adjudication appointing authority is recommended, not just to arbitration.

⁵ In the UK Employers, public or private, have generally not adopted the replacement of traditional retention with a retention bond. Main Contractors have naturally passed any retention obligations on to sub contractors.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

NOTES FOR GUIDANCE *(not forming part of the Contract)*

Agreement

The printed form envisages a simple procedure of offer and acceptance. In order to avoid the traps and uncertainties that surround "letters of acceptance" and "letters of intent", it was thought preferable to promote a clear and unambiguous practice.

It is intended that the Employer will write in the Employer's name in the Agreement and fill in the Appendix where appropriate and send two copies to tenderers together with the Specification, Drawings etc forming the tender package. In respect of both copies, the Contractor is to complete, sign and date the Offer section and complete any remaining spaces in the Appendix. Having decided which tender to accept, the Employer signs the Acceptance section of both copies and returns one copy to the Contractor. The Contract comes into effect upon receipt by the Contractor of his copy.

If post-tender negotiations are permitted and changes in specification or price are agreed, then the form can still be used after the Parties have made and initialled the appropriate changes to their respective documents. The Contractor thus makes a revised offer in response to the Employer's revised tender documents and the revised offer is accepted by the Employer signing and returning the Acceptance form. If the changes are extensive, a new form of Agreement should be completed by the Parties.

As the Contract comes into effect upon receipt of the signed Acceptance by the Contractor, the Employer should take steps to establish when receipt occurs, for example by requiring the Contractor to collect and sign for the Agreement.

When the applicable law imposes any form of tax such as VAT on the Works, the Employer should make clear whether tenderers should include such taxes in their prices. Similarly, if payment is to be made in whole or in part in a currency other than the currency of the Country, the Employer should make this clear to tenderers. See Sub-Clause 11.7

COMMENTARY

Note that the Agreement comes into effect on the date when the Contractor receives one original of this document signed by the Employer, not on the date of signing or of posting. Thus actual receipt is required. It may be necessary for both parties to ensure that they are both aware of that date. Thus recorded delivery facilities will provide independent verification of the date. Alternatively the contractor may wish to ensure that he has a dated receipt for the delivery. This is important since risk and the liability for events that occur prior to the finalisation of the contract may be quite distinct from the allocations of risk and liability set out in the contract.

Where the contract sum is indicated, it is advisable to add the words "inclusive or exclusive of VAT" etc.

Appendix

Any Notes for Guidance on the completion of the Appendix are to be found in the Notes to the Clauses concerned. The Employer should complete the Appendix as indicated prior to inviting tenders. Tenderers may be asked to insert a Time for Completion at 1.1.9 if none is specified. Where tenderers are required to submit design with their tenders, the documents containing the tendered design should be identified by the tenderer against item 1.1.1(f) of the Appendix.

A number of suggestions have been made in the Appendix, such as the time for submission of the Contractor's programme under Sub-Clause 7.2 and the amount of retention under Sub-Clause 11.3. If these suggestions are adopted by the Employer, no action is required. Otherwise, they should be deleted and replaced.

COMMENTARY

The question as to time for completion highlighted in the guidance note for the appendix is vital since it is relevant to subsequent claims for damages for late completion.

Note that there is a facility for contractor design. Where a contractor provides designs liability for design defects may well shift to the contractor. The mere fact that the employer has approved the designs does not automatically shift responsibility for the design to the employer.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

General Conditions	
1 General Provisions	
1.1. Definitions	In the Contract as defined below, the words and expressions defined shall have the following meanings assigned to them, except where the context requires otherwise:.

NOTES FOR GUIDANCE (not forming part of the Contract)

General Provisions 1.1

Definitions. The definitions in these Conditions are not all the same as those to be found in other FIDIC Contracts. This is as a result of the need for simplicity in Conditions of this sort. Significantly different definitions include Commencement Date, Site, Variation and Works.

COMMENTARY

1.1 Definitions provisions in a contract are extremely important. Clauses in other contracts which may appear to be identical on their face may in fact have a very different effect if the definition ascribed to specialist words is different in the two contracts. For the common law lawyer, great care has to be taken, when paying regard to precedent to ensure that judicial determinations on the effect of a clause relate to a clause which is in fact the same and on all fours with the provision you are dealing with. This problem does not of course occur where specialist terms are not defined, increasing the value and importance of the case law.

The Contract	1.1.1	"Contract" means the Agreement and the other documents listed in the Appendix.
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NOTES FOR GUIDANCE (not forming part of the Contract)

1.1.1 "Contract".

The list of documents serves two purposes: firstly, to identify which documents form part of the Contract; and secondly, to provide an order of priority in the event of conflict between them.

Document identification is necessary to avoid any possible doubt, for example because specifications have been subject to revisions. A complete list of Drawings is always desirable and could be attached on a separate sheet.

There is no need for Particular Conditions but if amendments to these Conditions are required, they should be inserted on the sheet headed Particular Conditions and given priority over the General Conditions. If none, delete the reference.

The Specification should set out in clear terms any design that the Contractor is required to undertake, including the extent to which any design proposals are to be submitted with the tender. If none, the reference to the Contractor's tendered design should be deleted.

If there is no bill of quantities, delete the reference.

If there are additional documents which are required to form part of the Contract, such as schedules of information provided by the Contractor, these should be added by the Employer. Consideration should be given in each case to the required priority.

COMMENTARY

1.1.1 This provision emphasises the importance of ensuring that that any documents which the parties wish to form part of the basis upon which they have contracted and give rise to legal consequences are itemised in the appendix.

Note also that the order of listing is also important since that order establishes the hierarchy of the documents. In the event of a contradiction between provisions the provisions in the earlier document will prevail.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

The Contract <i>cont'</i>	1.1.2	" Specification " means the document as listed in the Appendix, including Employer's requirements in respect of design to be carried out by the Contractor, if any, and any Variation to such document.
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COMMENTARY

See above pages 5,6 and 7 for the text of the Appendix and comments thereafter.

The Contract <i>cont'</i>	1.1.3	" Drawings " means the Employer's drawings of the Works as listed in the Appendix, and any Variation to such drawings.
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COMMENTARY

1.1.3 "Drawings" appears to be limited to the employer's drawing. However, it is possible to allocate responsibility for design to the contractor, as noted in 1.1.2 and so a mechanism for reference to the drawings of the contractor qua designer is needed.

Persons	1.1.4	" Employer " means the person named in the Agreement and the legal successors in title to this person, but not (except with the consent of the Contractor) any assignee
Persons <i>cont'</i>	1.1.5	" Contractor " means the person named in the Agreement and the legal successors in title to this person, but not (except with the consent of the Employer) any assignee

COMMENTARY

1.1.4 & 5: Personality under the contract is identified in the person of the employer and the contractor. Unilateral assignment is precluded not by prohibition but rather by non-recognition of the assignee. This is of particular importance to sub-contractors, who without specific reference to the Third Parties Rights Act 1999, are deemed not to acquire rights under the contract. Use of the FIDIC form in the UK may benefit from a specific reference to the Act.

"Successors in title" refers to any new owner of the business of the employer or contractor and would embrace the conversion of a business from a partnership or private business to corporate status. Whilst the requirement of consent prevents the contract being passed on to a third party who is in dispute with the other party, it is less clear what would happen in the event of a corporate buy out since the predator organisation would be a successor in title.

Persons <i>cont'</i>	1.1.6	" Party " means either the Employer or the Contractor.
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COMMENTARY

This makes it clear, particularly from the perspective of the Contract (Third Parties) Act 1999 in the UK that no third party is deemed to be a party to the contract. None the less, it is probably wise, if the effects of the Act are to be categorically negated, that a specific statement to that effect be included as an amendment in the Particulars.

Dates, Times and Periods	1.1.7	" Commencement Date " means the date 14 days after the date the Agreement comes into effect or any other date agreed between the Parties.
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NOTES FOR GUIDANCE (not forming part of the Contract)

1.1.7 "Commencement Date". The starting date for the Contract is 14 days after the date when the Contractor receives the Agreement signed by the Employer, unless the Parties agree otherwise.

COMMENTARY

See Condition 7.1 – Execution of the Works : "The contractor shall commence the works on the commencement date and shall proceed expeditiously without delay."

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

WORKSHOP QUESTIONS

1. What amounts to expeditious and what amounts to delay?
2. What, if anything, is the penalty for failing to do so, apart of course from not completing the contract in time ?
3. If a different date is agreed between the parties, where will that date be recorded?

Dates, Times & Periods	1.1.8	" day " means a calendar day.
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COMMENTARY

1.1.8 "day" – this makes it clear that 24 hour day configurations are not applicable. Note also that there is no provision for the exclusion of non-working days – so weekends and public holidays are treated as day units for calculation periods – unless expressly provided for in a clause.

Dates, Times & Periods <i>cont'</i>	1.1.9	" Time for Completion " means the time for completing the Works as stated in the Appendix (or as extended under Sub-Clause 7.3), calculated from the Commencement Date.
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COMMENTARY

1.1.9 Time for Completion (Clause 7) : This is expressed in days rather than a specified date. To determine the actual due date for completion the parties should calculate forward carefully from the agreed or calculated commencement date. It is submitted, that at the appropriate time, if, as and when the parties agree the starting date that they calculate and confirm the time for completion, for the avoidance of doubt.

Money and Payments	1.1.10	" Cost " means all expenditure properly incurred (or to be incurred) by the Contractor, whether on or off the Site, including overheads and similar charges, but does not include profit
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COMMENTARY

1.1.10 Cost : The significant questions here concern firstly what is "properly" incurred? ; and secondly, once determined, what will be considered to be a "similar" charge? ⁶

The vexed question as to management costs is spelt out clearly as being included. Lost opportunity and lost profit are expressly not covered by the term. This is related to the issue of claims for disruption, which can result in increased overheads for a contract. Cross-reference Clauses 6.1 and 10.

Other Definitions	1.1.11	" Contractor's Equipment " means all apparatus, machinery, vehicles, facilities and other things required for the execution of the Works but does not include Materials or Plant.
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COMMENTARY

1.1.11 Contractor's equipment : Does this definition embrace equipment hired by and the responsibility of the contractor?

What is the distinction between machinery etc and plant? See 1.1.16 which defines plant as something to be incorporated into the works, such as a permanent generating plant.

⁶ The definition of "Cost" is vague and similar to that in ICE 7th Edition.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Regard should therefore be had to roof top cranes which will remain fixed to the structure on completion, often not because the employer wants them or will use them but rather because the cost of removing them is disproportionate to the benefit of recovery by the contractor.

Other Definitions	1.1.12	"Country" means the country in which the Site is located.
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COMMENTARY

1.1.12 Country : In an international contract the country of overseas contractors needs to be spelt out expressly.

Other Definitions	1.1.13	"Employer's Liabilities" means those matters listed in Sub-Clause 6.1.
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COMMENTARY

1.1.13 Employer's liabilities : Covers 7.3 extensions of time and 10.4 contractor's claims : It could equally be described as employer's financial responsibilities for consequences of specified events or even better as employer's risks⁷. Thus, the contractor's risks are set out in 13 under the somewhat more apt heading Risk and Responsibility.

Other Definitions	1.1.14	"Force Majeure" means an exceptional event or circumstance: which is beyond a Party's control; which such Party could not reasonably have provided against before entering into the Contract; which, having arisen, such Party could not reasonably have avoided or overcome; and, which is not substantially attributable to the other Party.
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NOTES FOR GUIDANCE (not forming part of the Contract)

1.1.14 "Force Majeure" may include, but is not limited to, exceptional events or circumstances of the kind listed below, so long as all of the four conditions stated in the definition have been satisfied:

- a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,*
- b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war,*
- c) riot, commotion, disorder, strike or lockout by persons other than the Contractor's personnel and other employees,*
- d) munitions of war, explosive materials, ionising radiation or contamination by radioactivity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radioactivity, and*
- e) natural catastrophes such as earthquake, hurricane, typhoon or volcanic activity.*

COMMENTARY

1.1.14 Force Majeure : the clause is in the traditional form. The commentary glosses over the tricky issue of government action and changes of law. Given that frequently the government is the employer, the status of changes in the law brought about by a domestic government, which is also an employer albeit that the relationship vests with an individual government ministry, requires substantial discussion. The question that arises is as to whether or not responsibility is attributable to the Ministry or not. For example, construction material, currently being sourced from a foreign country, may cease to be lawfully usable following a government decree banning imports from that country, resulting in loss and delay or the total frustration of the venture.

In this short form clause 6.1 places liability for exceptional events beyond the control of the contractor on the employer, irrespective of whether it was or was not beyond the employer's control. This differs from UK law, which traditionally prevents recovery, liability staying where it falls.

In the Turnkey contract by contrast the risk of force majeure is placed firmly with the contractor so again the question does not require answering.

⁷ See commentary by Corbett, ICLR 1999.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Other Definitions	1.1.15	"Materials" means things of all kinds (other than Plant) intended to form or forming part of the permanent work.
Other Definitions	1.1.16	"Plant" means the machinery and apparatus intended to form or forming part of the permanent work.

COMMENTARY

The relevance of the distinction between permanent works and contractor's equipment lies in the fact that anything that becomes part of permanent works will have been priced up in the tender documents if supply and fix or will otherwise be the property of the employer as supplier.

Other Definitions	1.1.17	"Site" means the places provided by the Employer where the Works are to be executed, and any other places specified in the Contract as forming part of the Site.
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COMMENTARY

What is included in the site is often an issue regarding liability for consequences of occurrences off site : Specification in the contract is therefore important in respect of storage and parking areas, particularly if not provided by the employer. This highlights the danger of using vacant land as a convenient usable space, particularly where an employer orally suggests it might be used but the land is not owned and hence not provided by the employer. Site maps should clearly demarcate all boundaries, not just of works but of other land available for use by the contractor. This is particularly a problem for road construction.

Other Definitions	1.1.18	"Variation" means a change to the Specification and / or Drawings (if any) which is instructed by the Employer under Sub-Clause 10.1.
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COMMENTARY

Clause 10.1 provides for payment by the contractor for variations. Thus it is vital that a contractor gets written instructions to prove a variation has been ordered, or at least some acknowledgement of the order. There is no contractual procedure for the verification of variations (as for CVI's under JCT), but there is a time requirement for submitting claims.

To the extent that it is possible for a court to find that a specified variation amounted to a "substantial change to works" the decision in **Hallamshire Construction plc v South Holland District Council** ⁸ could cause complications for the use of the Green Form for supposedly small, simple straight forward project, and which therefore omits the detailed types of provision regarding substantial changes to works and the distribution of risks that is catered for in the major Rainbow Suite Contracts.

Other Definitions	1.1.19	"Works" means all the work and design (if any) to be performed by the Contractor including temporary work and any Variation
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NOTES FOR GUIDANCE (not forming part of the Contract)

1.1.19 "Works". The term "Works" is intended to cover all the obligations of the Contractor, including any design and the remedying of defects

COMMENTARY

The question of fact as to what the parties intended to form part of the work will remain for determination by an adjudicator in relevant circumstances in respect of materials and plant. The extent of a site as specified in the contract may fall to be determined by an adjudicator, particularly if the specification is not sufficiently clear. What has been instructed by the employer may likewise be a matter that falls for determination. What is comprised of in "works" to be performed by the contractor may likewise fall to be determined.

⁸ **Hallamshire Construction plc v South Holland District Council** December 2003, TCC
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NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

1.2 Interpretation	Words importing persons or parties shall include firms and organisations. Words importing singular or one gender shall include plural or the other gender where the context requires.
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COMMENTARY

Whilst it might not be necessary in the UK to spell out that organisations have legal personality, that may not be the case in other jurisdictions.

1.3 Priority of Documents	The documents forming the Contract are to be taken as mutually explanatory of one another. If an ambiguity or discrepancy is found in the documents, the Employer shall issue any necessary instructions to the Contractor, and the priority of the documents shall be in accordance with the order as listed in the Appendix.
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COMMENTARY

It is submitted that the term “mutually explanatory” is not particularly explanatory, but presumably it means that the combined documents should be read as one.

That the employer should advise on ambiguities and discrepancies is understandable. What however is the contractor’s position if he disagrees with the explanation or correction?

1.4 Law	The law of the Contract is stated in the Appendix.
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COMMENTARY

It is common for one party to specify the law of the contract and for the other to demur and acquiesce without giving the issue much thought. The importance of the provision cannot be over-stated, since the supportive powers of the law and the courts can have a significant impact on the outcome of disputes that subsequently arise out of the contract.

- In domestic contracts, compelling reasons would be required to justify specifying the governing law of the contract as being that of some other state to that where the contract is to be performed.
- The matter should be given serious consideration, particularly in international contracts, since recovery of damages will involve reliance upon the courts of a country foreign to the claimant. Private international law, despite the title “international” differs from state to state. There is no universal set of rules. The difficulty however, lies in the fact that it is not possible to predict in advance what disputes will arise and who will be the claimant and who the respondent, and hence the most appropriate law to govern the matter. The choice therefore should be made on the basis of the clarity, development, coherence etc of the governing law, not on the basis of who will be best favoured by that law.

See also commentary on the law governing dispute resolution processes later in respect of Clause 15 and the distinctions between the substantive law of the contract and the lex fori. The law of the contract should not be selected in isolation from other relevant factors, including choice of law in respect of insurances and guarantees.

1.5 Communications	Wherever provision is made for the giving or issue of any notice, instruction, or other communication by any person, unless otherwise specified such communication shall be written in the language stated in the Appendix and shall not be unreasonably withheld or delayed.
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NOTES FOR GUIDANCE (not forming part of the Contract)

1.5 Communications. The problem of languages is addressed by requiring the important communications such as notices and instructions to be in the language stated in the Appendix. Otherwise there is no “Ruling Language”. Any arbitration will be conducted in the specified language

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

2 The Employer	
2.1 Provision of Site	The Employer shall provide the Site and right of access thereto at the times stated in the Appendix.

NOTES FOR GUIDANCE (not forming part of the Contract)

The Employer 2.1 Unless the Parties have agreed otherwise, the Site must be handed over by the Employer to the Contractor on the Commencement Date. This is 14 days after the Contract has come into effect, which occurs when the signed Agreement has been returned by the Employer to the Contractor (see also Sub-Clause 1.1.7 above).

COMMENTARY

See Condition 7.1 – Execution of the Works : “The contractor shall commence the works on the commencement date and shall proceed expeditiously without delay.”

The reference to the appendix appears to relate only to the following, namely

Provision of Site	2.1	On the Commencement Date *.....
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2.1 It might have been better if this clause stated “at and between” the times stated in the Appendix – presumably from 14 days from the commencement date through to the completion date, or more realistically through to practical completion and the end of snagging.

The only time spelt out is 14 days from commencement, which seems only to require access on day one, which cannot be the intention of the draftsmen. A frequent basis for extensions of time is an allegation that the contractor has been denied access to a site for some period of time during the course of the project.

Clause 2.1 only expressly refers to a “right to access”. It does not extend to a “right to possession”.⁹ However, under Clause 6(1)(f) it would appear that the employer will be liable for problems caused to the contractor by the employer’s occupation of the site.

2.2 Permits and Licences	The Employer shall, if requested by the Contractor, assist him in applying for permits, licences or approvals which are required for the Works.
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NOTES FOR GUIDANCE (not forming part of the Contract)

2.2 If for any reason, permits etc may also be required from places other than the Country, this Sub-Clause could be limited by the addition at the end of the words: “... in the Country but not elsewhere.”

COMMENTARY

Whilst it is clearly in the interest of an employer to assist the contractor, how much assistance is deemed to be sufficient will necessarily be a question of fact in any given situation. What is the penalty for failing to provide such assistance?

2.3 Employer's Instructions	The Contractor shall comply with all instructions given by the Employer in respect of the Works including the suspension of all or part of the Works.
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COMMENTARY

Whilst the contractor is responsible for “ways and means” this provision clearly puts the employer in the driving seat in terms of what should be done as opposed to how it should be done. A clear and unequivocal statement of this responsibility is essential to any contract.

⁹ As to the distinction between “possession” and “access” see **Rapid Building Group Ltd v Ealing Family Housing Association** [1985] 29 BLR 127 and **LRE Engineering Services Ltd v Otto Simon Caves Ltd** [1981] 24 BLR 127.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

The employer, as client, has the contractual power to direct in order to keep the project in line. Whilst the contractor must comply with such instructions, keeping the project moving forward, the interests of the contractor are addressed elsewhere in the contract.

The employer thus has the right to give instructions, but will also bear the responsibility for adverse consequences of such instructions, where the contract affords remedies to the contractor. Thus under Clause 6.1 Liabilities of the employer, subsection (j) it is clear that whilst the contractor must comply with the suspension order, where the cause is related to a problem of the employer, the employer is liable to compensate the contractor.

2.4 Approvals	No approval or consent or absence of comment by the Employer or the Employer's representative shall affect the Contractor's obligations.
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NOTES FOR GUIDANCE *(not forming part of the Contract)*

2.4 The term "approval" is only used in the Conditions in relation to the performance security at Sub-Clause 4.4 and insurances at Sub-Clause 14.1. It is important that risks such as those of poor workmanship or Contractor's design are not transferred to the Employer unintentionally. The Sub-Clause is intended to prevent argument.

COMMENTARY

This short provision is central to the change in ethos introduced by this contract and the shift away from the role of employer's paid and appointed (independent) contract administrator, in the old Red Book, traditionally a civil engineer who issued certificates etc. Instead the contractor issues his bills and the employer accepts and pays or makes deductions with reasons. Even payment is no warranty of acceptance and the right to subsequently claim remains alive.

By making it clear that no one has the power to make a decision or representation, which binds the employer. All final decisions as to quality and fitness of work, if not mutually agreed between the parties, are reserved to the dispute settlement process.

The result on the one hand is that all payments are provisional and a final settlement can be made at the end. All aspects of payment can thus be revisited during consideration of the final account, subject to any determinations by an adjudicator or arbitrator during the intervening period arising out of challenges to interim valuations.

Whilst a pragmatic flexible approach that enables a realistic evaluation of the entire project, the inability of contractor to rely on valuations and to put work behind him as satisfactorily completed deprives the contractor of certainty and predictability.

It also places a premium on record keeping, since certain events may be revisited a long time after the event when the mental powers of recall will have diminished.

It may have been preferable for the FIDIC contract to provide a definition of "approvals" and "consents" though because they cannot be relied upon, a factor which it is important that the contractor remains fully aware of at all times, it is perhaps understandable why no definition was given.

WORKSHOP QUESTIONS

Does 2.4 relieve the employer of legal liability and responsibility for representations ?

Whilst 2.4 makes it clear that the contractor's obligations are not affected, this does not also extend to the contractor's rights. Whilst this argument is potentially tautological since duties placed on one party may impact upon and hence reduce the duties of the contractor, to what extent if at all, do you consider that 2.4 is sufficiently clear to give the employer a green light for making representations however irresponsible or inaccurate, knowing that the contractor will be influenced by them (even if not entitled to rely upon them) ?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

3 Employer's Representatives	
3.1 Authorised Person	One of the Employer's personnel shall have authority to act for him. This authorised person shall be as stated in the Appendix, or as otherwise notified by the Employer to the Contractor.

NOTES FOR GUIDANCE (not forming part of the Contract)

Employer's Representatives 3 Two principles guided the drafting of this Clause.

Firstly, the Contractor should know who in an Employer organisation is authorised to speak and act for the Employer at any given time. This is achieved by Sub-Clause 3.1: the authorised individual should be named in the Appendix.

COMMENTARY

A failure to identify clearly, at all times, who officially represents the parties is one of the most significant contributors to confusion, uncertainty, distrust, lack of co-operation, a break down in communications, problems and consequently to legal actions in the construction industry.

3.2 Employer's Representative	The Employer may also appoint a firm or individual to carry out certain duties. The appointee may be named in the Appendix, or notified by the Employer to the Contractor from time to time. The Employer shall notify the Contractor of the delegated duties and authority of this Employer's representative.
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NOTES FOR GUIDANCE (not forming part of the Contract)

Employer's Representatives 3 Two principles guided the drafting of this Clause.

Secondly, those Employers who require professional assistance should not be discouraged from doing so and their consultant should have clearly established delegated powers. This is the object of Sub-Clause 3.2. Once appointed, the Employer's representative acts for and in the interests of the Employer. There is no dual role or duty to be impartial.

If an impartial Employer's Representative is required with a role similar to the traditional Engineer, then the following words could be used in the Particular Conditions:

"Replace the final sentence of Sub-Clause 3.2 with the following: "The Employer's Representative shall exercise in a fair and impartial manner the powers of the Employer under or in connection with the following Sub-Clauses: 1.3, 2.3, 4.2, 4.3, 5.1, 7.3, 8.2, 9.1, 9.2, 10.1, 10.2, 10.5, 11.1 to 11.6 11.8, 12.1, 13.2 and 14.1. "

To the extent that the Employer has delegated powers to an Employer's representative, he should be careful not to exercise such powers himself in order to avoid the risk of conflicting instructions, decisions etc.

COMMENTARY

Many contracts today, such as JCT Minor Works /the Institution of Civil Engineer's Contract ICE and the FIDIC Red Book 1999 have retained the role of the traditional engineer. Under this form of contract the Engineer acts in what is called a quasi – arbitral or independent role in relation to financial matters such as valuing extensions of time, variations and direct loss and expense claims. In such a capacity the Engineer must be left alone to carry out these duties and must not be influenced by either the Employer or the Contractor.

Clause 3.2. is not clear in relation to what the " certain duties" may be nor that the Employer will leave the Employer's Representative free to exercise them without due influence from the Employer, if that is what is intended. If the recommended language is used, namely : "The Employer's Representative shall exercise in a fair and impartial manner the powers of the Employer under or in connection with the following Sub-Clauses: 1.3, 2.3, 4.2, 4.3, 5.1, 7.3, 8.2, 9.1, 9.2, 10.1, 10.2, 10.5, 11.1 to 11.6 11.8, 12.1, 13.2 and 14.1. " it might be possible to argue that once the power is delegated, the employer no longer has the right to exercise that power, though the advice from FIDIC about the employer exercising restraint seems to preclude this.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

The Contractor may be concerned that Clause 3.2 does not provide the impartiality he has come to expect from the Engineer as Contract Administrator under traditional standard form contracts. That said however if this Contract is to be used for Design and Build procurement it may not be so unusual for an Employer's Representative to act in this capacity.

The ECC relies on a greater need for impartiality than do more traditional forms such as ICE. Because the powers of the Project Manager under ECC are far greater than the powers of the Engineer's Representative (ER) under ICE. The Employer may delegate powers to the ER under ICE but there are certain powers that cannot be delegated and have to be retained by the Employer. To an extent this gives the ER some protection in that his actions are limited by the Employer to those powers delegated to the ER. This is not the case under ECC.

In response to the complaint that the notion of professionalism is no longer trusted as a guarantee of impartiality, independence has been reinforced in new editions of some of the more recently revised construction contracts that use the contract administrator concept to provide for joint appointment and shared remuneration, so that the administering engineer becomes effectively an employee not of the employer but rather of the project.

If such a contract administrator is needed the words "The Employer's Representative" would need to be replaced with something on the lines of "The Project Representative / Engineer." Major surgery would be required elsewhere in the contract to ensure that no conflicts of duties appeared. Such a course of action is not recommended. The advice would be to use a different contract, such as the FIDIC Red Book 1999.

WORKSHOP QUESTIONS

- 1 List the essential terms of reference that you consider appropriate for an employer's representative.

- 1 Draft the terms of reference and appointment that you consider would be appropriate for an employer's representative.

- 2 What responsibilities, if any, do you consider that the employer's representative owes to the contractor, when issuing instructions and valuations? To what extent, if at all, does such responsibility impact upon his relationship with his employer?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

4 The Contractor	
4.1 General Obligations	The Contractor shall carry out the Works properly and in accordance with the Contract. The Contractor shall provide all supervision, labour, Materials, Plant and Contractor's Equipment which may be required. All Materials and Plant on Site shall be deemed to be the property of the Employer

NOTES FOR GUIDANCE *(not forming part of the Contract)*

The Contractor 4.1 Most contracts do not specify the exact standard required for each element of the Works, so some benchmark standard is needed with which the Contractor is to comply. If a more specific set of standards could be referred to for a particular project, then an amendment in the Particular Conditions would be desirable.

COMMENTARY

Questions as to what amounts to carrying out the works “properly¹⁰” and what is considered to be “in accordance with the contract” represent the very core of disputes within the construction industry. Predictability comes out of clarity and, despite the fact that it is envisaged that Particular Conditions are not required, this is an area where clear specification is always desirable.

A practical and useful quality benchmark, in the absence of a specified standard, is to establish what an “experienced and competent contractor” would have done in a similar situation. Whilst the individual may have a personal/subjective view of what this amounts to, the test is in fact objective. Accepted workmanship and practices can be referred to, to determine what the trade considers to be required. In legal proceedings of course, this often leads to a “battle of the experts” leaving the adjudicator to choose between conflicting opinions. A useful tactic is to appoint a joint expert.

It is also implicit that the contractor’s programme of works (see 7.2) is such that the sequence and timing of the works does not have any detrimental impact on the permanent works. Also implied is the competent execution of any temporary works deemed necessary for constructing the permanent works.

The terms Material, Plant, Contractor’s Equipment and Site are all defined in Section 1.

1.1.11 “**Contractor's Equipment**” means all apparatus, machinery, vehicles, facilities and other things required for the execution of the Works but does not include Materials or Plant.

COMMENTARY

1.1.11 Contractor’s equipment : Does this definition embrace equipment hired by and the responsibility of the contractor?

What is the distinction between machinery etc and plant? See 1.1.16 which defines plant as something to be incorporated into the works, such as a permanent generating plant. Regard should therefore be had to roof top cranes which will remain fixed to the structure on completion, often not because the employer wants them or will use them but rather because the cost of removing them is disproportionate to the benefit of recovery by the contractor.

¹⁰ Properly is open to interpretation. Does it mean “in a good and workmanlike manner and fit for the purpose” ? See also the Supply of Goods and Services Act 1982 under UK Law.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

1.1.15 "**Materials**" means things of all kinds (other than Plant) intended to form or forming part of the permanent work.

1.1.16 "**Plant**" means the machinery and apparatus intended to form or forming part of the permanent work.

COMMENTARY

The relevance of the distinction between permanent works and contractor's equipment lies in the fact that anything that becomes part of permanent works will have been priced up in the tender documents if supply and fix or will otherwise be the property of the employer as supplier.

1.1.17 "**Site**" means the places provided by the Employer where the Works are to be executed, and any other places specified in the Contract as forming part of the Site.

COMMENTARY

What is included in the site is often an issue regarding liability for consequences of occurrences off site : Specification in the contract is therefore important in respect of storage and parking areas, particularly if not provided by the employer. This highlights the danger of using vacant land as a convenient usable space, particularly where an employer orally suggests it might be used but the land is not owned and hence not provided by the employer. Site maps should clearly demarcate all boundaries, not just of works but of other land available for use by the contractor. This is particularly a problem for road construction.

4.2 Contractor's Representative
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The Contractor shall submit to the Employer for consent the name and particulars of the person authorised to receive instructions on behalf of the Contractor

COMMENTARY

It is always good practice to ensure that everyone on site knows exactly who is authorised to act as the primary vehicle for the passing of information and instructions.

Whilst Clause 3.1 and 2 above require that the Employer's Authorised person and Representative (if any) are set out in the appendix, a similar facility or requirement does not pertain to the contractor's authorised / contact person. Nonetheless there is a requirement to specify such a person. There must be the ability to change that person, if as and when required, though this is not specified.

Note also that the employer can exercise a veto over the selected person. Such a power of veto could create problems, particularly if the employer does not have someone else in his organisation that he trusts or is available for that project. Should the withholding of consent be subject to a reasonableness test?

Furthermore, despite the fact that under Clause 2.4 the contractor's right to rely on consent is limited, surely here there would be a right to rely on the employer's consent to the appointment. Or does this mean that consent can be withdrawn at any time, acting as a trigger to require the contractor to make a fresh alternative submission?

4.3 Subcontracting

The Contractor shall not subcontract the whole of the Works. The Contractor shall not subcontract any part of the Works without the consent of the Employer.
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COMMENTARY

The bar against subcontracting the whole of the Works reflects and reinforces the provisions of 1.1.5 against assignment.

There is no provision in the contract for employer nominated sub-contractors. However, the right of the employer to veto the contractor's choice of sub-contractor could be problematic unless subject to a reasonableness requirement. Where there is only one available subcontractor a veto could prevent completion of the works.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

5 Design by Contractor	
5.1 Contractor's Design	The Contractor shall carry out design to the extent specified, as referred to in the Appendix. The Contractor shall promptly submit to the Employer all designs prepared by him. Within 14 days of receipt the Employer shall notify any comments or, if the design submitted is not in accordance with the Contract, shall reject it stating the reasons. The Contractor shall not construct any element of the permanent work designed by him within 14 days after the design has been submitted to the Employer or where the design for that element has been rejected. Design that has been rejected shall be promptly amended and resubmitted. The Contractor shall resubmit all designs commented on taking these comments into account as necessary.

NOTES FOR GUIDANCE (not forming part of the Contract)

Design by Contractor 5.1 As with all design-build contracts it is essential that the Employer's requirements are set out clearly and precisely. The Appendix should indicate to tenderers the Sub-Clauses in the Specification that set out the design requirement. Where the Employer procures any part of the design, the responsibility for design will be shared as this Contract makes the Contractor responsible only for design prepared by him. The extent of the Contractor's design obligation should therefore be clearly stated if disputes are to be avoided. The Conditions avoid the confusing concept of approval of design. Designs are submitted and may be returned with comments or rejected. The Employer need not react at all

COMMENTARY

Whilst the default expectation of the Green Form is that the Employer is responsible for design, in which case Clause 5 is superfluous, the provision of Clause 5 is a demonstration of the inherent flexibility of the new Green Form in that it facilitates contractor design, if required by the parties.

Under the obligations of clause 4.1 the contractor will, in many cases, have to provide some "temporary" or "enabling" works to facilitate the construction of the permanent works. The Appendix should contain a statement that places an obligation on the contractor to submit temporary works' designs for approval (in accordance with this clause) when required to do so by the client or his representative. This is common practice for special temporary works, or where such work can impact on the permanent works, and may require the supply of relevant permanent work design information to the contractor.

As pointed out in the Notes for Guidance, where design requires input from both the contractor and the employer, care should be taken to provide specify exactly what the respective responsibilities of the parties is. None the less it is likely that difficult questions could arise from such shared responsibility. Great care should therefore be taken in the selection of an appropriate adjudicator. This provides an example of where the standing adjudicator process may not best serve the interests of the parties, though there is nothing to prevent the adjudicator seeking expert advice and assistance, albeit at an additional cost to the parties.

WORKSHOP QUESTIONS

- 1 Design is often an on-going affair, particularly where unexpected obstacles arise. The employer will naturally press the contractor to make progress and avoid delay. How might such pressure impact upon a contractor, who produces a design proposal to overcome a problem, but does not receive prompt approval from the employer?

WORKSHOP QUESTIONS

2 If the contractor follows the proposed design in response to pressure from the employer, is there an implied acceptance of the design?

3 Design is often an on-going affair, particularly where unexpected obstacles arise. The employer will naturally press the contractor to make progress and avoid delay. How might such pressure impact upon a contractor, who produces a design proposal to overcome a problem, but does not receive prompt approval from the employer?

4 If the contractor follows the proposed design in response to pressure from the employer, is there an implied acceptance of the design?

5 What happens if within the 14 days, but after work has progressed the employer rejects the design?

6 What happens if the contractor progresses with the work, with the knowledge of the employer, who is reluctant to commit himself to the design remains silent, simply to be able to find out if the design will work, with the intention of taking a benefit out of success but reserving the ability to reject if it fails ?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

5.2 Responsibility for Design	The Contractor shall remain responsible for his tendered design and the design under this Clause, both of which shall be fit for the intended purposes defined in the Contract and he shall also remain responsible for any infringement of any patent or copyright in respect of the same. The Employer shall be responsible for the Specification and Drawings.
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NOTES FOR GUIDANCE *(not forming part of the Contract)*

5.2 The Contractor's responsibility for his design remains, as is made clear here and in Sub-Clause 2.4. In the event of conflict between the Specification and Drawings and the Contractor's tendered design, the order of priority in the Appendix makes it clear that the Employer's documents prevail. This means that if the Employer prefers the Contractor's tendered solution, the Specification and Drawings should be amended before the Contract is signed by the Parties.

The Contractor will have an absolute obligation to ensure that the parts of the Works designed by him are fit for their purpose, provided that the intended purposes are defined in the Contract. The Employer must therefore make clear in the parts of the Specification that impose design obligations, the intended purposes of the part of the Works to be designed by the Contractor. This should be done even where this seems obvious in order to avoid argument about whether an intended purpose is defined or not.

If a party wishes to protect the intellectual property in his design, provision must be made in the Particular Conditions.

COMMENTARY

Clause 5 packages liability for design and for construction together,¹¹ whereas they are dealt with separately under both the ICE and JCT

In consequence, the standard required for design under Clause 5 is "fitness for purpose". By contrast ICE and JCT largely set the standard of "reasonable skill and care" for design work.¹²

The Supply of Goods and Services Act 1982, Part II, s13 also stipulates a standard of reasonable skill and care, a standard described in **Bolam v Friern Hospital Management Committee**¹³ as being the exercise of "the ordinary skill of an ordinary competent man exercising that particular art." Fitness for purpose under s4 SGSA 1982 reflects the provisions of s13 and 14 Sale of Goods Act 1979 (as amended 1992/94). To benefit from the exclusions under s4(3) specific reference is required s4(3)(a) to defects in the contract of sale and supply. Under s4(3)(b) examination by the purchaser will also relieve the supplier of liability if the defect was detectable.

In the UK it is common for Professional Insurance policies to provide cover for "reasonable skill and care" which could potentially cause a conflict.

WORKSHOP QUESTIONS

- 1 Whilst the advice of FIDIC in the commentary 5.2 on amending the order of preference in the appendix in relation to design is fine for design pre-mobilization, this is not feasible for a design approved by the contractor in relation to part of the works after commencement. What should the contractor do in such a situation?
- 2 The commentary at 5.1 points out that the employer may approve a design. What is the consequence of such approval and hence is the "confusing concept of approval of design" really completely avoided?

¹¹ This is the default situation in respect of a combined package of design and fix under English law, where the contract does not otherwise provide. There is however the right to expressly exclude the provisions of the Act, unlike s12 etc which are mandatory. See **Greaves v Baynham Meikle** [1975] 3 All ER 99, CA ; **IBA v EMI & BICC** [1980] 14 BLR 1 ; **Viking Grain Storage v White (T.H.) Installations** [1985] 33 BLR 103.

¹² See ICE 7th Clause 8(2) and JCT 1998 with contractor's design.

¹³ **Bolam v Friern Hospital Management Committee** [1957] 1 W.L.R. 582 at 586.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

6 Employer's Liabilities

NOTES FOR GUIDANCE (not forming part of the Contract)

Employer's Liabilities 6.1 This Sub-Clause gathers together in one place the grounds for extension of time under Sub-Clause 7.3 and the grounds for claims under Sub-Clause 10.4. There is no time or claim for bad weather although this could be adjusted in the Particular Conditions if so required.

COMMENTARY

Clause 6 covers the employers risks. The converse, contractors risks is dealt with under Clause 13. Clause 6 must be read in conjunction with Clause 2.3, Clause 7.3, Clause 10.3 and Clause 10.4

According to Edward Corbett,¹⁴ a similar overall risk philosophy has been adopted as for the Red and Yellow Books. He subsequently describes the nature of the provisions in respect of those books in the following terms :-

"Overall, the risk allocation has moved slightly in the contractor's favour. The definition of force majeure has broadened beyond the impossible or illegal basis of the Orange Book. Now it must be beyond a party's control, something against which he could not reasonably have provided and which he cannot now reasonably avoid or overcome and for which he cannot blame the other party. The illustrative list now includes forces of nature and changes of laws as well as the usual extreme events. The contractor recovers time and money for such events.

The contractor also recovers time and money for rectifying damage to works, goods and documents caused by employer's risks which are most of the force majeure list plus use or occupation and design by the employer.

The increased power of the contractor in relation to the employer's ability to pay and actual payment is a significant and entirely justified shift in commercial risk, in this writer's view. Financing -charges and suspension for non-payment and suspension for late interim payment certificates all serve to increase the pressure on employers to have their financing properly organised or, where that is not possible, to relieve the contractor from the obligation to work on regardless.

These beneficial moves for contractors are balanced to some extent by the termination for convenience option which provides no profit for the contractor.

The potential severity of the claims provision and the consequences of a failure to give the right notices and particulars represents a danger to the contractor and may well have the undesirable consequences of shortening the project honeymoon, of increasing the claims staff on projects and causing disputes to arise early in the life of a project."

However, it should be noted that the Green Form in fact takes a much lighter touch than the Red and Yellow Books. The inevitable outcome of the aim and intension of producing a very short, simple document is that there is an absence of the detailed procedures. Nonetheless, the requirements to provide notices by both parties are as ever very important. A failure, as will be seen, to provide notices can result in the loss of entitlement.

Combining elements of entitlement. Clause 6 represents an attempt to simplify the contractual provisions when the Contractor can ask for more time to complete the works in accordance with section 7.3 and the Contractor's right to ask for more money as a result of a variation or claim in accordance with clause 10.4.

Traditionally it has been considered that claims (*made under the provisions of the Contract and sanctioned by the Contract as opposed to damages for breach of contract*) for

- i) additional money sometimes referred to as "direct loss and expense,"
- and claims for
- ii) more time

should be kept separate,¹⁵ but Contractors often regard an event such as a variation as being their trigger for more time and more money and so perhaps it is more honest and more realistic to present as FIDIC has done here a "catch all" trigger clause for both claims.¹⁶

Whilst clause 6 does not refer expressly to either clause 7 or to clause 10, it is necessary when considering each of these clauses in turn, to look back to clause 6 to identify the triggers respectively for extensions of time and additional payment.

¹⁴ *International Construction Law Review* 16 Pt. 1 (1999) 39-46

¹⁵ see for example JCT Clauses 26 and 25

¹⁶ see also the list of "Compensation Events" in the new ECC contract which adopts a similar approach to claims.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

6.1 Employer's Liabilities	In this Contract, Employer's Liabilities mean	
6.1 <i>Employer's Liabilities</i>	a)	war, hostilities (whether war be declared or not), invasion, act of foreign enemies, within the Country
6.1 <i>Employer's Liabilities</i>	b)	rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,
6.1 <i>Employer's Liabilities</i>	c)	riot, commotion or disorder by persons other than the Contractor's personnel and other employees, affecting the Site and/or the Works,

COMMENTARY

Clause 6.1.(a), (b) and (c) essentially cover the traditional exclusions in respect of war and civil unrest. Because these are expressly provided for they do not therefore give grounds for frustration for unforeseen events, since they are foreseen and liability placed firmly on the employer.

6.1 <i>Employer's Liabilities</i>	d)	ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such an assembly, except to the extent to which the Contractor may be responsible for the use of any radio-active material,
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COMMENTARY

Clause 6.1.(d) against is a standard nuclear exemption, but care is taken to ensure that where nuclear power plants are involved, the exclusion is not applicable. Note that under UK Law such contracts would be outside the scope of the HGCRA and thus a FIDIC Contract in the UK for such a development would result in a voluntary adjudication process – not subject to s108 HGCRA 1996 or the Scheme.

6.1 <i>Employer's Liabilities</i>	e)	pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,
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COMMENTARY

Clause 6.1.(e) is by and large traditional, but one might wonder whether or not there might be a specific design requirement to ensure that a building is capable of surviving such pressure waves.

6.1 <i>Employer's Liabilities</i>	f)	use or occupation by the Employer of any part of the Works, except as may be specified in the Contract,
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COMMENTARY

Clause 6.1.(f) should be cross referenced with Clause 2.1. above,

2.1 Provision of Site,	The Employer shall provide the Site and right of access thereto at the times stated in the Appendix.	
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and subsequent comments in respect of access and possession.

6.1 <i>Employer's Liabilities</i>	g)	design of any part of the Works by the Employer's personnel or by others for whom the Employer is responsible, and
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COMMENTARY

Cross reference 1.1.3 definition of employer's drawings – set out in the appendix.
Cross reference also Clause 5 above in respect of contractor's liability for design.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

6.1 <i>Employer's Liabilities</i>	h)	any operation of the forces of nature affecting the Site and/or the Works, which was unforeseeable or against which an experienced contractor could not reasonably have been expected to take precautions.
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COMMENTARY

This is a traditional aspect of both frustration and common law force majeure or what is also referred to as "Act of God." Again, frustration rules are avoided by express allocation of financial responsibility for such events onto the employer.

6.1 <i>Employer's Liabilities</i>	i)	Force Majeure
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COMMENTARY

As noted by the Notes for Guidance, there is a considerable overlap between 6.1.(i) and other provisions of clause 6 – for example clauses 6.1.(a) – (c).

See the definition of force majeure in clause 1.1.14 above.

1.1.14 " Force Majeure " means an exceptional event or circumstance: which is beyond a Party's control; which such Party could not reasonably have provided against before entering into the Contract; which, having arisen, such Party could not reasonably have avoided or overcome; and, which is not substantially attributable to the other Party.		
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And the commentary thereafter.

6.1 <i>Employer's Liabilities</i>	j)	a suspension under Sub-Clause 2.3 unless it is attributable to the Contractor's failure,
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COMMENTARY

See Clause 2.3

2.3 Employer's Instructions The Contractor shall comply with all instructions given by the Employer in respect of the Works including the suspension of all or part of the Works.		
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And commentary thereafter.

6.1 <i>Employer's Liabilities</i>	k)	any failure of the Employer,
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COMMENTARY

A sweeping up provision, just in case anything occurs which is attributable to a failure of the employer, which is not expressly mentioned elsewhere, and for which liability has not yet been allocated. However, it might be debateable as to what exactly amounts to a "failure."

6.1 <i>Employer's Liabilities</i>	l)	physical obstructions or physical conditions other than climatic conditions, encountered on the Site during the performance of the Works, which obstructions or conditions were not reasonably foreseeable by an experienced contractor and which the Contractor immediately notified to the Employer,
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COMMENTARY

Unforeseeable Ground Conditions : Clause 6.1.(l) :This places the onus and responsibility for unforeseeable ground conditions firmly upon the employer.

The problem however, will turn on what was and was not reasonably foreseeable and whether or not the individual with responsibility for design and surveying etc, should have been able to predict these conditions by the exercise of reasonable skill and care. Note also that the additional test or requirement of an "experienced" contractor ups the stakes somewhat, over and beyond the standard imposed in English law. It would make no difference that subjectively the contractor did not have the relevant experience.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Again, the question as to what an experienced contractor would exercise is a standard that the decision maker is going to have to determine as a question of fact, before moving forward to apply it to the facts of the instant case.

Inclement weather : As noted in the Notes for Guidance, inclement weather is not provided for in the Green form, though it is possible for the parties to insert an express provision, allocating risk to one party or the other for such eventuality.

Whilst from one perspective inclement weather is not the fault of the contractor, it is outside the scope of standard force majeure clauses, unless expressly included, because bad weather is something which can be anticipated and against which some, if not total, precautions can be taken.

Since inclement weather is not a risk of the employer, the contractor is not entitled under 7.3. to an extension of time. Given that any unjustified over-run will lead to liquidated damages, at the rate set out in the Appendix under 7.4 up to a maximum of 10% of the contract sum (though this percentage may be expressly changed) this represents a considerable shift of liability onto the contractor. An extension of time, even if not attracting remuneration might therefore be considered desirable.

6.1 <i>Employer's Liabilities</i>	m)	any delay or disruption caused by any Variation,
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COMMENTARY

Since delay and disruption caused by variations is to the employer's account, there is a concomitant right to extensions of time for the contractor, thereby shifting the date for completion.

6.1 <i>Employer's Liabilities</i>	n)	any change to the law of the Contract after the date of the Contractor's offer as stated in the Agreement
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COMMENTARY

This is traditionally covered in "Restraint of Princes" – Government action clauses, often swept up in the force majeure clause. Again, by placing liability on the employer, the fact that such events are provided for in the contract prevents the application of the rules of frustration.

6.1 <i>Employer's Liabilities</i>	o)	losses arising out of the Employer's right to have the permanent work executed on, over, under, in or through any land, and to occupy this land for the permanent work, and
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COMMENTARY

Presumably this relates to land owned by another and not to the site itself. The provision is somewhat ambiguous. It might be anticipated that such works could suffer delay, complications and added expense, which is therefore firmly placed upon the employer's shoulders. Licences, court orders, statutory orders, etc may be needed to carry out such works.

6.1 <i>Employer's Liabilities</i>	p)	damage which is an unavoidable result of the Contractor's obligations to execute the Works and to remedy any defects.
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COMMENTARY

Clause 6.1(p) represents a form of general sweeping up clause to deal with any other risks not expressly covered by the other provisions of Clause 6(a)-(o), providing in a somewhat oblique manner that any unavoidable damage which occurs during the course of the operations is at the employer's risk.

WORKSHOP QUESTIONS

1 What is the test for causation, ie that something that occurs is a consequence arising out of a specified risk allocated to the employer under clause 6.1 ?

2 Would the UK "BUT FOR " test apply elsewhere to distinguish between background scene setting events and events that cause a consequence?

3 To what extent, if at all, are ground tremors, volcanoes and earthquakes foreseeable ? 6.i.h and 6.1.l

4 How foreseeable are floods and dams bursting from heavy rains causing inundations and washing the works away etc ? 6.i.h and 6.1.l

5 If a state enterprise as contractor instigates a change in the law, using its in house links to government and the legislature, can the government contractor benefit from that change in the law and shift liability onto the private employer? 6.1.n.

6 What events, if any, might be covered by Force Majeure 6.1.i which are not already expressly covered by the other provisions of clause 6.1 ?

7 Compose a provision to cover inclement weather.

8 Since variations are to the employer's account, what procedures must be followed by the contractor to ensure an entitlement to an extension of time and to quantify that rights?

9 What is the respective duty of an employer and the contractor in respect of the construction of telephone lines, sewers etc that pass over and or under the land of neighbours? 6.1.o

10 What is the test for unavoidable in 6.1.p?

11 Why is the employer liable for the "unavoidable" consequences of the contractor carrying out remedial action, given that no such action might be necessary if the contractor had not done something wrong which requires remedial work ?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

7 Time for Completion	
7.1 Execution of the Works	The Contractor shall commence the Works on the Commencement Date and shall proceed expeditiously and without delay and shall complete the Works within the Time for Completion.

COMMENTARY

The definitions of the key words within this duty are set out in clause 1 as follows :-

1.1.7 "**Commencement Date**" means the date 14 days after the date the Agreement comes into effect or any other date agreed between the Parties.

1.1.9 "**Time for Completion**" means the time for completing the Works as stated in the Appendix (or as extended under Sub-Clause 7.3), calculated from the Commencement Date.

1.1.19 "**Works**" means all the work and design (if any) to be performed by the Contractor including temporary work and any Variation

COMMENTARY

See also the section 1 commentary on each of these terms.

Key words not defined in section 1 include "expeditiously" and "without delay."

It is implicit that the contractor acts throughout the contract duration to expedite progress and minimise delay and its consequences.

Completion and the concept of practical completion are canvassed in clause 8 below.

WORKSHOP QUESTIONS

1 What is the relationship between the duty to proceed expeditiously and the allocation of responsibility on the employer under clause 6.1.f & k ?

2 What is the test for "expeditiously" ?

3 What is the test for delay and how much of a delay is significant enough to be counted?

4 What is the penalty for failing to complete on time?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

7.2 Programme	Within the time stated in the Appendix, the Contractor shall submit to the Employer a programme for the Works in the form stated in the Appendix.
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NOTES FOR GUIDANCE (not forming part of the Contract)

Time for Completion 7.2 The Appendix should stipulate any particular requirements as to the form and level of detail of programme to be submitted. Where Contractor’s design is required, the Appendix could stipulate that the programme should show the dates on which it is intended to prepare and submit drawings etc.

Appendix : Program

Time for submission	7.2	Within 14 days of the Commencement Date.
Form of programme	7.2	.....

COMMENTARY

What is the penalty for failing to submit the program within the specified time? Does the employer have to accept the program or can he challenge it and if so to what effect?

Supplementary data in the form of a “method statement” is often advantageous as it clarifies the contractors intent and strategy, this assists in understanding the submitted programme.

Clearly, it will be difficult for the contractor to mobilise without first producing such a program, and if he does mobilise in the absence of a program he will have difficulties demonstrating that he has been delayed by anything the employer does since the employer will be able to deny knowledge of the fact that something he has done or omitted to do was likely to cause a problem.

Clause 7 Time for Completion must be read in conjunction with clause 6.1 and 10.3 as the triggers to the Contractor successfully claiming for more time. A claim for an extension of time is essentially a claim that no damages for delay may be levied by the Employer until some date later than that originally stated.

WORKSHOP QUESTIONS

1 What is the penalty for failing to submit the program within the specified time?

2 What happens if the employer supplies the contractor with insufficient information to be able to produce an entire programme of works, perhaps because the work is innovative and aspects of the program will depend upon the success of initial developments ?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

8 Taking-Over	
8.1 Completion	The Contractor may notify the Employer when he considers that the Works are complete.

COMMENTARY

The contractor takes the initiative in terms of handing over, by furnishing the initial notice.

8.2 Taking-Over Notice	<p>The Employer shall notify the Contractor when he considers that the Contractor has completed the Works stating the date accordingly. Alternatively, the Employer may notify the Contractor that the Works, although not fully complete, are ready for taking over, stating the date accordingly</p> <p>The Employer shall take over the Works upon the issue of this notice. The Contractor shall promptly complete any outstanding work and, subject to Clause 9, clear the Site.</p>
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NOTES FOR GUIDANCE *(not forming part of the Contract)*

Taking-Over 8.2 In line with normal practice, it is not envisaged that the Works need be 100% complete before the Employer may take over. Once the Works are ready to be used for their intended purpose, the notice should be given. There is no provision for taking-over of only parts of the Works but if this is required, provision should be made in the Particular Conditions.

If any tests are required to be completed prior to taking-over, these should be specified in the Specification. The definition of Works is broad enough to include any such tests.

COMMENTARY

The employer is effectively in charge of the taking over process. There appears to be no express requirement that the employer attach any importance to the contractor's notice of completion.

Furthermore, the employer may issue a notice of completion at a stage when the contractor might prefer to remain exclusively on site. The premature taking over of the works by the employer could cause the contractor considerable inconvenience. Despite this inconvenience, the onus is then on the contractor to promptly complete.

The adjudication process that could establish whether or not the employer's notice is valid is somewhat lengthy in such circumstances, and a decision might be reached long after the event, though presumably this would then entitle the contractor to additional costs for the inconvenience, under Clauses 6.1.(f) and Clause 10.4.

WORKSHOP QUESTIONS

Consider the following : An employer notifies the contractor that the even though the works are not complete, he is of the opinion that they are ready for taking over, duly notifies the date and takes over. The contractor finds it difficult to make progress once he has to share access to the site with the new users of the premises. The employer then complains to the contractor that he is failing to promptly complete in compliance with 8.2

What advice would you give to the contractor ?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

9 Remedying Defects	
9.1 Remedying Defects	<p>The Employer may at any time prior to the expiry of the period stated in the Appendix, notify the Contractor of any defects or outstanding work. The Contractor shall remedy at no cost to the Employer any defects due to the Contractor's design, Materials, Plant or workmanship not being in accordance with the Contract.</p> <p>The cost of remedying defects attributable to any other cause shall be valued as a Variation. Failure to remedy any defects or complete outstanding work within a reasonable time of the Employer's notice shall entitle the Employer to carry out all necessary work at the Contractor's cost.</p>

NOTES FOR GUIDANCE *(not forming part of the Contract)*

Remedying Defects 9.1

There is no defined Defects Liability Period but during the period - normally 12 months - from the date of taking-over, the Employer may notify the Contractor of defects. The Contractor must remedy such defects within a reasonable time. If he fails to do so, the Employer may employ others for that purpose at the Contractor's cost. The Employer may also notify defects at any time prior to taking-over.

The liability of the Contractor for defects will not normally end with the expiry of the period stated in the Appendix. Although he is then no longer obliged to return to Site to remedy defects, the defect represents a breach of contract for which the Contractor is liable in damages. This liability remains for as long as the law of the Contract stipulates, often 3, 6 or 10 years from the date of the breach. If this long-term liability is to be reduced or eliminated, a Clause in the Particular Conditions is required

Appendix : Programme

Period for notifying defects	9.1 & 11.5	365 days * calculated from the date stated in the notice under Sub-Clause 8.2
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Note that the period of time may be increased or decreased.

COMMENTARY

If the contractor successfully challenges a defect notice, the additional work becomes a variation, which presumably not only gives rise to additional costs, but also to an extension of time thereby reducing or avoiding liability for liquidated damages for late completion.

9.2 Uncovering and Testing	<p>The Employer may give instruction as to the uncovering and/or testing of any work. Unless as a result of any uncovering and/or testing it is established that the Contractor's design, Materials, Plant or workmanship are not in accordance with the Contract, the Contractor shall be paid for such uncovering and/or testing as a Variation in accordance with Sub-Clause 10.2.</p>
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COMMENTARY

Wherever and whenever possible the employer is advised to ensure that testing is carried out promptly before works are covered up.

WORKSHOP QUESTIONS

- 1 What is the test to determine between defects attributable to any other cause and defects attributable to the contractor?
- 2 What is the obligation, if any, of the employer to ensure that works carried out to remedy a failure to remedy defects or complete outstanding work are carried out at a reasonable or market price?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

10 Variations and Claims	
10.1 Right to Vary	The Employer may instruct Variations.

NOTES FOR GUIDANCE (not forming part of the Contract)

Variations and Claims 10.1 Variation is defined to include any change to the Specification or Drawings included in the Contract. If the Employer requires a change to part of the Works designed by the Contractor either as part of his tender or after the Contract was awarded, then this is to be done by way of an addition to the Specification or Drawings which by Sub-Clause 5.2 will prevail over Contractor's design.

COMMENTARY

The definition of variation in clause 1 is as follows:-

1.1.18 "**Variation**" means a change to the Specification and / or Drawings (if any) which is instructed by the Employer under Sub-Clause 10.1.

Forman and Co. Proprietary Ltd. v The Ship Liddlesdale discussed variations and compliance with procedures for variations. Whilst the actual provisions of a contract must be considered, nonetheless **Liddlesdale** provides an interesting insight into the law's attitude to variations. In **Liddlesdale**, the Employers agent expressly requested an **ORAL** variation. However, clause 8 of the Contract provided for all alterations or deviations from the specification to have the written approval of the Employer and placed the responsibility for applying for the variation order with the Contractor. The Privy Council held that because the employer had not confirmed the alteration in writing, the Employers agent had no authority to make the variation order. Consequently the Employer had no liability in respect of the variation order (V.O.).¹⁷

By contrast in **Brodie v Cardiff Corporation**,¹⁸ a contract contained an arbitration clause providing for arbitration after completion of works and for the arbitrator to rule on any objection by the Contractor in relation to any decision of the Engineer. The court held that this gave the arbitrator jurisdiction to review the decisions of the person with responsibility for making written V.O.'s in circumstances where "*that person fails to make such an order, believing there to be no change in scope of works*" in spite of a contract stipulation that "*no extra changes in respect of extra work will be allowed unless such works shall have been ordered in writing by the Engineer.*"

The Contractor had claimed a variation in the scope of works, which was refused by the Engineer. Subsequently, at the end of the works, in accordance with the contract, the Contractor referred the matter to Arbitration, asserting even in the absence of a variation order, a right to additional payment. The Arbitrator awarded the additional payment. The court enforced the Arbitrator's decision on the grounds that the dispute related to the question as to whether or not the item was an extra for which a written variation order should have been issued. The conclusion is that in certain instances of default, which inevitably also result in pre-requisite procedures for entitlement being absent, such absence will not prevent recovery.

Equity has also from time to time assisted a Contractor where correct procedures for awarding a V.O. had not been complied with. Thus, in **Meyer v Gilmour**¹⁹ it was held that the requirement for a written variation order was impliedly waived by an Employer who was in attendance at meetings where the oral VO's were given, hence the employer was estopped from denying that which he had given the contractor the impression he was entitled to rely upon, and which he had subsequently relied upon, clearly incurring a potential detriment if not enforced, which fulfils all the classic requirements of equitable estoppel under English Law.

Under clause 10.3 the requirement is for the contractor to give notice of relevant circumstances.

¹⁷ See also Michael Patrick O' Reilly : " Civil Engineering Construction Contracts" 2nd Edition, commenting on Liddlesdale :- "where the contract requires that instructions or variation orders be given in a prescribed format or manner any purported instruction or variation order which is not given may be ineffective and the contractor may not be entitled to be paid for it."

¹⁸ **Brodie v Cardiff Corporation** (1919) AC 337, House of Lords.

¹⁹ **Meyer v Gilmour** (1899) 18 NZLR

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

10.2 Valuation of Variations	Variations shall be valued as follows:	
	a)	at a lump sum price agreed between the Parties, or
	b)	where appropriate, at rates in the Contract, or
	c)	in the absence of appropriate rates, the rates in the Contract shall be used as the basis for valuation, or failing which
	d)	at appropriate new rates, as may be agreed or which the Employer considers appropriate, or
	e)	if the Employer so instructs, at daywork rates set out in the Appendix for which the Contractor shall keep records of hours of labour and Contractor's Equipment, and of Materials used.

NOTES FOR GUIDANCE *(not forming part of the Contract)*

10.2 This Sub-Clause sets out alternative procedures for the valuation of Variations, to be applied in the order of priority given. It applies equally to omissions as to additional works.

a) A lump sum should be the first method to be considered as it can encompass the true cost of a Variation and avoid subsequent dispute over the indirect effect. The Employer can invite the Contractor to submit an itemised make-up (Sub-Clause 10.5) before instructing the Variation so that an agreed lump sum can form part of the instruction.

b) Alternatively, a more traditional approach can be taken by valuing the Variation at rates in the bill of quantities and any schedules, or

c) using these rates as a basis, or

d) using new rates.

e) Daywork rates are normally used when the Variation is of an indeterminate nature or is out of sequence with the remaining Works. To ensure reasonable daywork rates, provision should be made for these to be priced competitively in the tender documents.

COMMENTARY

The primary method of establishing a value for variations is a combination of 10.2. and 10.5. The other methods will only apply if this fails to produced an agreed valuation. If agreement is reached then that is the end of the matter. Therefore it is only valuations arising out of (b)-(e) that might lead to a reference to adjudication.

WORKSHOP QUESTIONS

If you lack practical experience in valuation, how would you deal, as an adjudicator, with a valuation claims?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

10.3 Early Warning	A Party shall notify the other as soon as he is aware of any circumstance which may delay or disrupt the Works, or which may give rise to a claim for additional payment. The Contractor shall take all reasonable steps to minimise these effects. The Contractor's entitlement to extension to the Time for Completion or additional payment shall be limited to the time and payment which would have been due if he had given prompt notice and had taken all reasonable steps.
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NOTES FOR GUIDANCE (not forming part of the Contract)

10.3 This Sub-Clause and Sub-Clause 10.5 require the Contractor to notify the Employer of events promptly and to detail any claim within 28 days. If the effects of the event are increased or if the ability of the Employer to verify any claim is affected by the failure to notify, then the Employer is protected.

COMMENTARY

The duty to provide notice is placed upon both parties of potential delay or disruption events or events that will trigger additional payment. The provision appears to be evenly balanced, thus :-

- a) The duty of the contractor to then take reasonable steps to minimise the effects of such events is triggered by the notice, so there is an incentive on the employer to provide such notice as soon as possible, since otherwise the entitlements of the contractor may be increased because nothing has been done to minimise said effects, and nothing until that time needs to have been done.
- b) Conversely, a contractor who fails to give prompt notice may suffer a penalty by forfeiting both entitlement to an element of related additional payments and elements of entitlement to extensions of time under Clause 7.3. above.

The similarities between making a claim for damages for breach of contract and a claim for additional time and money under the FIDIC GREEN FORM are strikingly obvious. The concurrence of entitlements can also be observed in JCT and ICE contract.²⁰

“ Where there has been a breach of contract the claimant is entitled to damages to place it in the (financial) position it would have been in if the contract had been properly performed providing that the loss is not too remote or unreasonable... In the JCT forms of Contract the drafting bodies have codified this principle. So in the JCT Contracts the Contractor is entitled to be paid the direct loss and / or expense that he has incurred because the regular progress of the works has been delayed or disrupted by the Employer or Architect. In the ICE contracts the contractor can recover extra costs resulting from the specific defaults by the Engineer.”

Furthermore, in relation to direct loss and / or expense Daniel Atkinson²¹ states that

“ the claims for common Law are claims for damages for breach of contract . The two heads are entirely separate although they may relate to the same event. If, for example, information is issued late there may be grounds for a claim under both heads. Of course the claimant will not be allowed to recover twice for its loss. The measure of damages for breach will take account of the compensation received under the contract.”

10.4 Right to Claim	If the Contractor incurs Cost as a result of any of the Employer's Liabilities, the Contractor shall be entitled to the amount of such Cost. If as a result of any of the Employer's Liabilities, it is necessary to change the Works, this shall be dealt with as a Variation
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COMMENTARY

It falls to be determined what amounts to a delay or a disruption. Do the de minimis rules apply ? Does something have to amount to an unreasonable or significant delay or disruption before it can to be taken into account? Perhaps a clear specification requiring delay of “less than X hours or days to be discounted” would assist.

²⁰ Jeremy Winter (2001) : “ Head Office Overheads and Profit” at www.bakernet.com

²¹ Section 4/14 of the Construction Law Handbook

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

As noted above, the claim for “cost” may possibly be compared with ²² a “claim for direct loss and/or expense” The provision enables a contractor to claim reimbursement for “costs” arising as a result of certain matters affecting the regular progress of the works. Cost, it will be recalled, is defined at 1.1.10 as “all expenditure properly incurred (or to be incurred) by the Contractor, whether on or off the Site, including overheads and similar charges, but does not include profit”

It is important to ascertain the meaning of “additional payment” which the Contractor is entitled to receive under clauses 10.3 and 10.4. Whilst “cost” has been defined in the contract, “additional payment” has not been defined. Depending on the exact meaning of “additional payment” there is a potential conflict between the two terms and hence a potential conflict within Clause 10 if the additional payment does not correlate exactly with the cost as determined under 1.1.10.

It is trite law, reiterated in **British Sugar PLC v NEI Power Projects** that “Every case of [contract] construction would turn on the particular contract”. Previous established case law *may* help as a guide to understanding when the Contractor will be entitled to more money under this contract but the true test will come when the Short Form is tested in court. This is of course scant comfort for the adjudicator who may be left with little or no guidance in the interim, though this might be of less concern to those from a civil law background who are more used to applying teleological contract interpretation on a case-by-case basis. Equally however, it provides little guidance to the parties as to who will ultimately have to bear financial responsibility for the event.

The central problem that arises for the adjudicator, tasked with determining how much additional payment is due to cover the costs that have been incurred as a result of the event. What are the criteria? Hence, the discussion as to what amounts to direct loss and / or expense.

The term direct loss and expense itself has an immediate connection here to common law contractual principles as to the distinction between losses which flow directly from the act complained of, and which are therefore recoverable and losses which are indirect and which are not recoverable.²³

The general principle remains that the Contractor must prove his actual losses, in other words that on the balance of probabilities he incurred the losses he claims in direct consequences²⁴ of the delays and disruptions for which the employer is responsible. This similarity of a claim under and pursuant to the Contract and a claim for damages for breach has also been recognised in case law :-

“in my judgement there are no grounds for giving the words “direct loss and/or damage” any other meaning than that which they have... the claimants are as a matter of law entitled to recover that which they would have obtained if this contract had been fulfilled in the terms of the picture visualised in advance in my judgement the claimants are entitled to recover as being direct loss and/or [damage] those sums of money which they would have made if the contract had been performed”. ²⁵

The meaning of ‘direct damage’ is also important in the overall understanding of what is meant by “direct loss and or expense” and was considered by Atkinson J. in **St Line Ltd v Richardson** where it stated that “direct damage is that which flows naturally from the breach without other intervening causes and independently of special circumstances”.

The meaning of “Consequential Loss” was also considered in detail by the Court of Appeal in **The Simkins Partnership v Reeves Lund**²⁶ where it was held that a contract which included a term for limiting liability for consequential loss would not have the effect of limiting recovery of damages “arising naturally” as described in the first limb of the rule in **Hadley v Baxendale**. The Court of Appeal agreed with the findings of **British Sugar v NEI Power Plant Projects** (1998) where the obligation on NEI was to pay such damages as flowed naturally and directly from the breach. Those damages were unlimited in amount.

²² e.g. Clause 26 JCT.

²³ See **Hadley v Baxendale** (1854) 9 EX 341

²⁴ As to the difference between direct and indirect loss and expenses, see **Croudace Construction v Cawoods Concrete Products Ltd.** [1978] 2 Lloyd's Rep 55.

²⁵ **Wraight Ltd. v PH & T Holdings** (1986) 13 BLR 26

²⁶ **The Simkins Partnership v Reeves Lund & Co Ltd** QBD 18th July 2003 C.A.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

The limitation in respect of consequential loss was to be imposed in relation to some other type of loss which did not flow directly e.g. which might flow from special circumstances falling within the second limb of **Hadley v Baxendale**.²⁷

Thus, to be able to sue for breach of contract the Claimant must prove a loss has been suffered. Equally for a claim for cost and additional payment to be claimed under the FIDIC GREEN FORM the Contractor by virtue of clauses 10.3 /6.1 must firstly notify (clause 10.1) as soon as he is aware of any basis upon which he is entitled to more time and more money, which entitlement, according to the provision “ will be limited to the time and payment which would have been due if he had given prompt notice and had taken all reasonable steps.”.

At common law the Claimant has a duty to mitigate his loss. Similarly, under clause 10.3 the Contractor, in order to claim for more time and additional payment, must “take all reasonable steps to minimise these effects “

*“Notices – Civil Engineering contracts frequently contain provisions which purport to deprive or limit the right to claim unless proper notices are served. While a failure to comply with notice provisions may prevent the Contractor from receiving benefits under the contract, breaches of contract or extra contractual remedies will not normally be affected.”*²⁸

Does cost and additional payment therefore mean something along the lines of limb 1 of **Hadley v Baxendale**, that is to say “losses occurring directly and in the reasonable contemplation of the parties at the time when the contract was entered into?”²⁹

The **A.G. Falklands Islands v Gordon Forbes Construction**³⁰ concerned and allowed a claim for “additional payment” under the old FIDIC Red Book It could therefore set a precedent of sorts to follow, although the case mainly about the keeping of contemporary records to support a claim. Furthermore, **Motherwell Bridge Construction Ltd v Micafil Vakuumtechnik** also appears to support claims for “additional payment.”

Itemising Heads of Claim

It is often more straightforward for Contractor’s to itemise their claims under Heads of Claim and the following heads of claim might be recoverable. These are sometimes called “ Prolongation, delay and disruption claims”

As Michael Patrick O’Reilly points out

*“Claims for prolongation etc frequently arise from reduced site access, craneage, storage facilities etc, interference from other contractors or personnel, delays in issue of information, free issue materials, preceding work or necessary programming causing inefficient working (e.g. winter working).”*³¹

A selection of some of the Heads of Claim are as follows though, as to whether they will apply or not in the Short Form of FIDIC Contract will no doubt be tested in time :-

- a) Money paid by the Contractor to sub-contractors due to delay (i.e Contractor out of pocket).³²
- b) In ICE 7th Edition the Contractor is entitled to claim for interference from other contractors etc., where such interference could not reasonably be foreseen.
- c) Wages and stores
- d) Accommodation, plant hire, tools, transport and storage costs.
- d) Management costs,. but proper records must be provided.³³
- e) Interest or financing charges.³⁴

²⁷ The rule in **Hadley v Baxendale** is as follows “ where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as

- 1) arising naturally i.e. according to the usual course of things from such breach of contract itself or
- 2) such as may reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract as the probable result of the breach of it”

²⁸ Michael Patrick O’ Reilly : “ Civil Engineering Construction Contracts” 2nd Edition

²⁹ **Insert 2 cases on ICE**

³⁰ **Attorney General for the Falklands Islands v Gordon Forbes Construction (Falklands) Ltd (NO 2) 2003**

³¹ supra fn 24

³² see **Croudace Construction Ltd v Cawoods Concrete Products Ltd 1978 8 BLR 20.**

³³ **Tate and Lyle Food Distribution v GLC [1982] 1WLR 149. Phee Farrar Jones Limited v Connaught Mason Limited TCC 30th April 2003 and the Falklands case, fn 25 above.**

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

- f) Loss of productivity.³⁵
- g) Loss of profit. In **Wright v P H & T Holdings**³⁶ work was suspended by an architect. The Contractors properly determined their employment. The court held that loss of profit by the contractors was a direct and natural consequence of the determination of the contract and the contractors were entitled to claim. Please note that in this Short Form of Contract profit is excluded in the definition of “cost”

Increased main office overheads always present for a difficult computation . O’Reilly points out that
“ the costs of head office overheads are usually claimed as a Supplement to the direct on site costs. Their computation is frequently controversial.”

A number of formulae have been advocated including the Hudson formulae, the Emden Formulae and the Eichlay Formulae (USA). The use of Formulae has received some qualified support.³⁷ It is submitted by O’Reilly that they provide no advantage over traditional calculation in which the overheads which are being claimed are set out with reasonable particularity.”³⁸

Property & Land Contractors Ltd v Alfred McAlpine³⁹ is also of interest. The court held that “ Under clause 26 JCT the claimant was entitled to recover the fixed overheads expenditure on a delayed contract on the basis of either direct expense due to the progress of the works being materially affected by the delay or the shortfall in the contribution that the volume of work was expected to have made towards the fixed overheads. Direct loss or expense in respect of plant owned by the claimant meant the actual loss or expense sustained, and not any hypothetical loss or expense based on assumed or typical hire charges.”

WORKSHOP QUESTIONS

CAUSATION AND THE INCURRING OF COST

Consider the following : As a contractor you are engaged on a project to build a canal between Aqaba and the Dead Sea. You engage a large number of overseas experts and consultants to assist in the execution of the works, on fixed term premium prices, with generous travel allowances, including home visiting rights. *

Following allegations that the work is disturbing sacred sites, work is at a standstill for a prolonged period, due to civil unrest. The Overseas experts return home at great expense.

The contractor claims under 10.4 for the costs and for additional labour costs arising out of 6.1. The employer responds that most of these costs are a consequence of employing expensive overseas workers rather than locals. Who is correct and why ?

- (assume that it is lawful to employ the overseas workers)

³⁴ It was held in **F.G. Minter v. WHTSO** [1981] 3BLR. that the costs to the Contractor in financing the non – payment by the Employer were direct “loss and or expense” . Such expenses included interest as a constituent part of the direct loss and or expense claim which was extremely advantageous to the contractor. See also **Rees & Kirby v Swansea City Council** (1980) 30 BLR 1 (CA). Interest must normally be claimed as a statutory entitlement.

Ogilvie Builders Ltd v Glasgow City Council concerned whether or not bank charges and lost interest on credit balances are recoverable under a building contract clause as “direct loss and expense.” The court confirmed that “ the claim for such charges could come within the expression direct loss and or expense.”

³⁵ **Peak Construction v. McKinney** 1970 1BLR 111.

³⁶ **Wright Ltd v P H & T Holdings Ltd** (1968) 13 BLR 26.

³⁷ **Finnegan v Sheffield City Council** (1988) 43 BLR 124

³⁸ See **Alfred McAlpine Homes v Property and Land Contractor’s Ltd (1995)** CILL 1130

³⁹ **Property & Land Contractors Ltd v Alfred McAlpine Homes North Ltd** (2000)

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

10.5 Variation and Claim Procedure	The Contractor shall submit to the Employer an itemised make-up of the value of Variations and claims within 28 days of the instruction or of the event giving rise to the claim. The Employer shall check and if possible agree the value. In the absence of agreement, the Employer shall determine the value.
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COMMENTARY

This clause provides for the Employer to determine, in the event of non-agreement, the value of any variation.⁴⁰ If the Contractor disputes the Employer's assessment of the value of the variation claim, this will be a sufficient "dispute" for the purposes of Adjudication under clause 15.

As with any construction contract, the Contractor would be well advised to submit at least a best guesstimate at the earliest possible opportunity. This will, if nothing else provide the Employer with an idea of the likely cost implications of a particular change. Frequently an Employer might introduce changes, which are not essential to the success of a project. In highlighting the potential cost the Contractor will firstly provide the Employer with a second opportunity to reconsider the impacts of a change on what might already be a tight budget and secondly in the event of a dispute arising at a later stage the Contractor can at least be held to have provided an early assessment of the cost before the Employer was necessary committed.

It is evident that the requirement for "early warning" (see 10.3) and the collection submission and verification of "supporting details" (see 7.3) will greatly assist the employer (or possibly Adjudicator) in reaching a balanced conclusion.

WORKSHOP QUESTIONS

If the Contractor disputes the Employer's assessment of the value of the variation claim will this be a sufficient "dispute" for the purposes of Adjudication under clause 15.

⁴⁰ See **Dean & Dyball**. This point is equally relevant to the payment of interim payments as set out in clause 11.3.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

11 Contract Price and Payment	
11.1 Valuation of the Works	The Works shall be valued as provided for in the Appendix, subject to Clause 10.

NOTES FOR GUIDANCE *(not forming part of the Contract)*

Contract Price and Payment 11.1

Normally only one of the options in the Appendix should be used to indicate how the sum in the offer is be calculated and presented. The following explains what is intended:

Lump sum price	<i>A lump sum offer without any supporting details. This would be used for very minor works where Variations are not anticipated and the Works will be completed in a short period requiring only one payment to the Contractor.</i>
Lump sum price with schedule of rates	<i>A lump sum offer supported by schedules of rates prepared by the tenderer. This would be a larger contract where Variations and stage payments would be required.</i>
Lump sum price with bill of quantities	<i>If the Employer does not have the resources to prepare his own bill of quantities then this alternative would be suitable</i> <i>A lump sum offer based on bill of quantities prepared by the Employer. This would be the same as last but where the Employer has the resources to prepare his own bill of quantities. A better contract would result with an Employer's bill of quantities.</i>
Remeasurement with bill of quantities	<i>A sum subject to remeasurement at the rates offered by the tenderer in the bill of quantities prepared by the Employer.</i> <i>This would be the same as last but would suit a contract where many changes are envisaged to the Works after the Contract has been awarded.</i>
Cost reimbursable	<i>An estimate prepared by the tenderer which will be replaced by the actual cost of the Works calculated in accordance with the terms set by the Employer. This would suit a project where the extent of work cannot be ascertained before the Contract is placed. An example of this would be an emergency reconstruction of a building damaged by fire.</i>

However, if for some special reason, more than one option is selected, for example there is a remeasurable element in a lump sum Contract, then the details should be carefully defined.

The Foreword indicates that this Short Form of Contract is intended for works of short duration. In the event of a contract for works of long duration, a new clause could be inserted at Sub-Clause 11.1 to adjust for the rise and fall in the cost of labour, materials and other imports to the Works. Such a clause could be adapted from the other FIDIC Conditions of Contract.

COMMENTARY

Care needs to be exercised in the selection of the valuation basis for the contract. The Employer may need to seek professional advice on the most appropriate option for the project.

The Employer needs to balance flexibility within the contract for instructing changes and variations, against a rigid form of contract (such as lump sum) in which there is little basis in the contract to evaluate the effect and cost of changes. The latter can make reaching agreement on the effect of change far more difficult to resolve.

The four little word proviso "subject to Clause 20" should not be overlooked. This makes it clear that the contract price is for the works as specified in the contract and no more. If the work grows "like topsy" then the price will also – but the contractor needs to keep his paperwork and variation tracking procedures up to date, putting in notices etc on time if cash flow problems are to be avoided..

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

11.2 Monthly Statements	The Contractor shall be entitled to be paid at monthly intervals:	
	a)	the value of the Works executed
	b)	the percentage stated in the Appendix of the value of Materials and Plant delivered to the Site at a reasonable time,
	subject to any additions or deductions which may be due.	
	The Contractor shall submit each month to the Employer a statement showing the amounts to which he considers himself entitled.	

NOTES FOR GUIDANCE (not forming part of the Contract)

11.2 If the Contract is for a lump sum, consideration should be given as to how the work is to be valued for the purposes of interim payments. In completing the Appendix for Sub-Clause 11.1, the Employer may request tenderers to submit a cash flow forecast linked to a stage payment proposal for agreement. This would be reviewed in the event of an extension of time made in accordance with Sub-Clause 7.3.

Alternatively, interim payment can be based on valuation of the Works which would also be appropriate for remeasurement and cost reimbursable Contracts. Payment could also be based on the achievement of milestones or a schedule of activities to which values are assigned

If local law or practice so dictates, an invoice may also be required, in which case it could be submitted with the statement.

COMMENTARY

It is important that the stage payments made are in proportion to the value of the work done. Failure to do this will expose the employer to financial risk if the work is over valued. An adequate provision by the employer for his representative on site to monitor the contractors valuations is an important factor in achieving the above aim.

In cases where the contractor is committed to high initial expenditure on temporary works e.g. ground de-watering or sheet piled coffer dams, agreement may be sought at tender for part payment to be made on the successful completion of the relevant work item.

11.3 Interim Payments	<p>Within 28 days of delivery of each statement, the Employer shall pay to the Contractor the amount shown in the Contractor's statement less retention at the rate stated in the Appendix, and less any amount for which the Employer has specified his reasons for disagreement. The Employer shall not be bound by any sum previously considered by him to be due to the Contractor.</p> <p>The Employer may withhold interim payments until he receives the performance security under Sub-Clause 4.4 (if any).</p>
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NOTES FOR GUIDANCE (not forming part of the Contract)

11.3 No provision is made for advance payments. If such a payment is to be made, there should be provision in the Particular Conditions and for any security to be provided by the Contractor. An example form of advance payment guarantee is to be found in FIDIC's Conditions of Contract for Construction.

COMMENTARY

No time table is specified for the employer to give notice of withholding or the reasons for so doing, beyond the fact that the reasons should be provided at the time that the money is withheld. This gives the contractor little opportunity to either make contingency plans or to object promptly. A FIDIC Green Form contract would require amendment to become Scheme compliant if intended to be used in the UK.

Note also that 11.3 allows the employer to change his mind, preventing the contractor from relying on the employer's expressed opinions on monies due.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Note further that, in the context of payments for major temporary works, as noted above, this could be deemed advance payments on permanent works. Such payments reduce the contractor's cash flow problems early in the contract, and for Bill of Quantities contracts ensures the rate quoted for permanent work items remain un-distorted by the inclusion of temporary work items. The contractor still carries the risk of failure in respect of temporary works, but the employer is released from the these additional rates on items if they are the subject of variations.

11.4 Payment of First Half of Retention	One half of the retention shall be paid by the Employer to the Contractor within 14 days after issuing the notice under Sub-Clause 8.2.
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NOTES FOR GUIDANCE (not forming part of the Contract)

11.4 The deduction of retention is sometimes replaced by the provision of security by the Contractor to the Employer. Alternatively, the entire retention sum deducted is released after taking-over upon the provision by the Contractor of security. In either event, suitable text would be required in the Particular Conditions. An example form of retention guarantee is to be found in FIDIC's Conditions of Contract for Construction.

COMMENTARY

It is important at the take over period, that there are no outstanding major defects known to be present. If there are, the employer should not take over the work or release any retention money, as the second part of the retention alone may be insufficient to cover the cost of rectifying the defects.

11.5 Payment of Second Half of Retention	The remainder of the retention shall be paid by the Employer to the Contractor within 14 days after either the expiry of the period stated in the Appendix, or the remedying of notified defects or the completion of outstanding work, all as referred to in SubClause 9.1, whichever is the later.
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NOTES FOR GUIDANCE (not forming part of the Contract)

11.5 The release of the second part of the retention will serve as confirmation that all notified defects have been remedied.

Appendix : Programme

Period for notifying defects	11.5	365 days * calculated from the date stated in the notice under Sub-Clause 8.2
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* Period is subject to increase of decrease.

COMMENTARY

The repayment / release of retentions is a contentious issue. It is common that by default retentions are never repaid. In the UK there is a tendency for some employers and or main contractors in relation to retentions to treat them as a form of windfall profit and the property to the employer or main contractor. Part of the difficulty lies in the question as to whether or not all defects have been remedied and or outstanding work has been completed, an issue which may fail to be determined where the employer makes spurious demands which the contractor loses energy to deal with, the substantial work being completed and the principal sum having been paid. The need to commence action to establish that such demands are spurious acts as a major deterrent. The facility of a low cost determination process, such as adjudication may go some way to rectifying this problem.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

12 Default	
12.1 Default by Contractor	<p>If the Contractor abandons the Works, refuses or fails to comply with a valid instruction of the Employer or fails to proceed expeditiously and without delay, or is, despite a written complaint, in breach of the Contract, the Employer may give notice referring to this Sub-Clause and stating the default.</p> <p>If the Contractor has not taken all practicable steps to remedy the default within 14 days after the Contractor's receipt of the Employer's notice, the Employer may by a second notice given within a further 21 days, terminate the Contract. The Contractor shall then demobilise from the Site leaving behind Materials and Plant and any Contractor's Equipment which the Employer instructs in the second notice is to be used until the completion of the Works.</p>

NOTES FOR GUIDANCE *(not forming part of the Contract)*

Default 12.1 The Employer may terminate the Contract if the defaulting Contractor does not respond to a formal notice by taking all practicable steps to put right his default. This recognises that not all defaults are capable of correction in 14 days. If termination takes place, the Employer may take over and use the Contractor's Equipment to complete the Works. Care should be taken, however, if the equipment on Site is hired: no specific provision is made to cover this situation and the Employer is unlikely to be able to retain such equipment.

COMMENTARY

This is a difficult position for the employer to find himself in and every effort should be made to avoid it. It is almost inevitable that where a new contractor is appointed, the question of who will bear responsibility and liability for works already completed or partly completed by the original contractor will arise. The new contractor may not wish to assume this risk, in which case the employer has to accept it, or the new contractor (if he is wise!) will include a cost for the risk of assuming the responsibility.

12.2 Default by Employer	<p>If the Employer fails to pay in accordance with the Contract, or is, despite a written complaint, in breach of the Contract, the Contractor may give notice referring to this Sub-Clause and stating the default. If the default is not remedied within 7 days after the Employer's receipt of this notice, the Contractor may suspend the execution of all or parts of the Works.</p> <p>If the default is not remedied within 28 days after the Employer's receipt of the Contractor's notice, the Contractor may by a second notice given within a further 21 days, terminate the Contract. The Contractor shall then demobilise from the Site.</p>
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NOTES FOR GUIDANCE *(not forming part of the Contract)*

12.2 This provision provides the Contractor's main remedy for non-payment. 7 days after the Employer's receipt of a default notice, which must refer to Sub-Clause 12.2, the Contractor may suspend all or part of his work. 21 days later the option to terminate arises if the Employer persists with non-payment or other default. The Contractor must use his right to terminate within 21 days or lose it. This is to prevent a party abusing a right to terminate in his dealings with the other party for the remainder of the project.

If Contractor's Equipment is essential for the safety or stability of the Works, the Employer will be obliged to agree terms with the Contractor for the retention of such equipment. Local law will often protect the Employer from the immediate and reckless removal of essential items.

COMMENTARY

The employer can generally avoid this with adequate financial planning, a feasible estimate and control of "variations and changes" to the work, after the contract is agreed. There may also be external factors that produce this crisis, so this clause at least gives the contractor some legal status for the recovery of consideration.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

12.3 Insolvency	If a Party is declared insolvent under any applicable law, the other Party may by notice terminate the Contract immediately. The Contractor shall then demobilise from the Site leaving behind, in the case of the Contractor's insolvency, any Contractor's Equipment which the Employer instructs in the notice is to be used until the completion of the Works.
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NOTES FOR GUIDANCE (not forming part of the Contract)

12.3 The right of the Employer to retain the Contractor's Equipment may clash with the right of a liquidator or receiver to realise the assets of an insolvent Contractor. Reference to the applicable law would be necessary.

COMMENTARY

It is a wise strategy, particularly for the employer, to adequately research the financial standing of the contractors at the time of tender, and also the extent and risk of their current commitments. Contractors also need to undertake some research on their potential clients, both on current financial status and previous contractual performance records.

However, where a contract is for labour only as opposed to supply and fix, it is common, at least in the UK to employ management companies who have virtually no financial assets of account.

12.4 Payment upon Termination	After termination, the Contractor shall be entitled to payment of the unpaid balance of the value of the Works executed and of the Materials and Plant reasonably delivered to the Site, adjusted by the following:	
	a)	any sums to which the Contractor is entitled under Sub-Clause 10.4,
	b)	any sums to which the Employer is entitled,
	c)	if the Employer has terminated under Sub-Clause 12.1 or 12.3, the Employer shall be entitled to a sum equivalent to 20% of the value of those parts of the Works not executed at the date of the termination,
	d)	the Contractor has terminated under Sub-Clause 12.2 or 12.3, the Contractor shall be entitled to the Cost of his suspension and demobilisation together with a sum equivalent to 10% of the value of those parts of the Works not executed at the date of termination.
	The net balance due shall be paid or repaid within 28 days of the notice of termination.	

NOTES FOR GUIDANCE (not forming part of the Contract)

12.4 This Sub-Clause enables the financial aspects of the Contract to be resolved quickly and without the necessity to await the completion of the Works by others. By specifying the damages payable to the innocent party for the defaults leading to the termination, much delay, complication and scope for dispute are avoided. The Employer's costs in obtaining a replacement contractor will generally be higher than the Contractor's loss of profit.

COMMENTARY

Termination of a contract is a situation that it is desirable to avoid, and can sometimes be avoided by close supervision of the works and insistence on the part of the client, that revised programmes are submitted and that programme dates and milestones are met. If this fails and a new contractor has to be appointed, then the already completed works are more likely to be in an acceptable state and the financial implication less severe.

WORKSHOP QUESTIONS

A contractor claims he cannot make progress without instructions from the employer, perhaps in relation to a variation. The employer insists that the contractor get on with it and stop complaining. The contractor fails to do so. The employer issues a notice and because the contractor does not respond gives notice of immediate termination on day 15. Discuss.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

13 Risk and Responsibility	
13.1 Contractor's Care of the Works	<p>The Contractor shall take full responsibility for the care of the Works from the Commencement Date until the date of the Employer's notice under Sub-Clause 8.2. Responsibility shall then pass to the Employer. If any loss or damage happens to the Works during the above period, the Contractor shall rectify such loss or damage so that the Works conform with the Contract</p> <p>Unless the loss or damage happens as a result of an Employer's Liability, the Contractor shall indemnify the Employer, the Employer's contractors, agents and employees against all loss or damage happening to the Works and against all claims or expense arising out of the Works caused by a breach of the Contract, by negligence or by other default of the Contractor, his agents or employees.</p>

NOTES FOR GUIDANCE *(not forming part of the Contract)*

Risk and Responsibility 13.1 Although the Contractor is responsible for the Works prior to taking-over, he is protected by the obligation to insure the Works under Clause 14 and by his ability to recover under Clause 6 his Cost if one of the Employer's Liabilities occurs.

8.2 Taking-Over Notice : The Employer shall notify the Contractor when he considers that the Contractor has completed the Works stating the date accordingly. Alternatively, the Employer may notify the Contractor that the Works, although not fully complete, are ready for taking over, stating the date accordingly
The Employer shall take over the Works upon the issue of this notice. The Contractor shall promptly complete any outstanding work and, subject to Clause 9, clear the Site.

COMMENTARY

Cross reference Clause 6, Employer's Liabilities.

Note the reference to indemnifying the Employer's contractors, agents and employees. Under UK Law this gives rise to widespread liability in consequence of the effect of the Contract (Third Parties) Act 1999, since a range of classes of third party are specified, thereby triggering Section 1 of the Act. Any attempt to exclude the provisions of the Act in a FIDIC Green Form contract would therefore give rise to a contradiction in the terms of the contract. However, if the exclusion were in the Particular Conditions they would over-ride Clause 8.2. The question that would then arise is "How much of Clause 8.2. would be over-ridden, the entire clause or simply that part which refers to third parties?"

On a separate issue, the care of the works can also be affected by the method of working. In appraising the submitted programmes of work, the effect of already completed or future permanent works needs to be considered before the programme is accepted. The contractor should be made aware of any unacceptable effects that might arise from the impact of permanent works on his proposed programmes, and should be required to modify the programme or working methods to eliminate said effects.

WORKSHOP QUESTIONS

What is the extent of liability for the losses of third parties and how will it be assessed? Is it limited to direct losses, indirect or consequential losses, and since there is no contract with these parties, will it include pure economic loss? Discuss.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

14 Insurance		
14.1 Extent of Cover	The Contractor shall, prior to commencing the Works, effect and thereafter maintain insurances in the joint names of the Parties:	
	a)	for loss and damage to the Works, Materials, Plant and the Contractor's Equipment,
	b)	for liability of both Parties for loss, damage, death or injury to third parties or their property arising out of the Contractor's performance of the Contract, including the Contractor's liability for damage to the Employer's property other than the Works, and
	c)	for liability of both Parties and of any Employer's representative for death or injury to the Contractor's personnel except to the extent that liability arises from the negligence of the Employer, any Employer's representative or their employees.

NOTES FOR GUIDANCE *(not forming part of the Contract)*

Insurance 14.1 The Employer should set out his precise requirements in the Appendix. Third Party, public liability insurance would normally be mandatory. As smaller contracts are likely to fall within tenderers' standing Contractors' All Risk (CAR) insurance policies, tenderers should generally be asked to submit details of their insurance cover with their tenders.

Any requirements for insurance after the date of the Employer's notice under Sub-Clause 8.2, or arising from taking-over parts of the Works, should be covered by Particular Conditions. See also Clause 13.

If the Employer wishes to take out the insurances instead of the Contractor, the following should be used as a Particular Condition in place of SubClause 14.1:

"Replace the text of Sub-Clause 14.1 with the following: "The Employer shall, prior to the Commencement Date, effect insurance in the joint names of the Parties of the types, in the amounts and with the exclusions stipulated in the Appendix. The Employer shall provide the Contractor with evidence that any required policy is in force and that the premiums have been paid. "

Sub-Clauses 14.2 and 14.3 should be deleted if the Employer takes out the insurances.

It should be noted that in the event of the Employer's failure to insure, the Contractor may give notice under Sub-Clause 12.2.

COMMENTARY

The contract of insurance and its contents are of major importance in any commercial contract. It is important that the parties to a contract know who bears the burden of this aspect of the contract. Under the short form of the contract the burden falls on the contractor not the employer to insure the "site, works and equipment", unless the contract specifically states otherwise. In the modern world, insurance is a must be and is an essential part of any construction contract. There is an assumption that contractors are insured and because of this the burden typically falls on the contractor who could be covered by his "standard" insurance liability policies. In many cases this is a more equitable practice than the employer taking out insurance to cover a "one off" project.

Whatever part of the world and under any legal jurisdiction there is an obligation on the employer and the contractor to ensure that the construction site is covered by appropriate insurances. The employer gains the benefit of the contractor's insurance, but in many, if not all instances, the site is "handed over" to the contractor and as such the contractor is liable for the safety of the site. This clause indemnifies the employer with the exception of the employer's negligence and the employer's own directly employed contractors.

It is possible under the contract that the employer can accept some or all of the risks and if he does so sub-clauses 14.1 (b) and (c) are excluded.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Clause 14.1(a) protects the works; that is, the site and the work in progress, the materials, though exceptions may be included to cover the situation where the employer directly includes some specific materials into the contract and is responsible for their supply and fitting. The plant and the contractor's equipment are inherently the responsibility of the contractor. This regularises the standard practices adopted in the construction industry. The exceptions to this sub-clause are the standard exceptions namely claims arising from the employer's negligence or from the negligence of employees directly employed by the employer.

Sub-clauses 14.1(b) and (c) can be read together. The contractor is responsible for death and injury to third parties and his own personnel who are on site as well as loss or damage to third parties or their property arising from the contractor's presence on site. The normal exceptions apply in that the employer is responsible for his own negligence or the negligence of his direct employees.

These are "standard" clauses to ensure that the burden of insurance is allocated to one of the parties and that both parties know who bears the burden and have proof that the burden has been recognised and is covered under the terms of the contract.

WORKSHOP QUESTIONS

Concerning the issue as to whether the injury is the fault of the employer or the contractor, what cover should a contractor or employer put in place to cover the litigation costs of determining fault – or will this be covered by the carriers who will fight it out between themselves ?

14.2 Arrangements	All insurances shall conform with any requirements detailed in the Appendix. The policies shall be issued by insurers and in terms approved by the Employer. The Contractor shall provide the Employer with evidence that any required policy is in force and that the premiums have been paid All payments received from insurers relating to loss or damage to the Works shall be held jointly by the Parties and used for the repair of the loss or damage or as compensation for loss or damage that is not to be repaired.
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COMMENTARY

The terms of the clause are clear in their aims. If there are any special requirements for the contract, they must be included in the Appendix. If there are special terms then the parties need to agree them and to include them in the Appendix.

There is an onus on the contractor to produce a satisfactory insurance policy or policies in accord with the terms of the contract. However, there is also a burden placed on the employer in that he has a duty to inspect the insurance certificates and the terms of the insurance cover as well as being satisfied that the insurer is an acceptable company to carry coverage of the employer's project.

If there have been actions against the contractor then any monies forthcoming from the insurer are held jointly between the employer and contractor. This ensures that neither party can use such monies for purposes other than those of restitution within the terms of the contract. The contract is clear on this point in that it clearly states "used for the repair of the loss or damage or as compensation for loss or damage that is not to be repaired".

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

It is thus in the interests of both contractor and employer to work together to ensure that any such monies are used in a beneficial manner. Being held jointly both parties need to agree to how it is used. If they do not then neither party can use such monies. The contract is clear it is a joint effort, not the prerogative of one party alone to handle such monies.

What the contract fails to clarify is the issue of payment for the original works, which have subsequently become damaged. In the UK JCT Standard Forms of Contract, the Employer is obliged to pay for works as if they were not damaged or lost. The insurance payment would then be paid upon the rectification of the damaged works. This form does not clarify the point. If a major insurance issue arose there is the potential that the Contractor could be left out of pocket for works already completed but were subsequently damaged and also for the repair costs until all matters had been resolved. This appears to be an unfair burden for a Contractor to bear and it might be prudent that this issue be discussed and clarified prior to commencement of the contract.

WORKSHOP QUESTIONS

What happens if the contractor is unable to negotiate a conforming policy?

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14.3 Failure to Insure

If the Contractor fails to effect or keep in force any of the insurances referred to in the previous Sub-Clauses, or fails to provide satisfactory evidence, policies or receipts, the Employer may, without prejudice to any other right or remedy, effect insurance for the cover relevant to such default and pay the premiums due and recover the same as a deduction from any other monies due to the Contractor.

COMMENTARY

The clause recognises the importance of insurance to the successful completion of the contract. Insurance is seen as a requisite throughout the world and if for some reason the contractor is unable or unwilling or has allowed the insurance to lapse then the employer can safeguard his position by taking out the necessary insurances to ensure that the project has insurance cover. The employer is further entitled to deduct such premiums as are payable from the contractor by a deduction from the monies due to the contractor. The employer is however, under no obligation to find the cheapest quote for such cover, but only that he [the employer] is contractually entitled to ensure that the project has insurance cover even though under section 14.1 this is a prime responsibility of the contractor. If the contractor defaults on his insurance responsibilities the contract recognises that there is a need to cover such eventualities and empowers the employer to take the necessary steps to ensure that the project has the necessary insurance cover.

WORKSHOP QUESTIONS

What happens if the employer enters into an insurance policy incurring an excessive premium?

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NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

15 Resolution of Disputes	
15.1 Adjudication	Unless settled amicably, any dispute or difference which arises between the Contractor and the Employer out of or in connection with the Contract, including any valuation or other decision of the Employer, shall be referred by either Party to adjudication in accordance with the attached Rules for Adjudication ("the Rules"). The adjudicator shall be any person agreed by the Parties. In the event of disagreement, the adjudicator shall be appointed in accordance with the Rules.

NOTES FOR GUIDANCE *(not forming part of the Contract)*

Resolution of Disputes

15.1 There are advantages in appointing an adjudicator from the outset even though the adjudicator may not be required to take any action or earn any fee unless and until a dispute is referred to him. Delays will inevitably occur if the parties initiate the procedure to appoint an adjudicator only when a dispute has arisen. It is therefore recommended that the Employer propose a person to act as adjudicator either at tender stage or shortly after the Agreement is signed and that the matter is discussed and agreed as soon as possible.

Care should be taken about whether an adjudicator should be local or from a neutral country. Although the adjudicator should be impartial, the costs of employing someone from a third country could be disproportionate if it is necessary for the adjudicator to visit or if a hearing became necessary. However, in view of the costs involved in arbitration, even of minor disputes, any extra cost of a truly impartial adjudicator is a recommended investment

It is intended that all decisions made by the Employer or his representative should be capable of being reviewed by an adjudicator and, if required, by an arbitrator.

COMMENTARY

The words "out of or in connection with" cover tort disputes as well as contract disputes. Valuation is expressly covered, reflecting the initial role of the contractor to fix a value and the facility of the employer to determine an initial payment price, if different from that of the contractor, all the while providing reasons.

Note that the parties can appoint any person as adjudicator by mutual consent, but in the absence of agreement then the appointment rules will apply. See Rules 3 and 4.

The adjudicator should be "suitably qualified", (Rule 3) whatever that means. What happens if he is not? Does a lack of qualifications affect the import of his decision? Or is this merely a bit of common sense advice?

The advice in the Notes of Guidance in respect of the advance appointment of the adjudicator is a natural follow on from the concept of the Dispute Review Board that is employed in the Red, Silver and Yellow Books. The central premise of the DRB concept is that the board is established at the outset, before mobilization commences and that the board is updated on progress, so that the board can both facilitate amicable settlement of problems and issues as they arise, thereby preventing disputes from chrysalizing and in the event that a dispute does arise, ensuring that the board can rapidly respond to a dispute referred to it because it is up to speed on all relevant background information. FIDIC conceives of a potential role of the adjudicator as a one man DRB. Thus there is a facility in the Adjudicator's Agreement – Clause 2 for the adjudicator to receive both a monthly retainer and daily fees. Contrast the UK practice where the adjudicator usually bills on an hourly rate. However, the role falls somewhat short of a one man DRB in that there is no protocol for the convening of the DRB before mobilization, for the provision of contract documentation or regular site visits. The DRBF concept of informal advice is expressly forbidden by Rule 7 which states that "The Adjudicator shall not give advice to the Parties or their representatives concerning the conduct of the project of which the Works form part other than in accordance with these Rules." The DRBF limitation on advice is that a DRB should not give advice on "ways and means" though advice on conduct would be not only permitted but actively encouraged.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Compatibility with statutory provisions for adjudication in Australia, New-Zealand and the UK.

In order for the Green Form to be used in the UK and other jurisdictions, which have emulated it, significant changes would have to be made to Clause 15 and the Adjudication Rules to ensure that the contract is fully compliant with the requirements of domestic law. The following commentary draws attention to the areas of the contract and rules which are not in compliance with the UK statutory regime. In addition, as already observed, certain amendments would also have to be made to other provisions of the contract to ensure compliance with payment provisions under domestic law.

A very comprehensive body of law has developed in respect of construction adjudication in the UK. How relevant, if at all is this to an understanding of Green Form adjudication?

- Where the adjudication is subject to UK Law and jurisdiction and the contract is performed in the UK, the UK law is the governing law of the contract and must be complied with an applied by the adjudicator.
- Where the adjudication is subject to UK Law and jurisdiction but the contract is performed outside the UK, whilst the UK law is the governing law of the contract, the Housing Grants Construction and Regeneration Act and the Statutory Scheme do not apply. The courts would therefore apply the contract and the adjudication rules. Judicial precedent, which relates specifically to application of the HGCRA and Scheme provisions would not be relevant. However, judicial precedent on concepts of natural justice and fairness would be relevant and an adjudicator should take notice of them.
- Where the adjudication is subject to the law and jurisdiction of another state, the law of that state should be referred to as the governing law. However, an adjudicator or foreign court may take note of the rulings of the English Courts and draw guidance and inspiration from them in relation to concepts of natural justice and fairness.

Choice of Jurisdiction : Clause 15.1 requires any unsettled dispute to be referred to adjudication. By contrast, the HGCRA 1996 and the Scheme provide the right for either party to refer a dispute to adjudication, but the parties, subject to the provisions of the construction contract are allowed to litigate or arbitrate. No stay of action would lie, even if the other party chose to refer the dispute to adjudication. The expectation would be that the adjudication process would be completed long before the arbitration / court process commenced, and the decision would be implemented in the interim period. However, under the Green Form provisions any attempt by a party to unilaterally refer a dispute arising under a Green Form contract to court or arbitration would be susceptible to a stay of action to stop the court / arbitration proceedings. Nothing of course prevents the parties agreeing to arbitrate or litigate instead of adjudicating.

15.2 Notice of Dissatisfaction	If a Party is dissatisfied with the decision of the adjudicator or if no decision is given within the time set out in the Rules, the Party may give notice of dissatisfaction referring to this Sub-Clause within 28 days of receipt of the decision or the expiry of the time for the decision. If no notice of dissatisfaction is given within the specified time, the decision shall be final and binding on the Parties. If notice of dissatisfaction is given within the specified time, the decision shall be binding on the Parties who shall give effect to it without delay unless and until the decision of the adjudicator is revised by an arbitrator.
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COMMENTARY

Temporary finality : Clause 15.2 expresses the central distinction between adjudication and arbitration, namely the concept of temporary finality.

The decision converts from a temporary to final decision if no notice of dissatisfaction is given within 28 days of receipt of the decision. Under the HGCRA 1996 process the parties are free to agree after the event that the decision be final, but there is no automatic conversion process. There is no reason why the parties to a Green Form contract dispute could not agree to conversion to finality before the expiry of 28 days.

WORKSHOP QUESTIONS

The UK courts have ruled⁴¹ that if a party tenders payment in full and final settlement of a dispute then cashing the cheque amounts to acceptance of the offer and brings the dispute to an end.

- 1 If therefore a party tenders payment pursuant to an adjudication decision stating that it is “in full and final settlement of the dispute”, does accepting the payment bring about finality?
- 2 What if the receiver protests the finality proviso but goes ahead and cashes the cheque?
- 3 Is it necessary first to insist on a fresh cheque or withdrawal of the proviso?
- 4 Alternatively, should the receiver return the cheque and proceed to enforcement?

Default of adjudicator and recourse to arbitration. The adjudicator must comply with the adjudication rules and the timescale therein. Rule 23 provides that the decision should be delivered within 56 days from receipt of reference. Recourse to arbitration is permitted if the adjudicator fails to produce a decision within the time scale. It is not entirely clear who can refer the dispute. “The Party” is presumably the dissatisfied party. Since either of the parties could be dissatisfied with the failure to produce a decision, it would appear that either party could refer the dispute to arbitration.

WORKSHOP QUESTIONS

If the decision is delivered late the adjudicator will have failed to comply with his obligations. An adjudicator does not become “functus officio” according to Rule 5 until the end of the contract or until a dispute has been withdrawn or decided, whichever comes latest. Under English Law the courts have ruled that a late decision may none the less be enforceable unless a party has objected or sought the appointment of a replacement adjudicator.

- 1 Does withdrawal of a dispute by reference to arbitration automatically terminate the adjudicator’s appointment? Is a standing adjudicator entitled to continue to claim monthly retainers? Can further disputes be referred to that adjudicator? Must the parties appoint a replacement adjudicator? See Rule 10.
- 2 If a dispute is referred to arbitration after, rather than before, a late decision is delivered, is the decision nonetheless temporarily binding?
 - Cross reference **Saint Andrews Bay v HBG Management** and **Simons v Aardevarch**.⁴²
- 3 What is the effect, if any, of this failure on the defaulting adjudicator’s entitlement to fees?
 - Consider the impact of Rule 11 and contrast immunity and right to claim fees.

⁴¹ **Lathom Construction Ltd v Brian & Ann Cross** [1999] CILL 1568

⁴² **Saint Andrews Bay Development Ltd v HBG Management Ltd** P370/03 23.03.2003 and **Simons Construction Limited v Aardevarch Developments Limited** 29.10.2003

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

The nature of the decision upon conversion to finality : The question is whether or not the decision converts from being a adjudication decision to an arbitral award. The relevance of the nature of the decision upon conversion is important for international disputes because the New York Convention on the enforcement of arbitral awards does not apply to adjudication decisions. It may be advantageous to add a provision in the Particular Conditions to the effect that the decision becomes an arbitral award to ensure universal enforcement under the Convention.

A problem in this respect however arises out of the express statement in Rule 21 that “the adjudicator shall act as an impartial expert, not as an arbitrator”.

15.3 Arbitration	A dispute which has been the subject of a notice of dissatisfaction shall be finally settled by a single arbitrator under the rules specified in the Appendix. In the absence of agreement, the arbitrator shall be designated by the appointing authority specified in the Appendix. Any hearing shall be held at the place specified in the Appendix and in the language referred to in Sub-Clause 1.5
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NOTES FOR GUIDANCE (not forming part of the Contract)

15.3 Arbitration may not be commenced unless the dispute has first been the subject of an adjudication. The Rules of arbitration should be stipulated in the Appendix. The UNCITRAL Rules are recommended. However, if administered arbitration is required, that is arbitration overseen and administered by an arbitral institution, the ICC Rules could be specified. The ICC Court of Arbitration and its Secretariat in Paris appoints and replaces arbitrators, checks the form of terms of reference and awards and generally monitors progress and the performance of arbitrators. Where alternative arbitration rules are chosen that include a procedure for the appointment of an arbitrator, the authority designated in the Appendix to make the appointment should be changed to reflect this. For example, if ICC Rules are chosen, then the appointing authority should normally be changed to “ICC Court of Arbitration”. The place of arbitration is significant as the arbitration law of the place of arbitration will apply in such matters as the ability of a party to appeal

COMMENTARY

As observed in the Note for Guidance an adjudication is a prerequisite to arbitration. The delivery of an adjudication is not a prerequisite since the non-delivery of a decision gives rise to a right to refer to arbitration.

Note that 15.3 specifies a “single arbitrator” not a three-man tribunal. Given the expectation that the Green Form will be used for smaller and or less complicated projects, keeping the costs of any arbitration to a minimum appears to be a sensible provision.

However, there is nothing to prevent the parties agreeing to appoint a three man tribunal, but they would also need to agree a mechanism for appointing said tribunal. This would need to be done in advance since agreement on such matters after the event is difficult to achieve. Equally, if the parties want future disputes to go to a three man tribunal then it would be advisable to specify this in the contract at the outset.

If NADR arbitration is required, NADR should be stated as the appointing body in the Appendix and the NADR arbitration rules should likewise be specified.

The Note of Guidance draws the reader’s attention to the distinctions between Substantive Law of the contract and the Procedural Law of the arbitration process, the “lex fori.” It is preferable, in order to avoid complex distinctions, that the law of the contract and the lex fori are from the same country if at all possible, though there are often very good other reasons for not doing so.

WORKSHOP QUESTIONS

To what extent, if at all, are the parties free to subsequently agree to vary the location and/or the language set out in the Appendix?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Rules for Adjudication⁴³

General	1	Any reference in the Conditions of Contract to the Rules for Adjudication shall be deemed to be a reference to these Rules.
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COMMENTARY

Conditions of Contract refers here to the General Conditions of the Contract i.e. Clauses 1-15 since it would be possible in the Particular Conditions to expressly replace the rules with amended rules, which would be necessary to ensure compliance with for example UK domestic law.

General	2	Definitions in the Contract shall apply in these Rules
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COMMENTARY

See in relation to

- **Contract** – Rules 1,4,8,9,20,21;
- **Employer** – Rule 17, 21;
- **Contractor** – Rule 17, 21;
- **Party(ies)** – Rules 3, 4, 5, 7, 8, 9, 10, 19, 20, 21, 22, 23;
- **Site** – Rules 14, 15, 20 ;
- **Works** – Rule 5

Appointment of Adjudicator	3	The Parties shall jointly ensure the appointment of the Adjudicator. The Adjudicator shall be a suitably qualified person
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COMMENTARY

Where the contract specifies a standing adjudicator, the requirements of Rules 3 and 4 are automatically fulfilled from the outset. Cross-reference the commentary following Rule 19 Procedure for Obtaining Adjudicator's Decision.

Appointment of Adjudicator	4	If for any reason the appointment of the Adjudicator is not agreed at the latest within 14 days of the reference of a dispute in accordance with these Rules, then either Party may apply, with a copy of the application to the other Party, to any appointing authority named in the Contract or, if none, to the President of FIDIC or his nominee, to appoint an Adjudicator, and such appointment shall be final and conclusive.
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COMMENTARY

The appendix provides for the specification of an appointing body for arbitration. It is not clear whether or not that would also be the appropriate appointing body for adjudication as well. The reference to “any appointing body named in the contract” could be interpreted to include adjudication, but equally it is possible to argue that because of the arbitration heading to the section that it does not. Perhaps it would be wise to expressly state the adjudication body for the avoidance of doubt.

For the purposes of Rule 4, “Reference of a dispute” relates to the “reference to the other party” pursuant to Rule 19.

⁴³ referred to in Sub-Clause 15.1

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Appointment of Adjudicator	5	The Adjudicator's appointment may be terminated by mutual agreement of the Parties. The Adjudicator's appointment shall expire when the Works have been completed or when any disputes referred to the Adjudicator shall have been withdrawn or decided, whichever is the later
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COMMENTARY

The adjudicator becomes “functus officio” if his appointment is terminated by mutual agreement. Otherwise the adjudicator remains in office even after the decision is delivered. Once appointed it would be wise for the parties to agree that all subsequent disputes be referred to the same adjudicator, otherwise it would be possible to have several adjudicators in office at the same time with jurisdiction over different issues. The HGCRA 1996 and the Scheme⁴⁴ make it clear that once a dispute has been adjudicated a second reference of that dispute to adjudication is not permitted. There is a danger of aspects of the same dispute being considered by two adjudicators and the potential for the delivery of conflicting decisions if more than one adjudicator is in office at the same time. Hence, once a decision is delivered it may be wise for the parties to terminate the appointment of an ad hoc adjudicator rather than wait for the completion of works if there is no agreement to refer all subsequent disputes to that adjudicator.

In the UK once an adjudicator delivers a decision he becomes functus officio,⁴⁵ so the issue does not arise. Subsequent disputes may then be referred to the same or a different adjudicator. Where one party is not comfortable with an adjudicator the appointment of a different adjudicator for subsequent disputes is desirable. Otherwise there may be advantages in using the same adjudicator who is familiar with the background to the dispute.

Terms of Appointment	6	The Adjudicator is to be, and is to remain throughout his appointment, impartial and independent of the Parties and shall immediately disclose in writing to the Parties anything of which he becomes aware which could affect his impartiality or independence
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COMMENTARY

This mirrors Section 108(2)(e) HGCRA 1996 and Rules 12 of the Scheme. Note that the duty of disclosure of potential conflicts of interest is an ongoing duty.

An adjudicator should disclose potential indirect conflicts at the time of acceptance and leave it to the parties to decide whether or not to continue. Note that the subsequent discovery of information that potentially affects his impartiality or independence does not automatically bring about termination of office. The adjudicator may where the conflict is patent feel compelled to tender his resignation but in lesser circumstances it may be better to leave it up to the parties to make a decision. The parties may feel that they have invested so much in proceedings to date and the risk is so minor that they are prepared to take that risk. It might be a useful precaution to firstly advise the parties in writing and to request that they respond in writing stating what course of action they wish to follow. Written confirmation of the continuation of his office would prevent a party subsequently seeking to get a decision set aside on the basis of the declared conflict of interest and ensure that allegations of an ignored oral request to step down are not raised.

An adjudicator should decline to accept an appointment if he or she is aware of any direct conflicts of interest. Where an adjudicator has previously served on a dispute involving one of the parties that should be declared.⁴⁶

⁴⁴ Section 108(3) and Rule 1 and 9(2) : See also **Holt Insulation Ltd v Colt International Ltd** [2001] LV01 5929 and **William Naylor t/a Powerfloated Concrete Floors v Greenacres Curling Ltd** 26.06.2001 P514/01

⁴⁵ **Sim Group Ltd v Neil Jack** 05.06.2002. Adjudication.co.uk, Once an arbiter delivers his final decision he becomes functus officio and cannot without fresh appointment go on to determine further issues.

⁴⁶ **Pring & St Hill Ltd v C.J.Hafner t/a Southern Erectors** [2002] EWHC 1775 . The same adjudicator had previously acted on four related adjudications involving different parties. He was ask to step down by one of the parties but refused to do so. The court held that his prior knowledge and the views he had already formed about issues caused prejudice.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Terms of Appointment	7	The Adjudicator shall not give advice to the Parties or their representatives concerning the conduct of the project of which the Works form part other than in accordance with these Rules
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COMMENTARY

On the one hand there could be a potential conflict of interests if a contract advisor were to be appointed as adjudicator, which of course underpins the movement away from the concept of a contract administrator with remunerated other responsibilities to either the parties.

If the reference to advice in relation to the “conduct of the project” refers to what the Americans refer to as “ways and means” then the effect of Rule 7 corresponds with the DRBF rules on the role of the DRB, i.e. the adjudicator can comment on contract compliance in terms of fitness for purpose etc, but not on methods of work / how to do a job.

However, in the US there appears to be a more relaxed view to what may occur during “informal” discussions with the parties before a dispute is referred to the board.

If strictly adhered to this embargo reduces the asserted value of a DRB (as per the DRBF) in identifying problems in advance and in reducing conflict by promoting and facilitating informal solutions. There is a clear Atlantic divide on this issue and other related forms of “mini-trial” process.

On the other-hand, it would appear that once a dispute has been referred to an arbitrator, adjudicator or judge, it is perfectly legitimate for the decision maker to give either of the parties an indication as to the direction the decision maker is going in and then request that the party address that particular issue in further depth or equally to indicate avenues of argumentation that do not find favour with the decision maker, albeit that the decision maker must not close his or her mind to any issue until it has received full and complete consideration and submission by either party to the dispute.

Terms of Appointment	8	The Adjudicator shall not be called as a witness by the Parties to give evidence concerning any dispute in connection with, or arising out of, the Contract
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COMMENTARY

Whilst this is a standard provision in many contracts and indeed in the process rules of most ADR service providers, it cannot over-ride the powers of most courts. Some jurisdictions respect such private provisions but others do not. By contrast, where domestic law provides that an ADR practitioner cannot be called as a witness, such provisions are effective. Even so, most jurisdictions will have the power to over-ride such provisions in the case of alleged fraud and other instances of illegal behaviour, deemed to be contrary to domestic public policy. The immunities extended to counsel (legal privilege) rarely apply to ADR processes.

Terms of Appointment	9	The Adjudicator shall treat the details of the Contract and all activities and hearings of the Adjudicator as confidential and shall not disclose the same without the prior written consent of the Parties. The Adjudicator shall not, without the consent of the Parties, assign or delegate any of his work under these Rules or engage legal or technical assistance
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COMMENTARY

This confidentiality / non delegation clause is in the usual terms. Note that the provision does not state what the consequences of breach of this provision are.

Confidentiality : Where a court has the power to require the adjudicator to disclose confidential information and to pierce the veil of legal privilege the provision may be over ridden.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Non-delegation : The bar against assignment / delegation of the adjudicator's work is both standard and completely effective, unless consent is given to the delegation,⁴⁷ not because the clause sets out the consequences of breach, but rather because unauthorised delegation would deprive the decision of the adjudicator of enforceability.⁴⁸ The clause reflects the concept of "*delegates non potest delegare.*"

What amounts to delegation is open to debate, particularly where an adjudicator seeks a legal opinion on an issue. The English Courts have had occasion to consider this matter recently, first in respect of what amounts to delegation, the ability of the adjudicator to pass on the costs of such consultation and finally, in respect of disclosure of such advice to the parties and their opportunity to comment upon it before the adjudicator reaches a decision. Advice and assistance given by a third party to an adjudicator must be fully disclosed to an adjudicator,⁴⁹ as must all other information relied upon by the adjudicator to reach his decision,⁵⁰ including information disclosed by one party to the adjudicator which is not revealed to the other.⁵¹ The lack of disclosure is a breach of the rules of natural justice, which protect the right of the party to hear all elements of the case against him and to be afforded an opportunity to respond and challenge the information.⁵²

Compare the Scheme provisions, Clause 17 of which imposes a duty on the adjudicator to consider all relevant information and Clause 18 of which implies a duty of confidentiality, subject to a necessity exemption in respect of disclosure necessary to carry out the adjudication.

Terms of Appointment	10 The Adjudicator may resign by giving 28 days' notice to the Parties. In the event of resignation, death or incapacity, termination or a failure or refusal to perform the duties of Adjudicator under these Rules, the Parties shall agree upon a replacement Adjudicator within 14 days or Rule 4 shall apply.
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COMMENTARY

Clearly it is good practice for the adjudicator to give advance notice of an intention to resign to enable the parties to appoint a replacement adjudicator. The provision is particularly relevant in respect of a sitting adjudicator, who would no doubt be entitled to receive his retainer whilst he sits out the notice period. Is the facility to resign in 28 days exclusive, thereby outlawing immediate resignation?

⁴⁷ **Try Construction Ltd v Eton Town House Group Ltd** [2003] EWHC 60, 28.01.2003 The parties to an adjudication consented to the adjudicator commissioning of a programming report regarding Extensions of Time and L&D. The court held that the adjudicator was allowed to rely on the report, provided at the end of the day he made the decision.

⁴⁸ **Woods Hardwick Ltd -v- Chiltern Air Conditioning Ltd** [2001] BLR 23. HT 00/28, 02.10.2000 An appearance of bias resulted from the adjudicator not disclosing information to a party and taking legal advice without inviting comment.

⁴⁹ **Costain Limited v Strathclyde Builders Limited** 19.12.2003, An adjudicator took legal advice but neither shared it with the parties nor invited comments. The court refused to order enforcement of the adjudicator's decision because this failure amounted to a serious breach of the rules of natural justice; see also **Balfour Beatty v Mayor & Burgess of London Borough of Lambeth** [2002] BLR 288, [2002] EWHC 59712.04.2002 where an adjudicator produced a critical path analysis, which established a right to an extension of time. The court held that since the defendant not consulted on the analysis, enforcement would be denied; see further **RSL Southwest Ltd v Stansell Ltd** [2003] EWHC 1390, 16.6.2003, where an adjudicator relied upon a report that had not been viewed by the defendant. The court struck down the entire decision. The claimant had requested severance of elements of decision not permitted so that at least part of the decision might be upheld. The court refused asserting that the breach tainted the entire decision.

⁵⁰ **Checkpoint Ltd v Strathclyde Pension Fund**. An arbiter can use his personal knowledge to evaluate the parties assertions but must share his expert opinions with the parties for comment.

⁵¹ **Discaint Project Services Ltd -v- Opecprime Developments Ltd** [2000] BLR 402, 09.08.2000, [2001] BLR 285, 11.04.2001 Telephone conversations with one party without disclosure of contents to the other party sufficient grounds to invalidate a decision

⁵² Note however, that the parties can forgo the right to be present at all hearings and to immediately challenge proceedings. Thus in **Dean & Dyball Construction Limited v Kenneth Grubb Associates Ltd**, 28.10.2003, which concerned a CIC adjudication procedure, which stipulates that the parties to be interviewed separately and given summary of interview, the court held that the parties had waived right to be present.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

It is likely that the adjudicator may not have advance knowledge of the circumstances, which might prevent him from continuing to serve in office. Furthermore, there are likely to be times when, due to the attitude of one or more of the parties or their representatives, that the adjudicator no longer feels able or willing to serve. An adjudicator may also be taken unawares by conflicts of interest that require him to resign immediately.⁵³

The question that arises is this, "What is the status of the adjudicator in the 28 days between giving notice and the contractual date of termination of office, if he gives notice of immediate resignation?"

- Does he remain in office, or does he unlawfully but nonetheless effectively cease to be in office?
- If he reluctantly remains in office does this prevent the appointment of a replacement?

Once an adjudicator has given notice, it is likely that neither party would wish to submit a dispute to a sitting adjudicator, since he will not be able to see the reference through to a decision in the time remaining in office.

Terms of Appointment	11	The Adjudicator shall in no circumstances be liable for any claims for anything done or omitted in the discharge of the Adjudicator's duties unless the act or omission is shown to have been in bad faith
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COMMENTARY

This mirrors s108(4) HGCR 1996, Clause 9(4), 25 & 26 Scheme and s29 Arbitration Act 1996⁵⁴

Terms of Appointment	12	If the Adjudicator shall knowingly breach any of the provisions of Rule 6 or act in bad faith, he shall not be entitled to any fees or expenses hereunder and shall reimburse each of the Parties for any fees and expenses properly paid to him if, as a consequence of such breach any proceedings or decisions of the Adjudicator are rendered void or ineffective
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COMMENTARY

This mirrors the provisions of Clause 11(2) of the Scheme.

Payment	13	The Adjudicator shall be paid the fees and expenses set out in the Adjudicator's Agreement
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COMMENTARY

The agreement provides :-

"2. The Adjudicator shall be paid:

A retainer fee of _____ per calendar month
(where applicable)

A daily fee of _____

Expenses (including the cost of telephone calls, courier charges, faxes and telexes incurred in connection with his duties; all reasonable and necessary travel expenses, hotel accommodation and subsistence and other direct travel expenses).

Receipts will be required for all expenses."

Note that whilst the retainer and daily fee rates are fixed, expenses are recoverable, but note the limitation on office expenses for retained adjudicators in 14 below.

⁵³ Compare FIDIC with the provisions of the Scheme under UK law, clause 9 of which states that the adjudicator can resign at any time. If he resigns because of a conflict of interest that subsequently comes to light he is entitled to recover fees earned up to that time, but not otherwise.

⁵⁴ See also *Sutcliffe v Thackrah* [1974] 1 All ER 859 and *Arenson v Casson* [1975] 3 All ER 901

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Payment	14	The retainer fee, if applicable, shall be payment in full for: <ul style="list-style-type: none"> (a) being available, on 28 days' notice, for all hearings and Site visits; (b) all office overhead expenses such as secretarial services, photocopying and office supplies incurred in connection with his duties; (c) all services performed hereunder except those performed during the days referred to in Rule 15.
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COMMENTARY

Note particularly 14(b) – which means that either in submitting charge rates at commencement or in accepting the rate offered, an adjudicator should calculate all these matters in advance.

On the other-hand, travelling and accommodation expenses for site visits and hearings etc are recoverable.

Payment	15	The daily fee shall be payable for each working day preparing for or attending Site visits or hearings or preparing decisions including any associated travelling time
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COMMENTARY

The parties should be fully aware of the fact that full working fee rates apply to travel time when selecting or appointing an adjudicator, particularly where international travel is involved. Even in domestic appointments a locally based adjudicator will prove to be far more economic than one based out of town.

Payment	16	The retainer and daily fees shall remain fixed for the period of tenure of the Adjudicator
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COMMENTARY

This provision is non-contentious in the context of a small project, but if the project extends over a long period of time, it could lead to financial problems for the adjudicator particularly if international travel and fluctuations of exchange rate have an adverse impact.

Payment	17	All payments to the Adjudicator shall be made by the Contractor who will be entitled to be reimbursed half by the Employer. The Contractor shall pay invoices addressed to him within 28 days of receipt. The Adjudicator's invoices for any monthly retainer shall be submitted quarterly in advance and invoices for daily fees and expenses shall be submitted following the conclusion of a Site visit or hearing. All invoices shall contain a brief description of the activities performed during the relevant period. The Adjudicator may suspend work if any invoice remains unpaid at the expiry of the period for payment, provided that 7 days prior notice has been given to both Parties.
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COMMENTARY

In common with the DRBF rules of practice, the parties share the costs of the adjudicator equally. However, rather than a statement of joint and several liability, the norm in UK adjudication, the primary responsibility for payment rests with the contractor. However, see rule 18 below.

The rule that costs follow the event under UK law does not appear to be applicable here, even if the work involved in hearings results from one parties unreasonable intransigence. Thus neither the costs of the adjudication nor legal costs can be recovered.

Rule 17 partly reflects the fact that adjudication is based on a 56 day turn around period in contrast to the 28 day period in the UK and partly to reflect the potential of appointing a sitting adjudicator. Hence the provision to submit invoices in advance for retainers.

The UK does not have any provisions for the adjudicator to suspend work, since payment becomes due after the event.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Payment	18	If the Contractor fails to pay an invoice addressed to it, the Employer shall be entitled to pay the sum due to the Adjudicator and recover the sum paid from the Contractor
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COMMENTARY

This partially achieves the objectives of joint and severable liability provisions in that if the contractor is in default the employer can pay the adjudicator, but note that he is not compelled to do so. Thus he is only likely to do so if it is in his interests to do so. On the other-hand this is likely to be the case, since a contractor who wants and needs the adjudicator to complete his work in the expectation of a decision that goes against the employer will probably pay up to ensure the adjudicator does not suspend his work. However, in circumstances where the adjudicator is trying to recover fees after making a decision, which has gone against the contractor, a refusal to pay up could easily be envisaged.

Procedure for Obtaining Adjudicator's Decision	19	A dispute between the Parties may be referred in writing by either Party to the Adjudicator for his decision, with a copy to the other Party. If the Adjudicator has not been agreed or appointed, the dispute shall be referred in writing to the other Party, together with a proposal for the appointment of an Adjudicator. A reference shall identify the dispute and refer to these Rules
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COMMENTARY

This partly reflects the provisions of s108 HGCRA 1996 in that either party may refer a dispute. If an adjudicator nominating body is specified in the appendix there would be no need to sort out proposals for appointment, which might be difficult to conclude if the parties are involved in a heated dispute.

There is no requirement for a separate notice of intention to refer, followed by the actual reference as required by s108 HGCRA 1996. The Rules would require amendment for use in the UK in the Particular Conditions.

Procedures	20	The Adjudicator may decide to visit the Site. The Adjudicator may decide to conduct a hearing in which event he shall decide on the date, place and duration for the hearing. The Adjudicator may request that written statements from the Parties be presented to him prior to, at or after the hearing. The Parties shall promptly provide the Adjudicator with sufficient copies of any documentation and information relevant to the Contract that he may request
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COMMENTARY

The powers of the adjudicator are similar to the core provisions of Clauses 12-6 of the Scheme but do not spell out the consequences of a failure to comply with the directions of the adjudicator.

Procedures	21	<p>The Adjudicator shall act as an impartial expert, not as an arbitrator, and shall have full authority to conduct any hearing as he thinks fit, not being bound by any rules or procedures other than those set out herein. Without limiting the foregoing, the Adjudicator shall have power to:</p> <ul style="list-style-type: none"> (a) decide upon the Adjudicator's own jurisdiction, and as to the scope of any dispute referred to him, (b) make use of his own specialist knowledge, if any, (c) adopt an inquisitorial procedure, (d) decide upon the payment of interest in accordance with the Contract, (e) open up, review and revise any opinion, instruction, determination, certificate or valuation, related to the dispute, (f) refuse admission to hearings to any persons other than the Employer, the Contractor and their respective representatives, and to proceed in the absence of any Party who the Adjudicator is satisfied received notice of the hearing.
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NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

COMMENTARY

The definition of an adjudicator as an impartial expert as contrasted with an arbitrator is at variance with the understanding of the nature of adjudication under UK law, where the distinction lies essentially in the temporarily final nature of the decision as contrasted with the final nature of an arbitral award. Indeed, in all other respects the role and duty of the adjudicator is placed on all fours with that of the arbitrator under UK Law.⁵⁵

The traditional distinction between an expert determinator and an arbitrator turns on the concept of the expert as determinator of facts whilst the arbitrator, like a judge determines fact, applies the law to the facts and reaches a legal decision. Is this really what FIDIC intends or is it merely a way of paving the ground for (a)-(f) of clause 21, which appears to be more likely?

By contrast with HGCRA adjudicator, 21(a) gives the adjudicator the power to determine his own jurisdiction. Under UK rules, this only occurs if the parties expressly give that power to the adjudicator, since an adjudicator does not have an implied power.⁵⁶ Thus in the UK an adjudicator will consider the question of jurisdiction and make a personal decision whether or not to resign or continue, leaving it up to a court during enforcement proceedings to settle the issue, or alternatively he might seek a declaration before continuing.⁵⁷

Note also that the threshold jurisdiction issue under UK law in respect of sections 104-106 is not relevant outside the UK, but would apply equally to a FIDIC contract within the UK. The upshot of this is that for the excluded categories, the FIDIC contract would be treated as a voluntary adjudication, not governed by Part II of the HGCRA or by the Scheme.

By contrast included categories would be governed by the HGCRA. In consequence, it would be vital, for the provisions of the FIDIC contract to hold water, that the contract be amended to make it compliant with s108, since otherwise the Scheme provisions would apply.

Furthermore, in respect of payment provisions, any non compliant aspect of payment within the FIDIC contract would be supplanted by the Scheme payment provisions, for s104-106 categories.

Whilst the UK requires under s107 that the contract be in writing, this is clearly not relevant since there is clearly a FIDIC contract in existence, in writing.

Whilst under 21(b) the adjudicator can make use of his special knowledge, which is perhaps central to his appointment in the first place, it is perhaps useful to remind adjudicators of the value of advising the parties of the adjudicator's understanding of things, so that they can comment upon his views.⁵⁸

The concept of adopting an inquisitorial procedure under 21(c) is one that should be approached with caution. There is a difference between inquiring of the parties about aspects of the dispute that cause the adjudicator concern, or taking a look see and becoming a detective, since the later may well amount doing one parties work and making the case for that party.⁵⁹

21(d) power to award interest prevents any challenge and is useful. See similarly Clause 20(c) of the Scheme

21(e) performs the same function as Clause 20(a) of the Scheme, enabling the adjudicator to open up decisions, in this case of the employer.

21(f) is in similar terms to aspects of Clause 16 of the Scheme on rights of audience. Whilst the power to keep nosy parkers at bay and thus to protect the private nature of hearings, the exclusion of anyone called by a party as a witness could prejudice the process.

⁵⁵ See opinion of Lord Derummon Young in **Costain Ltd v Strathclyde Builders Ltd** CA 96/03, 17 December 2003. See also s108(2)(f) HGCRA 1996 and Clause 13 of the Scheme.

⁵⁶ **Whiteways Contractors (Sussex) Ltd -v- Impresa Castelli Construction UK Ltd** [2001] 75 Con LR HT 00/199, 09.08.2000 An invitation by the parties to decide upon jurisdiction gives the adjudicator jurisdiction, a decision which is enforceable even if wrongly decided. Similarly see **Nolan Davis Ltd -v- Steven P Catton** 22.02.2000

⁵⁷ **Abbey development Ltd v PP Brickwork Ltd** HT 0373, 4.7.2003 and **Adonis Construction Ltd v Mitchells & Butler**, 2003.

⁵⁸ **Checkpoint Ltd v Strathclyde Pension Fund**. Supra.

⁵⁹ **Balfour Beatty v Mayor & Burgess of London Borough of Lambeth** [2002] BLR 288, [2002] EWHC 59712.04.2002, supra

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Proceeding in the absence of a party mirrors Clause 15 of the Scheme. Note however, that whilst Clause 15 only applies where the absent party fails to provide sufficient cause, it could be possible for the adjudicator to continue where the absent party sends his apologies and provides a valid excuse and asks for a deferral. However, to do so would be unwise, unless it is clear that the absentee is using this as an excuse to create inordinate delay.

Procedures	22 All communications between either of the Parties and the Adjudicator and all hearings shall be in the language of the Adjudicator's Agreement. All such communications shall be copied to the other Party
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COMMENTARY

Whilst this is a sensible provision and pragmatic, some exceptions might be required where witnesses are unable to communicate in the contract language. The requirement that all communications be copied to the other party is uncontroversial and mirrors the findings of the UK courts. However, it is not clear from the provision who should do the copying and what the consequence of breach would be. Under UK law it is clear that a decision may be avoided if the adjudicator fails to notify a party of private conversations and correspondence with the other party. However, does the provision impose a duty on the adjudicator to provide the other party with all documentation supplied to him? It is to be hoped that the forwarding of a list of documents received would be sufficient, and for him to then leave it to the other party to insist on copies being provided to him.

Under UK law, a pragmatic way forward, at the commencement is to treat the date of submission of referral documents to the respondent as the relevant date to start the 28 day clock ticking. Then if the defendant submits voluminous documents late in the day to the referrer, to rely on the referrer granting an extension of time. None of this is spelt out in the Scheme and has to be adopted as common sense and one imagines a similar common sense approach might valuably be applied to the FIDIC process.

Procedures	23 No later than the fifty-sixth day after the day on which the Adjudicator received a reference or, if later, the day on which the Adjudicator's Agreement came into effect, the Adjudicator shall give written notice of his decision to the Parties. Such decision shall include reasons and state that it is given under these Rules
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COMMENTARY

The adjudicator is given 56 days to reach a decision. As under UK law the question arises as to the status of decisions reached after that time. In the UK it would appear that unless the parties have exercised default powers and appointed a replacement adjudicator or protested the decision stands.⁶⁰

Under Clause 22 of the Scheme the parties may require the adjudicator to provide reasons for the decision, but otherwise there is no duty to do so, which contrasts with the duty under s52(4) Arbitration Act 1996 to give reasons unless otherwise required by the parties. The reason for requiring an arbitrator to provide an unreasoned award, which is the default position under US law, is that it renders the decision virtually unchallengeable and in effect final, thereby ensuring closure and further preventing disclosure of confidential information in a public forum. What would happen under FIDIC if the parties expressly provided that no reasons be given? It would make the adjudicator's task easier. However, the requirement to provide reasons makes and adjudicator think harder about the decision and ensures that the decision is fully reasoned and justified, which it is submitted is no bad thing at all.

⁶⁰ **Saint Andrews Bay Development Ltd v HBG Management Ltd** P370/03, 23.03.2003. Despite being two days late the court enforced decision because the court found that nothing significant enough had occurred to render the decision a nullity. Subsequently another court upheld an adjudicator's decision in **Simons Construction Limited v Aardevarch Developments Limited** 29.10.2003, in spite of it being delivered late because neither party had repudiated the appointment either expressly or impliedly by calling for another adjudicator..

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Adjudicator's Agreement

Identification of Project:

(the "Project")

Name and address of the Employer:

(the "Employer")

Name and address of Contractor:

(the "Contractor")

Name and address of Adjudicator:

(the "Adjudicator")

Whereas the Employer and the Contractor have entered into a contract ("the Contract") for the execution of the Project and wish to appoint the Adjudicator to act as adjudicator in accordance with the Rules for Adjudication ["the Rules"].

The Employer, Contractor and Adjudicator agree as follows:

- 1. The Rules and the dispute provisions of the Contract shall form part of this Agreement.
2. The Adjudicator shall be paid:
A retainer fee of _____ per calendar month
(where applicable)
A daily fee of _____
Expenses (including the cost of telephone calls, courier charges, faxes and telexes incurred in connection with his duties; all reasonable and necessary travel expenses, hotel accommodation and subsistence and other direct travel expenses).
Receipts will be required for all expenses.
3. The Adjudicator agrees to act as adjudicator in accordance with the Rules and has disclosed to the Parties any previous or existing relationship with the Parties or others concerned with the Project.
4. This Agreement shall be governed by the law of _____
5. The language of this Agreement shall be _____

SIGNED BY _____
for and on behalf of the Employer in the presence of
Witness _____
Name _____
Address _____
Date _____

SIGNED BY _____
for and on behalf of the Contractor in the presence of
Witness _____
Name _____
Address _____
Date _____

SIGNED BY _____
for and on behalf of the Adjudicator in the presence of
Witness _____
Name _____
Address _____
Date _____

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Particular Conditions

Note It is intended that the Short Form of Contract will work satisfactorily without any Particular Conditions. However, if the requirement of the project makes it desirable to amend any Clause or to add provisions to the Contract, the amendments and additions should be set out on pages headed Particular Conditions. Care should be taken with the drafting of such Clauses especially in view of the high priority given to the Particular Conditions by Sub-Clause 1.3.

COMMENTARY

Amending the provisions of a standard form contract is on the one hand undesirable firstly because one of the principal benefits of using a standard form contract is that it creates certainty and predictability for the parties ; secondly because unless the amendments are done very carefully there is a danger of creating conflicts within the document and thirdly because such forms are designed to ensure both that the risks are shared out in a proportionate and workable manner.

Nonetheless, as FIDIC acknowledges there are times when circumstances will require amendments to be made.

The order of the documents in the appendix and hence the priority of documents subject to Sub-clause 1.3 is as follows :-

- (a) The Agreement
- (b) Particular Conditions
- (c) General Conditions
- (d) The Specification
- (e) The Drawings
- (f) The Contractor's tendered design
- (g) The bill of quantities.

The General Conditions are the standard form conditions contained in Clauses 1-15 of the Green Form Contract, which clearly will be over-ridden by anything stipulated in the Particular Conditions. Hence the need to ensure that the draftsman of the particular conditions needs to have a thorough knowledge and understanding of the general conditions to ensure no conflicts occur, and that what remains of the general conditions, after amendment remain coherent,

The stipulations in the appendix form part of the agreement, which in turn take priority over the particular conditions, so it is equally important to ensure that the particular conditions are a logical extension of the matters set out in the appendix. Care should be taken especially in respect of the nomination of the employer's representative and any attempt to alter the scope of the representative's powers. Such alterations to powers, despite any temptation to revert back to familiar territory to reflect the old red form type regime, is not recommended and should be resisted.

WORKSHOP QUESTIONS

In the tender process, how practicable, if at all, is it for the contractor to play a significant role in the drafting of Particular Conditions?

Should the court / arbitrator pay any attention to an imbalance of power where the particular conditions are draconian and result in serious and unreasonable disadvantage to the contractor.

Would it make any difference to your answer if the contractor regularly worked for the same employer who occupied a monopoly position in the market place?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Question Two : Costs and Interest

In a dispute which was referred you, as adjudicator in April this year arising out of a FIDIC Green Form Construction Contract, the Claimant sought payment of a debt amounting to £100,000 which became due on 2 January last year. The Respondent's defence raised a set-off of £50,000 arising out of the same facts and due on 1 February last year. Both parties claimed interest.

On 27 April last year the Respondent paid £20,000 to the Claimant.

On 8 October last year the Respondent made a Sealed Envelope offer to compromise the claim and the set off in the sum of £20,000 plus interest at a specified rate from the respective dates that the claim and set-off were due. The offer was rejected on 19 October 2002.

The matter came to a hearing following which you, the adjudicator published your decision by which on the substantive issues the Claimant was to receive £65,000 after taking account, as a deduction, of the £20,000 paid on 27 April 2003; and that the Respondent succeeded on its set-off in the amount of £45,000; according the Respondent should pay £20,000 to the Claimant.

Produce a decision in relation to costs and interest.

Question Three : Powers of discovery.

In a FIDIC Green form construction sub-contract adjudication an issue arises regarding the dissipation of funds, between a Claimant sub-contractor, Andy, a small business, and the Respondent, Bill a large main contractor. You were requested at a preliminary meeting to give a direction for disclosure. The respondent was represented by a lawyer, but Andy the sole proprietor represented himself.

Respondent's lawyer asked for a direction for full discovery and in order to prevent any misunderstanding he asked you to give a formal ruling that Andy's correspondence with his brother-in law regarding the latter's holiday home in Spain must be disclosed. Andy objected to this saying that it was private correspondence and nothing to do with the construction project in which both parties were involved.

The lawyer explained that he was interested in where the money had gone and wished to establish whether it has been applied contrary to the terms of the contract.

Discuss how you would deal with this matter.

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Question Four : Allegations of Bias.

During a FIDIC Green Form Construction Adjudication hearing the Respondent's Expert, whilst being cross-examined referred to a technical paper which you had published a few years ago, which apparently supported his opinion. Counsel for the Claimant said he did not know the paper but then promptly asserted that if what the witness said was a correct quotation, you could not act in an impartial manner and should resign.

Discuss how you would deal with this matter.

Question Five : Irregularities during a hearing.

A building Contractor claimed loss and expense due to design changes and alleged mistakes on drawings. The resultant dispute proceeded to arbitration. You served as Arbitrator. The following situations arose at the Hearing. All witnesses gave evidence under oath.

- A) The Architect, under cross-examination, refused to answer a question concerning the alleged mistakes "on the advice of my Personal Insurance Underwriter". Counsel invited you to accept that the architect by so refusing to answer was admitting that there were mistakes on the drawings.
- B) Cross-examination of a witness for the Claimant was interrupted by the weekend. On the following Monday morning the witness made a statement, which contradicted something he had said the previous week. Counsel did not appear to notice the change in evidence and continued his cross-examination.

How would you deal with the above when drafting your adjudication decision?

NOTES AND COMMENTARY ON THE FIDIC SHORT FORM OF CONTRACT

Question Six : Attendance of witnesses.

You are the adjudicator for a dispute between David (Claimant) and Eddy (Respondent) under a FIDIC Green Form sub-contract for drainage work on a housing development.

The Claimant claimed the costs of alleged delay and disruption caused by the Respondent's failure to organise the work on site.

The Respondent agreed that the Claimant was late in completing his work, but denied all the allegations and counterclaimed his own costs, alleging that the delay occurred because the Claimant did not have sufficient labour on site to carry out the works.

Witness statements by the contracts managers for both sides generally confirmed that the delays were caused by the other side.

Fred, the Respondent's site foreman on the site is working on a project in South America. A statement by Fred, sworn before a judge in Rio De Janerio was introduced at the hearing. The statement supported the Claimant's version of the events on site.

Explain how you would deal with the above when writing your decision.

Question Seven : Liability for design and defects

During the tender for the construction of a bridge, subject to a FIDIC Green Form contract, the Contractor proposed the use of permanent formwork when casting the bridge deck and gave the reason for this alternative proposal as speed and safety of construction. The deck was some 18 metres above ground level. The Engineer refused to accept this alternative and required the flat cast in-situ soffit between the main steel beams as shown on the drawings.

When the sub-structure of the bridge was complete the Engineer requested the Contractor to submit his temporary works details for the casting of the bridge deck. These showed the formwork supported from the permanent steel beams thus precluding the need for extensive load bearing formwork. After consideration the Engineer consented to the Contractor's method.

After the steel beams were erected the Engineer requested calculations from the Contractor to ensure that the concrete loading on to the formwork and particularly the strut from the bottom flange of the steel beams to the formwork face was adequate. The Contractor submitted the necessary calculation within two days of the request but the Engineer took 18 days to check the calculations. The Engineer gave consent to the temporary works but the Contractor notified the Engineer that he had been delayed by 14 days due to the Engineer taking an unreasonable length of time checking the calculations.

During the pouring of concrete a section of formwork collapsed and seriously injured an operative below as well as causing damage to the bridge deck, which as a consequence required major remedial work.

What matters would you wish to consider in the adjudication?
