

EIC CONTRACTOR'S GUIDE TO THE MDB
HARMONISED EDITION (JUNE 2010) OF THE FIDIC
CONDITIONS OF CONTRACT FOR CONSTRUCTION,
APRIL 2011¹

Editorial Note: We are very pleased to be able to reproduce, at the thoughtful suggestion of Mr Frank Kehlenbach, Director of European International Contractors, and one of our Correspondents for Germany, extracts from EIC's recent guide to the latest MDB harmonised version of the FIDIC Red Book. The extracts comprise the Foreword and the Executive Summary, which provide an excellent outline and guidance on certain provisions, primarily those where EIC comments on developments which depart from the FIDIC Red Book 1999 (and in some instances, the 2006 harmonised edition of the MDB version).

FOREWORD TO THE FIDIC JUNE 2010 MDB EDITION OF
THE FIDIC CONDITIONS OF CONTRACT FOR
CONSTRUCTION²

Since the publication of the FIDIC Red, Yellow and Silver Books (so-called "New Books") in 1999, EIC has published four "EIC Contractor's Guides" to the new FIDIC suite of standard contract forms for major works, namely the

- *EIC Contractor's Guide to the FIDIC Conditions of Contract for EPC Turnkey Contracts* (hereafter referred to as the FIDIC 1999 Silver Book), published in March 2000, with subsequent revision published in August 2003;
- *EIC Contractor's Guide to the FIDIC Conditions of Contract for Construction* (hereafter referred to as the FIDIC 1999 Red Book), published in March 2002, reprinted in March 2003;
- *EIC Contractor's Guide to the FIDIC Conditions of Contract for Plant and Design-Build* (hereafter referred to as the FIDIC 1999 Yellow Book), published in March 2003;

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EIC sincerely appreciates the valuable contributions of Mr Mark Roe, Pinsent Masons LLP, for his legal review of the draft guide and suggested improvements to the text.

- *EIC Contractor's Guide to the FIDIC Conditions of Contract for Design, Build and Operate* (hereafter referred to as the FIDIC Gold Book), published in September 2009.

As was the case with the Fourth Edition of the old Red Book (1987) the FIDIC 1999 Red Book was adopted by the World Bank as the basis for the General Contract Conditions of its Standard Bidding Documents for Works, however, with significant modifications reflecting the Bank's standard procurement practice. In the light of the on-going process of issuing harmonised procurement documents for construction projects for which the Multilateral Development Banks (MDBs) are providing finance, the World Bank and most of the other MDBs resolved that there should be a modified standard form of the FIDIC 1999 Red Book for use by the MDBs in which the General Contract Conditions would contain the standard wording which previously had been incorporated by the MDBs in the Particular Conditions.

EIC has been consulted several times during the drafting process of the MDB Harmonised Conditions of Contract for Construction as a "friendly reviewer". As early as December 2004, FIDIC invited EIC to review a first draft version that was, at the outset, to become the Second Edition of the FIDIC 1999 Red Book.

Notwithstanding the reservations expressed by EIC, the World Bank published in conjunction with FIDIC in May 2005 a first harmonised version of the FIDIC 1999 Red Book for use by the MDBs. The 2005 version was scrutinised by EIC and a summary of EIC's early comments was published in the January 2006 volume of *The International Construction Law Review*.

Following EIC's critical remarks, as well as those from other commentators, the 2005 version was reviewed and superseded by an update in March 2006 which to some extent addressed the comments of EIC on the FIDIC 2005 version, one such comment regarding the confusing definition of "Unforeseeability".

However, the March 2006 updated version was still criticised by contractors from all continents and, therefore, the World Bank decided to enter into more comprehensive deliberations with the global construction federation, the "Confederation of International Contractors' Associations" (CICA), in order to discuss in detail the wording of particular clauses. These talks came to a close in Spring 2010 and, subsequent to a renewed consultation with the MDBs, FIDIC published the 3rd version of its MDB edition in June 2010 (hereafter referred to as the "FIDIC 2010 MDB Harmonised Construction Contract").

Upon analysing the FIDIC 2010 MDB Harmonised Construction Contract, EIC remained concerned that several clauses, for example, those dealing with the Engineer's Duties and Authority, the Replacement of the Engineer, the Performance Security, Termination by the Employer in case

of corrupt, fraudulent, collusive or coercive practices, Limitation of Liability and Arbitration, represented a move in the wrong direction and might deter experienced international contractors from tendering for MDB financed construction works.

Tenderers for World Bank-financed works contracts should be further aware that the FIDIC 2010 MDB Harmonised Construction Contract has again been modified by the World Bank in August 2010, in particular with respect to sub-clauses 1.12 [*Confidential Details*], 1.15 [*Inspections and Audit by the Bank*], 6.20 [*Forced Labour*], 6.21 [*Child Labour*], 15.6 [*Corrupt or Fraudulent Practices*], 20.5 [*Amicable Settlement*] and 20.6 [*Arbitration*].

This observation extends also to the question of guarantees. Whereas the FIDIC 2010 MDB Harmonised Construction Contract provides in sub-clauses 4.2 [*Performance Security*], 14.2 [*Advance Payment*] and 14.9 [*Payment of Retention Money*] that the Performance Security/Advance Payment Guarantee/Retention Money Guarantee shall be “issued by a reputable bank or financial institution selected by the Contractor”, the World Bank in the respective sub-clauses still requires that the security shall be “issued by an entity and from within a country approved by the Employer”. The overall impression is that the changes introduced by the World Bank are disadvantageous to the contractor when compared to the original FIDIC wording. EIC has thus asked the World Bank to revert to the standard FIDIC text.

As a result of this somewhat uncoordinated drafting policy and practice, users must be conscious that there are currently (at least) four standard forms relating to the MDB Harmonised Conditions of Contract, i.e.:

1. The May 2005 MDB Harmonised Construction Contract, published by FIDIC;
2. The March 2006 MDB Harmonised Construction Contract published by FIDIC;
3. The June 2010 MDB Harmonised Construction Contract published by FIDIC; and
4. The World Bank General Conditions of Contract published by the World Bank (in their latest version) in August 2010.

Employers and contractors are well advised to pay particular attention to exactly which version they are dealing with in an individual tender as all four versions vary to some extent from each other. This EIC Contractor's Guide relates to the FIDIC 2010 MDB Harmonised Construction Contract only.

EIC wishes to make it clear that this document is not exhaustive and is intended for guidance only. Expert legal advice should always be obtained before submitting an offer or making any commitment to enter into a contract. Neither EIC nor the authors of this document accept any responsibility or liability in respect of any use made by any person or entity

of this document or its contents which is and shall remain entirely at the user's risk.

EXECUTIVE SUMMARY ON THE FIDIC 1999 ‘RED BOOK’

We readily accept that in some respects the FIDIC 1999 Red Book is an improvement on the Fourth Edition. However, we believe that the balance of all amendments will increase the risk to contractors and have concluded therefore that the FIDIC 1999 Red Book is a less satisfactory form of contract than the Fourth Edition. From a contracting perspective, the clauses dealing with the provision of confidential information, fitness for purpose, tests on completion and notice of claim represent a move in the wrong direction. Whilst we recognise that today's engineer can no longer act impartially, we believe that some of his new powers could prove problematical in practice, especially where he is required to make judgements as if he were an experienced contractor.

Improvements

The first of the welcome changes requires the employer to demonstrate that sufficient finance is available to carry out the works (sub-clause 2.4). This will be particularly important where the immediate client is a Special Purpose Company (SPC) and is funded by loans. For contracts placed by an SPC it is usual for the lending banks to put a Direct Agreement in place, which permits them to take over control of the contract should the SPC default. Where such an agreement exists it is important that the contractor is given the opportunity to study and consider its terms and conditions before the construction contract is finalised. This clause will also prove useful where major variations are ordered or where the employer has acknowledged the contractor's right to any significant payment for additional works or major claims.

The procedure for dealing with Employer's Claims (sub-clause 2.5) is also an improvement over the Fourth Edition. The employer must now follow a set procedure if he considers himself entitled to any payment and must give notice as soon as practicable and provide particulars of the claim. These provisions are mandatory. The engineer must then make a determination but the contractor can refer such a determination to a new and independent body, the Disputes Adjudication Board (the DAB, sub-clause 20.2). These new provisions should go a long way to prevent any unreasonable actions of the employer, especially in terms of the application of Delay Damages, a not uncommon practice with some employers in countering or indeed negating the legitimate claims of the contractor. The DAB can comprise either one or three members, to be appointed by the employer and the contractor. The appointment of the DAB expires only after a

written discharge by the contractor has become effective and the DAB is therefore available throughout the duration of the contract. Provided both parties agree they can refer any matter to it and this provision could prove useful in resolving disputes before they affect the progress of the works. The creation of the DAB is a welcome addition to the FIDIC 1999 Red Book and the binding nature of its decisions, even if either party is dissatisfied, is an added benefit.

Our friendly and impartial engineer has been laid to rest! The engineer is now required to act for the employer (sub-clause 3.1) and no longer has a duty to act impartially. Why do we consider this a change for the better? Simply because it recognises what has long been the established custom and practice in the industry. In any event, we believe that any possible downside will be more than compensated for by the introduction of the DAB.

Whilst the employer can still make claims on the Contractor's Performance Security (sub-clause 4.2), any claim must now be made strictly in accordance with the terms laid down in the contract. This is an improvement on the Fourth Edition of the old Red Book, as the contractor is offered protection for all costs incurred should the employer make a false claim and the employer must indemnify the contractor accordingly. Whereas the Fourth Edition merely required the employer to notify the contractor prior to making a claim, the FIDIC 1999 Red Book limits the employer's claims under this guarantee to amounts to which the employer is entitled.

Retrogressions

Regrettably there are quite a few clauses in the FIDIC 1999 Red Book which have been toughened up and whilst the principal obligations and risks carried by the contractor are still construction orientated, they are generally more onerous than under previous construct-only editions and the overall effect is to increase the risk profile by comparison with the Fourth Edition.

The contractor is now required (sub-clause 1.12) to provide all such confidential information as the engineer may reasonably require in order to verify the contractor's compliance with the contract. This clause is overly demanding and could place the contractor in a difficult position in situations where a dispute has arisen, especially with regard to third parties. A similar provision to that in the Silver Book would be more appropriate, which sets out a mutual confidentiality obligation and provides for agreement of privileged information pre-tender. This would be a more sensible approach.

The contractor is entitled to Extension of Time for Completion and payment of additional cost suffered due to errors in Setting Out information provided by the employer (sub-clause 4.7). However, this entitlement is now subject to the test of whether an experienced contractor would spot the

error and the engineer will be the judge on this matter. Not only does the engineer act for the employer, he is also required to make decisions as if he were an experienced contractor!

Of particular concern for contractors working under English or Common Law is the introduction of an obligation (sub-clause 4.1) which stipulates that any designs by the contractor must be fit for purpose. Under those jurisdictions, the employer's designer will only have an obligation to design with reasonable skill and care and this could lead to some interesting disputes should difficulties arise as a result of any conflicts or anomalies that occur between the employer's and the contractor's designs.

A requirement to carry out Tests on Completion has been introduced (clause 9) and is a novel concept for a construct-only contract. It is difficult to see what type of contract would qualify and it is not the tests themselves that are the problem but rather the punitive sanctions that could be suffered in the event of failure to pass such tests. In extreme circumstances, these could include dismantling the structure, removing it and returning the site to its original condition and repaying all monies received by the contractor. This clause, which may well be attractive to the less reasonable type of employer should be deleted in its entirety—a possibility that FIDIC actually provide for if the clause is inappropriate to the nature of work being carried out. This makes it even more difficult to understand why it is there in the first place.

Most parties to a construction contract would agree that the ability of any contractor to prepare an accurate cost estimate is completely dependent on the quality and comprehensiveness of the information provided at tender stage. In the Fourth Edition, the employer was required to supply all available data on hydrological and sub-surface conditions. It is difficult to understand therefore the provisions of the FIDIC 1999 Red Book (sub-clause 4.10) which modifies that requirement to relevant data in the employer's possession. It is difficult to see how it will help employers to limit in any way the information provided to bidders and contractors should try to amend this requirement to reflect the terms of the Fourth Edition.

Where the contractor encounters unforeseen conditions (sub-clause 4.12), the engineer may now consider whether conditions in similar parts of the works were more favourable than could have been foreseen before finally determining any entitlement to additional costs. If, in the engineer's opinion, such favourable conditions were encountered, the engineer can take them into account when determining any entitlement to additional cost. This provision could be extremely prejudicial to the contractor and is open to widely differing interpretations. A further new concept permits the contractor to provide evidence of the physical conditions foreseen in his tender calculation. However, if such evidence is provided, the engineer may or may not take account of it and is not bound by it. It would appear that FIDIC's objective is to use every means possible to reduce the financial impact of claims for unforeseeable conditions but the extent of the

discretionary powers now at the engineer's disposal seem more likely to increase the potential for dispute and disagreement.

The employer now has the right, not present in the Fourth Edition, to terminate for convenience (sub-clause 15.5). This right can be exercised at any time 28 days after giving written notice. The payment terms do not provide for loss of profit and are inequitable and inappropriate in the case of termination for the employer's convenience. In such circumstances, loss of profit should be payable to the contractor. The clause states that the employer may not terminate in order to undertake the works directly or arrange for them to be completed by another contractor.

The contractor's obligation to issue a notice has changed for the worse and he is now required to give notice 28 days after becoming aware, or when he should have become aware (sub-clause 20.1). Contractors should beware! Failure to comply with this provision will incur a fierce penalty and will result in the contractor forfeiting his right to an Extension of the Time for Completion and to additional payment and the employer is also discharged from any liability. The penalty for failure to comply with a purely technical requirement to give notice is unduly harsh. This is the first time that a FIDIC contract has removed the fundamental right of the contractor to make a claim merely as a result of a failure to comply with a fixed period of time to submit the required notice. Whilst we accept that the contractor may prejudice his entitlement by failing to comply strictly with a notice provision we cannot agree that he should forfeit his rights altogether and neither should the employer be discharged from any and all liability. It becomes doubly unreasonable that this provision also applies when the employer is responsible for causing the problem in the first case. It is revealing to compare these terms with the obligations of the employer where either the employer or the engineer is only required to give notice as soon as practicable after becoming aware. This demonstrates once again the unfair imbalance between the respective obligations of the employer and the contractor that is becoming symptomatic of FIDIC contract forms.

EXECUTIVE SUMMARY ON THE FIDIC 2010 MDB HARMONISED CONSTRUCTION CONTRACT

In view of EIC's previous statements concerning the FIDIC's 1999 standard forms of contract, we have used our *EIC Contractor's Guide to the FIDIC 1999 Red Book*, dated March 2003, as a baseline and reference in the preparation of this commentary on FIDIC's 2010 MDB Harmonised Construction Contract. This approach has been chosen mainly for ease of reference and to further emphasise the position of EIC on the provisions of the FIDIC 1999 Red Book.

Improvements

EIC is pleased to note that several comments made earlier by EIC, either in relation to the FIDIC 1999 Red Book or with regard to the May 2005 and the March 2006 versions of the FIDIC MDB Harmonised Construction Contract have been rectified in the FIDIC 2010 MDB Harmonised Construction Contract, such as:

- Sub-clause 1.12 [*Confidential Details*]*—*the parties' obligations with regard to Confidential Details are now mutually binding.
- Sub-clause 1.13 [*Compliance with Laws*]*—*obtaining the building permit is now the explicit responsibility of the employer.
- Sub-clause 2.5 [*Employer's Claims*]*—*the 28-days' notification deadline contained in sub-clause 20.1 now also applies to the employer.
- Sub-clause 3.5 [*Determinations*]*—*the time limit for the engineer to make a Determination has been fixed to 28 days.
- Sub-clause 7.7 [*Ownership of Plant and Materials*]*—*the ownership subrogates only with incorporation in the works or with actual payment.
- Sub-clause 8.1 [*Commencement of Works*]*—*the commencement of works is now subject to conditions precedent.
- Sub-clause 13.1 [*Right to Vary*]*—*an additional reason entitling the contractor to reject a Variation has been introduced.
- Sub-clause 14.2 [*Advance Payment*]*—*the purpose of the advance payment as cash flow injection enabling investment and mobilisation is demonstrated more clearly given that the amortisation schedule is to become less burdensome on the contractor.
- Sub-clause 14.9 [*Payment of Retention Money*]*—*the repayment of the Retention Money has been modified in favour of contractor.
- Sub-clause 20.1 [*Contractor's Claims*]*—*The Dispute Board can be activated if the engineer fails to respond within the given deadline.

Retrogressions

Whilst the aforementioned amendments are appreciated by EIC, it must also be kept in mind that the new wording will significantly increase the risks for contractors and thus the overall costs due to some retrogression, for instance:

- Sub-clause 3.1 [*Engineer's Duties and Authority*]*—*the employer now has a right to unilaterally change the authority of the engineer.
- Sub-clause 3.4 [*Replacement of the Engineer*]*—*the employer now has a right to unilaterally replace the engineer.
- Sub-clause 4.2 [*Performance Security*]*—*the employer now has an expanded and thereby discretionary right to make a claim under the Performance Security.

- Sub-clause 12.3 [*Evaluation*]*—*the thresholds for claiming a new rate due to a change in quantities have increased significantly.
- Sub-clause 15.6 [*Corrupt or Fraudulent Practices*]*—*the employer has now a unilateral right to terminate the contract if it determines that the contractor has engaged in corrupt, fraudulent, collusive or coercive practices.
- Sub-clause 17.6 [*Limitation of Liability*]*—*the coverage of the well-established principle of mutual limitation of liability has been significantly reduced at the disadvantage of the contractor.
- Sub-clause 20.6 [*Arbitration*]*—*the arbitration clause introduces separate mechanisms to final dispute resolution depending on whether the contract has been awarded to a foreign or a domestic contractor.

In addition, EIC is very concerned about the combined effect that some of the aforementioned retrogressions may lead to. The newly introduced alterations of sub-clause 3.1 [*Engineer's Duties and Authority*], sub-clause 3.4 [*Replacement of the Engineer*] and sub-clause 4.2 [*Performance Security*] may represent an opportunity for abusive behaviour towards the contractor since the employer is granted discretionary rights to alter the fundamental balance of the contract. EIC would rather have seen that the express policy of the World Bank and the other Regional Development Banks to combat corruption also appears in their standard form of contract to the appropriate extent, i.e., that focus would be to close every window of opportunity for corrupt behaviour, rather than to introduce such indirect opportunities, which regretfully now are part of the standard form of contract.

EIC is particularly missing a balanced provision which would entitle the contractor to suspend or terminate the contract in the case of unethical practices (extortion) by the employer.

Bearing in mind the MDBs' wish to reverse the trend whereby experienced international contractors have over time demonstrated less interest in participating in MDB funded projects, EIC cannot see the logic behind the aforementioned provisions in their standard form of contract.

Comments on a number of individual clauses follow and deal in greater detail with the matters referred to above.

Particular contract conditions

The FIDIC 2010 MDB Harmonised Construction Contract provides for Particular Conditions which consist of the Contract Data in Part A (see sub-clause 1.1.1.10) and the Specific Provisions in Part B.

Considering the application of the Particular Contract Conditions, the User's Guide of the World Bank's Standard Bidding Documents for the Procurement of Works stipulates that

“the Particular Conditions (PC) complement the General Conditions (GC) to specify data and contractual requirements linked to the special circumstances of the country, the Employer, the Engineer, the sector, the overall project, and the Works”.

The World Bank User’s Guide provides for a set of sample provisions for use by the employer in preparing the PC. However, the Bank emphasises that “they are not a complete set of PC provisions”.

EIC holds the view that Particular Conditions must only be employed to regulate the project and country-specific items and that they should not be used to re-allocate risk, which unfortunately is sometimes the case. Therefore, EIC encourages the MDB, after having undertaken the commendable task of harmonising their General Contract Conditions for major construction works, to draft standardised Particular Conditions, as they should have a strong interest themselves in preventing any subsequent misuse of their standard form of contract by inexperienced or ill-disposed third parties through the insertion of unbalanced or inapplicable Particular Conditions.

EIC deplores that the World Bank no longer expresses in the latest User’s Guide the wish that “standard, country-specific PC should be developed”. Instead, we suggest that MDBs provide an exhaustive list of admissible deviations from the standard form, in order to avoid open-ended possibilities for deviation from the General Conditions. MDBs should not approve bidding documents that contain any such deviation and, as a consequence, contracting authorities may not disqualify a tenderer who has based a given qualification on a deviation from the standard conditions introduced by the employer.

EXTRACTS FROM THE GUIDE RELATING TO SPECIFIC CLAUSES

1.13 Compliance with Laws

The contractor shall comply with all applicable laws. However, responsibility for obtaining permits, licences or approvals is not entirely clear when comparing sub-clauses 1.13 (a) and (b). Whilst sub-clause 1.13 (a) provides that “the Employer shall have obtained (or shall obtain) the planning, zoning, building permit or similar permission for the Permanent Works”, sub-clause 1.13 (b) provides that

“the Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by the Laws in relation to the execution and completion of the Works and the remedying of any defects”.

EIC welcomes that the obligation to obtain the building permit is now explicitly allocated to the employer. Responsibility for obtaining permissions is, however, still ambiguous and should be further clarified. For instance, what is “similar permission” for which the employer is responsible

pursuant to sub-clause 1.13 (a) and how does it fit with the contractor's obligations under sub-clause 1.13 (b)? More clarity would be achieved if paragraph (b) were prefaced by the words "Unless otherwise stated in paragraph (a) above" in order to avoid ambiguity between the "building permit" in paragraph (a) and "all permits" in paragraph (b).

Ideally, the contract should include a detailed schedule of the permits required and should identify the party responsible for obtaining the same. In the event that the contractor is responsible then, under sub-clause 2.2 (b) (i) [*Permits, Licences and Approvals*], "the Employer shall provide reasonable assistance to the Contractor".

Consequently, any delays caused by the employer's failure entitle the contractor to an Extension of Time for Completion in accordance with sub-clause 8.4 (e) [*Extension of Time for Completion*]. Any delays caused by authorities entitle the contractor to an Extension of Time for Completion under 8.5 [*Delays Caused by Authorities*], and subsequently sub-clause 8.4 (b) [*Extension of Time for Completion*].

In particular, all permits that are required to allow the project to be developed at the site of the works should be specifically identified in the contract as being the responsibility of the employer. In the event that the contractor undertakes any design of the works, he must clarify who is responsible for the provision of permits, licences or approvals for that part of the works.

EIC welcomes that the FIDIC 2010 MDB Harmonised Construction Contract adds an important qualification to sub-clause 1.13 (b). The contractor's obligation to indemnify the employer for any failure does not apply in case "the Contractor is impeded to accomplish these actions and shows evidence of its diligence".

2.5 Employer's Claims

Amendments made in the FIDIC 2010 MDB Harmonised Construction Contract, mean that this sub-clause now offers better protection to the contractor and obliges the employer to follow a given procedure ("the Employer shall give notice and particulars to the Contractor") if he

"considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period".

The employer or the engineer may give notice and

"The notice shall be given as soon as practicable and no longer than 28 days after the Employer became aware, or should have become aware, of the event or circumstance giving rise to the claim".

The employer must also give particulars of the claim, after which the parties may agree the claim or failing which the engineer may then make a determination in accordance with sub-clause 3.5 [*Determinations*].

EIC is pleased to note that the FIDIC 2010 MDB Harmonised Construction Contract places the same level of responsibility with regard to early warning obligations on both the employer and the contractor (see sub-clause 20.1 [*Contractor's Claims*]). However, we regret that the revised sub-clause 2.5 does not establish the same sanctions for employer and contractor in the event of a failure to notify a claim. Whilst the contractor under sub-clause 20.1 [*Contractor's Claims*] forfeits his right to an Extension of Time for Completion or additional payment if he fails to give notice of a claim, there is no similar penalty on the employer. EIC therefore questions the logic of this amendment, since the imbalance between contractor and employer continues. For the sake of reciprocity of obligations between contractor and employer, we consider there should be an express time-bar preventing the employer from making claims after the expiry of the deadline.

In any case, it should also be noted that such time-bars may be void under certain jurisdictions. Contractors are advised to undertake their own due diligence in order to ascertain under the applicable law, whether the time-bar contained in sub-clause 20.1 [*Contractor's Claims*] is void or not before requesting reciprocity.

The provisions of this sub-clause are also mandatory in the event that the employer wishes “to set off against or make any deduction from an amount due to the Contractor”. In accordance with sub-clause 3.5 [*Determinations*], the engineer shall make a determination in respect of any such employer claim.

These provisions should go a long way to prevent any unreasonable actions of the employer, especially in terms of the application of Delay Damages and they represent a significant improvement over the Fourth Edition of the old Red Book. If the engineer fails to make a fair determination pursuant to sub-clause 3.5 [*Determinations*], the dispute procedure laid down in sub-clause 20.4 [*Obtaining Dispute Board's Decision*] operates within very strict time constraints and offers, therefore, an immediate means of challenge and should act as a deterrent to any unreasonable action on the part of the engineer.

3. The Engineer

3.1 Engineer's Duties and Authority

This sub-clause states that the engineer acts for the employer but the obligation to act impartially as set out in the Fourth Edition of the Red Book does not appear in the FIDIC 2010 MDB Harmonised Construction Contract.

Where the engineer is required to obtain the approval of the employer before issuing an instruction this shall be stated in the Particular Conditions. However, whenever the engineer issues an instruction without first

obtaining approval, then the employer shall be deemed to have given his approval. This means that the contractor is relieved of any need to establish any limitations on the engineer's powers.

In the FIDIC 2010 MDB Harmonised Construction Contract, sub-clause 3.1 [*Engineer's Duties and Authority*] has changed dramatically in comparison with the FIDIC 1999 Red Book in so far as changes to the engineer's authority are concerned.

Under the FIDIC 1999 Red/Yellow Books, the employer was required to obtain the contractor's consent before changing *any* authority attributed to the engineer and the last sentence of the third paragraph reads:

“The Employer undertakes not to impose further constraints on the Engineer's authority, except as agreed with the Contractor.”

This vital criterion has been changed for the worse in the FIDIC 2010 MDB Harmonised Construction Contract version to now read:

“The Employer shall promptly inform the Contractor of any change to the authority attributed to the Engineer.”

EIC holds that the duty and the authority of the engineer, specified or implied, is a cornerstone of any project—during the course of the tender stage as well as during the execution of the contract. The powers of the engineer form a significant part of the risk assessment of any concerned tenderer and are therefore fundamental to the success of the project, whether it be a construction-only contract or a design-build contract. In our opinion, neither party should be entitled to alter such a fundamental aspect unilaterally.

Any such unilateral change made by the employer can have a profound impact on the project and obviously on the contractor, who has based his price on given data that subsequently is changed by the employer, without the contractor having the opportunity to adapt his price to the level he would have, had he known before the Tender Date that such a change would be made. The new clause wording may represent an opportunity for abusive behaviour towards the contractor and significantly alters the balance of risk in the contract without providing any entitlement to the contractor for additional time or cost.

As an absolute minimum requirement, prior written approval from the concerned MDB should be obtained by the employer, taking into account all reasonable representations by the contractor, and the MDB should be prohibited from permitting any change in the event that the contractor raises reasonable objections.

In addition, a time gap might arise as the term “promptly” implies that the employer gives the notice after changing the authority of the engineer. The result may, therefore, be that the engineer's authority has already been changed whilst the contractor is still relying on the unchanged authority of the engineer. The FIDIC 2010 MDB Harmonised Construction Contract does not resolve this problem. In EIC's view, it would have been preferable

if the employer were obliged to give “7 days’ prior notice” and if it had been clarified that any exercise of authority by the engineer prior to the (effective) date of the change in his authority, were not affected by the change.

The engineer’s authority has been further severely restricted by adding to the conventional clause wording the provisions (A) to (D) as a new seventh sub-paragraph. As a consequence, the engineer now needs to have obtained the specific approval of the employer before taking action on sub-clauses 4.12 [*Unforeseeable Physical Conditions*], 13.1 [*Right to Vary*], 13.3 [*Variation Procedure*] and 13.4 [*Payment in Applicable Currencies*]. Since these provisions are not added as Particular Conditions but to be found in the General Conditions, the deemed approval as per the fourth sub-paragraph (D) does not apply. The restrictions must therefore be regarded as absolute and not the subject of a deemed approval.

EIC strongly opposes such a restriction of the engineer’s authority (and duty) because it will inevitably result in the contractor bearing these (potentially very substantial) time and cost effects until such time when the approval of the employer is obtained. As the employer is also the obligor to pay, it is evident that it will not give its approval easily. The FIDIC 2010 MDB Harmonised Construction Contract thus has created what EIC believes FIDIC never wanted: a self-certifying employer on a crucial area of the works.

3.3 Instructions of the Engineer

This sub-clause gives the engineer wide powers “to issue to the Contractor (at any time) instructions and additional or modified drawings which may be necessary for the execution of the Works” and obliges the contractor to comply with such instructions. Contractors should note the two-day period in sub-paragraph (b) regarding the written confirmation of oral instructions of the engineer or delegated assistants.

3.4 Replacement of the Engineer

The revised wording of this sub-clause in the FIDIC 2010 MDB Harmonised Construction Contract entitles the employer to replace the engineer even if the contractor raises reasonable objections against such replacement. The employer is merely obliged to “give full and fair consideration to the objection”. According to the existing language, the employer will still be entitled to replace the engineer if the contractor indeed raises a reasonable objection.

The sub-clause, as originally drafted in the FIDIC 1999 New Red/Yellow Books, has traditionally been acceptable to and implemented by employers, engineers and contractors without objection. The established norm of the industry is that no replacement of the engineer can take place in the event

that the contractor raises reasonable objections against the employer's introduced suggestion for such replacement. Hence, in order to alter such norm, there should be obvious benefits to the project and the parties involved arriving from such alteration. EIC fails to see any such benefit for the project as such.

EIC maintains that the identity of the engineer is a cornerstone of any project. His reputation and qualification form a significant part of the risk assessment of any concerned tenderer and is therefore fundamental to the success of the project, whether it be a construction-only contract or a design-build contract. Neither party should be entitled to alter such a fundamental aspect unilaterally.

Any such unilateral change made by the employer can have a profound impact on the project and obviously on the contractor, who has based his price on given data that subsequently are changed by the employer, without the contractor having the opportunity to adapt his price to the level he would have, had he known before the Tender Date that such a change would be made. The new clause wording may well represent an opportunity for abusive behaviour towards the contractor and significantly alters the balance of risk in the contract without providing any entitlement to the contractor for additional time or cost.

As an absolute minimum requirement, prior written approval from the concerned MDB should be obtained by the employer, and the MDB should be prohibited from permitting any change in the event that the contractor raises reasonable objections.

3.5 Determination

Sub-clause 3.5 sets down the procedure to be followed by the engineer when he is required to make a determination. The engineer shall consult both parties, endeavour to reach an agreement and, failing agreement, he will then make a fair determination taking account of all relevant circumstances. The contractor must be aware that the sub-clause places no obligation on the employer to label his decision a determination.

The engineer is required to make a determination under the following clauses:

- 1.9 [*Delayed Drawings or Instructions*]
- 2.1 [*Right of Access to the Site*]
- 2.5 [*Employer's Claims*]
- 4.7 [*Setting Out*]
- 4.12 [*Unforeseeable Physical Conditions*]
- 4.19 [*Electricity, Water and Gas*]
- 4.20 [*Employer's Equipment and Free-Issue Materials*]
- 4.24 [*Fossils*]
- 7.4 [*Testing*]
- 8.9 [*Consequences of Suspension*]

- 9.4 [*Failure to Pass Tests on Completion*]
- 10.2 [*Taking Over Parts of the Works*]
- 10.3 [*Interference with Tests on Completion*]
- 11.4 [*Failure to Remedy Defects*]
- 11.8 [*Contractor to Search*]
- 12.3 [*Evaluation*]
- 12.4 [*Omissions*]
- 13.2 [*Value Engineering*]
- 13.7 [*Adjustments for Changes in Legislation*]
- 14.4 [*Schedule of Payments*]
- 15.3 [*Valuation at Date of Termination*]
- 16.1 [*Contractor's Entitlement to Suspend Work*]
- 17.4 [*Consequences of Employer's Risks*]
- 19.4 [*Consequences of Force Majeure*]
- 20.1 [*Contractor's Claims*]

EIC notes that the FIDIC 2010 MDB Harmonised Construction Contract imposes a time limit upon the parties to reach agreement and the sub-clause, contrary to the FIDIC 1999 New Books, imposes a period of 28 days for the engineer to make a determination. This is very helpful to the contractor.

Bearing in mind that the engineer, at least since the FIDIC 1999 Red Book, is not only *de facto*, but also contractually, a person who is in the camp of the employer, the engineer's power to make determinations that are binding in the interim is potentially a great disadvantage to the contractor. More so when this power also applies to claims of the employer.

It should be considered whether it would be beneficial to replace the last sentence of the second paragraph of sub-clause 3.5 by the two last sentences of sub-clause 3.5 as per the FIDIC 1999 Silver Book, i.e.:

“Each Party shall give effect to each agreement or determination, unless the Contractor gives notice, to the Employer, of his dissatisfaction with a determination within 14 days of receiving it. Either Party may then refer the dispute to the DAB in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*].”

Such drafting would reduce the risk of a self-certifying body on the employer's side

4.2 Performance Security

The first paragraph of sub-clause 4.2 [*Performance Security*] of the FIDIC 2010 MDB Harmonised Construction Contract has been amended to the effect that the Performance Security may not only be denominated in the currencies of the contract but alternatively also “in a freely convertible currency acceptable to the Employer”. This certainly is an advantage as it grants more freedom for the parties.

It should however be noted that no provision has been made for fluctuation in the exchange rate of the currency in which the contract is denominated as against the “freely convertible currency” of the Performance Security. Should the currency of the Performance Security devalue after the date of its issue, the situation will arise whereby the value of the Performance Security is worth less than the amount required by the Contract Data. This would constitute a breach of sub-clause 4.2 [*Performance Security*] and would constitute a reason for termination under sub-clause 15.2 (a) [*Termination by Employer*]. In order to avoid ambiguity, either a fixed exchange rate should be agreed, or the amount of the Performance Security should be adjusted for fluctuation when it is adjusted under the last paragraph of sub-clause 4.2 [*Performance Security*].

The second paragraph is the subject of a further positive amendment. The entity that provides the Performance Security is no longer required to be “approved by the Employer”, but the Performance Security must be issued by a “reputable bank or financial institution”. Moreover, that bank or financial institution may be “selected by the Contractor”. The ability of the employer not to approve the contractor-proposed bank for petty reasons (and thereby to exert undue pressure) has been removed. There is now an objective criterion to be met by the contractor: is his bank reputable, i.e., is it of a certain financial standing? Undoubtedly, these amendments have a considerable positive effect on the contractor.

If not set out in the contract, the form of Performance Security is still subject to approval. Failure to do the latter could, therefore, result in difficulty in obtaining approval from the employer and particularly so if a conditional bond is offered whereas the contract anticipates an on-demand bond.

Furthermore, this sub-clause offers protection for all costs incurred in the event that the employer makes a false claim by limiting the employer's claims under the guarantee to “amounts to which the Employer is entitled” and the employer's entitlement to demand sums under the guarantee is limited by sub-clause 2.5 [*Employer's Claims*].

EIC, however, opposes the revised wording of the FIDIC 2010 MBD Harmonised Construction Contract to the extent that it does not list (as the FIDIC 1999 Red Book does) the reasons (an exhaustive list) for which a demand on the Performance Security could be made. We question the need for the revised wording because the existing FIDIC 1999 Red Book together with the reference to the ICC Uniform Rules provides sufficient guarantees to the employer as well as to the financing institutions and the contractor. The wording of this sub-clause was generally acceptable both to employers and to contractors before the revision. Now, the revised wording opens the way for employers to abuse the “on-demand” provisions.

We refer to our earlier observation that the FIDIC 2010 MDB Harmonised Construction Contract will be applied in the framework of the express policies to combat corruption existing within the World Bank and MDBs

and supported by contractors. The new clause wording may well represent an opportunity for abusive behaviour towards the contractor and significantly alters the balance of risk in the contract without providing any entitlement to the contractor for additional time or cost.

Last but not least, the MDB Harmonised Construction Contract adds a provision at the end of sub-clause 4.2 [*Performance Security*] that allows the engineer to request the contractor to vary the amount of the Performance Security in the event that there is a “change in cost and/or legislation or as a result of a Variation amounting to more than 25% of the portion of the Contract Price payable in a specific currency”.

7.7 Ownership of Plant and Materials

EIC welcomes the improvement of this sub-clause in the FIDIC 2010 MDB Harmonised Construction Contract. Whilst the FIDIC 1999 New Books determined that “Plant and Materials will become the property of the Employer when *delivered to Site* or when the Contractor is *entitled to payment* of the value of the Plant and Material”, whichever is the earlier, the MDB edition provides that ownership passes to the employer only when the Plant and Materials are incorporated in the works, or when the contractor is paid the corresponding value of such Plant and Materials, whichever is the earlier.

8. Commencement, Delay and Suspension

8.1 Commencement of Work

EIC agrees with the revised wording in the FIDIC 2010 MDB Harmonised Construction Contract that substitutes the time restrictions set out in the FIDIC 1999 Red Book with conditions precedent to be fulfilled before the issue of the instruction to commence the works. Contractors normally do not wish mobilisation to start work before the criteria set out in paragraphs (a) to (d) have been fulfilled. These are:

- (a) signature of the Contract Agreement by both parties, and if required, approval of the contract by relevant authorities of the country;
- (b) delivery to the contractor of reasonable evidence of the employer’s financial arrangements (under sub-clause 2.4 [*Employer’s Financial Arrangements*]);
- (c) except if otherwise specified in the Contract Data, effective access to and possession of the site given to the contractor together with such permission(s) under (a) of sub-clause 1.13 [*Compliance with Laws*] as required for the commencement of the works;
- (d) receipt by the contractor of the Advance Payment under sub-clause 14.2 [*Advance Payment*] provided that the corresponding bank guarantee has been delivered by the contractor.

In addition, it is a requirement that the engineer's instruction has been received by the contractor. However, the contractor has a right to terminate the contract under sub-clause 16.2 [*Termination by the Contractor*] if he does not receive said instruction within 180 days from his receipt of the Letter of Acceptance. Contractors should be aware that late receipt of the instruction might have consequences for the duration of the works in the event of weather seasons, for example.

In the event that no Contract Agreement is signed in accordance with sub-clause 1.6 [*Contract Agreement*] and/or 1.5 [*Priority of Documents*] and the contract becomes valid following the Letter of Acceptance, this document should form a condition precedent in the sense of paragraph (a). Therefore, the wording "(if any)" should be added after the "Contract Agreement".

14.2 Advance Payment

Provision is made for the contractor to receive an Advance Payment as an interest-free loan for his mobilisation and design provided that the amount of the advance is stated in the Contract Data.

If an advance payment is specified in the Contract Data then the engineer will issue an Interim Payment Certificate after receipt by him of

"a Statement (under Sub-Clause 14.3 [*Application for Interim Payment Certificates*]) and after the Employer receives (i) the Performance Security in accordance with Sub-Clause 4.2 [*Performance Security*], and (ii) a guarantee in amounts and currencies equal to the advance payment".

The advance payment may be paid in instalments. However, the number and timing of such instalments must be stated in the Contract Data and the contractor must ensure that this is clear in the advance payment guarantee.

There are some changes made to sub clause 14.2 in the FIDIC 2010 MDB Harmonised Construction Contract which are an improvement to the FIDIC 1999 Red Book. To start with, the third paragraph no longer requires that the entity that provides the Advance Payment Guarantee is "approved by the Employer", but that the Advance Payment Guarantee is issued by a "reputable bank or financial institution". Moreover, that bank or financial institution may be "selected by the Contractor". The ability of the employer not to approve the bank proposed by the contractor for petty reasons (and thereby to exert undue pressure) has thus been removed. The criterion that is to be met by the contractor is now an objective one: is the bank proposed by the contractor "reputable", i.e., is it of an adequate financial standing?

Whereas in the FIDIC 1999 Red Book repayment of the Advance Payment commences after only 10% of the Accepted Contract Amount less Provisional Sums has been certified for payment in Interim Payment Certificates by the engineer, the repayment deduction in the FIDIC 2010 MDB

Harmonised Construction Contract does not commence until 30% of the Accepted Contract Amount less Provisional Sums has been certified for payment in Interim Payment Certificates.

Whereas in the FIDIC 1999 Red Book, amortisation takes place through deduction of 25% of the value of each Interim Payment Certificate, thus generally causing the amortisation to be completed long before 90% of the Accepted Contract Amount less Provisional Sums has been certified for payment by the engineer, the FIDIC 2010 MDB Harmonised Construction Contract provides that amortisation takes place through deductions at the rate stated in the Contract Data from the amount of each Interim Payment Certificate, with the provision that the entire amount of the advance payment shall be repaid prior to the time that 90% of the Accepted Contract Amount less Provisional Sums has been certified for payment by the engineer. Thus the repayment of the advance payment may be stretched to the point in time where almost the whole Accepted Contract Amount less Provisional Sums has been certified by the engineer for payment. At the amortisation rate for the Advance Payment chosen by the MDBs, the contractor does indeed obtain cash-flow support.

15.6 Corrupt or Fraudulent Practices

This is a new sub-clause that does not appear in the FIDIC 1999 New Books. Apparently, the Multilateral Development Banks have not been completely successful in their harmonisation efforts, at least not with regard to the important question of what constitutes corrupt or fraudulent practices and the consequences thereof.

Sub-clause 15.6 contains separate approaches to this topic by:

1. the African Development Bank;
2. the Asian Development Bank;
3. the Black Sea Trade and Development Bank and the European Bank for Reconstruction and Development;
4. the Caribbean Development Bank;
5. the Inter-American Development Bank; and
6. the World Bank.

It is also significant that the issue is raised in clause 15 [*Termination by the Employer*] and it is not addressed in clause 16 [*Suspension and Termination by the Contractor*]. This implies that only contractors (and not employers) engage in corruption or fraudulent practices. This is not reflected by the experiences of contractors and this provision denies the contractor a reciprocal contractual mechanism to deal with an employer and/or the engineer that engages in corrupt or fraudulent practices.

EIC is critical of the fact that clause 16 [*Suspension and Termination by the Contractor*] does not provide the contractor with an explicit opportunity to

(suspend and/or) terminate the contract by reason of the employer and/or the engineer engaging in corruption, fraud or the like.

In this context, EIC observes a contractual imbalance which EIC already referred to under sub-clauses 3.1 [*Engineer's Duties and Authority*], 3.4 [*Replacement of the Engineer*] and 4.2 [*Performance Security*]. The FIDIC 2010 MDB Harmonised Construction Contract will be applied in the framework of the express policies to combat corruption existing within the World Bank and Multilateral Development Banks and generally supported by contractors. Against that background, EIC sees no benefit in granting discretionary rights to the employer. On the contrary, EIC would have preferred to see that the focus of this sub-clause is on closing every window of opportunity for potentially corruptive behaviour and recommends that the Multilateral Development Banks provide for reciprocal rights and duties for both parties and provide the contractor with a right to suspend or terminate the contract in case of coercive practices by the employer, the employer's personnel and/or the engineer.

The operation of sub-clause 15.6 is simple: If the employer “determines” —note that a conviction by an independent court of justice, the Dispute Board or any other more objective determination (which is strongly preferred) is not needed—that the contractor has in fact engaged in corrupt, fraudulent, collusive or coercive practices in competing for or in executing the contract, then he may (after giving 14 days' notice to the contractor) terminate the contract and expel him from the site. If any employee of the contractor is determined to have engaged in such practice during the execution of the work, then he may be removed in accordance with sub-clause 6.9 [*Contractor's Personnel*].

Upon examination of the banks' differing wordings of this sub-clause, the following items are worth noting:

- All the banks define to a greater or lesser extent the terms used to provide a framework for corrupt or fraudulent practices. Some definitions are quite similar and clear and practical, others differ greatly and allow a very broad interpretation. Interestingly, the African Development Bank, the European Bank for Reconstruction and Development and the Black Sea Trade and Development Bank have all omitted to define “coercive practices”.
- In some definitions reference is made to “the execution of a Contract”. Apparently, the bank in question wishes to extend the operation of this definition beyond the realm of the contract. So in the view of that bank, could a corrupt practice in the execution of *any* contract be a reason to the employer to terminate the contract? Would that have any effect where the first paragraph of sub-clause 15.6 clearly limits the entitlement of the employer to terminate the contract as a consequence of engaging in any of these practices within the realms of the contract?

- The Inter-American Development Bank has opted for a vastly different sub-clause, albeit that the first two paragraphs are the same as in the Contract Conditions employed by the other Multilateral Development Banks, spelling out the possible consequences of corrupt or fraudulent practices. However, the Inter-American Development Bank then continues by requiring all involved to adhere to the bank's policies for procurement of works and goods financed by the bank. It requires all involved to adhere to the highest ethical standards and to report any suspected acts. Fraud and corruption include "bribery, extortion or coercion, fraud, and collusion". These are then defined and the definitions cover the most common types of corrupt practices, but are not exhaustive.

17.6 Limitation of Liability

The modifications in the FIDIC 2010 MDB Harmonised Construction Contract water down the limitation concerning consequential damages and neutralise the benefit of the sub-clause. Whilst the FIDIC 1999 Red Book only referred to sub-clauses 16.4 [*Payment on Termination*] and sub-clause 17.1 [*Indemnities*], the amended sub-clause also relates to sub-clauses 8.7 [*Delay Damages*], 11.2 [*Cost of Remedying Defects*], 15.4 [*Payment after Termination*], 17.4 (b) [*Consequences of Employer's Risks*] and 17.5 [*Intellectual and Industrial Property Rights*] as exception from the principle that there is no liability on either party to the other party for loss of use of any works, loss of profit, loss of any contract or for any indirect or consequential loss or damage.

The newly introduced exceptions, sub-clauses 8.7, 11.2, and 17.4 (b), are made for reference only and do not alter the original risk allocation because these constitute services to be rendered under a contract by one party to the other party and can therefore not be affected by limitation of liability.

The incorporation of sub-clause 15.4 [*Payment after Termination*] in the list of exceptions constitutes by contrast a massive alteration of the risk allocation to the detriment of the contractor. In case of employer's termination, the contractor bears the risk of all indirect and consequential losses and damages including loss of profit, loss of revenue and business opportunities. These risks are not quantifiable.

Contractors should always strive to revert to the original FIDIC model risk allocation stipulated in the FIDIC 1999 New Books by deleting at least the exception of sub-clause 15.4 [*Payment after Termination*] by an appurtenant wording in the Particular Conditions. In addition, it should be noted that the overall limitation is no longer the Accepted Contract Amount, but instead a multiplier mechanism has been introduced.

17.7 Use of Employer's Accommodation/Facilities

EIC questions why this sub-clause (which was not present in the FIDIC 1999 Red Book) has been inserted under clause 17. The new sub-clause deals with the allocation of one further responsibility to the contractor and thus should have been dealt with in clause 4.

Moreover, the notion of "to the satisfaction of the Engineer" is a wording which FIDIC gave up many years ago for two good reasons. The contractor needs objective standards to work against, and, in addition, under many legal systems, such a subjective criterion in a contract clause cannot be easily reviewed in court or by a tribunal.

20. Claims, Disputes and Arbitration

20.1 Contractor's Claims

This sub-clause details the procedure that the contractor must follow when he considers himself entitled to an extension to the Time for Completion on and/or additional payment under any clause or otherwise in connection with the contract.

The contractor is required to give notice of his claim as soon as practicable and not later than 28 days after becoming aware, or when he should have become aware, of the event or circumstance giving rise to the claim. Failure to comply with this notice provision results in the contractor forfeiting his right to an extension to the Time for Completion and to additional payment and the employer is then discharged from his liability in connection with the event.

Therefore, the contractor must take great care in serving, the timing and the content of his notification.

EIC considers the penalty for failure to comply with a purely technical requirement to give notice of a claim is unduly harsh. With the FIDIC 1999 Red Book FIDIC removed the fundamental right of the contractor to make a claim merely as a result of a failure to comply within a fixed period of time to submit the required notice and detailed particulars. In certain circumstances, the contractor may prejudice his entitlement by failing to comply strictly with a notice provision but he should certainly not forfeit his rights altogether and neither should the employer be discharged from any and all liability in connection with an event. It is ironic that this provision would also apply when the event or circumstance giving rise to the claim is caused by the employer in the first case, for example, sub-clause 8.9 [*Consequences of Suspension*].

In addition to the 28-day notice period, the contractor is also subject to a 42-day period (that is a further 14 days) by which he has to send to the engineer "a fully detailed claim with full supporting particulars". This could prove to be extremely difficult and inevitably, the task of compiling and interpreting the relevant facts to support and justify the claim will be a

time-consuming and long drawn-out process. Such provisions could lead to intensive disputes and costly arbitration. Contractors should note also the provisions for continuing claims.

EIC welcomes that the FIDIC 2010 MDB Harmonised Construction Contract now clarifies that the engineer's response to the contractor's substantiation of its claim follows the procedure under sub-clause 3.5 [*Determinations*] and that:

“If the Engineer does not respond within the timeframe defined in this Clause, either Party may consider that the claim is rejected by the Engineer and any of the Parties may refer the matter to the Dispute Board in accordance with Sub-Clause 20.4 [*Obtaining Dispute Board's Decision*].”

Comments made under this sub-clause should be read in conjunction with those under sub-clauses 14.10 [*Statement at Completion*] and 14.14 [*Cessation of Employer's Liability*] all of which underline the importance of submitting all required notices in time to ensure that the contractor's rights are protected and maintained.

20.2 Appointment of the Dispute Board

The FIDIC 2010 MDB Harmonised Construction Contract renames the “Dispute Adjudication Board” to be the “Dispute Board”. It is important to understand that the Dispute Board (DB) makes “decisions” that are immediately binding on the parties and is therefore equivalent to the Dispute Adjudication Board (DAB) under the other FIDIC 1999 contracts and the 2004 ICC Dispute Board Rules.

This sub-clause provides for the establishment of the DB comprising either one or three members to be appointed by the parties. The DB is to be appointed by the date given in the Contract Data. The appointment of the DB expires after the contractor's written discharge to be provided under sub-clause 14.12 [*Discharge*] has become effective.

Accordingly, the DB is available throughout the duration of the contract to review any disputes referred to it.

If both parties agree, any matter may be referred to the DB to obtain its advisory opinions. If this is employed sensibly, it could present a useful forum for resolving disputes before they cause delay and disruption to the progress of the works.

The FIDIC 2010 MDB Harmonised Construction Contract makes further changes with respect to the FIDIC 1999 Red Book. The second paragraph clarifies and improves the mechanism for the selection of the third member of a three-person DAB. If in the first instance the parties do not agree on the nomination of the DB including the third member within the time stipulated for appointing the DB, then the parties will each nominate one member for the approval of the other. The two members shall recommend and the parties shall agree upon the third member.

20.3 Failure to Agree Dispute Board

Contractors should be advised that the Contract Data of the FIDIC 2010 MDB Harmonised Construction Contract does not indicate the President of FIDIC as the default nominating entity in the event the parties are unable to agree on the appointment of the DB. The appointing official is to be named in the Contract Data and contractors are cautioned to be certain that the employer has complied with this requirement in drafting its contract conditions.

The FIDIC 2010 MDB Harmonised Construction Contract makes an important improvement to the conditions precedent for invoking the nominating entity by adding in subparagraph (b) the words, “or fails to approve a member nominated by the other Party . . .” This improvement gives authority to the nominating entity to nominate if one party attempts to frustrate the process by its failure to approve. Such term is missing in the FIDIC 1999 Red Book.

20.4 Obtaining Dispute Board's Decision

As under the FIDIC 1999 Red Book, either party may refer a “dispute (of any kind whatsoever)” that arises out of the contract or the execution of the works to the DB and at any time. However, under the revised wording of sub-clause 20.1 [*Contractor's Claims*] of the FIDIC 2010 MDB Harmonised Construction Contract, the contractor now has certainty as to when he can initiate DB proceedings, i.e., either upon receipt of a determination or after expiry of a period of 42 days calculated from the date of request of such determination.

If the DB gives its decision as required by this sub-clause and if neither party gives Notice of Dissatisfaction within 28 days after having received the DB's decision, the decision becomes final and binding on the parties. Even if one or both of the parties is dissatisfied by a decision of the DB, it becomes binding on both parties “who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award”.

However, contractors should note that, if the employer refuses to honour the DB decision, its only remedy (other than perhaps suspension or termination) is to refer the matter to arbitration, obtain an award and then seek to enforce that award. That award may be months if not years after the DB decision.

The contractor is required to “continue to proceed with the Works” but the obligation of the employer, in so far as payment is concerned, is merely to comply with the normal process for Interim or Final Payments detailed in clause 14 [*Contract Price and Payment*]. Payment under this process does, of course, give the contractor the right to suspend or terminate the works if the employer fails to make the payment due. However, any payments due

as a result of a DB decision should be made with immediate effect and not in accordance with clause 14. Any failure to make immediate payment should give the contractor the rights under clause 16.

20.6 Arbitration

Whilst the FIDIC 2010 MDB Harmonised Construction Contract specifies that disputes shall be settled by arbitration, it deviates from the FIDIC 1999 New Books requirements for international arbitration. It introduces different procedures depending on whether the contract has been awarded to “foreign contractors” (in which case international arbitration rules shall apply) or to “domestic contractors” (in which case arbitration proceedings shall be conducted in accordance with the law of the employer’s country).

In principle, EIC understands the need for establishing two separate sets of dispute resolution mechanisms, depending on whether the project is characterised by local content only, or whether—especially on major projects—contractors from abroad execute a project in a foreign country. We are concerned, however, that the FIDIC 2010 MDB Harmonised Construction Contract provides for the unintended possibility for the employer ultimately to resort to a means of dispute settlement other than international arbitration.

In particular, the provisions of the FIDIC 2010 MDB Harmonised Construction Contract do not provide guidance on the characteristics of either a “foreign contractor” or a “domestic contractor”. It would thus be highly recommended to define in the FIDIC 2010 MDB Harmonised Construction Contract under which conditions a contractor is to be considered a “foreign contractor”. A definition could, e.g., read as follows:

“A Contract is with foreign contractors if the call for Tenders was international and also attracted contractors from countries other than the Employer’s, or if the Employer for the proper execution of the Works and other purposes connected with the project requests securities from international banks or from a parent company, the head office of which is in a country other than the Employer’s.”

If such a definition is not made, it is highly advisable for a foreign contractor to contractually agree that despite its local registration, a joint venture comprising a domestic contractor or any other local contents, international arbitration shall apply.

EIC also regrets that the FIDIC 2010 MDB Harmonised Construction Contract departs from automatically proposing ICC arbitration in case a foreign contractor is involved. According to sub-clause 20.6 (a) (i), the dispute shall be settled by the arbitration institution designated in the Contract Data, or, if so specified in the Contract Data, in accordance with the proceedings pursuant to the UNCITRAL Arbitration Rules.

Only in the case that the Contract Data are silent on the arbitration institution, then international arbitration shall be administered by the ICC and conducted under the ICC Rules of Arbitration.

The UNCITRAL Arbitration Rules, as now suggested by the FIDIC 2010 MDB Harmonised Construction Contract, are *ad hoc* rules with no arbitration institution. The mechanism creates a gap with regard to an Appointing Authority and, therefore, the contractor should be aware of the need to determine the Appointing Authority beforehand, as suggested by the UNCITRAL Arbitration Rules themselves.

Last but not least, EIC would like to point out that in many countries where the FIDIC 2010 MDB Harmonised Construction Contract may be used, problems exist in enforcing arbitral awards because of inefficiencies, bias or corruption in the local court system. Local courts subject to political pressures may be particularly loath to order enforcement against the state or state owned entities. Courts are, in some countries also inclined to intervene in arbitral awards or even proceedings on the basis that “errors of law” constitute a breach of public policy or other reasons.

Contractors are advised to carry out due diligence on the employer with which they will contract, and also the courts and judicial system of the country in which the works are to be carried out. Enforcement is much easier if assets are available outside the jurisdiction where the work is being done or if the entity with which one contracts trades internationally.

If there is likely to be a problem in enforcing an award, contractors should consider taking steps to ensure that they can remain cash-positive at all times by having sufficient advance payments in relation to the works. In this context bonds or guarantees should be performance related as opposed to “on demand”.

20.7 Failure to Comply with Dispute Board's Decision

The revised wording of this sub-clause erroneously maintains an ambiguity with regard to accessibility to arbitration. The wording of the first sentence should be equivalent to that used in the FIDIC Gold Book and read:

“In the event that a Party fails to comply with any decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20. [*Arbitration*] for summary or other expedited relief, as may be appropriate.”