

## **FIDIC's New Suite of Contracts - Clauses 17 to 19**

Risk, Responsibility, Liability, Indemnity, Insurance and Force Majeure

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### INTRODUCTION

Part I of the excellent article by Christopher Seppala in which he explains the thinking behind Clauses 17 & 19 of FIDIC's new suite of contracts, published by ICLR<sup>1</sup>, prompts me to respond with a critique of these two clauses and must, by necessity, include the related Insurance Clause sandwiched between them. Mr. Seppala explains lucidly the changes made in the FIDIC forms, which led to the new forms and how the new Clauses 17 and 19 differ from their equivalent provisions in FIDIC's old Red, Yellow and Orange Books. In this, article I attempt to highlight the shortcomings and problems in these new clauses and outline what, in my view, should have been the text of these three clauses.

#### A. Clause 17 - Risk & Responsibility

1. Although this clause of FIDIC's new suite of contracts is entitled "Risk & Responsibility", it encompasses other contractual provisions, including Indemnities; Limitation of Liability; and the unrelated topic of Intellectual and Industrial Property Rights. In fact, Clause 17 starts from the wrong end of the stick by dealing first with "Indemnities" and then it somehow back tracks to deal with "Responsibility" and then takes a further leap backwards and returns to "Risk" and finally marches on to "Liability". This illogical sequence hardly helps the non-lawyer professionals for whom these provisions are intended. The clause leaves even the expert in the field wondering about the purpose of this confused and baffling sequence.
2. The theory of Risk has developed in the past twenty years or so to such an extent that it is now common knowledge that for a contract to be performed in an effective manner, the inherent risks must be allocated to the contracting parties on some logical basis, which should be made known to them. Thus, it has been said that the main purpose of a contract is to identify the principles of allocating the risks facing the contracting parties. Once these principles are identified, the consequences flow in the natural pattern of Risk to Responsibility to Liability to Indemnity to Insurance<sup>2</sup>. The format of Clause 17 should, therefore, follow that same sequence, with the insurance provisions left to the next clause, i.e. Clause 18, if it is desired that they should be presented separately.
3. Accordingly, Clause 17 ought to start with the provisions for "Risk" and

not with "Indemnities" and Sub-clause 17.3 should be 17.1. Furthermore, the wording of Subclause 17.1 should then start by explaining that the risks included under Clause 17 of the conditions of contract are only those Risks of Loss and Damage and not the whole spectrum of the risks to which the project is exposed. The term "Employer's Risks" in the context of this clause should therefore be replaced by "Employer's Risks of Loss and Damage", since these risks are confined to those which lead to some form of accidental loss or damage to physical property or personal injury, which in turn may lead to financial and/or time loss risks, directly or through the other clauses of the contract.

4. If this explanation is not given and the mistake of referring to the risks under Clause 17 as "Employer's Risks" is not corrected, then there is serious danger that the reader, and of course the user, will conclude that having identified in Clause 17 the Employer's Risks, all the other risks are the Contractors' risks, including the contractual risks in the remaining provisions of the contract. This problem can be highlighted by reference to Clause 17 of the Orange Book where the draftsman fell into that trap and stated expressly in Sub-clause 17.5 that "*The Contractor's risks are all risks other than the Employer's Risks listed in Sub-Clause 17.3*". This mistake has led to many instances of misunderstanding, conflict and at least one serious arbitral proceedings, where the employer pointed out that by Sub-clause 17.5 he bears no risks under the contract other than those specified in Sub-clause 17.3.
5. It is also interesting to note that, in referring to the article by Mr. Seppala, the editors of ICLR fall into the same trap in their "Introduction". They refer to the term "Employer's Risks" in Sub-clause 17.3 as the contractual risks concluding that "*Part I (of the article) considers the contractual risks to be borne by contractor and employer...*".<sup>31</sup> As explained above, such a conclusion is of course incorrect.
6. Accordingly, it is essential to understand that the Employer's Risks traditionally identified under Sub-clause 20.3 of the old Red Book and those under Sub-clause 17.3 of the new suite of contracts, are only the amalgamation of risks which are beyond the control of either the contractor alone or both the contractor and the employer. Furthermore, these risks might have an implied resultant loss or damage to physical property or cause bodily injury, all of which are insurable. In contrast, very few of the other risks to which the project is exposed are insurable.
7. There are other problems in Clause 17. The second problem is the allocation of the risks specified in sub-paragraph (h) of Sub-clause 17.3 to the employer<sup>4</sup>. Whilst this does not form a departure from the old Red Book, it was hoped that the new suite of contracts would be up to date with developments in this field. The origin of this sub-paragraph goes back to the ACE Form of Contract recognisable as the route for the FIDIC Red Book. Whilst it is true that the contractor has no control over the events

identified in this sub-paragraph, he is in control over their consequences and can instigate protection measures. The contractor can also mitigate any losses that might occur should any of these risks eventuate. Perhaps, more importantly, all the risks identified in sub-paragraph (h) represent events that are insurable and are generally required to be insured under the terms of the contract. The employer ultimately pays for such insurance through the contract provisions leaving the contractor in charge of any necessary repair, its cost and any claim negotiations with the Insurers following the filing of such claims. These risks are not included as Employer's Risks in the ICE domestic contract or the others rooted in it<sup>5</sup>.

8. The third problem in Clause 17 of the new suite of contracts is the newly introduced restriction in Sub-clause 17.1(b)(ii) of the contractor's indemnity to the employer for property damage. This indemnity is now based on negligence rather than on legal liability as was provided in Clause 22.1 of the old Red Book.<sup>6</sup> This change is a retrograde step and copied from standard forms of contract for Building Works in the UK<sup>7</sup> without any benefit to either the contractor or the employer. The only beneficiary as a result of this change is the insurance market since to cover this gap a new policy is now needed, which is commonly referred to in the UK as the non-negligence insurance policy. As Mr. Seppala explains in his article, it seems that in making this change, the draftsmen of Clause 17 of the new suite of contracts took comfort from a footnote in Hudson's Building and Engineering Contracts (1995), Vol. II, page 1437, where reference is made to both the RIBA and the ICE forms of contract. The reference to the ICE form of contract in that footnote is incorrect since civil engineering contracts do not distinguish between the indemnity required to be given by the contractor for property damage on one hand and that for bodily injury, disease or death of any person on the other. In fact, the standard forms of contract for civil engineering construction in the UK or elsewhere do not impose the restriction now introduced.<sup>8</sup>
9. The last major problem in Clause 17 relates to the allocation to the contractor of the risk of "*use or occupation by the employer of any part of the Permanent Works*" in the EPC Form of contract. The reasoning for such allocation is extremely obscure since such use or occupation by the employer of any part of the Permanent Works cannot be within the control of the contractor and thus it is not a risk that could be assessed or against which some preventative measure could be taken.
10. Finally, there are some minor problems of drafting in Clause 17, which should be addressed for the proper understanding of what is intended by such a clause. For example, Sub-clause 17.2 is a "Responsibility" clause; Sub-clause 17.5 is a "Risk" clause; and accordingly they should be designated as such. Another example is the need for there to be a statement as to proportional apportionment of indemnities when both employer and contractor have contributed to damage, loss or bodily injury. This would be particularly important where an indemnity clause is strictly interpreted under the applicable law of contract.<sup>9</sup>

## B. Clause 18 -Insurance

11. Whilst there was no commentary provided by Mr. Seppala on Clause 18 of FIDIC's new suite of contracts, it is important to include one here, since, as explained earlier, insurance is the last of the contractual provisions in the chain of Risk; Responsibility; Liability; Indemnity; and Insurance.
12. The first major problem in this Clause is the fact that the "Insuring Party", as defined in the contract, is not the same for all the insurance policies required under the contract and it may be either of the two parties, employer or contractor. This is a recipe for confusion, gaps and/or overlaps in the combined insurance package, which could cost the parties dearly. It could only be advantageous to those involved in the insurance market.
13. The second paragraph of Clause 18 assumes that there would be a meeting between the parties prior to the date of the Letter of Acceptance at which the whole insurance package would be discussed and agreement would be reached on a policy towards insurance, which would "*take precedence over the provisions of (Clause IS)*". It remains to be seen as to how this provision would operate in practice and the effect it would have.
14. There are many drafting ambiguities in this Clause, which should be clarified if the contract is to be operated successfully. Examples are:
  - Sub-clause 18.1 provides that "*Wherever the Employer is the insuring Party, each insurance shall be effected with insurers and in terms consistent with the details annexed to the Particular Conditions*".<sup>10</sup> What is intended by the term "details"? If, as stated, these details are expected to furnish the terms of the insurances supplied by the employer, then surely this must mean that nothing less explicit than the policies of insurance themselves have to be annexed.
  - Sub-clause 18.1 provides that "*When each premium is paid, the insuring Party shall submit evidence of payment to the other Party ....*".<sup>11</sup> This wording does not provide the intended meaning. Payment of each insurance premium should be made to initiate or maintain the insurance cover and evidence should be provided whenever required.
  - Sub-clause 18.2(d) specifies the deductibles to be applied to the insurance cover for some of the Employer's risks. Should the insurance cover for the Contractor's risks be subject to no deductibles?
  - What is the meaning of "insurable at commercially reasonable terms" in Sub-clause 18.2(d); in the last paragraph of Sub-clause 18.2; and in Sub-clause 18.3(d)(iii)?

## C. Clause 19 - Force Majeure

15. As observed by Mr. Seppala, a force majeure clause is an increasingly common feature of international contracts. It is the fashion, but is it necessary or even desirable? For FIDIC, I suspect that importing force majeure from the old Yellow and Orange Books into the new suite of contracts was a desire to show a closer position to the civil law concepts and a move away from the common law principles. If the truth be told, such a move in the context of "force majeure" is neither necessary nor desirable because:

- Firstly, incorporating a clause such as Clause 19 into a contract not only duplicates what is usually provided for in the civil code of a civil law jurisdiction, but also enlarges the scope of the meaning and application of force majeure. This could result in the Parties getting into a muddle and a contradictory situation;
- Secondly, the original concept of the Special Risks in Clause 65 of the old Red Book is all the protection that the contractor needs;
- Thirdly, most of the risks, which now come under the FIDIC definition of force majeure, are insurable and required to be insured. Therefore, no real benefit accrues to the contractor from being protected by such a clause without having to slip into uncharted waters.

16. Therefore, whilst it must be agreed that the treatment of the risks specified in Clause 19 should be a special one, it is erroneous to swing to the extreme end of the scale and designate them in the category of force majeure, particularly when that term has legal implications in certain jurisdictions. The answer for the purposes of these conditions of contract should be to designate as what they are, i.e. an exceptional set of risks with different treatment to that given to the normal set of risks to which the project is exposed.

D. The solution

17. It is unwise to criticise without offering a reasonable alternative. Therefore, attached herewith is a replacement offer to Clauses 17 to 19 of the new Red Book of FIDIC. The new Yellow Book and the Silver Book require some modification to suit the risks shifted from the employer to the contractor and in particular the design risk.

E. The Replacement for Clauses 17 to 19 of the New Red Book <sup>12, 13</sup>

## **17 RISK AND RESPONSIBILITY**

### ***Employer's Risks of Loss & Damage***

17.1 The risks of loss and damage to the Works, Goods or Contractor's

Documents for which the Contractor is not liable are:

(a) Employer's Exceptional Risks of Loss & Damage, which are:

- i. war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
- ii. rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,
- iii. riot, commotion or disorder within the Country by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors, and
- iv. munitions of war, explosive materials, ionising radiation or contamination by radio-activity, within the Country, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity.

(b) Employer's Normal Risks of Loss & Damage, which are:

- i. pressure waves caused by aircraft or other aerial devices traveling at sonic or supersonic speeds,
- ii. use or occupation by the Employer of any part of the Permanent Works, except as may be specified in the Contract, and
- iii. design of any part of the Works by the Employer's Personnel or by others for whom the Employer is responsible, if any.

### ***Responsibility for Care of the Works***

17.2 The Contractor shall take full responsibility for the care of the Works and Goods from the Commencement Date until the Taking-Over Certificate is issued (or is deemed to be issued under Sub-Clause 10.1 [Taking Over of the Works and Sections]) for the Works, when responsibility for the care of the Works shall pass to the Employer. If a Taking-Over Certificate is issued (or is deemed to be issued) for any Section or part of the Works, responsibility for the care of the Section or part shall then pass to the Employer.

After responsibility has accordingly passed to the Employer, the Contractor shall take responsibility for the care of any work which is outstanding on the date stated in a Taking-Over Certificate, until this outstanding work has been completed.

If any loss or damage happens to the Works, Goods or Contractor's Documents during the period when the Contractor is responsible for their care, from any cause not listed in Sub-Clause 17.1 [Employer's Risks of Loss & Damage], the Contractor shall rectify the loss or damage at the Contractor's risk and cost, so that the Works, Goods and Contractor's Documents conform with the Contract.

The Contractor shall be liable for any loss or damage caused by any actions performed by the Contractor after a Taking-Over Certificate has been

issued. The Contractor shall also be liable for any loss or damage, which occurs after a Taking-Over Certificate has been issued and which arose from a previous event for which the Contractor was liable.

### ***Consequences of Employer's Risks of Loss & Damage***

17.3 If any of the risks listed in Sub-Clause 17.1 (a) above occur, the parties' rights and obligations are set out in Clause 19 below.

If and to the extent that any of the risks listed in Sub-Clause 17.1(b) above result in loss or damage to the Works, Goods or Contractor's Documents, the Contractor shall promptly give notice to the Engineer and shall rectify this loss or damage to the extent required by the Engineer. If the Contractor suffers delay and/or incurs Cost from rectifying this loss or damage, the Contractor shall give a further notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and
- (b) payment of any such Cost, which shall be included in the Contract Price. In the case of sub-paragraphs ii and iii of Sub-Clause 17.1(b) [*Employer's Normal Risks of Loss & Damage*], reasonable profit on the Cost shall also be included.

After receiving this further notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

### ***Risk of infringement of Intellectual and Industrial Property Rights***

17.4 In this Sub-Clause, "infringement" means an infringement (or alleged infringement) of any patent, registered design, copyright, trade mark, trade name, trade secret or other intellectual or industrial property right relating to the Works; and "claim" means a claim (or proceedings pursuing a claim) alleging an infringement.

Whenever a Party does not give notice to the other Party of any claim within 28 days of receiving the claim, the first Party shall be deemed to have waived any right to indemnity under this Sub-Clause.

The Employer shall indemnify and hold the Contractor harmless against and from any claim alleging an infringement which is or was:

- (a) an unavoidable result of the Contractor's compliance with the Contract,  
or

- (b) a result of any Works being used by the Employer:
- i. for a purpose other than that indicated by, or reasonably to be inferred from, the Contract, or
  - ii. in conjunction with any thing not supplied by the Contractor, unless such use was disclosed to the Contractor prior to the Base Date or is stated in the Contract.

The Contractor shall indemnify and hold the Employer harmless against and from any other claim which arises out of or in relation to (i) the manufacture, use, sale or import of any Goods, or (ii) any design for which the Contractor is responsible.

If a Party is entitled to be indemnified under this Sub-Clause, the indemnifying Party may (at its cost) conduct negotiations for the settlement of the claim, and any litigation or arbitration which may arise from it. The other Party shall, at the request and cost of the indemnifying Party, assist in contesting the claim. This other Party (and its Personnel) shall not make any admission which might be prejudicial to the indemnifying Party, unless the indemnifying Party failed to take over the conduct of any negotiations, litigation or arbitration upon being requested to do so by such other Party.

### ***Limitation of Liability***

17.5 Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect loss or damage which may be suffered by the other Party in connection with the Contract, other than under Sub-Clause 16.4 [*Payment on Termination*], Sub-Clause 17.6 [*Indemnities by the Contractor*], and Sub-Clause 17.7 [*Indemnities by the Employer*].

Indirect loss shall include, but not limited to, for the purpose of this clause loss of profits, loss of use, loss of production, loss of business or loss of business opportunity

The total liability of the Contractor to the Employer, under or in connection with the Contract other than under Sub-Clause 4.19 [*Electricity, Water and Gas*], Sub-Clause 4.20 [*Employer's Equipment and Free-Issue Material*], and Sub-Clause 17.4 [*Risk of Infringement of Intellectual and Industrial Property Rights*] shall not exceed the sum stated in the Particular Conditions or (if a sum is not so stated) the Accepted Contract Amount.

This Sub-Clause shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.

### ***Indemnities by the Contractor***

17.6 The Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

- (a) bodily injury, sickness, disease or death of any person whatsoever employed on or in connection with the Works; and
- (b) damage to or loss of any property real or personal (other than the Works),

arising out of or in the course of or by reason of the Contractor's design (if any), the execution and completion of the Works and the remedying of any defects, unless attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents.

#### ***Indemnities by the Employer***

17.7 The Employer shall indemnify and hold harmless the Contractor, the Contractor's Personnel and their respective agents against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of:

- (a) bodily injury, sickness, disease or death, which is attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel, or any of their respective agents;
- (b) Damage to crops being on the Site (save in so far as possession has not been given to the Contractor);
- (c) The use or occupation of land (provided by the Employer) by the Works or any part thereof or for the purpose of the construction and completion of the Works (including Consequential Losses of Crops) or interference whether temporary or permanent with any right of way light air or water or other easement or quasi-easement which are the unavoidable result of construction of the Works in accordance with the Contract;
- (d) The right of the Employer to construct the works or any part thereof on over under in or through any land;
- (e) Damage which is the unavoidable result of the Contractor's obligations to execute the Works and remedy any defects in accordance with the

Contract; and

(f) The Employers' Risks as set out in Sub-Clause 17.1 above.

The indemnities provided pursuant to Sub-Clause 17.6 and this Sub-Clause by the parties towards each other shall be proportionally reduced, if any act or neglect by either Party to the other Party contributed to the said bodily injury, sickness, disease, death, damage or loss.

## **18 INSURANCE**

### ***General Requirements for Insurances***

18.1 If a policy indemnifies additional joint insured, namely in addition to *the Employer and the Contractor* (i) the Contractor shall act under the policy on behalf of these additional joint insured except that the Employer shall act for Employer's Personnel, (ii) additional joint insured shall not be entitled to receive payments directly from the insurer or to have any other direct dealings with the insurer, and (iii) the insuring Party shall require all additional joint insured to comply with the conditions stipulated in the policy.

Each policy insuring against loss or damage shall provide for payments to be made in the currencies required to rectify the loss or damage. Payments received from insurers shall be used for the rectification of the loss or damage.

The Contractor shall, within 28 days of the date of the Letter of Acceptance\_ or as otherwise agreed, submit to the Employer:

- (a) evidence that the insurances described in this Clause have been effected, and
- (b) copies of the policies for the insurances described in Sub-Clause 18.2 [*Insurance for Works and Contractor's Equipment*] and Sub-Clause 18.3 [*Insurance against Injury to Persons and Damage to Property*]. .
- (c) evidence of payment of each insurance premium

Whenever evidence or policies are submitted to the Employer, the Contractor shall also notify the Engineer of such submission.

The Employer and the Contractor shall comply with the conditions stipulated in each of the insurance policies. In the event that the Contractor or the Employer fails to comply with any condition imposed by the

insurance policies effected pursuant to the Contract each shall indemnify the other against all losses and claims arising from such failure. The Contractor shall keep the insurers informed of any relevant changes to the execution of the Works and ensure that insurance is maintained in accordance with this Clause.

Neither Party shall make any alteration to the terms of any insurance without the prior approval of the other Party. If an insurer makes (or attempts to make) any alteration, the Party notified by the insurer shall promptly give notice to the other Party.

If the Contractor fails to effect and keep in force any of the insurances it is required to effect and maintain under the Contract, or fails to provide satisfactory evidence and copies of policies in accordance with this SubClause, the Employer may (at its option and without prejudice to any other right or remedy) effect and keep in force any such insurance for the relevant coverage and pay the premiums due. The Employer may from time to time deduct the amount of these premiums so paid from any monies due or which may become due to the Contractor or recover the same as a debt due from the Contractor, and the Contract Price shall be adjusted accordingly.

Nothing in this Clause limits the obligations, liabilities or responsibilities of the Contractor or the Employer, under the other terms of the Contract or otherwise. Any amounts not insured or not recovered from the insurers shall be borne by the Contractor and/or the Employer in accordance with these obligations, liabilities or responsibilities. However, if the insuring Party fails to effect and keep in force an insurance which is available and which it is required to effect and maintain under the Contract, and the other Party neither approves the omission nor effects insurance for the coverage relevant to this default, any moneys which should have been recoverable under this insurance shall be at the cost of the Contractor.

Payments by one Party to the other Party shall be subject to Sub-Clause 2.5 [*Employer's Claims*] or Sub-Clause 20.1 [*Contractor's Claims*] as applicable.

## **Insurance for Works and Contractor's Equipment**

18.2 The Contractor shall insure the Works, Plant, Goods and Materials (including any unfixed Materials and Plant or other things whether on the Site or otherwise intended for the Works) and Contractor's Documents for not less than the full reinstatement cost plus an additional 10% to cover any additional costs that may arise incidental to the rectification of any loss or damage including cost of demolition, removal of debris, professional fees and profit. This insurance shall be effective from the Commencement Date until the date of issue of the relevant Taking-Over Certificate for the

Works.

The Contractor shall maintain this insurance to provide cover until the date of issue of the Performance Certificate, for loss or damage for which the Contractor is liable arising from a cause occurring prior to the issue of the Taking-Over Certificate, and for loss or damage caused by the Contractor in the course of any other operations (including those under Clause 11 [*Defects Liability*]).

The Contractor shall insure the Contractor's Equipment for not less than the full replacement value, including delivery to Site. For each item of Contractor's Equipment, the insurance shall be effective while it is being transported to the Site and until it is no longer required as Contractor's Equipment.

The insurance policies under this Sub-Clause:

- (a) shall be in the joint names of the Employer and the Contractor, who shall be jointly entitled to receive payments from the insurers, payments being held or allocated between the parties for the sole purpose of rectifying the loss or damage,
- (b) shall cover all loss and damage from any cause not listed in Sub-Clause 17.1 [Employer's Risks of Loss & Damage], with deductibles per occurrence of not more than the amount stated in the Appendix to Tender.
- (c) shall also cover loss or damage to a part of the Works not in the occupation of the Employer which is attributable to the use or occupation by the Employer of another part of the Works; and
- (d) may however exclude loss of, damage to, and reinstatement of:
  - i. a part of the Works which is in a defective condition due to a defect in its design, materials or workmanship (but cover shall include any other parts which are lost or damaged as a direct result of this defective condition and not as described in subparagraph (ii) below),
  - ii. a part of the Works which is lost or damaged in order to reinstate any other part of the Works if this other part is in a defective condition due to a defect in its design, materials or workmanship, and
  - iii. a part of the Works which has been taken over by the Employer, except to the extent that the Contractor is liable for the loss or damage.

***Insurance against Injury to Persons and Damage to Property***

18.3 The Contractor shall insure against each Party's liability for any loss, damage, death or bodily injury which may occur to any physical property (except things insured under Sub-Clause 18.2 [Insurance for Works and Contractors Equipment;]) or to any person (except persons insured under Sub-Clause 18.4 [Insurance for Contractor's Personnel]), which may arise out of the Contractor's performance of the Contract and occurring before the issue of the Performance Certificate.

This insurance shall be for a limit per occurrence of not less than the amount stated in the Appendix to Tender, with no limit on the number of occurrences, and with deductibles per occurrence of not more than the amount(s) stated in the Appendix to Tender. If an amount is not stated in the Appendix to Tender, this Sub-Clause shall not apply.

The insurance policies specified in this Sub-Clause:

- (a) shall be in the joint names of the parties defined in the Appendix to Tender and shall contain a cross liabilities clause such that the cover shall apply separately to each Insured as though a separate policy had been issued for each of them.
- (b) may however exclude liability to the extent that it arises from a cause listed in Sub-Clause 17.7 [*Indemnity by the Employer*].

#### ***Insurance for Contractor's Personnel***

18.4 The Contractor shall effect and maintain insurance against liability for claims, damages, losses expenses (including legal fees and expenses) arising from injury, sickness, disease or death to any person employed by the Contractor or any other of the Contractor's Personnel.

The Employer and the Engineer shall also be indemnified under the policy of insurance, except that this insurance may exclude losses and claims to the extent that they arise from any act or neglect of the Employer or of the Engineer or their respective servants or agents or any other contractor (not being employed by the Contractor).

The insurance shall be maintained in full force and effect during the whole time that these personnel are assisting in the execution of the Works. For a Subcontractor's employees, the Subcontractor may effect the insurance, but the Contractor shall be responsible for compliance with this Clause.

### **19 EMPLOYER'S EXCEPTIONAL RISKS OF LOSS & DAMAGE**

#### ***Notice of an Employer's Exceptional Risk of Loss & Damage***

19.1 If a Party is or will be prevented from performing any of its obligations under the Contract by an Employer's Exceptional Risk of Loss & Damage, then it shall give notice to the other Party of the event or circumstances constituting such a risk and shall specify the obligations, the performance of which is or will be prevented. The notice shall be given within 14 days after the Party became aware, (or should have become aware), of the relevant event or circumstance constituting such risk.

The Party shall, having given notice, be excused performance of such obligations for so long as such risk prevents that Party from the performance thereof

Notwithstanding any other provision of this Clause, an Employer's Exceptional Risk shall not relieve either Party from making payments to the other Party under the Contract.

### ***Duty to Minimise Delay***

19.2 Each Party shall at all times use all reasonable endeavours to minimise any delay in the performance of the Contract as a result of an Employer's Exceptional Risk.

A Party shall give notice to the other Party when it ceases to be affected by the Employer's Exceptional Risk.

### ***Consequences of an Employer's Exceptional Risk***

19.3 If the Contractor is prevented from performing any of his obligations under the Contract by an Employer's Exceptional Risk of which notice has been given under Sub-Clause 19.1 [*Notice of an Employer's Exceptional Risk of Loss & Damage*], and suffers delay and/or incurs Cost by reason of such an Employer's Exceptional Risk, the Contractor shall be entitled subject to Sub-Clause 20.1 [*Contractor's Claims*] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [*Extension of Time for Completion*], and
- (b) if the event or circumstance is of the kind described in sub-paragraph (a) of Sub-Clause 17.1 [*Employer's Risks of Loss & Damage*] and, in the case of sub-paragraphs 17.1(a) (ii) to (iv), occurs in the Country, payment of any such Cost.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [*Determinations*] to agree or determine these matters.

### ***Optional Termination, Payment and Release***

19.4 If the execution of substantially all the Works in progress is prevented for a continuous period of 84 days by reason of Exceptional Risks of which notice has been given under Sub-Clause 19.1 [Notice of an Employer's Exceptional Risk of Loss & Damage], or for multiple periods which total more than 140 days due to the same notified Exceptional Risks, then either Party may give to the other Party a notice of termination of the Contract. In this event, the termination shall take effect 7 days after the notice is given, and the Contractor shall proceed in accordance with Sub-Clause 16.3 [Cessation of Work and Removal of Contractor's Equipment]. Upon such termination, the Engineer shall determine the value of the work done and issue a Payment Certificate which shall include:

- (a) the amounts payable for any work carried out for which a price is stated in the Contract;
- (b) the Cost of Plant and Materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery: this Plant and Materials shall become the property of (and be at the risk of) the Employer when paid for by the Employer, and the Contractor shall place the same at the Employer's disposal;
- (c) any other Cost or liability which in the circumstances was reasonably incurred by the Contractor in the expectation of completing the Works;
- (d) the Cost of removal of Temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost); and
- (e) the Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination.

### ***Release from Performance under the Law***

19.5 Notwithstanding any other provision of this Clause, if any event or circumstance outside the control of the parties (including, but not limited to the Exceptional Risks) arises after the date of the Letter of Tender which makes it impossible or unlawful for either or both parties to fulfil its or their contractual obligations or which, under the law governing the Contract, entitles the parties to be released from further performance of the Contract, then upon notice by either Party to the other Party of such event or circumstance:

- (a) the parties shall be discharged from further performance, without

prejudice to the rights of either Party in respect of any previous breach of the Contract, and

- (b) the sum payable by the Employer to the Contractor shall be the same as would have been payable under Sub-Clause 19.4 [Optional Termination, Payment and Release] if the Contract had been terminated under Sub-Clause 19.4.

## NOTES

1. Add to Clause 1 (Definitions) the definition of Employer's Exceptional Risks & Normal Risks as defined in 17.1.
2. Delete the definition of Force Majeure.

## FOOTNOTES

- <sup>1</sup> C. Seppala, "FIDIC's New Standard Forms of Contract - Force Majeure, Claims Disputes and Other Clauses", ICLR Vol. 17, Part 2, April 2000.
- <sup>2</sup> Nael G. Bunni, "The FIDIC Form of Contract-4" Edition", Black well Science. 1997.
- <sup>3</sup> Page 231, 7th line
- <sup>4</sup> The risks in paragraph (h) of Sub-clause 17.3 are: "*any operation of the forces of nature which is u'nforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions*".
- <sup>5</sup> For example, the Form of Contract for civil engineering construction of the Institution of Engineers of Ireland
- <sup>6</sup> Sub-clause 17.1(b)(ii) of the new suite of contracts provides that "*The Contractor shall indemnify and hold harmless the Employer, the Employer's Personnel, and their respective agents, against and from all claims, damages, losses and expenses (including legal fees and expenses) in respect of o damage to or loss of any property, real or personal (other than the Works), to the extent that such damage or loss:.....: is attributable to any negligence, wilful act or breach of the Contract by the Contractor....*"
- <sup>7</sup> Mr. Seppala explains on page 238 of his article referred to herein that FIDIC adopted this change in line with the policy in the major UK and other standard forms.
- <sup>8</sup> Cause 22 of the ICE form, whether the 5<sup>o</sup> edition, which is referred to in the referenced footnote in Hudson's Banding and Engineering Contracts (1995), or the 6<sup>h</sup> or the 7<sup>h</sup> edition, do not refer to negligence by the contractor and do not distinguish between the indemnity required for property damage as against that for bodily injury, disease or death of any person.
- <sup>9</sup> For example, under English law, indemnity clauses would be strictly construed if the indemnitee seeks to enforce the clause in spite of his own

negligence or fault.

<sup>10</sup> See the second line of the third paragraph of Clause 18.

<sup>11</sup> The wording chosen is "When each premium is paid...", which is not sufficiently explicit. It is not a question of when, since there is usually no insurance cover unless the premium has already been paid.

<sup>12</sup> My grateful thanks are due to Mr. Eamonn Conlon of Masons and Mr. Anthony Harkness, insurance consultant. for the time they have given to studying and refining the many drafts of these alternative Clauses.

<sup>13</sup> Any one who is attracted to using part or all of these clauses should carefully consider their effect on the conditions of contract incorporating them and should take full responsibility & liability for such use.