

FIDIC'S GREEN BOOK – CLAUSES 6, 13 & 14

RISK, RESPONSIBILITY, LIABILITY, INDEMNITY, INSURANCE AND *FORCE MAJEURE*

NAEL G. BUNNI

*BSc, MSc, PhD, CEng, FICE, FIEI, FStructE, FCI Arb, FIAE, MConsEI.**

INTRODUCTION

Having attempted to highlight the shortcomings and problems behind Clauses 17 to 19 of the three major forms of FIDIC's 1999 suite of contracts and outline what, in my view, should have been the text of these three clauses,¹ I was invited to give my views on the equivalent clauses in FIDIC's fourth form of that suite, the new Green Book. The Green Book, as stated in its Forward, is intended to be used as a form of contract for engineering and building work of fairly simple or repetitive work of short duration with relatively small capital value,² but it may be suitable, subject to the type of work and circumstances, for contracts of greater value. The objective of the Green Book is for the Contract to express in clear and simple terms traditional procurement concepts.³

Furthermore, the form is drafted in a flexible format which includes all essential commercial provisions and a variety of administrative arrangements. Thus, it is envisaged that the design may be provided by the employer, by others on his behalf, or by the contractor in a design/build format. In the latter situation, tenderers would be required to submit a design with their tenders which would be governed by the provisions of clause 5 of the Conditions "*Design by Contractor*". It is also envisaged that in the Green Book there would be no traditional "*Engineer*" or "*Employer's Representative*" in the formal sense used by FIDIC in most of its other forms of contract. Instead, the employer takes over the functions usually performed by the Engineer or the Employer's Representative. However, the employer may appoint an independent engineer to act impartially by modifying clause 3 of the Conditions "*Employer's Representative*".

* Chartered Engineer, Conciliator & Registered Chartered Arbitrator. Visiting Professor in Construction Law & Contract Administration at Trinity College Dublin.

¹ Nael G. Bunni, "FIDIC's New Suite of Contracts – Clauses 17 to 19, risk, Responsibility, Liability, Indemnity, Insurance and *Force Majeure*", [2001] 18 ICLR 523.

² It is suggested that the intended capital value is around US\$0.5 million.

³ See the first line of the Notes for Guidance, which forms the last section of the Green Book.

These various options are explained at the end of the Green Book in a section entitled “Notes for Guidance”, which do not form part of the Contract.⁴ Accordingly, once the employer considers the options available to him under the Green Book, he is guided to select what he needs and deletes what he does not, ending in a contract form which crystallises his choice. The employer is then directed to complete an appendix, which incorporates the characteristics of his chosen contract, prior to inviting tenders. This appendix appears at the beginning of the Green Book as part of the Agreement, which will be eventually signed with the selected contractor.

The flexibility of the document is a significant feature of the Green Book, particularly where insurance is concerned. This is due to the fact that the relevant clause, clause 14, only specifies the general framework of the cover required leaving the various details to be completed by the employer in the Appendix with extensive freedom to include any insurance requirement and in any detail he deems fit.

Therefore, for the purposes of the topic of this article, we need to focus not only on clauses 13 and 14 of the General Conditions of the Green Book, but also on the Appendix. However, as is noted later, it is also necessary to concentrate on the terms of clause 6, “*Employer’s Liabilities*”, and on sub-clause 1.1 “*Definitions*”, which provides in parts the definition of certain terms relevant to Risk, Responsibility, Liability and Insurance: “*Commencement Date, Cost, Contractor’s Equipment, Employer’s Liabilities, Force Majeure, Materials, Plant and Works*”.

In this commentary, I shall deal with the relevant topics by following the logical sequence of their inter-relationship, starting with Risk & Responsibility and ending with Liability and Insurance.

ANALYSIS & COMMENTARY

A. Clause 13 – Risk & Responsibility

It is useful for ease of reference to set out here the text of clause 13 of the Green Book.

“13. Risk and Responsibility

Contractor’s Care of the Works

13.1 The Contractor shall take full responsibility for the care of the Works from the Commencement Date until the date of the Employer’s notice under Sub-Clause 8.2. Responsibility shall then pass to the Employer. If any loss or damage happens to the Works during the above period, the Contractor shall rectify such loss or damage so that the Works conform with the Contract.

⁴ Unlike FIDIC Contracts Guide for the major forms of contract in FIDIC's 1999 Suite, which was published separately during 2001, but was copyrighted in 2000, the Notes for Guidance of the Green Book were given in the last section of the Book itself.

Unless the loss or damage happens as a result of an Employer's Liability, the Contractor shall indemnify the Employer, the Employer's contractors, agents and employees against all loss or damage happening to the Works and against all claims or expense arising out of the Works caused by a breach of the Contract, by negligence or by other default of the Contractor, his agents or employees.

Force Majeure

13.2 If a Party is or will be prevented from performing any of its obligations by Force Majeure, the Party affected shall notify the other Party immediately. If necessary, the Contractor shall suspend the execution of the Works and, to the extent agreed with the Employer, demobilise the Contractor's Equipment.

If the event continues for a period of 84 days either Party may then give notice of termination which shall take effect 28 days after the giving of the notice.

After termination, the Contractor shall be entitled to payment of the unpaid balance of the value of the Works executed and of the Materials and Plant reasonably delivered to the Site, adjusted by the following:

- a) any sums to which the Contractor is entitled under Sub-Clause 10.4,
- b) the Cost of his suspension and demobilisation,
- c) any sums to which the Employer is entitled.

The net balance due shall be paid or repaid within 28 days of the notice of termination.”

It is generally accepted that the purpose of a construction contract is to identify the risks to which the contracting parties are exposed and to allocate these risks and the consequent responsibility and liability to the parties, if and when such risks eventuate.

As can be seen from its title, clause 13 of the Green Book is the relevant clause to the topics of risk and responsibility. However, as we read the text of this clause, we find that there is no mention of Risk at all. In fact, other than in the title, the word “**Risk**” does not appear anywhere in the Green Book. But, on close scrutiny, it becomes apparent that the reference to an **Employer's Liability** in the second paragraph of clause 13 is intended to lead the reader to clause 6 of the form, where for some inexplicable reason the draftsman refers to risks as liabilities. It is extremely peculiar that FIDIC which pioneered the adoption of the risk concepts in its various forms of contract⁵ is now turning the clock back with its Green Book and confusing risk with liability. Even from a linguistic point of view, it is difficult to understand how one could confuse risk with liability. They are two terms which are entirely different etymologically, scientifically, legally and in every other sense. Risk is technically defined as “**A combination of the probability, or frequency, of occurrence of a defined**

⁵ The third edition of the Yellow Book and to some extent the fourth edition of the Red Book, both of which were first published in 1987, were the first forms of contract that recognised the natural flow of Risk to Responsibility to Liability to Indemnity to Insurance. See in this connection, Nael G. Bunni, “The FIDIC Form of Contract – 4th Edition”, second edition, Blackwell Science, 1997”.

hazard and the magnitude of the consequences of the occurrence".⁶ Liability, on the other hand is defined as *"the legal concept of one party being subject to the power of another, or to a rule of law requiring something to be done or not done. This requirement to do something or not to do it can be compelled by legal process at the other party's instance. It is sometimes called subjection."*⁷ Liability may arise either from a voluntary act or by force of some rule of law. Thus, a person who enters into a contract becomes liable to perform what he has undertaken, or to pay for the counterpart performance, or otherwise to implement his part of the bargain.

Even if it were not wrong to use the term *"risk"* and mean *"liability"*, and in the writer's view it is wrong, the substitution of *"risks"* with *"liabilities"* is a detrimental step. The topics of risk and risk management are now part of a respected field of science and their principles should be strengthened and enhanced rather than diluted in any contract.

Moving on to the second paragraph of clause 13.1, the text presents us with an equally serious problem and that is in respect of the gap created by the division of risks (referred to as liabilities), between the employer and the contractor. The employer is allocated the risks described in clause 6. The contractor is allocated the risks of all loss or damage happening to the Works and of all claims or expense arising out of the Works caused by *"a breach of the Contract, by negligence or by other default of the Contractor, his agents or employees"*. To whom then are the other risks allocated? The risks referred to here are the risks that do not qualify within the meaning of an *"employer's risk"* nor can they be described as *"a breach of the Contract"* by the Contractor. This problem is of a similar nature to that created in the three major forms of contract published by FIDIC in 1999 through their sub-clause 17.1(b)(ii) where the basis of indemnity is negligence rather than legal liability.⁸ This gap in risk allocation ultimately creates a gap in the insurance cover for the project, unless it is specifically dealt with in the Appendix.

Clause 13.2 deals with Force Majeure, which is a risk allocated to the employer in sub-clause 6.1(i), although it is referred to as *"a liability"*. Force Majeure is defined in sub-clause 1.1.14 of the Green Book as *"an exceptional event or circumstance: which is beyond a Party's control, which such Party could not reasonably have provided against before entering into the Contract; which, having arisen, such Party could not reasonably have avoided or overcome; and, which is not substantially attributable to the other Party."*

Whatever the merit, desirability or necessity for such a clause in a major form of contract such as the New Red, Yellow or the Silver Books, it is suggested here that there is none for a *"simple contract of short duration with relatively small capital value"*. This is due to the complications it creates from the legal and insurance points of view. It is further suggested that the appropriate method of dealing with the risks as captured by the intended meaning of clause 13.2 of the Green Book is to designate them as exceptional risks leading to specific

⁶ British Standard No. 4778: Section 3.1- Guide to concepts and related definitions: 1991. The British Standards Institution, Linford Wood, Milton Keynes, MK14 6LE, UK. In the same British Standard, the definition of "hazard" is given as "A situation that could occur during the lifetime of a product, system or plant that has the potential for human injury, damage to property, damage to the environment, or economic loss".

⁷ David M. Walker, "The Oxford Companion to Law", Clarendon Press, Oxford, 1980.

⁸ See reference no.1 above, but page 525, last paragraph.

remedies under the contract as is the case under clauses 65 and 66 of the 4th edition of the old Red Book: “*Special Risks*” and “*Release from Performance*”.⁹

Whilst the development of the title of clause 66 of the old Red Book from “*Frustration*” in its 3rd edition to “*Release from Performance*” in the 4th edition is outside the scope of this article, it is perhaps worth briefly exploring the difference between the two doctrines of frustration and Force Majeure with particular reference to construction and construction insurance.

With the exception of the White Book, the FIDIC construction contracts in their various forms and titles have always been based on the premise that liability for non-performance of contractual obligations is a strict one. Failure to perform these required duties under the relevant contract would give rise to a claim for damages. Where the White Book is concerned, which is intended for professional services, liability is based on the requirement of exercising reasonable skill and care in the performance of the duties under the contract. The rationale for the above rule in the FIDIC construction contract may lie in its common law origin, but in any case, except for specified events in the contract, the contractor is obliged to complete the contract.¹⁰

Where strict liability applies, why a party failed to fulfil its obligation is immaterial, and it is no defence for that party to plead that it has done its best.¹¹ As a party enters into contractual obligations freely, it accepts certain risks that are allocated to it and promises to bear these risks if and when they eventuate. In this way, the contracting parties are able to plan ahead with calculable certainty their schemes and arrange their business affairs. There are, however, specific risks that are beyond the capacity of a party to accept. In such circumstances, it would be better to name these risks and specify the method of dealing with and managing them. As construction contracts grow in size and complexity, such unacceptable risks become harder to identify and define in an explicit manner in the contract, hence the need for a doctrine of frustration or Force Majeure to excuse non-performance of promises. Frustration occurs whenever the law recognises that, *without default of either party*, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract: It was not this that I promised to do.

As argued by those who advocate the use of a Force Majeure clause, the advantage of such a clause is that it offers to the parties, should they wish to avail themselves of it, the opportunity to escape from the narrowness of the doctrine of frustration by including within their clause an event which would not be sufficient to frustrate the contract. However, such a clause does give the court power to review each word of the whole of the clause.¹² I

⁹ See reference no.1 above, but page 528, where a similar proposal is made in connection with FIDIC’s three major forms, but referring to the special risks as exceptional risks.

¹⁰ “Construction Insurance”, by Nael G. Bunni, Elsevier Applied Science Publishers, London, 1986, page 144. See also for example clause 13 in the old Red Book and clause 19.7 of the New Red Book

¹¹ *Raineri v. Miles* [1981] A.C. 1050, 1086.

¹² “Force Majeure and Frustration of Contract”, Edited by E McKendrick, Lloyd’s of London Press, 2nd Edition, 1995, page 43.

understand that, in certain jurisdictions, it is argued that conflict as to the interpretation of a Force Majeure clause becomes a matter for litigation rather than arbitration.

It is said that the doctrine of Frustration is much narrower than the doctrine of Force Majeure and that uncertainty is inherent in the former, but that such uncertainty might be eliminated to a large extent by the incorporation into a contract of a suitably drafted force majeure clause. Then, the enquiry of the court can be limited and focused on the terms of the clause rather than the whole general notion of what is reasonable and fair under the doctrine of frustration.¹³

Is it not much more sensible and less likely to produce conflict in the first place, if neither is stated in the contract conditions, leaving the matter to the provisions of the contract law in the relevant jurisdiction?

B. Clause 6 – Employer’s Liabilities

The text relevant to this clause is set out below.

“6. Employer’s Liabilities

Employer’s Liabilities

6.1 In this Contract, Employer’s Liabilities mean:

- a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies, within the Country,
- b) rebellion, terrorism, revolution, insurrection, military or usurped power, or civil war, within the Country,
- c) riot, commotion or disorder by persons other than the Contractor’s personnel and other employees, affecting the Site and/or the Works,
- d) ionising radiations, or contamination by radio-activity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive nuclear assembly or nuclear component of such an assembly, except to the extent to which the Contractor may be responsible for the use of any radio-active material,
- e) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,
- f) use or occupation by the Employer of any part of the Works, except as may be specified in the Contract,
- g) design of any part of the Works by the Employer’s personnel or by others for whom the Employer is responsible, and

¹³ As in reference 12, but on page 39.

- h) any operation of the forces of nature affecting the Site and/or the Works, which was unforeseeable or against which an experienced contractor could not reasonably have been expected to take precautions.
- i) Force Majeure,
- j) a suspension under sub-Clause 2.3 unless it is attributable to the Contractor's failure,
- k) any failure of the Employer,
- l) physical obstructions or physical conditions other than climatic conditions encountered on the site during the performance of the Works, which obstructions or conditions were not reasonably foreseeable by an experienced contractor and which the Contractor immediately notified to the Employer,
- m) any delay or disruption caused by any Variation,
- n) any change to the law of the Contract after the date of the Contractor's offer as stated in the Agreement,
- o) losses arising out of the Employer's right to have the permanent work executed on, over, under, in or through any land, and to occupy this land for the permanent works, and
- p) damage which is an unavoidable result of the Contractor's obligations to execute the Works and to remedy any defects."

It is generally accepted that the risks allocated to each of the employer and the contractor are divided into risks which result in physical loss; damage or injury & others which result in pure economic loss and/or loss of time. However, clause 6 combines and lists both types of risks. Some of these risks are dealt with elsewhere in the document in more detail, such as the risk of Force Majeure, whilst others are left without providing any further explanation.

It must be said, however, that grouping in one clause all the Employer's Risks (provided they are properly identified as risks), including those that lead to pure economic and/or time loss together with the others that lead to loss and/or damage is a good idea.¹⁴ At least then, it would not be likely for the user to fall into the trap set unwittingly for him in the three major forms of FIDIC's 1999 Suite of Contracts.¹⁵ It would not be amusing for a contractor to be told in arbitration that a risk, which he had assumed to be allocated to the employer, was in fact a contractor's risk. It would be even less amusing for the employer to find that the arbitrator had decided the opposite.¹⁶ That is, of course, if the user does understand the difference between "event" and "risk".¹⁷

In both types of risk, that which results in physical loss; damage or injury and the second type which results in pure financial loss and/or loss of time, neither clause 6 nor clause 14 tells the user whether the consequent liability of these risks is to be shifted by an indemnity

¹⁴ This idea of grouping all the employer's risks in one clause is now adopted in the latest of the published FIDIC's forms, the Form of Contract for Dredging and Reclamation Works, published in 2001.

¹⁵ See reference no.1 above, but page 524.

¹⁶ See Mr. Peter Boonen's letter to the Editor of ICLR published [2001] 18 ICLR 714, 5th paragraph.

¹⁷ An event is an occurrence, which could be desirable or undesirable, for example: an employer's occupation of the Works or a fire on the site, but risk is the combined effect of the probability of occurrence of an undesirable event, and the magnitude of the event.

or is to be covered by insurance. In this connection, reference should be made to clause 10.4 which provides as follows:

“Right to Claim

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

There is no explanation as how the interaction between liability and insurance works, other than in clause 14.2.

C. Clause 14 – Insurance

The text relevant to this clause is set out below.

“14. Insurance

Extent of Cover

14.1 The Contractor shall, prior to commencing the Works, effect and thereafter maintain insurances in the joint names of the Parties:

- (a) for loss and damage to the Works, Materials, Plant and the Contractor’s Equipment,
- (b) for liability of both Parties for loss, damage, death or injury to third parties or their property arising out of the Contractor’s performance of the Contract, including the Contractor’s liability for damage to the Employer’s property other than the Works, and
- (c) for liability of both Parties and of any Employer’s representative for death or injury to the Contractor’s personnel except to the extent that liability arises from the negligence of the Employer, any Employer’s representative or their employees.

Arrangements

14.2 All insurances shall conform with any requirements detailed in the Appendix. The policies shall be issued by insurers and in terms approved by the Employer. The Contractor shall provide the Employer with evidence that any required policy is in force and that the premiums have been paid.

All payments received from insurers relating to loss or damage to the Works shall be held jointly by the Parties and used for the repair or the loss or damage or as compensation for loss or damage that is not to be repaired.

Failure to Insure

14.3 If the Contractor fails to effect or keep in force any of the insurances referred to in the previous Sub-Clauses, or fails to provide satisfactory evidence,

policies or receipts, the Employer may, without prejudice to any other right or remedy, effect insurance for the cover relevant to such default and pay the premiums due and recover the same as a deduction from any other monies due to the Contractor.”

When a risk eventuates, the consequences might be either insurable or not. Whether or not it is required to be insured, clause 6 is silent on how and when insurance, if available, is to be provided in respect of the liabilities or the risks specified. Thus, the link between liability, indemnity and insurance is lost. This situation may be due to the idea expressed in sub-clause 14.2 that the employer should set out his precise requirements relating to the required insurance cover in the Appendix, but should not the Appendix then explain the relationship between sub-clauses 10.4 and 14.2?

It is smaller employers and contractors that are not usually fully versed in the complexities of construction insurance and therefore, it is in these smaller contracts that they require specific standard conditions to assist them in providing a balanced arrangement and one that would work without conflict when events lead to accidents. Some of the questions that may escape the attention of those who are not used to this topic include the following:

1. Clause 14.1(c) requires insurance cover to be provided ***“for liability of both parties and of any employer’s representative except to the extent that liability arises from the negligence of the Employer, any Employer’s representative or their Employees.”*** It is clear that there is no requirement to effect insurance against the negligence of the employer or the employer’s representative. However, does this mean that an insurance cover is required for non-negligence of those named above?
2. The term ***“Works”*** is defined in sub-clause 1.1.19 of the conditions as meaning ***“all the work and design (if any) to be performed by the Contractor including temporary work and any Variation.”*** As ***“Works”*** would most probably include design carried out by the contractor, there is a standard requirement for professional indemnity insurance included in sub-clause 14.1(a). Details of such cover must be included in the Appendix and therefore space must be allocated therein for such details.
3. What is the meaning of the phrase in clause 14.2 ***“evidence that any required policy is in force”***? Is a letter from an insurance broker sufficient? The wording of construction insurance policies differ greatly and it is meaningless to simply obtain as evidence anything other than the insurance policies themselves, including any endorsements issued and conditions attached.

Unfortunately, the intricacies of Construction Insurance is beyond the scope of this paper and beyond the space normally allowed for an article such as this. The topic is dealt with in depth in the Author’s forthcoming second edition of his book entitled ***“Risk & Insurance in Construction”***.¹⁸

¹⁸ ***“Risk & Insurance in Construction”***, 2nd edition by Nael G. Bunni, Spon Press, London, which is expected to be published in the Summer 2002.