Risk allocation in the context of a construction project is commonly understood to relate to the consequences of events or circumstances which are likely to adversely affect the parties’ ability to deliver the project to specification, on time and within budget. FIDIC contracts, like other standard forms of construction contract, seek to pre-allocate responsibilities for risks which may transpire during the project delivery phase between the Employer and the Contractor, so that where the Employer assumes responsibility for a particular risk the Contractor is contractually entitled to an extension to the Time for Completion and/or an addition to the Contract Price whereas where a responsibility for a particular risk is allocated to the Contractor, the occurrence of the risk would not generate an entitlement to additional time or money to complete the Works.

‘Risk’ in this context is closely related to the impact and consequences of different events which may occur during a project, however under Clause 17 (Risk and Responsibility) of FIDIC’s 1999 forms, the concept of ‘risk’ and the defined term ‘Employer’s Risks’ were instead tied to the parties’ responsibilities for loss or damage to the Works. To first time users, this often proved conceptually challenging: why was there no clear distinction between liability for loss or damage to the Works (i.e. a consequence of certain risks, which is the focus of Clause 17) and the risks themselves (for example unforeseeable ground, site and/or climatic conditions and force majeure, etc) which were dealt with separately?

FIDIC has attempted to address this confusion in the 2017 forms. Amongst the most notable changes to the 1999 forms is the absence of any Clause or Sub-Clause dealing specifically with ‘Risk’: Clause 17 of the 2017 forms (now entitled “Care of the Works and Indemnities”) restructures the “Risk and Responsibility” provisions of Clause 17 of the 1999 suite so that the concept of “Employer’s Risks” is removed entirely. This appears to make sense from a contract structuring perspective, since ‘risks’ and their consequences can now be understood in the wider sense described above. But what effect (if any) does this have on the overall risk profile of the 2017 Red, Yellow and Silver Books?

Perhaps unsurprisingly, the answer appears to be “not much”. Standard form construction contracts generally seek to achieve a ‘fair and balanced’ allocation of risk between employer and contractor, and FIDIC is no different in this respect: indeed the balance of risk and responsibilities and allocation of duties and authorities in the 1999 Red and Yellow Books have become widely accepted by employers and contractors as forming a reasonable and fair starting point in allocating risk between the parties, with risks allocated to the party best able to deal with and handle them (the Silver Book, being an EPC/turnkey contract with a risk profile weighted heavily in favour of the Employer, is intended to be a different case).

Within this context, FIDIC has established the following general approach to construction risks (as exemplified in the 1999 Red and Yellow Books, and maintained in the 2017 forms):

- the Contractor is best suited to deal with risks associated with works planning and execution, provision of labour, materials and construction equipment, and safety of site operations;
- the Employer assumes the risk of providing the Site (and any information he has collected about the Site) and ensuring it is available for the Contractor to carry out his work, and the extra cost incurred by the Contractor due to the occurrence of unforeseeable risks; and
- design risks are borne by the party responsible for providing the design.

As such, the basic grounds under which the Contractor may claim extensions of time (“EOT”) and loss and expense are largely unchanged in the 2017 forms.

Arguably the most notable change in approach to EOT entitlements is the attempt by FIDIC to highlight the issue of ‘concurrent delay’ (which was not addressed in the 1999 suite), with a reminder that this should be dealt with in the Particular Conditions, or if there are no Particular Conditions “as appropriate taking due regard of all relevant circumstances”. This approach arguably leads us to more questions than answers, the foremost being whether the absence of Particular Conditions addressing
concurrent delay would lead to a different outcome than the applicable common or civil law position which would have applied under the 1999 forms. Similarly, the basic principle of risk allocation in relation to the provision of site access and unforeseeable site and climatic conditions is also retained from the 1999 suite, however the 2017 forms include additional prescriptive detail regarding the notices to be issued and processes to be followed by the Contractor and the Engineer in relation to claims (the additional level of prescription is a consistent theme running throughout the 2017 forms).

Even the new rebranded Clause 17 (Care of the Works and Indemnities) retains much of the substantive content of its predecessor: the Contractor remains responsible for any loss or damage to the Works until taking over unless the loss or damage was caused by risks for which the Employer is responsible and for which the Contractor has no liability – such risks are broadly akin to “Employer’s Risks” in the terminology of the 1999 suite.

The old ‘Force Majeure’ clause (clause 19 of the 1999 suite) has been moved to clause 18 of the 2017 forms (before the ‘Insurance’ Clause) and rebranded “Exceptional Events” in an effort to be more ‘jurisdiction-neutral’, however this has the potential to lead to a degree of confusion in civil law jurisdictions where force majeure is a recognised legal concept. Nevertheless, the definition of “Exceptional Events” is very similar to the old “Force Majeure” definition, and the consequences (relief from performance, EOT, and payment of loss and expense) remain the same as in the 1999 suite.

FIDIC’s approach to the allocation of design risks in the 2017 forms is also broadly in line with that of the 1999 suite, however there have been some peculiar changes to the Contractor’s fitness for purpose obligations in the 2017 Yellow and Silver Books, which now provide that “the Works or a Section or part or a major item of Plant” will be fit for purpose. The intention behind this change is unclear, as are the effects of the change: why distinguish between Works, parts of the Works, and major items of Plant if they are all intended to be subject to the same fitness for purpose requirements? And why have FIDIC only included ‘major’ items of Plant (a categorisation which will inevitably lead to arguments between the parties) when minor items also form part of the Works? The answers to these questions are not clear, but employers in particular should note that the new fitness for purpose drafting is arguably more limited in scope than in the 1999 versions (and indeed the 2017 Red Book, which provides simply that the Works which the Employer is responsible for designing shall be “fit for the purposes specified in the Contract, or if the purpose is not specified, for the ordinary purposes of such works”).

The express fitness for purpose obligations are now backed by strict obligations on the Contractor to ensure that the design of the Works complies with the Contract and applicable standards, increased requirements in relation to the qualifications and competence of personnel engaged in the preparation of the design, and an indemnity from the Contractor. This indemnity is likely to be viewed as excessively onerous by many contractors (despite the risk being mitigated somewhat by the exclusion of liability for indirect and consequential losses and the overall cap on the Contractor’s liability).

The main distinguishing features of FIDIC 2017’s approach to risk allocation are thus the adoption of a more wide-ranging understanding of construction risk than in the 1999 suite, and an attempt by FIDIC (expressed through a significant increase in the word count) to set out a much more clear and precise way in which such risks are to be borne by each party. FIDIC has also sought to enhance the fair and balanced nature of the 2017 forms by introducing a greater degree of reciprocity in the obligations of each party in relation to matters such as confidentiality, compliance with laws, recruitment of persons, changes in laws, termination and claims.

Will the risk profiles set out in the updated General Conditions of Contract be respected by users? In order to try and ensure that they are, FIDIC has proposed ‘Five Golden Principles’ in the Guidance section of the 2017 forms, among which is a requirement that the Particular Conditions must not change the balance of risk/reward allocation set out in the General Conditions. These Golden Principles, once formally accepted by the Contracts Committee, are intended to be ‘inviolable’ so that any infringement of them will result in the contract in question not being permitted to describe itself as “FIDIC-based”. It remains to be seen whether this has the desired effect.

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