I. INTRODUCTION

One of the principal objectives of European International Contractors is to contribute constructively to the development of balanced standard forms of contract for use in the international construction industry. EIC shares FIDIC’s view that standardisation, both in technical and administrative matters, is more likely to result in the satisfactory and trouble-free execution of projects.

One of EIC’s contributions to the improvement of standard forms of contract was the publication of guides to FIDIC’s 1999 new standard forms of contract (“New Books”) which EIC published between 2000 and 2003. These EIC guides are:

- EIC Contractor’s Guide to the FIDIC Conditions of Contract for EPC Turnkey Projects (Silver Book), issued in March 2000 (see [2000] ICLR 504);
- EIC Contractor’s Guide to the FIDIC Conditions of Contract for Construction (Red Book), issued in March 2002 (see [2003] ICLR 53);

EIC welcomes, in principle, that FIDIC has enlarged its suite of standard forms of contract with an innovative contract form which is destined to
allow construction and engineering industries to compete on quality, efficiency and life-cycle cost. The FIDIC DBO Contract is a completely new FIDIC standard form of contract and EIC has expressed during the drafting process its appreciation of FIDIC’s effort to address a perceived market demand for a combined design-build obligation with a long-term operation commitment. The base scenario selected by FIDIC is a “green-field” Design-Build-Operate project with a 20-year operation period.

With respect to the Design-Build Period, the FIDIC DBO Contract borrows in large part from the structure and the wording of the FIDIC 1999 Yellow Book, Conditions of Contract for Plant and Design-Build, whereas the requirements regarding the Operation Service Period have been inserted in various provisions and most prominently in clause 10. This is in itself rather bold, since the FIDIC DBO Contract would then compete with the more usual separate forms of contracts, i.e., one covering Design-Build and the subsequent form covering the operation and maintenance phase of a project (or “Operation Service Period” as it is termed in the contract). In comparison, such contracts would comprise a substantial volume of pages and provisions, which would outnumber the FIDIC DBO Contract by far. This fact is not necessarily a drawback, but the key issue seems to be whether a combined format is sensitive enough to cater for the differences between the design-build and the operation and maintenance phases of a DBO project.

EIC cannot conceal a certain degree of uneasiness in that the FIDIC DBO Contract assigns to the contractor a strict responsibility for the quality, or any loss or damage to the asset, or loss of production of the facility for a period of 20 years or more. By doing so, the contract virtually puts the contractor in a concessionaire’s role, however, it exposes him to a much higher degree of financial liability, which might be unacceptable for contractors. EIC, therefore, would have preferred that FIDIC had distinguished more clearly between the Design-Build Period and the Operation Service Period, for instance through the provision of a standard form of contract for Operation Service as an optional Annex to the FIDIC 1999 Yellow Book. Having said this, we respect the attempt of the drafting committee to combine the Design-Build Period and Operation Service Period in one comprehensive contract with ongoing responsibilities and obligations for both parties.

EIC would like to note, however, that there are important sector specifics and even subsector peculiarities which potential users of this form will have to consider. For instance, in the transport sector the “Contractor” of the FIDIC DBO Contract may be one or more companies of the same industry, whilst in the energy and water sectors the “Contractor” will necessarily be a joint venture composed of members drawn from different industries. Hence, EIC questions whether a “one size fits all approach” will do justice to such differences and also whether the insurance/surety industry will be ready to offer the corresponding products.
Comparing the FIDIC DBO Contract with the FIDIC 1999 New Books, and in particular the FIDIC 1999 Yellow Book, EIC found that the new standard form contains both improvements on and retrogressions from the 1999 editions. Some of the EIC observations are presented in this article. The complete EIC Guide can be purchased from the EIC Secretariat.

II. IMPROVEMENTS OVER THE FIDIC 1999 EDITIONS

Sub-clause 1.1 [Definitions]

EIC welcomes FIDIC’s adoption of our proposal to group the 83 definitions in Sub-clause 1.1 [Definitions] by alphabetical order, thus making the list of definitions more user-friendly.

Sub-clause 2.4 [Employer’s Financial Arrangements]

It is positive that the employer under sub-clause 2.4 [Employer’s Financial Arrangements] must detail his financial arrangements from the outset in a Financial Memorandum to be submitted at tender stage in accordance with sub-clause 1.1.43.

FIDIC recognises the need for the contractor to be satisfied that the employer has the necessary financial strength to undertake his obligations under the contract. This sub-clause requires that:

“The Employer’s arrangements for financing the design, execution and operation of the Works, including the provision of the Asset Replacement Fund, shall be detailed in the Financial Memorandum”

and that

“If the Employer intends to make any material changes to the financial arrangements or has to do so because of changes in his financial or economic situation, the Employer shall give Notice to the Contractor, with detailed particulars.”

It is positive that the Financial Memorandum shall already be detailed at tender stage (as is implied by the definition of Financial Memorandum at sub-clause 1.1.43). However, the definition of Financial Memorandum also provides that it must be a separate document which is “attached to or forms part of the Employer’s Requirements”. EIC considers that the Financial Memorandum should not form part of the Employer’s Requirements, as they can be changed.

EIC questions further whether the status of the Financial Memorandum is in reality an undertaking of the Employer which must demonstrate at any time the availability of the necessary funds.
Sub-clause 2.4 further provides that:

“Within 28 days after receiving any request of the Contractor the Employer shall give reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the Contract Price.”

This is a crucial obligation on the employer, particularly where funding is being provided by third parties. The contractor must have the clear right to refuse to undertake any significant variation if no clear evidence is provided that the available funding is sufficient to cover the cost of the varied works—clause 13 [Variations and Adjustments] does not provide this.

A powerful sanction is available to the contractor should the employer fail to comply with the requirements of this sub-clause. The contractor is entitled to suspend the work or terminate the contract under sub-clauses 16.1 [Contractor’s Entitlement to Suspend Work] and 16.2 [Termination by Contractor]. However, what constitutes reasonable evidence is undefined and the contractor should try to establish this prior to submitting a tender. Failure to do so could prejudice any attempt to obtain more detailed information during the currency of the contract, if for example a major variation is instructed.

Contractors should give due consideration to the risk associated with continuing to work during the 28-day period available to the employer to provide the required evidence and the further extended notice periods required to comply with the suspension (see the 21-day notice period before suspension in sub-clause 16.1 [Contractor’s Entitlement to Suspend Work] and numerous “cure” periods in the termination provisions at sub-clause 16.2 [Termination by Contractor]). See also EIC’s comments in relation to these sub-clauses below.

The contractor should also have a right to be made aware of any terms, conditions or step-in rights that exist in any agreement between the employer and his lenders. If such agreements existed between lenders and the employer then the terms and conditions should be made available to the contractor prior to signature of the contract.

Sub-clause 13.1 [Right to Vary]

EIC appreciates that, with respect to the Operation Service Period, FIDIC have inserted a third paragraph in sub-clause 13.1 [Right to Vary] which restricts the employer’s wish to instruct a variation during the Operation Service Period. This new paragraph clarifies that the contractor shall not be obliged to proceed with the variation unless both parties have agreed on the price.

The Employer’s Representative may initiate variations at any time prior to issuing the Contract Completion Certificate for the works (that is, until completion of the Operation Service), and the contractor has only limited grounds for refusing to undertake the instructed variation, which are:
“(i) the Contractor cannot readily obtain the Goods required for the Variation,
(ii) it will reduce the safety or suitability of the Works for the purposes for which they were intended under the Contract,
(iii) it will have an adverse impact on the achievement of the Schedule of guarantees, or
(iv) it will have an adverse effect on the provision of the Operation Service under the Contract.”

Notwithstanding any objections raised by the contractor, the Employer’s Representative may still confirm his instruction. If the contractor believes that the variation will have an adverse effect on the undertaking of any of his obligations under the contract or, if, following a request by the contractor under sub-clause 2.4 [Employer’s Financial Arrangements], the employer is unable to provide evidence that satisfactory financial arrangements are in place and being maintained to pay for the addition to the Contract Price resulting from the variation, then it should be at the contractor’s sole discretion to refuse or accept a variation.

Should the Employer’s Representative instruct the variation despite the contractor giving notice that he will not consider himself bound by the variation, then the only remedy open to the contractor is to refer the matter to the Dispute Adjudication Board.

A Variation “shall not comprise the omission of any work which is to be carried out by others” which precludes the possibility of work being omitted simply for the purpose of having it carried out by another contractor.

EIC welcomes that FIDIC have inserted a third paragraph which regulates the Employer’s wish to instruct a variation during the Operation Service Period. EIC considers that the employer should not be entitled to initiate a variation during the Operation Service Period because construction has been completed and the contractor has left the construction site and is thus not in a position to execute the variation. The provision refers to sub-clause 13.3 [Variation Procedure] so that the price for executing the variation works should be agreed beforehand between the employer and the contractor.

Sub-clause 15.5 [Termination for Employer’s Convenience]

In the EIC Contractor’s Guides to the FIDIC 1999 New Books we have criticised the employer’s right to terminate for convenience under sub-clause 15.5. Under the FIDIC DBO Contract, this right can still be exercised at any time on 28 days’ written notice. Whilst the payment terms of the FIDIC 1999 New Books did not provide for loss of profit and thus were inequitable and inappropriate in the case of termination for the Employer’s convenience, the new sub-clauses 15.5 and 15.7 make reference to sub-clause 16.4 [Payment on Termination] which now does in fact provide under (c) for loss of profit following such termination.

This sub-clause introduces a right for the employer to terminate for convenience. EIC holds that the option of termination for convenience is not consistent with a DBO type of contract and the mechanism which FIDIC
establishes for dealing with the consequences is not satisfactory for the contractor.

In countries where contracts with public bodies can exist as part of the administrative (“public”) law, the administrative judges now consider that a contract has to be respected by both parties and that termination by a public body has to be well-grounded, for instance, a public authority may have to demonstrate that it is in the public interest to terminate the contract and it is not a termination for mere convenience.

It is moreover against the principle of “pacta sunt servanda” (“agreements must be kept”). In some countries where judges have the power to “amend” contracts and set aside terms and conditions, more and more weight is being attached to the aforementioned principle.

Furthermore, in the case of termination for employer’s convenience in the Operation Service Period, the contractor would be prevented from claiming his fair share of any surplus in the Asset Replacement Fund as sub-clause 14.18 [Asset Replacement Fund] (last paragraph) provides that in the event of a termination of the contract under clause 15

“... any amount remaining in the Asset Replacement Fund, including any accrued interest, shall be deemed to be to the account of the Employer and shall not be disbursed to the Contractor”.

In any event, presumably to strengthen the third paragraph whereby the employer cannot terminate in order to execute or operate the works himself, the employer loses any rights of use of Contractor’s Documents “and shall forthwith return all and any such Contractor’s Documents to the Contractor”.

This right to terminate can be exercised at any time upon 28 days’ written notice. Payment is then made in accordance with sub-clauses 15.7 [Payment after Termination for Employer’s Convenience] and 16.4 [Payment on Termination] (note that sub-clause 16.4 refers inadvertently to sub-clause 18.6 instead of 18.5), entitling the Contractor to loss of profit as a result of the termination. The new wording is welcomed, since it ought to negate the potential abuse of an employer terminating for convenience when the contractor has a right to terminate for employer default.

Contractors should note that the employer may not terminate under this sub-clause for the purpose of undertaking or operating the works directly or arranging for the works to be completed or operated by another contractor.

**Clauses 17–19 [Risk Allocation, Exceptional Risks, Insurance]**

EIC acknowledges that FIDIC have made a number of changes to the traditional approach of addressing the issues of risk allocation, insurance and *force majeure* in Clauses 17–19. These issues are now presented in a more logical order and the term “*force majeure*”, which has different legal
interpretations and connotations under different jurisdictions, has been replaced by the more neutral term “Exceptional Event”. However, the new structure and wording carries some pitfalls which have to be closely considered by contractors (see retrogressions, below).

Clause 20 [Claims, Disputes and Arbitration]

Clause 20 has been restructured in the FIDIC DBO Contract and several important improvements have been made to this sub-clause in respect of: (i) the notice provisions under sub-clause 20.1 [Contractor’s Claims]; (ii) the use of a standing Dispute Adjudication Board (“DAB”) in place of an ad-hoc body as envisaged by the FIDIC 1999 Yellow/Silver Books; and (iii) the enforceability of DAB decisions under the new sub-clause 20.9 [Failure to Comply with Dispute Adjudication Board’s Decision].

Under sub-clause 20.1, sub-paragraph (d), the Employer’s Representative is required to respond to the contractor’s claim giving his approval or disapproval within 42 days and he shall proceed in accordance with sub-clause 3.5 [Determinations] to agree or determine any Extension of Time for Completion and/or any additional payment. EIC appreciates that the contractor may refer the matter to the DAB “If the Employer’s Representative does not respond in accordance with the foregoing procedures and timetable”. Comments made under this sub-clause should be read in conjunction with those under sub-clauses 14.11 and 14.13 [Application for Final Payment Certificate Design-Build/Operations Service] and 14.16 [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.

Sub-clause 20.3 provides for the establishment of the DAB. The DAB is a standing body as envisaged both by the FIDIC 1999 Red Book and the MDB Harmonised Construction Contract and shall be appointed in accordance with the Contract Data. Unless otherwise agreed by the parties, the appointment of the DAB expires after the issue of the Commissioning Certificate.

Sub-clause 20.9 corrects the errors found in the FIDIC 1999 New Books by expanding the language to include, “binding or final and binding” in place of only “final and binding”.

III. RETROGRESSIONS FROM THE FIDIC 1999 EDITIONS

Regrettably, there are also retrogressions from the previous standard forms of contract and quite a few clauses that are inappropriate for the type of contract covered by the FIDIC DBO Contract and which, by comparison
with previous editions, have the overall effect of increasing the risk to the contractor.

Clause 3 [The Employer’s Representative]

FIDIC have chosen to label the representative acting on behalf of the Employer in clause 3 as an “Employer’s Representative” (as in the FIDIC Silver Book), whilst in fact this representative has been vested with the power and authority of an “Engineer” (as in the FIDIC 1999 Yellow Book). Such regulation is inconsistent with the general philosophy of a DBO contract according to which the employer can make the choice of a comprehensive contractual package and should only do so if he has confidence in the competence, resources and experience of his potential contractor. Given the fact that the FIDIC DBO Contract entrusts the contractor with the entire responsibility for designing, constructing and operating the works/facility, EIC would have expected that FIDIC adopt not only the same wording, i.e., “Employer’s Representative”, but in relation to his determinations also the same mechanism as in sub-clause 3.5 of the FIDIC Silver Book where:

“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.”

EIC is concerned that, notwithstanding the requirement to entrust the contract administration to a “suitably qualified and experienced” Employer’s Representative, there is a tendency in the market to avoid the employment of an independent company as the Engineer but rather to have the contract administered either by the employer’s in-house contract administration or individual consultants without the necessary technical support functions and the required independence.

EIC feels that the vast power and authority of the Employer’s Representative is inconsistent with the general philosophy of a DBO contract according to which the employer purchases a comprehensive contractual package including the design, construction and operation.

Therefore, there can be no justification for detailed supervision and interference by the Employer’s Representative—whilst keeping strict responsibility of the contractor—as clearly specified monitoring at defined milestone events should be perfectly adequate.

In view of the design and operation obligations of the contractor, EIC considers that the role of the Employer’s Representative should be similar to that in the FIDIC Silver Book. Furthermore, the employer will most likely not employ an independent third party for the 20-year contract administration. Thus if FIDIC calls the independent third party the “Employer’s Representative”, it should have adopted the language and approach of the FIDIC Silver Book.
It is an improvement, however, that the sub-clause 3.1 now provides that “The Employer shall appoint the Employer’s Representative prior to the signing of the Contract”. Whenever the Employer’s Representative exercises a specified authority 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 Employer’s Representative’s powers.

Sub-clause 3.3 gives the Employer’s Representative wide powers to “issue to the Contractor (at any time) instructions which may be necessary for the execution of the Works” and obligates the contractor to comply with such instructions. Instructions may be given by the Employer’s Representative or an assistant to whom the appropriate authority has been delegated. The instructions are to be in writing.

Unlike in the FIDIC 1999 New Books the Contractor is required by the FIDIC DBO Contract to “immediately notify” the employer, should it consider an instruction not to be in compliance with applicable laws or is “technically impossible”.

In EIC’s opinion this requirement provides significant potential for additional conflicts, as now not only may the parties be in dispute about the legality of an instruction, or whether it is technically possible to execute, but also the employer can argue that the contractor was under an obligation to give an earlier (“immediate”) notice. The remedy of the employer in such event will be a claim under sub-clause 20.2 [Employer’s Claims]. It is not clear what motives led FIDIC to add this requirement.

Sub-clause 4.2 [Performance Security]

The second paragraph of sub-clause 4.2 [Performance Security] implies that the Performance Security (albeit reduced) shall be valid also for the duration of the Operation Service Period. Notwithstanding the unlikely scenario where a contractor would concede to provide such an instrument and thereby supposedly commit a considerable part of its existing credit facilities to one project only, EIC questions whether a security for such a long period of time would ever be issued at all by any bank or a surety. The concept will hardly be compatible with the North American performance bond system. Bank guarantees will usually only cover the construction period and will certainly not be available for 20 years. In addition, EIC questions the need to extend the validity of the Performance Security into the Operation Service Period, given the existence of sub-clauses 14.18 [Asset Replacement Fund] and 14.19 [Maintenance Retention Fund]. The existence of these funds justifies the concern that the project may be “over-secured” and thereby raising unnecessary additional costs.

The form of Performance Security must be clearly set out in the contract. Failure to do so could 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.

This sub-clause is an improvement on the pre-1999 FIDIC contracts as the contractor is offered protection for all costs incurred in the event that the employer makes a false [unjustified] claim and the employer must indemnify the contractor accordingly. Whereas the pre-1999 FIDIC contracts merely required the employer to notify the contractor prior to making a claim under the Performance Security, the FIDIC DBO Contract limits the employer’s claims under this guarantee “for amounts to which the Employer is entitled” and the employer’s entitlement to demand sums under the guarantee is limited by sub-clause 20.2 [Employer’s Claims].

The employer is permitted to make a claim on the contractor’s Performance Security in the event of “circumstances which entitle the employer to terminate under sub-clause 15.2 [Termination for Contractor’s Default]”, but again such claim must be made in accordance with clause 20 [Claims, Disputes and Arbitration].

The second paragraph introduces a new feature as compared to the FIDIC 1999 New Books, since it provides that

“At the end of the Retention Period, the Contractor is entitled to a reduction of the amount of the Performance Security, as stated in the Contract Data”.

As outlined above there are problems with such security—first, there is a query whether a security for such a long period of time will be issued at all by a bank or a surety; secondly the concept does not fit the North American performance bond system, but also bank guarantees will usually only cover the construction period and will certainly not be available for twenty years. In most advanced performance-based contracting markets, such as the UK, bonds are not required from contractors for the operation phase.

FIDIC have also omitted to define what kind of performance should be guaranteed during the Operation Service Period. In fact, there is an extended liability for the Design-Build Period and it would be inappropriate to ask the contractor to be liable for defects for longer than his liability under the statutory law.

In addition, as mentioned, EIC questions the necessity of extending the validity of the Performance Security into the Operation Service Period in the light of Sub-Clauses 14.18 [Asset Replacement Fund] and 14.19 [Maintenance Retention Fund]. The existence of these funds justifies concern that the project may be “over-secured” and thereby raising unnecessary additional costs. Since any security should be adapted to the risk-profile of the relevant project phase, EIC would expect that the Performance Security is released after the Commissioning Certificate or at least its face value should be reduced very significantly upon completion of the Design-Build.

Ultimately, FIDIC should not adopt a “one size fits all” approach, e.g., since road projects differ substantially from power plants.
Clause 9 [Design-Build]

Clause 9 introduces a new term which is defined in sub-clause 1.1.29 as

“all work to be performed by the Contractor under the Contract to design, build, test and complete the Works and obtain the Commissioning Certificate issued in accordance with Sub-Clause 9.12 [Completion of Design-Build].”

EIC considers the interrelation between terms forming part of Design-Build and the subsequent Operations Service Period as fundamental. It appears, however, not entirely clear under the FIDIC DBO Contract how the term “Design-Build” interrelates with the definition of the “Works” under 1.1.82 on the one hand and, on the other hand, how sub-clause 9.12 interrelates with sub-clause 11.7 [Commissioning Certificate]. This confusion could be a regular source of disputes if not clarified by the parties. For the purpose of this Guide EIC assumes that Design-Build + Operation Service = Works.

Sub-clause 9.12 sets out the conditions precedent for completion of the Design-Build to be achieved, and for the Commissioning Certificate to be issued. In this respect the Commissioning Certificate is comparable to the Taking-Over Certificate in relation to the works found in the FIDIC 1999 New Books. Again the borderline between “Design-Build” and “Works” is not clear because, in sub-clause 9.12 (d) the Commissioning Certificate relates to the Design-Build, whilst in sub-clause 11.5 (b) [Completion of the Works and Sections] it refers to the “Works”. The definition of “Commissioning Certificate” refers further to sub-clauses 11.7 [Commissioning Certificate] and 9.12 [Completion of Design-Build] but both sub-clauses require each other as a precondition. Under sub-clause 9.12 the Design-Build shall not be considered complete until the Commissioning Certificate under sub-clause 11.7 has been issued and under sub-clause 11.7 the contractor’s Design-Build obligations will only be considered complete when the Employer’s Representative has issued the Commissioning Certificate confirming that the contractor has “completed all such obligations in accordance with the Contract” (including presumably those listed at sub-clause 9.12 (a)–(c)).

EIC is concerned that any ambiguity and circularity in such an essential feature of the contract may lead to major delays and disputes and can be misused by employers or their representatives. Therefore, EIC recommends that this be corrected and clarified in the contract in order to achieve the Commissioning Certificate without disputes.

Parties should bear in mind in this context the last paragraph of sub-clause 11.5 [Completion of the Works and Sections] that:

“If the Employer’s Representative either fails to issue the Commissioning Certificate or reject the Contractor’s application within the period of 28 days, and if the Works or Section (as the case may be) are substantially in accordance with the Contract, the Commissioning Certificate shall be deemed to have been issued on the last day of that period.”
Clause 10 [Operation Service]

Clause 10 is not adequate to regulate the Operation Service Period. In EIC’s experience, the contract provisions relative to the Operation Service Period need to be much more detailed than FIDIC has provided for under clause 10. Thus, the FIDIC DBO Contract appears to be insufficient for the Operation Service Period.

Sub-clause 17.8 [Limitation of Liability]

The absence of a reasonable limitation of liability under sub-clause 17.8 adds to the contractor’s risk in the FIDIC DBO Contract, which in consideration of the life span of a DBO project, is regarded as unsatisfactory and unjustified. The modifications introduced by the FIDIC DBO Contract water down the limitation concerning consequential damages and neutralise the benefit of this crucial sub-clause. By excluding sub-clauses 17.9 [Indemnities by the Contractor] and 17.10 [Indemnities by the Employer] from the limitation of liability both the contractor and the employer are fully liable for the events outlined in these two sub-clauses. Furthermore, the newly introduced last paragraph of sub-clause 17.9, which was not found in the FIDIC 1999 New Books, is entirely alien to the concept of “indemnities” that in the past only referred to the compensation for the violation of third party rights. It is not understood why FIDIC inserted a “fitness for purpose” obligation for the Works into the context of indemnities.

This sub-clause provides that there is no liability on either party to the other party:

“For any loss of use of any Works, loss of profit, loss of contract or any other indirect loss or damage which may be suffered by the other Party in connection with the Contract, other than under Sub-Clause 10.6 [Delays and Interruptions during the Operation Service], Sub-Clause 16.4 [Payment on Termination], Sub-Clause 17.9 [Indemnities by the Contractor], Sub-Clause 17.10 [Indemnities by the Employer] and Sub-Clause 17.12 [Risk of Infringement of Intellectual and Industrial Property Rights].”

Whilst the exclusion from the limitation of liability of sub-clauses 17.9 and 17.10 [Indemnities by the Contractor/Employer] is standard in FIDIC Contracts, a major shift in risk allocation to the detriment of the contractor has been made by making an important modification to sub-clause 17.9 (see below for comment). Also the comment made under sub-clause 10.6 [Delays and Interruptions during the Operation Service] should be duly taken into account by any contractor when assessing its risk exposure under this contract.

In addition, the contractor should note that it is only in certain cases of breach of contract by the employer that the contractor is entitled to compensation for loss of profit. This is inequitable and the contractor should always be entitled to compensation for loss of profit and other indirect or consequential damages, in the event of a breach of contract by
the employer. The use of the phrase “other indirect loss or damage” probably means that only indirect loss of profit is excluded—the normal “direct” loss of profit that flows from a breach would not be excluded.

The total liability during the Operation Service Period should be reduced and should not equal the original amount applicable during the Design-Build Period.

**Sub-clause 20.1 [Contractor’s Claims]**

As regards the procedure for contractor’s claims, EIC does not agree with the effect of sub-paragraph (c) of sub-clause 20.1 [Contractor’s Claims], by which “the Notice given under paragraph (a) above shall be deemed to have lapsed and no longer considered as a valid Notice” if the contractor fails to establish the principles of the claim within the said 42 days or other time allowed or approved. It may not be possible for the contractor to establish these principles in such a short time-frame, particularly if (nominated) subcontractors are involved. As stated in the EIC Contractor’s Guides to the FIDIC 1999 New Books, EIC believes that the general principle to remove the fundamental right of the contractor to make a claim merely as a result of a failure to submit the required notice within a fixed period of time is inequitable. EIC has been advised that such time bar would be regarded as onerous and not be upheld under some civil law jurisdictions. The prescribed provision would contribute to unnecessary discussions and ultimately disputes between the parties rather than co-operation.

EIC observes that FIDIC have restructured this important sub-clause into various sections. Hence, our commentary mirrors these different parts:

*Sub-paragraph (a), Notices*

Sub-clause 20.1 follows the principles first established by the FIDIC 1999 New Books, i.e., contractor’s claims are subject to time-barring if notice is not given within 28 days of an event or full and detailed particulars are not submitted within 42 days of an event, or in the case of an event/circumstances giving rise to the claim having a continuous effect, then “within 28 days after the end of the effects resulting from the event or circumstance” or within such other period as proposed by the contractor and approved by the Employer’s Representative.

Sub-clause 20.1 of the FIDIC DBO Contract, however, extends the language of the previous editions by setting out explicitly what before were implicit terms of the sub-clause thus simplifying the claims procedures and rendering the dispute resolution process easier.

Sub-paragraph (a) allows that circumstances may exist that justify the late submission of a notice and provides explicit powers to the Dispute Adjudication Board (DAB) to rule on the validity of a notice submitted later than 28 days of
an event. Sub-clause 20.1 is no longer a simple “guillotine clause”. Yet, the way FIDIC have addressed the problem will certainly increase the number of disputes.

EIC still believes that the penalty for failure to comply with a purely technical requirement to give notice of a claim is unduly harsh and is in fact detrimental to the contract, since all it does is to provoke protective notices from the contractor. Whilst EIC may understand the reason for FIDIC requiring the contractor to submit a notice within 28 days, the adequate sanction should be that the contractor may prejudice his entitlement by failing to comply strictly with a notice provision.

Conversely, he should certainly not forfeit his entitlements 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, e.g., sub-clause 9.8 [Consequences of Suspension].

EIC would advise that contractors insist on the use of the provisions of the applicable law, because generally they would be more balanced, since the notification period under many jurisdictions would be extended even perhaps until the final invoice and beyond.

The requirement that any notice must specifically state that it is given under sub-clause 20.1 should be deleted (the content of any notification should prevail over whether or not it has specifically mentioned sub-clause 20.1).

The fact that the DAB now has the power to overrule under certain circumstances the 28-days’ time bar does not change the fact that, without amendment, this sub-clause penalises contractors unduly.

Sub-paragraph (c), Details and particulars

In addition to the first 28-day notice period, the contractor is according to subparagraph (c) subject to a 42-day period (i.e., a further 14 days) by which he must send a fully detailed claim with full supporting particulars to the Employer’s Representative (see also the provisions for claims which have continuing effect). This could prove to be 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.

Therefore, EIC does not accept that in the new sub-paragraph (c), “the Notice given under paragraph (a) above shall be deemed to have lapsed and shall no longer be considered as a valid Notice” if the contractor fails to establish the principles of the claim within the said 42 days or other time allowed or approved, since it may not be possible for the contractor to establish these principles in such a short time-frame.

Contractors should also note that even interim claims are to be fully detailed. As above, EIC would advise that contractors insist on the use of the provisions of the applicable law, because generally they would be more
balanced, since the second tier notification period under many jurisdictions would be extended even perhaps until the final invoice and beyond.

A comparison of the notice provisions under sub-clause 20.1 with the notice provisions under sub-clause 20.2 [Employer’s Claims] where the employer or the Employer’s Representative is required to give notice as soon as practicable after becoming aware of the event or circumstance demonstrates once again the imbalance between obligations carried by the employer and the contractor.