Clause tougher on contractors

STUART JORDAN* looks at two aspects – regarding fitness of purpose and the new contractor indemnity – of the Second Edition of Fidic, which spell more bad news for contractors.

WE have been discussing in recent months the very substantial changes in the new Fidic (International Federation of Consulting Engineers) Second Edition standard main contracts. A lot of the commentary has been about the reasons behind the changes.

Contract publishers will often look at current market practice and especially at the way their forms of contract are usually amended by users. The publishers might then make changes that align with market practice. The Fidic *Silver Book*, for instance, is generally understood to have been written in response to project sponsor and funder requirements for a tougher risk profile which gives more certainty on outturn project cost and programme.

I am sure that market practice was taken into consideration in writing the Second Edition contracts, but two related aspects of them are quite mysterious to me. First is the extension of the already-controversial requirement of fitness for purpose.

In the First Edition forms, the completed (whole) works were required to be "fit for the purposes for which they are intended, as defined in the Contract". In all three of the new forms (*Red*, *Yellow* and *Silver*) there are additional requirements. The *Yellow Book* clause 4.1 states:

"When completed, the Works (or Section or Part or major item of Plant, if any) shall be fit for the purpose(s) for which they are intended, as defined and described in the Employer's Requirements (or, where no purpose(s) are so defined and described, fit for their ordinary purpose(s))".

The underlined words are the big change. "Part" is defined as a part of the works or of a section which is used by the employer and deemed to have been taken over under clause 10.2 – which deals with taking over of parts.

"Plant" is defined conventionally as apparatus, equipment and machinery, etc intended to form part of the permanent works.

It is difficult to know what this intends to achieve. 'Fitness for purpose' is already a difficult concept but the obligation has at least been examined as one relating to the whole completed works – a guarantee from the contractor that the works will be fit or suitable for their intended purpose. I don't see any additional benefit in requiring individual parts or pieces of equipment to be assessed or judged in the same way.

Jordan ... understanding contracts.

The function of component parts must be to support the complete works in meeting specification, in whatever ways that specification is expressed – including fitness for purpose. I suspect that parties will struggle to "define" a purpose for component parts which is not simply supporting the purpose for the works as a whole.

> **"The concept of "indemnity" is not universal. Its meaning depends on how it is recognised under different jurisdictions.**

Separately, the fitness or suitability of any component part is going to be a matter of selection, design and installation as well as the intrinsic quality or resilience of that part. A component may be suitable or may fail depending on what it is required to do.

I am not sure this new clause is going to add to employer protection, or to clarity on the nature of the 'fitness for purpose' obligation.

The second, and related, issue is the new contractor indemnity in all of the new contracts. Clause 17.4 of the *Silver Book* states:

"The Contractor shall also indemnify and hold harmless the Employer against all acts, errors or omissions... [in design] that result in the Works (or Section or Part or major item of Plant, if any) when completed, not being fit for purposes... [as required in clause 4.1]."

This indemnity looks like a significant extension of the contractor's potential liabilities in the event of the completed works failing. We should, however, assess its impact in the following context:

First, the contractor's liability under this clause would not include indirect and "consequential losses" – loss of profit, loss of contract, etc, which are excluded generally. Second, any liability under this indemnity would be limited within the overall liability cap.

In both of these respects, therefore, the 'fitness for purpose' indemnity leads to a contractor liability that is limited in ways which do not apply to other indemnities.

This takes us back to the original question: what is driving these changes? Did Fidic detect that the project developer and funder market thought 'fitness for purpose' wasn't tough enough on its own?

Finally, the concept of "indemnity" (as something more than the ordinary liability to compensate) is not universal. Its meaning depends on how it is recognised under different jurisdictions. Where that meaning is uncertain, the only clear impact of indemnities is their express exclusion from limitations on recovery of consequential losses and caps on liability. So, when such exclusions are not part of the contract, the whole point of this indemnity is uncertain. ■

** Stuart Jordan is a partner in the Global Projects group of Baker Botts, a leading international law firm. Jordan's practice focuses on the oil, gas, power, transport, petrochemical, nuclear and construction industries. He has extensive experience in the Middle East, Russia and the UK.*