

## FIDIC MODULE 2

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## Contracts Management and Administration under FIDIC Contracts

FIDIC Contracts Module 2

Management of Claims and the Resolution of Disputes

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### Outline

1. Managing Variations
2. The Management of Claims
3. The Resolution of Disputes
4. Arbitrating Claims

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### Session 1

## Managing Variations

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### Managing Variations

1. Definitions
2. Timing and Authority to Initiate Variations
3. Variations covered by Clause 13 and Related Clauses
4. Initiation and Instruction of Variations
5. The Contractor's Rights and Obligations
6. Practical Management Suggestions
7. Avoiding Typical Claims Issues Related to Variations

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## VARIATIONS ARE A MAJOR SOURCE OF CLAIMS

- WHAT IS THE ENGINEER'S AUTHORITY?
- WHAT MUST THE CONTRACTOR DO?
- HOW ARE THEY PRICED?
- WHAT ABOUT TIME?
- IMPORTANCE OF PROPER MANAGEMENT OF THE PROCESS?

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## 1. Definition

1.1.6.9 **"Variation"** means any change to the Works, which is instructed or approved as a variation under Clause 13 [Variations and Adjustments].

### QUESTION:

Does FIDIC define the term Variation Order?

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## 1. Definition

Other definitions to consider when dealing with Variations.

- 1.1.1.9 Bill of Quantities; Daywork Schedule [MDB]
- 1.1.3.1 Base Date
- 1.1.3.5 Taking-Over Certificate
- 1.1.4.2 Contract Price
- 1.1.4.3 Cost
- 1.1.4.10 Provisional Sum
- 1.1.5.2 Goods
- 1.1.5.4 Permanent Works
- 1.1.5.8 Works

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## 2. Timing and authority to initiate Variations

Who has authority to initiate a Variation?

- The Engineer

When can a Variation be initiated?

- "Any time prior to issuing the Taking-Over Certificate"

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## 2. Timing and authority to initiate Variations

Practical considerations:

Sub-Clause 3.1 Engineer's duty and authority. Important to respect these restrictions and procedures on authority.

- The Engineer shall have no authority to amend the Contract.
- The Engineer shall obtain the specific approval of the Employer before instructing a Variation, except:
  - In an emergency determined by the Engineer.
  - If the Variation would increase the Accepted Contract Amount by less than the percentage specified in the Contract Data.

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## 2. Timing and authority to initiate Variations

- "The Engineer shall obtain the specific approval of the Employer before instructing a Variation, before:
- Approving a proposal for Variation submitted by the Contractor in accordance with Sub Clause 13.1 or 13.2."
- "The Engineer may exercise the authority attributable to the Engineer as specified in or necessarily to be implied from the Contract. If the Engineer is required to obtain the approval of the Employer before exercising a specified authority, the requirements shall be stated in the Particular Conditions."

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## 2. Timing and authority to initiate Variations

- Be sure the firm and the individuals engaged as the Engineer have written mandates from the Employer clearly outlining their authority.
- Be sure the professional services agreements with the Engineer are compatible with the authority the Engineer is required to exercise under the MDB Contract.

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## 2. Timing and authority to initiate Variations

- Timing: No Variation may be initiated after the Taking-Over Certificate. Watch for situations where there are potential disagreements over when the Works are ready for taking over.
- Red Book and MDB: The Contractor is not bound by a Variation if he cannot readily obtain the Goods required for the Variation.
- Particular MDB language: The Contractor is not bound by a Variation if "triggers a substantial change in the sequence or progress of the Works."

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### 3. Variations covered by Clause 13 and related Clauses

The Engineer's right to vary (Sub Clause 13.1)

- Engineer has two choices: A direct instruction or issuing a request for a proposal from the Contractor.

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### 3. Variations covered by Clause 13 and related Clauses

A Variation may involve:

- Changes in quantities. (Are changes in quantities always a Variation?)
- Changes to the quality and other characteristics.
- Changes to the levels, positions etc.
- Omissions unless work is to be carried out by others.
- Additional work necessary for the permanent works.
- Changes to the sequence or timing of the execution of the Works.

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### 3. Variations covered by Clause 13 and related Clauses

Related Clauses

- 4.12 Unforeseeable Physical Conditions.  
The Contractor shall give notice as soon as practicable.  
The Contractor shall continue to execute the Works.  
The Contractor shall comply with instructions which the Engineer may give.  
If an instruction constitutes a Variation, Clause 13 [Variations and adjustments] shall apply.  
Claims under Clause 20 are discussed in a following section.

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### 3. Variations covered by Clause 13 and related Clauses

- 7.4 Testing.

The Engineer may, under Clause 13 [Variations and Adjustments], vary the location or details of the specified tests, or instruct the Contractor to carry out additional tests.

The Contractor shall bear the cost if the Plant, Materials are not in accordance with the Contract.

If in accordance, and the Contractor suffers delay and/or incurs Costs from complying with the Engineer's instruction, he shall give notice and shall be entitled, subject to Sub-Clause 20.1 and Clause 50.7, and payment of **plus profit**

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### 3. Variations covered by Clause 13 and related Clauses

#### Related Clauses

- 8.3 Programme.  
The Contractor shall promptly give notice of specific probable future events or circumstances which may adversely affect the work, increase the Contract Price or delay the execution of the Works.  
The Engineer may require the Contractor to submit an estimate of the anticipated effect... and/or a proposal under Sub-Clause 13.3 [Variation Procedure].

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### 3. Variations covered by Clause 13 and related Clauses

#### Related Clauses

- 8.4 Extension of Time for Completion.  
An adjustment to the Time for Completion can be agreed under Sub-Clause 13.3 [Variation Procedure].  
Otherwise a Contractor may make a claim under Clause 20 in respect of a Variation if he considers himself to be entitled to an EOT.

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### 3. Variations covered by Clause 13 and related Clauses

#### Related Clauses

- 8.11 Prolonged Suspension.  
In case of a Suspension of part of the Work, exceeding 84 days, the Contractor may request the Engineer's permission to proceed.  
Should the Engineer fail to give permission within 28 days, the Contractor may, by giving notice to the Engineer, treat the suspension as an omission under Clause 13 [Variations and Adjustments].

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### 3. Variations covered by Clause 13 and related Clauses

#### Related Clauses

- 11.2 Cost of Remedying Defects.  
The Contractor shall execute all work required to remedy defects or damage as may be notified during the Defects Notification Period [Sub-Clause 11.1 (b)]  
This work is at the Contractor's risk and cost if related to any of his own design, Plant, Materials or workmanship not in accordance with the Contract, or any failure to comply with any of his obligations.

If the work is due to other causes, the Contractor shall be notified promptly and in accordance with Clause 13.3 shall

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#### 4. Initiation and instruction of variations

- A Variation is initiated by the Engineer either by an instruction or a request for proposal.

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#### 4. Initiation and instruction of variations

Request for proposal.

- The Contractor shall respond as soon as practicable.
- The response shall include:
  - A description of the proposed work and a programme for its execution.
  - Proposal for modifications to the Time for Completion and the programme pursuant to Sub-Clause 8.3.
  - Proposal for evaluation of the Variation.

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#### 4. Initiation and instruction of variations

- Questions regarding a proposal.
  - How does timing of the proposed Variation impact a decision to instruct a Variation or request a proposal?
  - Keep in mind the Contractor shall not delay any work whilst awaiting a response.
  - Is a proposal automatically considered to be a fixed price and time offer?
- No. Clause 12 [Measurement and Evaluation] applies unless the Engineer instructs otherwise.

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#### 4. Initiation and instruction of variations

- Questions regarding a proposal.
  - Can the Contractor claim for his Costs associated with the preparation of the proposal?
  - The FIDIC forms are silent on this point. Costs are therefore likely to be claimable in these circumstances.

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#### 4. Initiation and instruction of variations

- Instructing a Variation.
- The Engineer is not obliged to request a proposal prior to issuing an instruction to vary.
- He may initiate immediately, or request a proposal.
- If a proposal process has been started the Engineer may nevertheless initiate an instruction prior to receiving or completing discussions on the proposal.

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#### 5. The Contractor's rights and obligations

- "The Contractor shall not make any alteration and/or modification of the Permanent Works, unless and until the Engineer instructs or approves a Variation." Sub-Clause 13.1.
- "The Contractor shall execute and be bound by each Variation..." -Sub-Clause 13.1.
- Reminder: The Contractor has certain rights to refuse an instruction to vary as already discussed.

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#### 5. The Contractor's rights and obligations

- In the case where the Employer has requested a proposal, or the Contractor has made his own value engineering proposal under Sub-Clause 13.2: "The Contractor shall not delay any work whilst awaiting a response."

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#### 5. The Contractor's rights and obligations

- Value Engineering under Sub-Clause 13.2
- The Contractor may make his own proposals if he believes he knows how to:
  - accelerate completion,
  - reduce the construction or operating costs of the Works,
  - improve efficiency or value of the completed Works, or
  - otherwise benefit the Employer.

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### 5. The Contractor's rights and obligations

- Value Engineering under Sub-Clause 13.2
- The Contractor may not claim his Costs for preparing his proposal under Sub-Clause 13.2, but is remunerated by a split savings formula if his proposal is approved.
- The split savings is based on the difference between the "reduction in contract value", and the "reduction (if any) in the value to the Employer of the varied works."
- The Contractor receives 50% of the difference.

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### 5. The Contractor's rights and obligations

- Value Engineering - EXAMPLE:
- The Contractor Price is \$100. The Contractor proposes a plan to save \$10.
- However in his plan, the Contractor changes a piece of equipment, and it is estimated this piece of equipment will cost \$4 more to operate in today's value to operate over the life of the project.
- The Engineer approves the Contractor's proposal. How is his remuneration calculated.

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### 5. The Contractor's rights and obligations

- Value Engineering - EXAMPLE:
- Following the formula in Sub-Clause 13.2 (c):
- The reduction in contract value per Sub-Clause 13.2 (c)(i) is equal to \$10.
- But, the reduction in value to the Employer of \$4 following this variation has to be taken into account according to Sub-Clause 13.2 (c)ii.
- Therefore the Contractor only receives 50% of the difference between \$10-\$4, or \$3.

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### 5. The Contractor's rights and obligations

- Value Engineering - EXAMPLE:
- The revised Contract Price becomes \$93.
- Note the potential for disagreements for the evaluation of the "reduction in value to the Employer" in Sub-Clause 13.2 (c)ii.

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## 6. Practical Management Suggestions

### Tracking

- The procedures and standard forms developed for the project should clearly separate the Engineer's instructions to vary from any other communications with the Contractor.
- It should be clearly indicated in procedures that unless the Contractor has been given an instruction to vary, all other communications are to be considered as contract neutral, ie. without incidence as to price or time, but are only issued as part of daily administration of the contract.

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## 6. Practical Management Suggestions

### Tracking

- In the event the Contractor considers any particular communication with the Engineer should have been issued as an instruction to vary, he can issue his notice of claim under various Clauses under the Contract and/or notably Sub-Clause 20.1.
- The Engineer should therefore issue instructions to vary with a unique chronological reference number, and follow the process using spreadsheet or data base software.

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## 6. Practical Management Suggestions

### Tracking

- The spreadsheet should include columns indicating: date of issue, date of responses, the status of evaluations between the parties, or any related Engineer's determinations, the status of time impact claims or counter positions and a substantial place for "comments," where a running commentary summarizing the history of the matter can be followed.

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## 6. Practical Management Suggestions

### Tracking

- The Contractor's claims, should be similarly recorded and followed, including a column to indicated the final status of the claim, such as "formally withdrawn," "instruction to vary issued," Contract amendment signed with the Employer" etc....
- Reminder: the Engineer has no authority to change the Contract, and there are no procedures described for a formal amendment signed with the Employer, as would be needed to change the Time for Completion for example.

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## 6. Practical Management Suggestions

### Tracking

- Spreadsheets, and chronological correspondence files alone are not sufficient.
- The Engineer should develop detailed files by issue of subject.

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## 6. Practical Management Suggestions

### Tracking

- For example, for each Contractor or Employer claim the Engineer should open a specific subject file. This file should include copies of: all correspondence, minutes etc... leading up to the claim notice, all notices, responses and formal claims, extracts of all relevant drawings, and specifications, all time related schedules and analysis, extracts of relevant contract provisions and internal notes and memos.
- A similar file should be opened for instructions to vary and even "brewing" topics.

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## 7. Avoiding typical claim issues related to Variations

### Rates

- Disputes often arise over the setting of new rates, and the Engineer is required to make a Determination under Sub-Clause 3.5.
- These disputes often fall into one of two categories: adjustment due to changes in quantities under Sub-Clause 12.3 (a) (i-iv), or completely new rates due to Variations or other changes under Sub-Clause 12.3 (b) (i-iii).

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## 7. Avoiding typical claim issues related to Variations

### Rates

- A key element in settling disputes over changes in quantities is separating out the value of any fixed portion of the rate corresponding to any necessary temporary works such as scaffolding, hoisting equipment, or other preliminaries.
- An example is recalculating unit rates in a "preliminaries neutral" manner.
- Disputes over this subject can be minimized by including sufficient details of temporary works and other preliminaries in the Bill of Quantities.

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## 7. Avoiding typical claim issues related to Variations

### Rates

- The impact of disruption should not be confused with determining if the work is similar and executed in similar conditions. Claims for disruption should be handled separately under the Contract.
- Likewise Cost data per unit is often not properly kept by the Contractor, or provided to the Engineer.
- The contractor's actual Cost data, may not reflect "reasonable" costs and may be distorted by disruption, which should be separated.

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## 7. Avoiding typical claim issues related to Variations

### Rates

- The Engineer should therefore be careful to include the records he wants to see with regard to Cost data when he instructs a Variation, and define any new rates to be set.
- The Engineer should also make his own time studies to help determine new rates, and always compare any such Cost data whether from the Contractor or observed, with any available standard reference materials for such rate.

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## 7. Avoiding typical claim issues related to Variations

### Design

- A Variation instruction following approval of a Contractor's value engineering proposal, may involve some design by the Contractor.
- Sub-Clause 4.1 in the FIDIC Red Book and MDB state that: The Contractor shall design (to the extent specified in the Contract), execute and complete the Works..."
- However the RB and MDB Contracts generally anticipate the design will be the Employer's responsibility.

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## 7. Avoiding typical claim issues related to Variations

### Design

- When subsequent value engineering involves the Contractor in design, the parties need to resolve who is responsible for the design related to the value engineering Variation.
- Does the Engineer take the Contractor's design, have it approved, and re-issue it as an instruction? Is the original designer assumes responsibility?

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## 7. Avoiding typical claim issues related to Variations

### Design

- Or does the Contractor take responsibility for his part of the design? In which case what unintended consequences are there vis a vis the original designer's overall responsibility?
- The Insurance provisions of the Contract will most likely require revision in the later case.

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## Session 2

## The Management of Claims

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## The Management of Claims

1. Claims: Causes and Risks (Module 1)
2. Notices and Claims Procedures
3. Contractor's Claims, Sub-clause 20.1
4. Claims for Delay
5. Claims for Additional Payment
6. Employer's Financial Claims

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## 1. Claims: Causes and risks

- Covered with Module 1

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## 2. Notices and Claims Procedures

- The principle claims Clause is Clause 20.
- The Contractor is required to give a notice of his claim to the Engineer describing the event of circumstances giving rise to the claim.
- The Contractor has 28 days to do this after he became aware or should have become aware of the event or circumstances.
- "if the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment"

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## 2. Notices and Claims Procedures

- The notice is only a warning that the Contractor might have a claim.
- The Contractor must submit his fully detailed claim 42 days after he became aware or should have become aware of the event or circumstances.
- Note, there are two different and distinct requirements.
  - a) A notice (watch out there is a problem) – 28 days.
  - b) Here is my claim with full details and further particulars – 42 days.

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## 2. Notices and Claims Procedures

- Under FIDIC a notice of claim is often required to be given under more than one Clause.
- The following list of Sub-Clauses cover the main areas where the Contractor is required to give a notice, in addition to Sub-Clause 20.1.
- The table also mentions whether the Contract has entitlement to claim for Costs, profit and/or time.

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## 2. Notices and Claims Procedures

Sub-Clause	Costs	Profit	Time
1.9 Delayed Drawings or Instructions	Yes	Yes	Yes
2.1 Right of Access to the Site	Yes	Yes	Yes
4.7 Setting Out	Yes	Yes	Yes
4.12 Unforeseeable Physical Conditions	Yes	No	Yes
4.24 Fossils	Yes	No	Yes
7.4 Testing	Yes	Yes	Yes
8.4 Extension of Time for Completion	No	No	Yes
8.5 Delay caused by authorities	Silent	Silent	Yes

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## 2. Notices and Claims Procedures

Sub-Clause	Costs	Profit	Time
8.9 Consequences of Suspension	Yes	No	Yes
10.2 Taking Over Parts of the Works	Yes	Yes	Yes
10.3 Tests on Completion	Yes	Yes	Yes
11.8 Contractor to search	Yes	Yes	No
12.4 Omissions	Yes	No	No
13.7 Adjustments for Changes in Legislation	Yes	No	Yes
16.1 Contractor's Entitlement to Suspend Work	Yes	Yes	Yes
17.4 Consequences of Employer's Risks	Yes	No	Yes
19.4 Consequences of Forces Majeure	Yes (i-m)	No	Yes
	NO (natural data)		

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## 2. Notices and claims procedures

Clause requiring notices by the Contractor  
1.9 [Delayed Drawings or instructions]

- "The Contractor shall give notice to the Engineer whenever the Works are likely to be delayed or disrupted if any drawing or instruction is not issued to the Contractor within a particular time..."
- "The notice shall include details of the necessary drawing or instruction, details of why and by when it should be issued, and the nature and amount of delay or disruption likely to be suffered if it is late."

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## 2. Notices and claims procedures

Clause requiring notices by the Contractor

1.9 [Delayed Drawings or instructions]

- This is a heavy duty imposed on the Contractor.
- Simply indicating dates when drawings are due on the Contractor's programme does not constitute notice.
- Recall the Contractor has to show why he needs the drawings or information, and justify his claims for delay or disruption.

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## 2. Notices and claims procedures

Clause requiring notices by the Contractor  
8.5 [Delays Caused by Authorities]

- If the following conditions apply, namely:
  - (a) The Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in the Country,
  - (b) these authorities delay or disrupt the Contractor's work, and
  - (c) the delay or disruption was foreseeable,

Then this delay or disruption will be considered as a cause of delay under sub-paragraph 1.9 of sub-Clause 8.4.

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## 2. Notices and claims procedures

Clause requiring notices by the Contractor  
8.5 [Delays Caused by Authorities]

- This is the only Sub-Clause, other than 8.4, which makes no mention of the financial impact of any delays incurred at the hands of the authorities.
- It does not mean the Contractor is not entitled to recover his Costs, but it would depend on circumstances. For example if the delay occurs at the outset of the project before mobilisation, there may be no Costs involved.

What about Profit

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5

- "if the Employer considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or any extension of the Defects Notification Period, the Employer or the Engineer shall give notice and particulars to the Contractor."

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5

- Sub-Clause 2.5 lists two exceptions to the notice requirement:
  - Sub-Clause 4.19 [Utilities],
  - Sub-Clause 4.20 [Employer's Equipment and Free Issue Materials]

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5

WHEN ARE NOTICE AND PARTICULARS TO BE GIVEN?

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## 2. Notices and claims procedures Employers/ Engineer's Claims, Sub-Clause 2.5

- RB: "The Notice shall be given as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim."
- MDB: "The Notice shall be given as soon as practicable **and no longer than 28 days** after the Employer became aware, or should have become aware, of the event or circumstances giving rise to the claim."

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## 2. Notices and claims procedures Employers/ Engineer's Claims, Sub-Clause 2.5

- RB & MDB: "The particulars shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension<sup>1</sup> to which the Employer considers himself to be entitled in connection with the Contract."

1 Usually the Defects Notification Period.

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## 2. Notices and claims procedures Employers/ Engineer's Claims, Sub-Clause 2.5

- Do the particulars and the notice have to be given together?
- The language could be interpreted that they are to be given at the same time, and some commentators have written this.
- Where the MDB is used, the 28 day notification period could make it onerous on the Employer to produce particulars at the same time as the notice.

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## 2. Notices and claims procedures Employers/ Engineer's Claims, Sub-Clause 2.5

- However, there is no obligation to give particulars at the same time as the notice.
- According to the FIDIC Contracts Guide 2000:  
"Particulars may be given at any time, but excessive delay in their submission may be construed as an indication that the Employer will not be proceeding with the notified claim."

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5  
More about the 28 day notice period in the MDB

- Note there is no specific time bar operating against the Employer as does against the Contractor under Sub-Clause 20.1.
- So what happens to the Employer if he fails to meet the 28 notice requirement?

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5  
More about the 28 day notice period in the MDB

- Failure by the Employer to comply with the 28 days notice period is a breach of contract.
- The Contractor would have to show he suffered damages due to this breach, and prove the amount of his prejudice.

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5  
More about the 28 day notice period in the MDB

- The underlying principle of a notification clause is to allow the other party an opportunity to take action which may mitigate the damages claimed.
- If a delay in notification deprived the party in default of the opportunity to mitigate, the notifying party might not be able to collect all of his damages.

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5  
More about the 28 day notice period in the MDB

- Note the particularly important case of Sub-Clause 8.7 [Delay Damages].
- MDB: "If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall be subject to Notice under Sub-Clause 2.5 ... pay delay damages..."

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5  
More about the 28 day notice period in the MDB

- Under the MDB what happens if the Employer fails to give notice pursuant to Sub-Clause 2.5 of his right to collect delay damages?

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5  
More about the 28 day notice period in the MDB

- The possibility for mitigation, the underlying the principle of notification, may have little or no effect in the case of delay damages.
- However, what is the point of having such a requirement to notify of delay damages, if the Sub-Clause can be so easily undermined?
- Avoid this pitfall by issuing a notice as soon as the Time for Completion, or other milestone carrying delay damages, is missed.

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5  
More about the 28 day notice period in the MDB

- Finally, local law should be verified as to the validity of such time bar clauses.

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## 2. Notices and claims procedures

Employer's/ Engineer's Claims, Sub-Clause 2.5

- Once the Engineer has the Employer's particulars, Sub-Clause 2.5 states:  
"The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period in accordance with Sub-Clause 11.3 [Extension of Defects Notification Period]."

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## 2. Notices and claims procedures

Employers/ Engineer's Claims, Sub-Clause 2.5

- Unless the parties reach an early agreement regarding the Employer's claim, no deduction from Payment Certificates can be made until the Engineer's determination is issued. Sub-Clause 2.5 states:

"This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause."

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## 2. Notices and claims procedures

Employers/ Engineer's Claims, Sub-Clause 2.5

- The following should be considered with regard to the Contractor's response:
- The Contractor is to acknowledge receipt of the notice (Sub-Clause 1.3(a)).
- The Contractor is to list all notices issued under Sub-Clause 2.5 in his progress reports (Sub-Clause 4.21(f)).
- The Contractor should not regard the notice as an aggressive act which must be rebutted.

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## 2. Notices and claims procedures

Employers/ Engineer's Claims, Sub-Clause 2.5

- The Contractor should respond to any factual errors he finds in the notice, however,
- the absence of any rebuttal should not be taken as any indication of agreement.

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## 2. Notices and claims procedures

Employers/ Engineer's Claims, Sub-Clause 2.5

Some tips on notice drafting

- State what actually happened (with dates & references of relevant correspondence, minutes of meetings, etc.)
- Remain as neutral as possible, avoiding open criticism. Instead of referring to people by name, use their titles:
- "A reply was received from the Contractor on 05 May 2005" instead of :
- "Mr. Smith failed to reply until 05 May 2005".

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## 2. Notices and claims procedures

### Employer's/ Engineer's Claims, Sub-Clause 2.5

#### Some tips on notice drafting

- Mention that the Claim is based on the best information available at the moment and that the Contractor reserves the right to modify his request if better information becomes available.
- Mention that the Additional Costs are being financed by the Employer and that any delay in settling the Claim will increase the amount of interest that is to be added to the amount claimed.

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## 2. Notices and claims procedures

### Employer's/ Engineer's Claims, Sub-Clause 2.5

#### Some tips on notice drafting

- Attach copies of notices, correspondence, minutes of meetings, etc. to which you refer.
- Note, if the notice under Sub-Clause 2.5 is issued by the Engineer, the Employer should be copied, and vice versa.

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## 2. Notices and claims procedures

### Employer's/ Engineer's Claims, Sub-Clause 2.5

#### Other points to watch:

- Sub-Clause 2.5: "A notice relating to any extension of the Defects Notification Period shall be given before the expiry of such period."
- If the Employer is unable to deduct or off set his claim once determined by the Engineer, because at that time no Payment Certificates are otherwise due to the Contractor, then this could trigger a call on the Performance Security (RB Sub-Clause 4.2(b)).

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## 2. Notices and claims procedures

### Employer's/ Engineer's Claims, Sub-Clause 2.5

#### Other points to watch:

- Sub-Clause 4.2(b) was deleted in the MDB version, but the Employer can nevertheless make a claim against the Performance Security for amounts to which he is entitled under the Contract.
- The Engineer can delegate some of his authority to assistants in writing, but not his authority to determine any matter in accordance with Sub-Clause 3.5 [Determinations]. This applies to Employer's claims and Contractor's claims.

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### 3. Contractor's claims, Sub-Clause 20.1

#### Notification of claims

- "If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstances giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstances."

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### 3. Contractor's claims, Sub-Clause 20.1

#### Notification of claims

- Important reasons for having a notice obligation with a time bar clause is to give the Engineer and the Employer the possibility to:
  - a) Mitigate the circumstances if possible. For example; cancel an instruction, adjust a Variation, or take action against a third party.
  - b) Issue instructions regarding the type of Cost records the Contractor should keep and inspect those records in order to avoid disputes over damages later.

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### 3. Contractor's claims, Sub-Clause 20.1

#### Notification of claims

- Note that many claims also have to be notified under another Sub-Clause, not just Sub-Clause 20.1
- Refer to the Clause which demands the notice and the Clause (and Sub-Clause) that gives rise to the claim:
  - "... extension of time under Clauses 1.9 (a) and 8.4 and reimbursement of the additional costs under Clauses 1.9 (b) and 20.1"
- Specify the subject using expressions contained in the Contract:

- "Notice of Delay"; "Notice of Claim for Additional Payment"

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### 3. Contractor's claims, Sub-Clause 20.1

#### Notification of claims

- Minutes of meetings, programmes, or other correspondence which do not specify the applicable Sub-Clause(s) are not generally considered to be "notices."
- It can seem unfair when a claim is time barred for lack of notice, especially if the circumstances were such that there was no possibility for the Employer to have taken mitigating action.

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### 3. Contractor's claims, Sub-Clause 20.1

#### Notification of claims

- Watch for usage and practice during the execution of the Contract vis à vis time bars.
- In many jurisdictions the Employer may lose his right to time bar a claim if during the administration of the Contract this provision is systematically or frequently ignored.
- If an Employer ever ignores or waives his time bar rights, he should clearly state in writing that such consideration is an exception, and cannot be interpreted as a waiver of any future recourse to the time bar provisions.



### 3. Contractor's claims, Sub-Clause 20.1

#### Notification of claims

- General considerations:
- The Employer is to acknowledge receipt of the notice (Sub-Clause 1.3(a)).
- The Contractor is to list all notices issued under Sub-Clause 20.1 in his progress reports (Sub-Clause 4.21(f)).
- The Employer should not regard the notice as an aggressive act which must be rebutted.



### 3. Contractor's claims, Sub-Clause 20.1

#### Contemporary records

- "The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records, and shall (if instructed) submit copies to the Engineer

### 3. Contractor's claims, Sub-Clause 20.1

#### Contemporary records

- The Contractor is ultimately responsible for keeping contemporary records if he wants to be able to prove any claims for costs or delays.
- The Engineer should however not hesitate to be proactive and instruct and inspect records as he sees fit. If the Contractor is keeping records, and these are made available to the Engineer, the Engineer may have difficulty complaining about the accuracy of these records later if he has remained silent.

- The Engineer may wish to keep his own independent records in some cases.

### 3. Contractor's claims, Sub-Clause 20.1

#### Contemporary records

- With regard to contemporary records the FIDIC Contracts Guide 2000 states:  
"The importance of good record-keeping cannot be over-emphasised. The resolution of disputes frequently rests on the adequacy of contemporaneous records. If a party declines to agree matters for record purposes on the spurious ground that agreement of facts indicates admission of liability, the DAB or arbitrator(s) may decide to rely upon the other party's unchallenged contemporaneous records."

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### 3. Contractor's claims, Sub-Clause 20.1

#### Contemporary records

What is a "contemporary record"

« A.G. of the Falkland Islands v Gordon Forbes (the importance and the meaning of « Contemporaneous Documents) »

- Contemporaneous Documents according to article 53.4 of FIDIC 4th Edition.
- Register of contemporaneous information furnished by those who had direct knowledge of the facts.
- Code of civil procedure regarding proof.
- A witness statement can be used in the very limited situation to explain a contemporaneous document.



### 3. Contractor's claims, Sub-Clause 20.1

#### Preparation of claims

- The notice of claim must not be confused with the submission of the full detailed claim.
- The Contractor must first submit his initial notice of claim no later than 28 days after he became aware, or should have become aware, of the event or circumstance.
- The Contractor must then submit his fully detailed claim including full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed within 42 days after the Contractor became aware, or should have become aware of the event or circumstances, giving rise to the claim.



### 3. Contractor's claims, Sub-Clause 20.1

#### Preparation of claims

- In other words, the Contractor is normally to submit his fully detailed claim within 14 days after the latest notice date under the Contract.
- Note however that Sub-Clause 20.1 also allows the Contractor to propose a different period, which the Engineer may approve. This may make sense for complicated claims.
- In the event the Contractor proposes a longer period than 42 days, it may be necessary and reasonable for the Engineer to request a longer period to reply.





### 3. Contractor's claims, Sub-Clause 20.1

#### Preparation of claims

- Note also that if the event or circumstance giving rise to the claim has a continuing effect, the following procedure described in Sub-Clauses 20.1(a)-(c) shall apply:
- The fully detailed claim shall be considered as interim;
- The Contractor shall send further interim claims at monthly intervals including the cumulative effect and further particulars reasonably requested by the Engineer;

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### 3. Contractor's claims, Sub-Clause 20.1

#### Preparation of claims

- A final claim within 28 days, or other agreed period, after the end of the effects resulting from the event or circumstances.

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### 3. Contractor's claims, Sub-Clause 20.1

#### Preparation of claims

#### COMMENT & RECOMMENDATION:

- With regard to time, Sub-Clause 20.1 only calls on the Contractor to submit full supporting details of a claim for an extension of time.
- It is recommended that the Engineer instruct the Contractor to submit his programme information in regard to any programme impact to the sequence of works or quantity of work whether the Time for Completion is impacted or not.

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### 3. Contractor's claims, Sub-Clause 20.1

#### Engineer's assessment and principles of claim

- Under Sub-Clause 20.1, the Engineer is allowed up to 42 days, or other such period as agreed between the parties, to respond with approval or disapproval and detailed comments.
- The Engineer may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim.
- An early approval or disapproval of the principle, or basis of the claim is essential to the efficient management of claims and control of ~~costs~~ **costs** and time.

### 3. Contractor's claims, Sub-Clause 20.1

Engineer's assessment and principles of claim

- If the principle is approved, the Contractor can proceed confidently in the expectation of interim payments and a time extension if necessary.
- Likewise the Employer has advanced notice of the changed circumstances and can re-plan and/or organise financing accordingly.
- If the principle is disapproved, the Contractor can decide whether to accept the Engineer's determination, or to submit the dispute to the DAB.

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### 3. Contractor's claims, Sub-Clause 20.1

Engineer's assessment and principles of claim

- Note, if the Engineer disapproves the claim, Sub-Clause 20.1 requires him to provide detailed comments in support of the disapproval.
- These comments should include a reasoned argument why the Contractor has no contractual entitlement to pursue the claim, and/or why any of the supporting particulars are insufficient.
- In the event only part of the claim is disapproved, the Engineer should provide his detailed comments as to why such part is disapproved.

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### 3. Contractor's claims, Sub-Clause 20.1

Engineer's valuation

- The Engineer may be able to evaluate the claim based on the supporting particulars provided by the Contractor, or he may also request any necessary further particulars.
- There is no restriction on the number of times the Engineer may request further and better particulars of a claim, however note the following citation from the FIDIC Contracts Guide 2000.

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### 3. Contractor's claims, Sub-Clause 20.1

Engineer's valuation

- "[the Contractor] is entitled to prompt payment of 'such amounts as have been reasonably substantiated as due', without waiting until he has submitted every element of substantiation of a particular claim. His claim would have typically arisen from an event or circumstance for which he was not blameworthy, so it would be unreasonable for him not to receive prompt payment..."

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### 3. Contractor's claims, Sub-Clause 20.1

#### Engineer's valuation

- The Contractor is therefore entitled to payment for such part of the claim as he has been able to substantiate, even if the claim as a whole has not been completely supported.
- Likewise, it is recommended that the Engineer deal with the issue of time extensions as quickly as possible.
- Recall however an Engineer's determination under Sub-Clause 3.5 is required with respect to extending the Time for Completion.

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### 3. Contractor's claims, Sub-Clause 20.1

#### Engineer's valuation

- What if the Engineer fails to respond within 42 days or other period as may be agreed by the parties?
- What if the Engineer fails to give detailed comments with his disapproval of the Contractor's claims?
- By comparison with the Contractor's procedural failures, there are not stated consequences for the Engineer's failures.
- However DAB members and arbitrators may view this negatively, and there may be recourse under applicable © FIDIC and AJCE 2010



### 3. Contractor's claims, Sub-Clause 20.1

#### Engineer's determination, Sub-Clause 3.5

- When the Engineer has sufficient particulars he shall proceed under Sub-Clause 3.5 to make a "determination."
- In the MDB there is particular language, which states that the Engineer should proceed under Sub-Clause 3.5 within the 42 days allocated to the Engineer to respond to the Contractor's claim.
- Under the MDB version of Sub-Clause 3.5, the Engineer has 28 days to issue his determination. The RB on the other hand states 42 days.

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### 3. Contractor's claims, Sub-Clause 20.1

#### Engineer's determination, Sub-Clause 3.5

- The Engineer's first job when acting under Sub-Clause 3.5 is to attempt to achieve the agreement of both parties through consultations.
- Failing an agreement within a reasonable time, the Engineer shall make "a fair determination in accordance with the Contract, taking due regard of all relevant circumstances."
- The Engineer's determination is to be accompanied with supporting particulars.

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### 3. Contractor's claims, Sub-Clause 20.1 Engineer's determination, Sub-Clause 3.5

- "Each Party shall give effect to each agreement or determination unless and until revised by the next higher step in the dispute resolution procedure.
- This almost always means a DB.

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### 3. Contractor's claims, Sub-Clause 20.1 Engineer's determination, Sub-Clause 3.5

- The Engineer may make an interim determination(s) on the principle, and even with regard to additional payment or an extension of time, indicating his intention to review the matter of additional payment when further particulars are presented to him.
- Any interim decision is binding on the parties and therefore a party may refer it directly to the DAB, however it is recommended to allow the Engineer the opportunity to review his previous determination.

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### 3. Contractor's claims, Sub-Clause 20.1 Engineer's determination, Sub-Clause 3.5

- FOOTNOTES:
- If the Engineer issues an interim determination for an extension of the Time for Completion, can this be reduced in a subsequent determination?
- Note the language of Sub-Clause 8.4 [Extension of time for Completion]: "When determining each extension of time under Sub-Clause 20.1, the Employer shall review previous determinations and may increase, but shall not decrease the total extension of time."

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### 4. Claims for delay Extension of time, Sub-Clause 8.4 and 8.5

- If the Contractor is entitled to a time extension, does that automatically translate into a right to additional payment?
- NO!

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- The Extension of time Sub-Clause is meant allow the Employer to extend the Time for Completion and thus reset the date on which delay damages will become due in situations where any of the listed events occur, or if there is a delay, impediment or prevention by the Employer himself (Sub-Clause 8.4(e)).
- The Contractor may or may not be entitled to additional payment under the Contract, but this is considered as a separate claim and is regulated by separate Clauses.

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- In the words of the Society of Construction Law's Delay and Disruption Protocol (October 2002):
- "The benefit to the Contractor of EOT is only to relieve the Contractor of liability for damages for delay (usually liquidated damages (LDs) for any period prior to the extended contract completion date. The benefit of an EOT for the Employer is that it establishes a new contract completion date, and prevents time for completion of the works becoming "at large"..."

(Core principles relating to delay)



#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- Sub-Clause 8.4 does not include a list of the events giving rise to entitlement to an extension under the Contract.
- However Sub-Clause 8.4(b) broadly refers to: " a cause for delay giving an entitlement to extension of time under a Sub-Clause of these Conditions."
- These Sub-Clauses are as follows:

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

Sub-Clause	Costs	Profit	Time
1.9 Delayed Drawings or Instructions	Yes	Yes	Yes
2.1 Right of Access to the Site	Yes	Yes	Yes
4.7 Setting Out	Yes	Yes	Yes
4.12 Unforeseeable Physical Conditions	Yes	No	Yes
4.24 Fossils	Yes	No	Yes
7.4 Testing	Yes	Yes	Yes
8.5 Delay Cause by Authorities	Depends	No	Yes
8.9 Consequences of Suspension	Yes	No	Yes

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

Sub-Clause	Costs	Profit	Time
10.2 Taking Over/Parts of the Works	Yes	Yes	Yes
10.3 Tests on Completion	Yes	Yes	Yes
13.7 Adjustments for Changes in Legislation	Yes	No	Yes
16.1 Contractor's Entitlement to Suspend Work	Yes	Yes	Yes
17.4 Consequences of Employer's Risks	Yes	No	Yes
19.4 Consequences of Forces Majeure	Yes (i-w)	No	Yes
	No (i) natural cat. etc.	No	Yes

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- In the words of the Society of Construction Law's Delay and Disruption Protocol (October 2002):
- "1.2.4 Applications for EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application."
- "1.2.12 For an EOT to be granted, it is not necessary for the Employer's Risk Event already to have begun to affect the Contractor's progress with the works or for the effect of the Employer's Risk Event to have ended."

Guidance Notes, pgs. 11 and © FIDIC and AJCE 2010

#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- "1.2.14 Where the full event of an Employer Risk Event cannot be predicted at the time of initial assessment by the CA, the CA should grant an EOT for the then predictable effect. The EOT should be considered by the CA at intervals as the actual impact of the Employer Risk Event unfolds and the EOT increased (but not decreased, unless there are express contract terms permitting this) if appropriate." [Guidance Notes, pg.13]

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- The principles of FIDIC RB and MDB follow the SCL recommended practices.
- The last sentence of Sub-Clause 8.4 states:
- "When determining each extension of time under Sub-Clause 20.1, the Engineer shall review previous determinations and may increase, but shall not decrease, the total extension of time."

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- Why is it considered good practice to grant time extensions as early as possible?
- Both Parties need predictability.

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- What about those cases where additional payment is due following an extension of time?
- Additional payment is supposed to be based on Costs, but if the extension of time is granted early, the Costs are not yet known.
- Is this a contradiction?

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- More details of Sub-Clause 8.4(e), giving the Contractor entitlement to an extension for:  
"any delay, impediment or prevention caused by or attributable to the Employer, the Employer's Personnel, or the Employer's other contractors on the Site."  
- Under most common law jurisdictions, the Employer must specifically allow himself the right to grant a time extension for delays to the works he has caused himself.

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- If he has not specifically granted himself this power, he may not extend the Time for Completion, however if the Employer has delayed the project, the Contractor will be excused from achieving the project by the Time for Completion, and thus no delay damages can be applied.
- Time is thus said to be at large, and the Contractor has a 'reasonable' period of time to complete the works, but in no event would the liquidated delay damages be applicable.

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- Note that most events, potentially giving rise to Contractor entitlement to an extension of time under Sub-Clause 8.4(e), are also covered as Employer's Risks pursuant to Sub-Clause 17.3 and 17.4.

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- Note that Sub-Clause 8.4(e) also applies to the Employer's other contractors.
- This entitlement however should be read in conjunction with Sub-Clause 4.6 [Co-operation].
- Note that in the RB, the Engineer may issue an instruction to allow appropriate opportunities for other contractors to carry out work. Such instruction shall constitute a Variation, and the Contractor may recover Unforeseeable Costs. There is no mention of a time extension.

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- In the MDB version, however, language has been added indicating that delays are to be taken into account under Sub-Clause 4.6.
- "Any such instruction shall constitute a Variation and to the extent that it causes the Contractor to suffer delays and/or to incur Unforeseeable Costs."

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- **RECOMMENDATION:** Include as much information as known in the contract documents regarding the number of other contractors and parties likely to work in parallel with the Contractor. Include the anticipated periods of site work, the areas where works will be performed, the state of completion by the Contractor required, restrictions on the Contractor's access, and any Services or access to Temporary Works or use of Contractor's Equipment. This allows the Contractor to price and foresee these constraints, and thus reduces the use of

Sub-Clauses 8.4(e) and AJCE 2010





#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- More details of Sub-Clause 8.4(c), giving the Contractor entitlement to an extension for: "exceptionally adverse climatic conditions,"
- How do you decide if climatic conditions have been exceptionally adverse?

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- The FIDIC Contracts Guide 2000 states the following: "...it might be appropriate to compare the adverse climatic conditions with the frequency with which events of similar adversity have previously occurred at or near the Site. An exceptional degree of adversity might, for example, be regarded as one which has a probability of occurrence of four or five times the Time for Completion of the Works (for example, once every eight to ten years for a two year contract).

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#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5

- Note that there is no corresponding entitlement to additional payment under FIDIC for such an extension of time, however,
- Note the potential difficulties in separating exceptionally adverse climatic conditions from the Employer's Risk, which does give rise to entitlement for additional payment, pursuant to Sub-Clause 17.3(h): "any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to take adequate preventative precautions."

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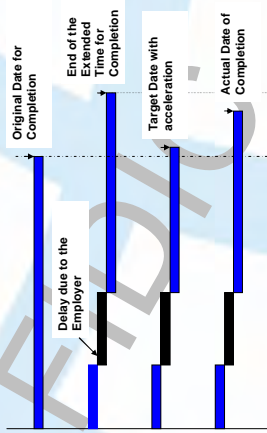
#### 4. Claims for delay

Extension of time, Sub-Clause 8.4 and 8.5 [added]

- A few comments on acceleration in the MDB.
- Unlike the RB, the Contractor can be ordered to revise his methods, including acceleration measures, even when the delay has been caused by the Employer [Sub-Clause 8.6j].
- In such case, the Contractor shall be paid his costs without profit.

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#### 4. Claims for delay

Force Majeure, Sub-Clause 19.4

- Sub-Clause 19.1 describes the general meaning of an Event of Force Majeure under the Contract at Sub-Clause 19.1(a)-(d).
- In Sub-Clauses 19.1(i) to (v), we find a non exhaustive list of the kind of events which can be considered as Force Majeure events.
- Sub-Clause 19.4 describes the consequences of various Force Majeure events.

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#### 4. Claims for delay

Force Majeure, Sub-Clause 19.4

- According to Sub-Clause 19.4(a), and provided the Contractor has given notice pursuant to Sub-Clause 19.2 and 20.1, the Contractor shall be entitled to a time extension in case of delay due to any Force Majeure event.
- According to Sub-Clause 19.4(b) however additional payment in respect of a Force Majeure event is limited to those cases described specifically under Sub-Clauses 19.4(i)-(iv) and only if the event has occurred in the Country where the Works are situated.

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#### 4. Claims for delay

Force Majeure, Sub-Clause 19.4

- Under Sub-Clause 19.4 therefore the Contractor does not have entitlement to claim for additional payment in respect of a Force Majeure event as described in Sub-Clause 19.4(v) ie:
  - "natural catastrophes such as earthquake hurricane, typhoon or volcanic activity."

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#### 4. Claims for delay

##### Force Majeure, Sub-Clause 19.4

- Note however the Employer's Risk event at Sub-Clause 17.3(h): "any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions."
- The events covered by Sub-Clause 17.3(h) and 19.4(v) are clearly very very similar.
- However, unlike Sub-Clause 19.4, the Contractor is entitled to additional payment pursuant to Sub-Clauses 17.3(h) and 17.4(b).

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#### 4. Claims for delay

##### Force Majeure, Sub-Clause 19.4

- What differentiates Sub-Clause 17.3(h) is the word Unforeseeable, which is defined in Sub-Clause 1.1.6.8 as follows:
- "**Unforeseeable** means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender."

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#### 4. Claims for delay

##### Some terminology for programming and delay analysis

- Programme: The elements and make up have been covered in Module 1 in connection with Sub-Clause 8.3 [Programme].
- Activity: An operation or process that takes time and possibly resources – sometimes called a "Task."
- Duration: The time needed to complete an activity.
- Link: The way in which two or more activities are related: can be "Finish to Start", "Start to Start" or "Finish to Finish."

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#### 4. Claims for delay

##### Some terminology for programming and delay analysis

- Lag: The minimum period of time necessary between two linked activities.
- Float: The time available for an activity in addition to its planned duration.
- Bar Chart: The usual way of presenting a programme: a series of horizontal bars, one for each activity, the length of which corresponds to the activity duration – sometimes called a "Gantt Chart"

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#### 4. Claims for delay

What is delay?

- Delay to Progress
- A delay which affects the Contractor's progress but which does not affect the Time for Completion of the Works – sometimes referred to as a "Non-Critical Delay"
- Delay to Completion
- A delay to progress of an activity on the critical path which will, without acceleration or re-sequencing, cause the overall project duration to be extended – sometimes called a "critical delay".

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#### 4. Claims for delay

What is the critical path?

- The sequence of activities from start to finish, the sum of whose durations determines the overall project duration.
- What is disruption?
- A disturbance or interruption of a Contractor's normal work progress, resulting in lower efficiency or lower productivity than would otherwise be achieved. It does not necessarily result in a Delay to Progress or a Delay to Completion.

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#### 4. Claims for delay

- It is essential for the Contractor to correctly prepare a programme in accordance with Sub-Clause 8.3 and to keep it updated in order to reflect all changes of logic and the actual progress of the Works.
- This programme should be prepared using the software specified in the Contract ("Suretrack", "Primavera", ...).
- The critical path should be shown.
- In general, bar-charts are more readable than networks.
- In general, the duration of individual tasks should not exceed 28 days or be less than 7 days.

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#### 4. Claims for delay

- As much as possible, each task should involve only one trade or one operation.
- For each task, indicate the quantity of work, planned output and the principal resources to be used.
- Holiday periods and public holidays should be shown.
- Other periods of unavoidable inactivity (such as time for curing of concrete) should be shown as lags between linked tasks.

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#### 4. Claims for delay

The programme should show obligations of the Engineer and Employer, such as:

- dates when parts of the site are to be made available;
- dates when drawings are to be supplied or approved;
- dates when materials and equipment are to be chosen or approved (and the subsequent delivery periods);
- dates by which Nominated Suppliers or Subcontractors are to be chosen;

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#### 4. Claims for delay

- These details must be linked to the tasks concerned rather than be shown as isolated dates, so that actual dates move according to the progress of earlier activities.
- The programme should be accompanied by a "Method Statement" and a "Cash Flow Forecast".
- The Engineer should insist the Contractor submit his programme within 28 days. The Engineer has 21 day to notify any extent to which the programme does not comply with the Contract. Failure to establish a clear and reasonable baseline programme at the outset of the project is a major source of disputes.



#### 4. Claims for delay

- Note the Engineer does not approve the programme, and by implication, the Contractor has broad freedom to determine how he will execute the Works. If the Engineer or the Employer intend for the Contractor to use any set methods or sequences, these need to have been defined in the Contract.
- Failure to establish a clear and reasonable baseline programme at the outset of the project is a major source of disputes.

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#### 4. Claims for delay

- The programme must be updated to take account of actual progress at least once per month and the update should be safe-guarded electronically.
- Each updated programme must be supported with details of resources actually used as well as output achieved.
- When updating the programme, insert a task or a sub-programme representing each cause of delay for which the Employer is liable.
- If the logic of the programme is modified during updating, these modifications should be explained in a text.



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#### 4. Claims for delay As Built programme

- The programme updated in this way represents at all times, the "as-built" programme.
- The quality of an "as-built" programme prepared on a monthly basis will be much higher than the quality of an "as-built" programme begun at the time of completion when proper information may be difficult to find.
- In any case, the schedule should be regularly updated if it is to be used as a tool for managing construction.
- This is mainly the Contractor's job – why should the Employer care?

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#### 4. Claims for delay

Recall Sub-Clause 8.4:

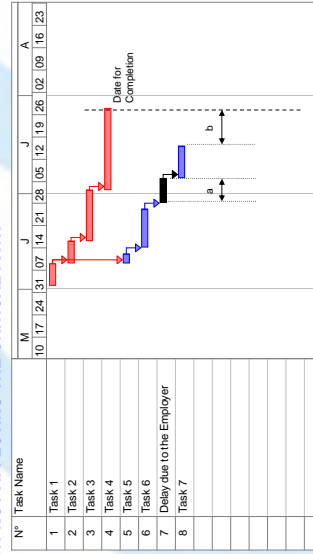
- "The Contractor shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to an extension of the Time for Completion if and to the extent that completion for the purposes of Sub-Clause 10.1 [Taking Over of the Works and Sections] is or will be delayed by any of the following causes:

- (a).....
- (b).....
- (c) etc."

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#### 4. Claims for delay

##### DELAY NOT AFFECTING THE CRITICAL PATH



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#### 4. Claims for delay

##### DELAY AFFECTING THE CRITICAL PATH BUT WITHOUT THE DATE FOR COMPLETION BEING EXCEEDED



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### 4. Claims for delay

**DELAY AFFECTING THE CRITICAL PATH SO THAT THE DATE FOR COMPLETION IS EXCEEDED**

N°	Task Name
1	Task 1
2	Task 2
3	Task 3
4	Delay due to the Employer
5	Task 5
6	Task 6
7	Task 7
8	Task 8

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### 4. Claims for delay

**DELAY CAUSED BY THE EMPLOYER AFTER THE DATE FOR COMPLETION**

N°	Task Name
1	Task 1
2	Task 2
3	Task 3
4	Task 4
5	Delay due to the Employer
6	Task 6
7	Task 7
8	Task 8

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### 4. Claims for delay

**DELAYS DUE TO EACH OF THE PARTIES - Case 1**

N°	Task Name
1	Task 1
2	Task 2
3	Task 3
4	Delay due to the Employer
5	Task 5
6	Task 6
7	Delay due to the Contractor
8	Task 8
9	Task 9

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### 4. Claims for delay

**DELAYS DUE TO EACH OF THE PARTIES - Case 2**

N°	Task Name
1	Task 1
2	Task 2
3	Task 3
4	Delay due to the Employer
5	Task 5
6	Task 6
7	Delay due to the Contractor
8	Task 8
9	Task 9

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#### 4. Claims for delay

##### DELAYS DUE TO EACH OF THE PARTIES – Case 3



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Claims and the Resolution of Disputes: 2 – The Management of Claims

#### 4. Claims for delay

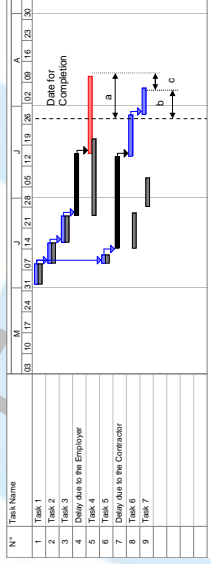
##### Cost v. Price

- At law, the Contractor has the right to reimbursement of his costs unless the Contract expressly states otherwise. "Cost" means all expenditure reasonably incurred (or to be incurred), by the Contractor, whether on or off the Site, including overhead and similar charges but does not include any allowance for profit" (Sub-Clause 1.1.4.3)
- The use of "Preliminaries" or other PRICES in order to evaluate prolongation costs should therefore be avoided.

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#### 4. Claims for delay

##### DELAYS DUE TO EACH OF THE PARTIES – Case 4



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#### 4. Claims for delay

##### Different categories of Costs

- Direct Costs (Labour, Equipment, Materials, Sub-contractors).
- Indirect Site Costs (Management & Supervisory staff, Support staff, Offices, Consumables, Insurances, etc.) – sometimes called Site Overheads.
- Indirect Head Office Costs – sometimes called Head Office Overheads.
- Financing Costs, and Inflation.

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#### 4. Claims for delay

- The Contractor must be able to prove that he has actually incurred or will incur the Costs claimed .
- Often actual costs cannot be ascertained before the end of the Works – but this does not release the Contractor from his obligation to provide interim details on the basis of the best information available.

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#### 4. Claims for delay

Prolongation Costs due to Variations or Increases in

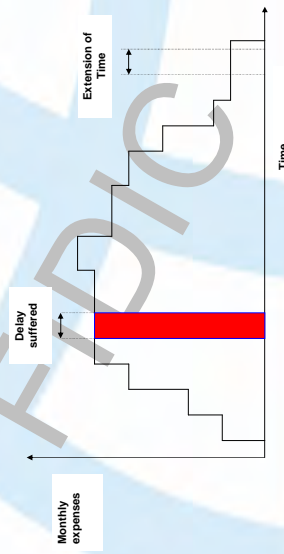
Quantity:

- Are not expressly foreseen by the Contract.
- Must be claimed via new prices under Clause 13.3, if the Engineer asks for a proposal from the Contractor before confirming his instruction to execute the Variation.
- Are to be assessed at the time of pricing the Variation – this means that the extension of time due to the Variation must also be assessed.

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#### 4. Claims for delay

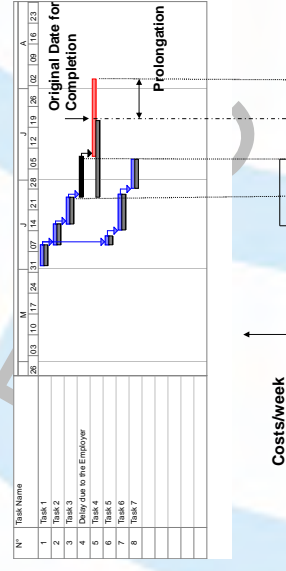
Period to be taken into account for evaluating Additional Costs



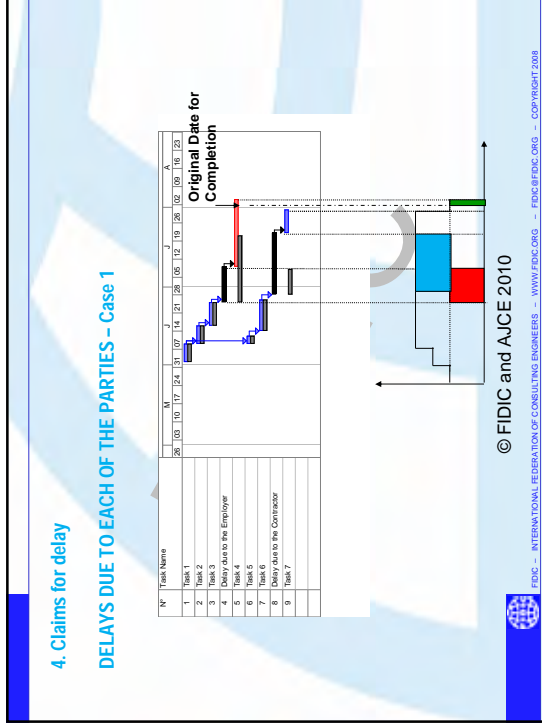
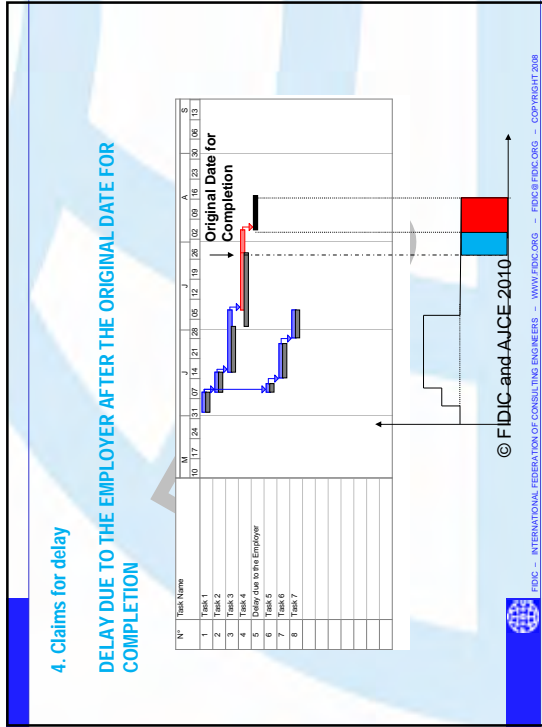
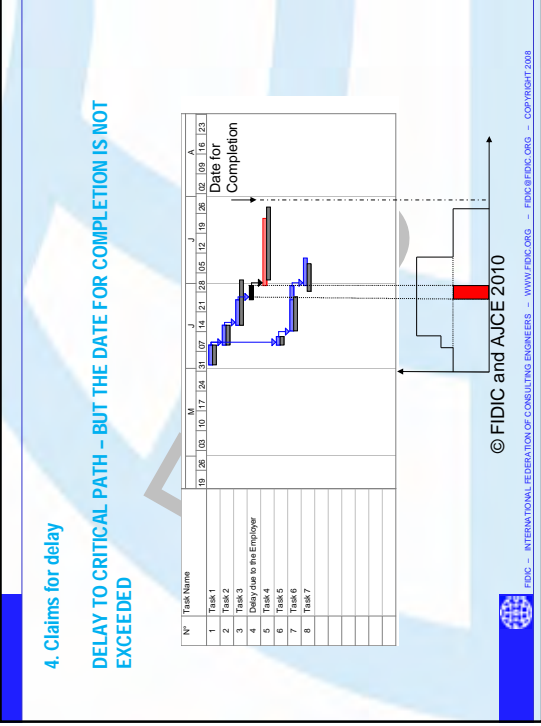
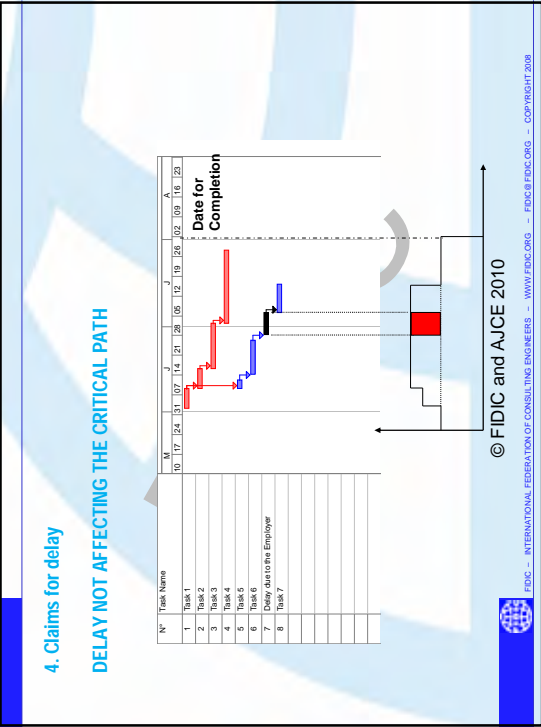
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#### 4. Claims for delay

DELAY TO CRITICAL PATH CAUSING - DATE FOR COMPLETION TO BE EXCEEDED



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Claims and the Resolution of Disputes: 2 - The Management of Claims

#### 4. Claims for delay

Disruption or loss of efficiency:

- The Society of Construction Law's Delay and Disruption Protocol (October 2002): defines "disruption" as disturbance, hindrance or interruption to a Contractor's normal working methods, resulting in lower efficiency.
- Work so disturbed by a cause for which the Employer is responsible, can give rise to a claim from the Contractor for the cost of the lost efficiency, even if it does not give rise to a right to an extension of time.

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Claims and the Resolution of Disputes: 2 - The Management of Claims

#### 4. Claims for delay

- The causes of disruption can also be symptoms of poor site management.
- The Engineer has to take a fair view of the situation, as the two causes are often difficult to separate. Hence the need for the Engineer to be very close to the programme update process.
- To be in the best possible position to assess the situation, excellent records of man-power, equipment and productivity are required.

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#### 4. Claims for delay

##### DELAYS DUE TO EACH OF THE PARTIES - Case 2

N°	Task Name	Start	End
1	Task 1	08	10
2	Task 2	10	13
3	Task 3	13	16
4	Delay due to the Employer	16	19
5	Task 4	19	21
6	Task 5	21	23
7	Task 6	23	25
8	Delay due to the Contractor	25	28
9	Task 7	28	31

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Claims and the Resolution of Disputes: 2 - The Management of Claims

#### 4. Claims for delay

Disruption or loss of efficiency:

- The most common causes of disruption are:
  - the loss of work rhythm (caused by example by additional moves between work areas or by out-of-sequence working),
  - congestion of the work area (caused by a concentration of different work trades, that is: workers of one trade begin working in an area before the preceding trade has finished in that area),
  - increases in the size of work gangs,
  - increases in the length and/or number of shifts worked (overtime).

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#### 4. Claims for delay

- The best way to prove disruption consequent to an event for which the Employer is responsible is to compare the poor productivity with productivity in areas or during periods which have not been disturbed. ("Measured Mile")
- See the following example

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#### Example:

Area/Period of Normal Work	Area/Period of Disrupted Work
Amount invoiced for tiling work during the period \$ 1060	Amount invoiced for tiling work during the period \$ 1100
Number of manhours spent on tiling during the period 85	Number of manhours spent on tiling during the period 120
Productivity = Amount invoiced per manhour \$ 12.47	Productivity = Amount invoiced per manhour \$ 9.17
Loss of Productivity per manhour as a percentage of normal productivity (12.47-9.17)/12.47	26.49%
Real cost of tiling manpower in the area/period disrupted 120 x \$ 3	\$ 360
Additional Cost	26.49% x \$ 360 \$ 95.64

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#### 4. Claims for delay

- It is very important to have accurate and precise details of resources deployed by area, by period and by activity.
- The Engineer may issue the instructions as necessary for the Contractor to maintain and supply the needed information.
- If the Contractor is not cooperating, or as a measure of precaution, the Engineer may want to deploy the means necessary on Site to collect his own data.

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#### 4. Claims for delay

- Difficulty can arise if the Works are so disturbed that there is no zone or period of normal productivity on which to base a comparison.
- Under such circumstances, a comparison can be made with productivity achieved by the Contractor on other projects - but the Contractor has to prove that the other projects are closely similar.
  - in geographical environment,
  - in size,
  - in the kind of Works, etc.

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#### 4. Claims for delay

- When no such similar projects exist, reference can be made to published information concerning the losses of efficiency to be expected under given circumstances.
- Disruption evaluated on the basis of such general statistics must be supported by the best possible evidence from the project itself.

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#### 4. Claims for delay

- If published information forecasts a loss of efficiency of about 25%, a comparison of actual productivity with that foreseen in the Contractor's tender must show a similar level of loss - after having taken account of events for which the Contractor is responsible, or his own causes of delay, such as equipment break-downs.
- In all evaluations of disruption, losses of productivity that are not the responsibility of the Employer must be removed.

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#### 4. Claims for delay

Avoid accepting 'Global Claims'

- The Contractor normally must prove that every cause of delay/additional cost from which he has suffered gives him the right to claim.
- He must eliminate the effects of every significant cause of delay/additional costs which is not due to the Employer, but:
- If it is not possible to eliminate every cause which is not the liability of the Employer, there is some jurisprudence whereby there can be apportionment of responsibility between the two Parties.

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#### 4. Claims for delay

Mitigation

- The Contractor must take reasonable measures to minimise the effects on his programme of events for which the Employer is liable:
- But without unreasonably increasing his overall costs.
- Therefore, more workers must be employed in order to minimise the delay if the cost of the increase is less than the prolongation costs that would be claimable if the delay was not reduced.

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#### 4. Claims for delay

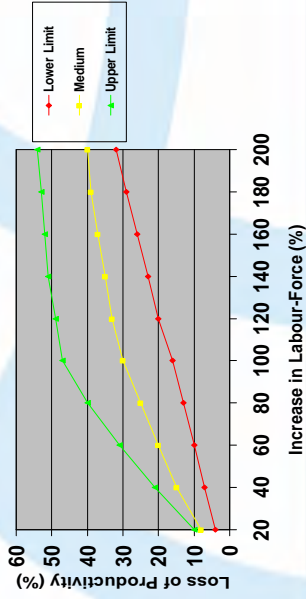
##### Effects of Acceleration Measures

- Acceleration measures can be relatively unproductive:
- A doubling of the labour-force does not cut the work duration by 50% - each worker achieves only 65% to 70% of his normal output, which yields a time-saving of 23% with a corresponding labour cost increase of 54%.

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#### LOSS OF PRODUCTIVITY v INCREASE IN LABOUR-FORCE



#### 4. Claims for delay

If you do decide to take acceleration measures, think carefully about all the consequences:

- Will the drawings be available?
- Is the Contractor's plan properly thought out and specific?
- Is the Contractor's plan credible vis à vis availability of equipment and labour?

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#### 5. Claims for additional payment

##### Ground Conditions, Sub-Clause 4.12 [Unforeseeable Physical Conditions]

- "In this Sub-Clause, 'physical conditions' means natural physical conditions and man-made and other physical obstructions and pollutants, which the Contractor encounters at the Site when Executing the Works, including sub-surface and hydrological conditions but excluding climatic conditions."
- "If the Contractor encounters adverse physical conditions which he considers to have been Unforeseeable, the Contractor shall give notice to the Engineer as soon as practicable."

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- "1.1.6.8 **'Unforeseeable'** means not reasonably foreseeable by an experienced contractor by the date for submission of the Tender."
- The verb to "foresee" has a synonym; "foreknow." There is therefore a suggestion of likelihood and predictability attached to the word.
- An event which is 'imaginable' is therefore not necessarily "reasonably foreseeable by an experienced contractor."

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- This definition is not perfect, and can leave room for disagreement.
- Two elements will have an impact on reducing disputes.
- First, is the quality of the Site Data supplied by the Employer und Sub-Clause 4.10 [Site Data].
- Second, The Employer may want to consider including precise descriptions of what is "not foreseen" in the Particular Conditions or Employer's Requirements with regard to such matters as hydrological conditions, and clarify the consequences of extremely adverse conditions.

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- The Contractor is responsible for interpreting the Site Data, and for obtaining other information, so far as was practicable.
- However, these obligations will be viewed in the perspective of the thoroughness of the Site Data, and the time available and the accessibility of the Site at Tender.
- Note that under Sub-Clause 4.10, the Employer shall make available "all relevant data" in his possession, and shall make available all such relevant data which comes into the Employer's possession after the Base Date.

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- Failure to provide all relevant data will have a significant impact on determining whether a physical condition was foreseeable.
- The law in some countries may entitle the Contractor to terminate if the data has been negligently withheld.
- According to the FIDIC Contracts Guide 2000, the following are not considered to be relevant data:
  - information which is known to be incorrect,
  - experts' opinion and other non-factual interpretation

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- The Contractor's notice is required to describe the physical conditions so that they can be inspected by the Engineer, and shall set out reasons why the Contractor considers them to be Unforeseeable.
- Unless instructed otherwise, "the Contractor shall continue executing the Works, using such proper and reasonable measures as are appropriate for the physical conditions."
- The Contractor shall also comply with an instruction given by the Engineer.

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- The Engineer's instruction may constitute a Variation, as an unforeseen physical condition frequently necessitates a change in design or methods.
- Sub-Clause 4.12 generally entitles the Contractor to an extension of time and additional payment of Costs (without profit) to the extent he encounters Unforeseeable physical conditions.
- The Engineer shall proceed immediately to make a determination under Sub-Clause 3.5 "upon" [MDB] or "after" [RB] receipt of such notice and inspection and/or investigation of the physical condition.

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

How should the Costs be calculated?

According to the FIDICS Contract Guide 2000:

- The amount due to the Contractor is equal to:
- The Cost attributable to the Unforeseeable physical conditions, compared with the anticipated physical conditions which could have been anticipated.

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

Basic example N° 1:

- The Contractor encounters a massive unforeseen spring, and the Engineer instructs the installation of several large pumping stations. Assume excavation continues normally thereafter.
- The Contractor does not have entitlement to adjust his unit rate for excavation, as he may attempt to claim.
- The Contractor shall be paid his contract value for the excavation plus his Costs associated with installing and running the pumping operation.

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

Basic example N° 2:

- The Contractor encounters a massive unforeseen spring, and the Engineer instructs the installation of several large pumping stations, and site access changes so that much smaller equipment now has to be used for excavation, and in general the earth is always damp, and difficult to handle. The excavation is substantially impacted.
- For such a relatively infrequent situation, different guidelines apply

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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- Sub-Clause 4.12 contains a rather unique mechanism for balancing Unforeseen physical conditions against more favourable than foreseen physical conditions.
- The Engineer has the power to review whether other physical conditions in similar parts of the Works (if any) were more favourable than could have been foreseen.
- If and to the extent these more favourable conditions were encountered, the Engineer may proceed in accordance with Sub-Clause 3.5.
- However the resulting reduction in Cost shall not result in a net reduction in the Contract Price.



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### 5. Claims for additional payment

Ground Conditions, Sub-Clause 4.12

- Recall Sub-Clause 4.10, where the Contractor is deemed to have examined and inspected the Site to the extent which was practicable taking account of cost and time.
- The Contractor may also have obtained information elsewhere from previous projects in the area or from publicly available records.
- The information gathered from the above sources can have an impact in interpreting what physical conditions were reasonably foreseeable to the Contractor.

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

- The key disputes over possession of the Site revolve around cases of:
  - Means of access to the Site.
  - Partial access to the Site.
  - Shared access to the Site.
- Access to land not directly associated with the Permanent Works (e.g. storage areas, quarries), or subsidiary to the main location of the Permanent Works (e.g. power line pylon installations.)

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Means of access to the Site.

- "if, under the Contract, the Employer is required to give (to the Contractor) possession of any ... means of access, the Employer shall do so in the time and manner stated in the Specification."
- If nothing is stated in the Specification, or elsewhere in the Contract, the Contractor is responsible, at his cost and responsibility vis à vis the Time for Completion, for obtaining permits and building access routes, even if the needed land is owned by third parties.

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Means of access to the Site.

- See also:  
Sub-Clause 4.13 [Rights of Way and Facilities]  
Sub-Clause 4.15 [Access Route]

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Partial access to the Site.

- "The Employer shall give the Contractor right of access to, and possession of, all parts of the Site within the time (or times) stated in the Contract Data."
- The Contractor has the right of access (i.e. possession) to the whole of the Site, unless the Employer/ Engineer have taken care to spell out any sequencing or restrictions/ partial handovers etc... in the Contract Data.

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Shared access to the Site.

- "The right [of access] and possession may not be exclusive to the Contractor."
- The contract Conditions do not specifically state that work anticipated by other parties in parallel with the Contractor have to be spelled out in the Specification or elsewhere.
- However, if the Employer knows work will be done by third parties, it should be described in the tender documents to allow tenderers to anticipate the consequences.

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Shared access to the Site.

- If information regarding third party operations on Site are not described under the Contract, the Contractor cannot bar the third party from entering the Site, but he may submit a notice of claim under Sub-Clause 20.1 for additional payment and an extension of the Time for Completion to the extent the third party interferes with his work.
- However in most cases, the Engineer should issue a Variation instruction.

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Shared access to the Site.

- This situation is linked to Sub-Clause 4.6 [Co-operation], which states the Contractor shall, as specified in the Contract or as instructed by the Engineer, allow appropriate opportunities to for carrying out work to third parties, public authorities and the Employer's Personnel.
- Sub-Clause 4.6 also states any instruction shall constitute a Variation if and to the extent it causes the Contractor to incur Unforeseeable Cost.
- This is a typical situation where good programme and productivity records are vital to resolving a dispute.



### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Shared access to the Site.

- The Contractor is normally considered to be responsible for safety, insurance and security of the Site once he has taken possession.
- Where multiple contractors will be sharing the Site, the Employer should give consideration to how these obligations are to be shared, and clarify the extent of the Contractor's responsibility.

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### 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Shared access to the Site.

- An associated Contractor's claim will focus on:
  - Lost productivity
  - Prolongation Costs
  - Use by the third party of the Contractor's Equipment, temporary works or access arrangements.
  - Damage to his Works, Temporary Works, or Contractor's Equipment.
- What about Profit? - Only Unforeseeable Cost. Why? <sup>32</sup>

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### 5. Claims for additional payment

#### Late Possession, Sub-Clause 2.1

Access to land not directly associated with the Permanent Works

–The exact boundaries of the Site should be clearly shown or described in the Contract. The terms “Site” with a capital “S” should be used, keeping in mind the definition of Site at Sub-Clause 1.1.6.7:

–“**Site**” means the places where the permanent Works are to be executed and to which Plant and Materials are to be delivered, and any other places as may be specified in the Contract as forming part of the Site.”

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### 5. Claims for additional payment

#### Late Possession, Sub-Clause 2.1

Access to land not directly associated with the Permanent Works

–Unless the definition of Site covers the special situation, the Contractor is responsible for obtaining access to other areas such as quarries, additional lay down space, or access to parcels of land need for Works such as pylons leading from a power plant for example.

–In the interest of the project however, it is advisable for the Engineer/ Employer to anticipate these matters as much as possible, and inform the tenderers.

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### 5. Claims for additional payment

#### Late Possession, Sub-Clause 2.1

Access to land not directly associated with the Permanent Works

–Alternatively, the Engineer/ Employer should satisfy themselves that the preferred tender has appreciated these special access problems and has planned and priced solutions.

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### 5. Claims for additional payment

#### Late Possession, Sub-Clause 2.1

Time for Site possession

–The time for Site possession should be indicated in the Contract Data in terms of number of days from the Commencement Date.

–If no time is prescribed, the Employer is to make the Site available pursuant to the Contractor's Programme submitted under Sub-Clause 8.3. The MDB and RB have differences in the precise wording.

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## 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Time for Site possession

-MBD: "...the Employer shall give the Contractor the right of access to and possession of, the Site within such times as may be required to enable the Contractor to proceed without disruption in accordance with the Programme submitted under Sub-Clause 8.3..."

-RB: "...the Employer shall give the Contractor the right of access to and possession of, the Site within such times as required to enable the Contractor to proceed without disruption in accordance with the Programme submitted under Sub-Clause 8.3..."

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## 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Time for Site possession

-Under either version, this solution leaves room for dispute over the timing of the submission of the Contractor's Programme, and its content.

-But it largely puts the matter of Site possession in the hands of Contractor, which may not be desirable.

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## 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Claims for failure to provide timely Site possession.

-Ultimately the Contractor may terminate the Contract pursuant to Sub-Clause 16.2(c).

-More usually, the Contractor will exercise his rights to claim for additional payment and an extension to the Time for Completion.

-Note that this type of claim occurs at the start of the project when the Contractor is supposed to be mobilising.

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## 5. Claims for additional payment

Late Possession, Sub-Clause 2.1

Claims for failure to provide timely Site possession.

-Frequently the Contractor is late in mobilising. The Engineer should monitor mobilisation carefully as this is often a concurrent delay with late Site possession.

-In such cases no additional payment would be due, but entitlement to an extension to the Time for Completion would probably still remain.

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## 5. Claims for additional payment

### Breach of Contract Claims

- All the claims examined so far are claims springing from the occurrence of specific events, whose consequences and remedies are anticipated under the Contract.
- The second source of claims come from a breach of a written term under the Contract, whose consequences and remedies are likewise anticipated under the Contract, such as the payment obligation under Sub-Clause 14.7 and the consequences for delayed payment under Sub-Clause 4.8.

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## 5. Claims for additional payment

### Breach of Contract Claims

- Especially for this category of claims there is often an escalating scale of remedy:  
STEP 1: Additional payment of a specified damage amount (i.e. interest on a late payment.)  
STEP 2: Suspension of the Works (often an optional intermediate step).  
STEP 3: Termination.

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## 5. Claims for additional payment

### Breach of Contract Claims

- Sub-Clauses of this nature include:
  - Sub-Clause 2.4 [Employer's Financial Arrangements]
  - Sub-Clause 14.6 [Issue of Interim Payment Certificate]
  - Sub-Clause 14.7 [Payment]
- The focus of this section will be on Sub-Clause 14.7 [Payment].

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## 6. Employer's financial claims

### Delay damages

- The Employer's delay damages are covered by Sub-Clause 8.7, and compensate the Employer if the Contractor fails to comply with the Time for Completion.
- In most common law jurisdictions these delay damages must be based on a genuine pre-estimate of the Employer's likely loss for delay.
- This should be the object of a calculation by the Employer or a consultant prior to the award of Contract, and a record of the calculation, proving its date kept in the Employer's files.

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## 6. Employer's financial claims

### Delay damages

- The amount should be clearly calculable, without ambiguity. The Contractor may be able to escape delay damages provisions if the an ambiguous formula has been used, or if the date at which the delay damages apply is not clear.
- In civil law countries delay damages will likely be considered as a penalty. As such, they are not subject to the same provisions regarding the concept of a "genuine pre-estimate of loss."
- In civil law countries however, it is not uncommon for a judge to adjust the percentage of the penalty.

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## 6. Employer's financial claims

### Delay damages

- In both legal systems however delay damages, whether a genuine pre-estimate of loss or a penalty, the amount is usually capped at between 5% - 15% of the Contract price.
- The percentage to be applied daily for delay, and the maximum delay damages, expressed as a percentage of the Contract Price, are to be stated in the Contract Data [MDB] or the Appendix to Tender [RB].
- Recommendation: In common law jurisdictions, express the delay damages as fixed amounts, not percentages, in order to avoid questions about calculation ambiguity.

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## 6. Employer's financial claims

### Delay damages

- Note, FIDIC does not specifically address delay damages for intermediate milestones.
- If delay damages are to be applied for an intermediate date, the Engineer/ Employer will need to define these in the Particular Conditions, and set the amount of the delay damage.
- In doing this keep in mind the rules already covered.
- The Employer may also wish to include a bonus for accelerated completion, and there is a draft Particular Conditions in the Guidance section of the RB for this.

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## 6. Employer's financial claims

### Delay damages

- "These damages are the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2."
- "...the Contractor shall subject to notice under [MDB] Sub-Clause 2.5 [Employer's Claims] pay delay damages to the Employer for this default."
- As discussed previously the Employer must therefore have an Engineer's determination under Sub-Clause 3.5 in his favour before being allowed to deduct delay damages.

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## 6. Employer's financial claims

### Delay damages

- Note the following cautionary word in the FIDIC Contracts Guide 2000:
- "Before the Employer deducts delay damages from moneys due to the Contractor, he could consider whether the delay is a reflection of cash flow shortfall from interim payments. If so, further diminution of cash flow (by withholding delay damages) could exacerbate the situation."
- If the Employer does not immediately exercise his right to withhold delay damages, he should write the Contractor reserving his right to do so at a later date.



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## 6. Employer's financial claims

### Delay damages

- As mentioned, the delay damages shall be the only damages due from the Contractor for delay.
- The Employer may not claim later a greater amount should his real damages be higher. Likewise, the delay damages should not be reduced should real damages be less or even zero.
- Nonetheless, the Employer may be entitled to further corollary damage amounts for matters stemming from the default of delay.



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## 6. Employer's financial claims

### Delay damages

- This would be the case for Employer's costs associated with supporting acceleration due to Contractor delay under Sub-Clause 8.6 and additional costs incurred pursuant to termination under Sub-Clause 15.2.



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## 6. Employer's financial claims

### Delay damages

- Delay can be a cause for termination pursuant to Sub-Clause 15.2(c)(i) if without reasonable excuse the Contractor fails to proceed with the Works in accordance with Clause 8 [Commencement, Delays and Suspension].
- After giving 14 days' notice to the Contractor under Sub-Clauses 15.1 and 15.2, the Employer may terminate the Contract.
- Termination in these conditions opens the Employer's rights to claim his losses and damages incurred by the Employer and any extra costs of completing the Works, including the Cost of remedying any defects.



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## 6. Employer's financial claims

### Delay damages

- The Employer's claims in this regard are subject to compliance with Sub-Clause 2.5, and thus an Engineer's determination will be necessary.
- The Employer is normally entitled to delay damages in addition to the above damages, which are triggered at termination. However watch for the following situation:
- Under Sub-Clause 15.1, prior to termination, the Employer shall give the Contractor notice "to make good the failure and remedy it within a specified reasonable time."

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## 6. Employer's financial claims

### Delay damages

- What happens if the Employer wants to terminate for delay after the Time for Completion?
- The notice should clearly state that any "reasonable" time to complete the Works mentioned in the notice shall not be construed as a waiver of delay damages otherwise due up to the expiry of the "specified reasonable time."

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## 6. Employer's financial claims

### Defect in works and/or design

- There are three periods when the question of defects can arise.
- During construction, in which case the relevant Sub-Clause with regard to financial claims is 7.6 [Remedial Works].
- During the Tests on Completion, in which case the relevant Sub-Clause with regard to financial claims is 9.4 [Failure to pass Tests on Completion].
- During the Defects Notification Period, in which case the relevant Sub-Clause with regard to financial claims is 11.4 [Failure to Remedy Defects].

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## 6. Employer's financial claims

### Sub-Clause 11.4 [Failure to Remedy Defects]

- Starting backwards, here is a look at Sub-Clause 11.4 [Failure to Remedy Defects].
- According to Sub-Clause 11.1: "...the Contractor shall... (b) execute all work required to remedy defects or damages, as may be notified by (or on behalf of) the Employer on or before the expiry date of the Defects Notification Period for the Works or Section..."
- This work is of course at the Contractor's risk and cost if and to the extent that the work is attributable to:
- (a) any design for which the Contractor is responsible,

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## 6. Employer's financial claims

### Sub-Clause 11.4 [Failure to Remedy Defects]

- (b) Plant, Materials or workmanship not being in accordance with the Contract, or
- (c) failure of the Contractor to comply with any other obligation.

Cited from Sub-Clause 11.2.

– Note, that if the works are attributable to any other cause, the Contractor shall be notified by (or on behalf of) the Employer, and Sub-Clause 13.3.

– If there is no specific notification vis à vis Sub-Clause 13.3, the costs automatically attaches to the Contractor.

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## 6. Employer's financial claims

### Sub-Clause 11.4 [Failure to Remedy Defects]

- What is a defect, and what is a defect in design?
- If the Contractor has not undertaken any part of the design, the measure of a defect must be taken by comparing the executed work strictly to the Employer's design.
- It is possible that the works are compliant, but the project is not performing as it was supposed to perform. In this case liability lies elsewhere.
- If the Contractor has undertaken part of the design, a substandard performance may or may not be the Contractor's responsibility and AJCE 2010



## 6. Employer's financial claims

### Sub-Clause 11.4 [Failure to Remedy Defects]

- If the Contractor fails to comply with the notice of defect issued under Sub-Clause 11.1, the Employer may initiate the procedure described in Sub-Clause 11.4 regarding failure to remedy defects.

– The Employer must fix a reasonable date by which the Contractor is expected to remedy the defect. If such a date was not set in the notice of defect sent under Sub-Clause 11.1, a second notice must be issued, preferably citing Sub-Clause 11.4 this time.

- It is very important that the Contractor be given a reasonable opportunity to remedy the defect himself.

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## 6. Employer's financial claims

### Sub-Clause 11.4 [Failure to Remedy Defects]

- If the Contractor fails to remedy the defect by the reasonable date notified, the Employer has several options.
- (a) The Employer can carry out the repair himself. Subject to Sub-Clause 2.5, the Employer can recover his reasonable costs expended.

Note, however that the Contractor shall have no responsibility for the work in this case.

- (b) Have the Engineer, via Sub-Clause 3.5, agree or determine a reasonable reduction in the Contract Price.

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### 6. Employer's financial claims

Sub-Clause 11.4 [Failure to Remedy Defects]

- (b) Have the Engineer, via Sub-Clause 3.5, agree or determine a reasonable reduction in the Contract Price.

Note: at law if a defect does not substantially impact the use of the works, and the cost of repair is very high, this option may be imposed on the Employer, for public policy reasons of economic waste.

How can the amount of the reduction be determined? See below under discussion of Sub-Clause 9.4.

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### 6. Employer's financial claims

Sub-Clause 11.4 [Failure to Remedy Defects]

- (c) If the defect deprives the Employer of substantially the whole benefit of the Works, or any major part, then the Employer may terminate the Contract and recover damages directly including:
  - All sums paid for the Works
  - plus financing costs
  - Cost of dismantling, clearing the Site and returning Plant and materials to the Contractor.
  - The foregoing is without prejudice to any other rights under the Contract or otherwise.

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### 6. Employer's financial claims

Sub-Clause 11.4 [Failure to Remedy Defects]

- Under Sub-Clause 11.6 [Further Tests], if the Employer incurs costs related to new tests, which must be done after repairs have been made, his costs are recoverable.
- Keep in mind Sub-Clause 11.8 [Contractor to Search]. The Engineer can require the Contractor to search for the cause of any defect under his direction.
- The Party ultimately responsible for the defect will bear the cost of this search. If the Contractor is not responsible, Sub-Clause 3.5 shall apply and he shall recover his Costs plus profit.
- The Contractor does not have the right to search, but if the cause is unknown, this is a recommended step.

### 6. Employer's financial claims

Sub-Clause 9.4 [Failure to Pass Tests on Completion]

- After having instructed the Contractor to repeat the test under Sub-Clause 9.3, the Engineer shall be able to either issue a Taking-Over Certificate (if the Employer so requests), however:
  - "...the Contract Price shall be reduced by such amount as shall be appropriate to cover the reduced value to the Employer as a result of this failure."
  - This is essentially the same "diminution in value" remedy as found in Sub-Clause 11.4. Sub-Clause 9.4 provides the following further procedure:

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## 6. Employer's financial claims

Sub-Clause 9.4 [Failure to Pass Tests on Completion]

- "Unless the relevant reduction for this failure is stated (or its method of calculation is defined) in the Contract, the Employer may require the reduction to be (i) agreed by both Parties (in full satisfaction of this failure only) and paid before the Taking-Over Certificate is issued, or (ii) determined and paid under Sub-Clause 2.5 [Employer's Claims] and Sub-Clause 3.5 [Determinations]."
- How do you calculate such a reduction?
- Defining as sliding scale based on a minimum performance level in the Particular Conditions as the outset is one possible way.

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## 6. Employer's financial claims

Sub-Clause 9.4 [Failure to Pass Tests on Completion]

- As under Sub-Clause 11.4, if the failure deprives the Employer of substantially the whole benefit of the Works, the Works may be rejected, and the remedy pursuant to Sub-Clause 11.4 would apply.
- The same cautionary notes from the previous section would apply.
- There is also no stated limit on how many times the Engineer can instruct the Contractor to repeat the tests at his cost.

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## 6. Employer's financial claims

Sub-Clause 7.6 [Remedial Work]

- If at any time any part of the Works, Plant or Materials if found not to be in accordance with the Contract, the Engineer may instruct removal and replacement of Plant or Materials, and removal and re-execution of any other work.
- This right is regardless of any apparently successful previous test or certification.
- Note at Sub-Clause 7.3 [Inspection] that the Contractor shall give notice to the Engineer prior to covering up any part of the works to allow for inspection within a reasonable time.

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## 6. Employer's financial claims

Sub-Clause 7.6 [Remedial Work]

- Should the Contractor fail to give such notice, the Engineer may require the Contractor to open up the works, and make good at his cost, regardless of the outcome of the inspection.
- If the Contractor fails to undertake the remedial work pursuant to Sub-Clause 7.6, the Employer shall be entitled to employ others to carry out the works.
- The Employer can recover his costs subject to Sub-Clause 2.5, and must make allowance for any amount the Contractor would have been entitled to be paid for the work.

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## 6. Employer's financial claims

### Sub-Clause 7.6 [Remedial Work]

- Unlike in Sub-Clause 11.4, there is no mention of the Employer or Engineer setting a specific reasonable date by which the remedial work must be completed prior to being able to undertake the works by a third party.
- However, under the applicable law such opportunities to repair, and notice, may be required. Therefore a notice is recommended.
- It is also recommended to keep the Contractor informed of the costs being incurred for the remedial work in advance, so as to reduce potential claims that the expense was unreasonable.

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## 6. Employer's financial claims

### Sub-Clause 7.6 [Remedial Work]

- Again, and unlike Sub-Clause 11.4 (a), there is no mention of who will be responsible for the warranty relative to remedial works when the Contractor is replaced.
- Recall Sub-Clause 11.4 clearly states the Contractor is not responsible in this situation after Taking Over.
- This is another reason in favour of giving notice to the Contractor prior to replacing him under Sub-Clause 7.6. Such notice should indicate the Employer's intention to maintain the Contractor's liability for the repairs. It may be advisable to allow the Contractor access to observe repairs.

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## 6. Employer's financial claims

### Sub-Clause 7.6 [Remedial Work]

- Ultimately, the ability to impose on the Contractor the liability for the repair work may not be tenable under applicable law.

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## 6. Employer's financial claims

### Retention and Bonds

- There are four types of securities the Employer may require at different stages from tender through issue of the Performance Certificate:
  - Bid Security
  - Performance Security (two options)
  - Advance Payment Security
  - Retention Money Security

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## 6. Employer's financial claims Retention and Bonds

- The paper copy of the slides in your handout for this section will not be covered in the classroom.
- They contain, however, useful and detailed aspects of the use of these various bond documents.
- Please feel free to contact us if you have any questions later on these materials.
- Watch for the following points:

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## 6. Employer's financial claims Retention and Bonds

- Expiry dates can be a problem in a case of delay.
- FIDIC has a choice of two types of Performance Security: Conditional and unconditional. FIDIC recommends conditional.
- Note the MDB has substantial changes in how the Retention Money is released when bonds are used.
- These points are covered in detail in your paper copies
- END SESSION 2

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## 6. Employer's financial claims Retention and Bonds

- A Bid Security is not always used.
- There are model forms at Annex B of the RB and Annex K of the MDB 2005 Edition.
- Both forms are governed by the ICC Uniform Rules for Demand Guarantees (URDG) published as number 458. This means that the security is a first demand guarantee.
- Such documents are usually issued by a bank.
- Note, the ICC has published a new set of rules in 2009, the URDG 758.

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## 6. Employer's financial claims Retention and Bonds

- There is no fundamental difference between the RB and MDB Tender or Bid security. The following is a description of the key features of the MDB Annex K.
- The intended use of a Bid security is to cover the difference in price between the low (or best) bidder and the second bidder in case the first bidder withdraws.
- The security may therefore be called in the event the bidder withdraws during the period of validity of the bid, or
- The bidder fails to sign the Contract Agreement or fails to provide the Performance and Security later.

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### 6. Employer's financial claims

#### Retention and Bonds

- The Bid security expires upon presentation of the signed Contract Agreement and the Performance Security, or
- If the bidder was unsuccessful, the security expires upon notification of the name of the successful bidder, or 28 days after the expiry of the Bidder's bid.
- Choosing the amount of the Bid Security is tricky.
- Recommendation: specify that the Bidder should set the security at between 5% -10% of his Bid.
- Be careful not to set the amount as a fixed figure equal to 10% of the Employer's budget for example.

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### 6. Employer's financial claims

#### Retention and Bonds

- The Performance Security is described at Sub-Clause 4.2.
- It is to be issued within 28 days after the Letter of Acceptance.
- The Employer may withhold Site access. Sub-Clause 2.1
- The receipt of an approved Performance Security is a condition precedent to issuing any Interim Payment Certificates. Sub-Clause 14.6.

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### 6. Employer's financial claims

#### Retention and Bonds

- Sub-Clause 4.2 in the RB states that: "The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under the Contract in the event of:..."
- Four situations are list and summarized as follows:
- Failure to extend the Performance Security when obliged.
- Failure to pay the Employer an amounts due per Sub-Clauses 2.5 and/or 20.1.
- Failure to remedy a default within 42 days.

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### 6. Employer's financial claims

#### Retention and Bonds

- Circumstances which entitle the Employer to termination under Sub-Clause 15.2.
- The MDB text is much streamlined, it simply states: "The Employer shall not make a claim under the Performance Security, except for amounts to which the Employer is entitled under the Contract." And there are no four conditions. Arguably it is harder to call a Performance Security under the MDB.
- Moreover under the MDB, if the Contract Price increases or decreases by more than 25%, the Engineer may request a corresponding adjustment to the Security.

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## 6. Employer's financial claims

### Retention and Bonds

- FIDIC proposes two alternative formats for the Performance Security:
- (a) An unconditional or on-demand security. This document is effectively equivalent to access to a cash line. Typically they are issued by a bank and, in theory, the bank has to honour any request without consideration of the underlying default of the Contractor.
- There is a model form at Annex C of the RB and Annex F of the MDB 2005.
- The on-demand version is governed by the ICC (URDG) published as number 488 and AJCE 2010



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## 6. Employer's financial claims

### Retention and Bonds

- (b) A conditional security or surety bond. This document requires a motivation for the call. It typically requires the issuer to make a judgment call vis à vis the merit of the call. As a practical matter, such securities are hard to call, short of the issue of an Arbitral Award.
- There is a model form at Annex D of the RB and Annex G of the MDB 2005.
- The surety bond version is governed by the ICC Uniform Rules for Contract Bonds (URBC) published as number 524.



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## 6. Employer's financial claims

### Retention and Bonds

- Clearly Employers prefer "on-demand" securities and contractors prefer the conditional variety.
- Note, the FIDIC Contracts Guide 2000 states: "FIDIC does not recommend unconditional securities, which may discourage tendering and/or result in higher pricing."
- The Performance Security shall remain in effect until the issue of the Performance Certificate at the expiry of the Defection Notification Period.



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## 6. Employer's financial claims

### Retention and Bonds

- Note, many institutions issuing performance certificates will insist on having a validity date on the document, and most model FIDIC forms have expiry dates.
- Care is therefore needed to be sure any extensions of Time for Completion or of the Defects Notification Period are taken into account the Performance Security adjusted accordingly.
- Recall, the MDB version has deleted the four conditions of Sub-Clause 4.2 allowing a call. Sub-Clause 4.2(a) RB specifically dealt with expiry – can you call the MDB security in the same conditions?



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## 6. Employer's financial claims

### Retention and Bonds

- Concluding remarks on the Performance Security:
- It is important to consider which country's laws will be specified to govern the security.
- Especially if a bank issues the security, it is important that the security be issued by the bank (or its correspondent) in the country of the project, or another country other than the contractor's country if he is foreign.
- Original copies of securities must be handled with great care, and despite stated expiry dates, the originals should be returned to the issuer as soon as possible.



## 6. Employer's financial claims

### Retention and Bonds

- Note, in the model forms at Annexes C, D of the RB (but not in the models F and G of the MDB) there is an option to reduce the guaranteed amount with the Taking Over Certificate.
- Recall the Performance Security is largely in place to protect the Employer in case the Contractor fails to deliver the project.
- Is the Performance Security therefore a duplication with the Retention Money in the period between Taking Over and expiry of the Defects Notification Period?



## 6. Employer's financial claims

### Retention and Bonds/ Advance Payment

- An Advance Payment is discretionary. If no amount is specified in the Appendix to Tender (RB) or in the Contract Data (MDB), no Advance Payment is due.
- No Advance Payment is due until after the Contractor has submitted both a compliant Advance Payment guarantee and a Performance Security.
- The Advance Payment is provided to allow an interest free loan to the Contractor for mobilisation.
- In the MDB version, "cash flow support" has been included as an additional reason.



## 6. Employer's financial claims

### Retention and Bonds/ Advance Payment

- The Advance Payment is intended to provide an assurance that the amount of the advance (or unreimbursed portion) can always be recovered.
- An example form is included at Annex E of the RB. It states that when calling the guarantee the demand must state that the Principle has failed to repay the advance payment in accordance with the Contract.
- The MDB 2006 version includes a different example guarantee at Annex H. In the example the demand must state that the Principle used the advance payment for purposes other than the costs of mobilisation.



## 6. Employer's financial claims

### Retention and Bonds/ Advance Payment

- Both reasons seem legitimate reasons to initiate a call on the guarantee, and perhaps combining the two examples should be considered.
- Both RB and the MDB example guarantees are the "unconditional" or on-demand (URDG 458) type, which is recommended given the scope for abuse in the case of an advance payment is smaller, and at stake is the recovery of the Employer's advance payment.
- Reimbursement of the advance payment commences after advancement of the project has reached 10% (RB) and 30% (MDB).

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## 6. Employer's financial claims

### Retention and Bonds/ Advance Payment

- Amortisation thereafter is calculated at the rate of 25% of each following Payment Certificate (RB). This is designed to amortise an advance payment of up to 22% before the project reaches 100% advancement.
- In the MDB the amortisation rate is not preset as in the RB, but to be given in the Contract Data.
- The MDB also has added language requiring the advance payment to be repaid prior to the time when 90% of the Accepted Contract Amount less provisional Sums has been certified for payment.

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## 6. Employer's financial claims

### Retention and Bonds/ Advance Payment

- The amortisation rate needs to be calculated taking into account the amount of the advance and the fact that its recovery will occur only on payments between 30% and 90% advancement.
- Under both the RB and MDB models the amount of the advance payment security is reduced as and when the advance payment is recovered through the payment certification process.
- The Contractor should send copies of the Interim Payment Certificate to the issuer of the guarantee, who in turn informs the Employer of the revised amount.

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## 6. Employer's financial claims

### Retention and Bonds/ Advance Payment

- Watch carefully for expiry dates in the case of the advance payment guarantee. Ideally it should not expire until the advance payment has been fully repaid.
- However issuers often do not accept to provide guarantees without a stated firm expiry date. Even the FIDIC models call for an expiry date of "70 days after the expected expiry of the Time for Completion."
- The Contractor is obliged to ensure that the guarantee is valid and enforceable until the advance payment has been repaid, and to extend the guarantee if necessary.

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## 6. Employer's financial claims

### Retention and Bonds/ Advance Payment

- However, failure to extend the guarantee is not a stated reason for calling the guarantee, as is the case of the Performance Security, thus there is potential for disputes.

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## 6. Employer's financial claims

### Retention and Bonds/ Retention Sub-Clause 14.3(c) and 14.9

#### Preamble

- Retention is design to give the Employer a source of funds to remedy any defects, especially during the period following the Taking-Over Certificate and before the Performance Certificate.
- On the other hand it can have an important negative effect on the Contractor's cash flow, and recall the previous discussion regarding the Performance Security.

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## 6. Employer's financial claims

### Retention and Bonds/ Retention

- Retention is to be withheld and cumulated from Interim Payment Certificates at the percentage stated in the Appendix to Tender (RB) or Contract Data (MDB) per Sub-Clause 14.3(c).
- Release of Retention is covered under Sub-Clause 14.9.
- The RB and the MDB have important differences in their procedures for release and contractor's rights.

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## 6. Employer's financial claims

### Retention and Bonds/ Retention

- Under Sub-Clause 14.9 of the MDB, the first 50% of the Retention Money is to be certified for payment by the Engineer when the Taking-Over Certificate has been issued.
- Moreover, the MDB provides that unless stated otherwise in the Particular Conditions, the Contractor shall be entitled to substitute a guarantee for the second 50% of the for the Retention Money.

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### 6. Employer's financial claims Retention and Bonds/ Retention

- The MDB further provides that if the Performance Security is in the form of a on-demand guarantee, and the amount guaranteed under it is more than half of the Retention Money at the time of the Taking-Over Certificate, then the Retention Money Guarantee will not be required.
- If the Performance Security covers less than an amount equal to half the Retention Money, then the Retention Money guarantee will only be required for the difference.
- The MDB reasoning seems to be in line with the general purpose of the two instruments.

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### 6. Employer's financial claims Retention and Bonds/ Retention

- Under the RB the first 50% of the Retention Money is likewise certified for payment following the issue of the Taking-Over Certificate. (However, under the RB only 40% of the value of the relevant Section or part is released, not 50%.)
- Under the RB, there is no mention of a Retention Money guarantee, and no default entitlement to a guarantee as under the MDB.
- Nevertheless it is possible, and the Guidance section provides advice on its implementation, plus an example guarantee is included in Annex F.

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### 6. Employer's financial claims Retention and Bonds/ Retention

- According to the RB suggested language in the Guidance notes for Sub-Clause 14.9, the Contractor is permitted to submit a Retention guarantee for 50% of the Retention Money once retention withholding has reach 60% of the limit stated in the Appendix to Tender.
- Under the text in the Guidance Notes, the Contractor would still be entitled to certification and payment of 50% of the Retention Money once the Taking-Over Certificate has been issued.
- If this option in the RB is retained, the conditions are slightly better for the Contractor than in the MDB version.

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### 6. Employer's financial claims Retention and Bonds/ Retention

- Note, these conditions can be heavily impacted by the applicable law. For example under French law, the retention amount may not exceed 5%, and the contractor has the automatic right to substitute retention with a conditional security.
- The model Retention Money guarantees at Annex F (RB) and Annex I (MDB 2006) are both unconditional on-demand guarantees under the ICC URDG at 485.
- The model in RB states the guarantee can be called for failure to rectify certain defects. There is a typo in the MDB 2006, which repeats the advance payment text.

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### 6. Employer's financial claims Retention and Bonds/ Retention

- The Retention obligation, whether by guarantee or physical withholding shall end upon the latest expiry dates of the Defects Notification Periods.
- In the case of physical withholding, the outstanding balance of the Retention Money shall be then promptly certified by the Engineer for payment.
- For a Retention Money guarantee, its expiry should be at the same time as for release of physical withholding.
- Ideally, as with the example guarantee in the MDB 2006 version, this should be upon presentation of the Performance Certificate.

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### 6. Employer's financial claims Retention and Bonds/ Retention

- However, the same difficulty exist vis a vis issuers insisting on including a fixed expiry date.
- The example guarantee in the RB uses this formula.
- The RB calls for a fixed date at 70 days after the expected date of the expiry of the Defects Notification Period.
- As with the advance payment guarantee, care needs to be taken to ensure this guarantee is kept current.

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### 6. Employer's financial claims Retention and Bonds/ Other guarantees

- The Employer may wish to consider the use of a Parent Company guarantee. Example guarantees are included at Annex A (RB) and Annex J (MDB 2006 version).
- Finally, the RB contains an example form of payment guarantee by the Employer at Annex G. This is obviously not part of the Employer's financial claims section, but its use may have an impact in reducing the Bidder's Price.

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## Session 3

### The Resolution of Disputes

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## The Resolution of Disputes

1. Dispute Adjudication Board Principles
2. DAB/DB Workings

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## 1. Dispute Adjudication Board Principles

Background of Dispute Resolution under FIDIC Contracts FIDIC 1<sup>st</sup> Edition 1957 (The Decision of the Engineer)

- A dispute shall in the first place be referred to and settled by the Engineer.
- The decision in respect of matters so referred shall be final and binding upon the Employer and the Contractor.
- If no claim to arbitration has been communicated ... within ... 90 days ... the .. decision shall remain final and binding upon the Employer and the Contractor.
- No arbitration until after the completion or alleged completion of the Works.

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## 1. Dispute Adjudication Board Principles

Background of Dispute Resolution under FIDIC Contracts FIDIC 1996 Supplement to 4<sup>th</sup> Edition 1987 (The DRB)

- Allow parties to refer disputes to the decision of either one or three impartial individual(s).
- Parties should not disregard the possibility to seek an opinion from the DAB on any matter to avoid a potential dispute.
- No formal notice of dispute is required to make a formal referral.
- The Board is then required to give notice of its decision, including reasons within 84 days.

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## 1. Dispute Adjudication Board Principles

Background of Dispute Resolution under FIDIC Contracts FIDIC 1<sup>st</sup> Editions 1999 (The DAB)

- The 1999 Editions incorporate same principles used in the 1996 Supplement.
- The DAB is to be named by the date stated in the Appendix to Tender.
- The DAB shall conduct regular Site Visits and shall be available on 28 days' notice.
- The appointment of the DAB (including each member) shall expire when the Discharge.
- The DAB shall render its decision within 84 days.

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## 1. Dispute Adjudication Board Principles

Background of Dispute Resolution under FIDIC Contracts

FIDIC Editions 1999 and MDB

- Standing Dispute Boards
  - FIDIC Construction Form, MDB Harmonized Edition and the Design Build and Operate (DBO)
- Ad hoc Dispute Boards
  - FIDIC the Plant and Design-build or the EPC Turnkey Project Forms
- Two-tier process.
- DAB/DB issue decisions are binding on the Employer and the Contractor unless and until that decision is overturned by amicable settlement or by an arbitral award.

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## 1. Dispute Adjudication Board Principles

- Composition of the 3-person Board
- construction professionals?
- lawyers?
- A balance of disciplines?
- Composition of the 1-person Board
- construction professionals?
- lawyers?

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## 1. Dispute Adjudication Board Principles

- DAB services may be terminated at any time by agreement between the Parties but not by a Party acting alone.
- 42 days notice.
- For failure of the DAB to comply with Conditions of the Dispute Adjudication Agreement.
- For failure of the Parties to comply with Conditions of the Dispute Adjudication Agreement.
- Sanctions
- refund of fees and of abortive costs to the Parties.

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## 1. Dispute Adjudication Board Principles

Background of Dispute Resolution under FIDIC Contracts

- The legal status of the DAB/DB is found in the Contract itself.
- Under the FIDIC forms of Contract the Parties sign on to a two-tiered dispute resolution process.
- The first tier is found in Clause 20 where the Parties submit to the DAB/DB process.
- If that fails the dispute passes to the second tier, arbitration.

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## 1. Dispute Adjudication Board Principles

Background of Dispute Resolution under FIDIC Contracts

- The origins of the DAB/DB process began during the industrial revolution both in civil law and common law jurisdictions.
- Power to decide on disputes was reserved to the engineer or the architect which would make decision in respect of time or money.
- The courts gave considerable weight to those decisions.
- The basis of the **FIDIC 1<sup>st</sup> Edition**.

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## 1. Dispute Adjudication Board Principles

The Standing (Full Term) DAB

- Retainer Fee
  - be available on 28 days' notice
  - becoming and remaining conversant with all project developments
  - all office and overhead expenses including secretarial services, photocopying and office supplies

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## 1. Dispute Adjudication Board Principles

The Standing (Full Term) DAB

- Daily Fee
  - travel up to two days in each direction,
  - each day spent reading submissions, attending hearings, preparing decisions, or making site visits.
- Reasonable Expenses
- Fixed for 24 months

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## 2. DAB/DB working

The method to appoint the DAB is set out in Sub-Clause 20.2 [Appointment of Dispute Adjudication Board]

- The DAB shall comprise either one or three suitably qualified persons.
- If three persons, each Party shall nominate one member for the approval of the other.
- The Parties shall consult both members and shall agree upon the third member – the chairman.

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## 2. DAB/DB working

The method to appoint the DAB is set out in Sub-Clause 20.2 [Appointment of Dispute Adjudication Board]

- The agreement between the Parties and the DAB shall incorporate by reference the General Conditions of Dispute Adjudication Agreement (Appendix) with any amendments as are agreed.

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## 2. DAB/DB working

If the Parties fail to appoint the method is set out in Sub-Clause 20.3 [Failure to Appoint the DAB].

- The Parties fail to agree upon the appointment.
- Either Party fails to nominate a member.
- The Parties fail to agree upon the appointment of the third member.
- The appointing entity, upon the request of either or both of the Parties and after due consultation with both Parties, shall appoint a member or the DAB. This appointment shall be final and conclusive.

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## 2. DAB/DB working

If the Parties fail to appoint the method is set out in Sub-Clause 20.3 [Failure to Appoint the DAB].

- Each Party shall be responsible for paying one-half of the cost of the appointing entity.

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## 2. DAB/DB working

Dispute Adjudication Agreement

- The DAB enters into a contract with the Parties (TPA)
- The TPA comprises the General Conditions of Dispute Adjudication Agreement.
- The TPA includes details of any amendments to the General Conditions of Dispute Adjudication Agreement.
- The terms of payment and the undertaking of the Employer and the Contractor to be jointly and severally liable to ensure that the DAB is paid.
- The TPA becomes effective on the date that it is signed by the three parties.

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## 2. DAB/DB working

The Standing DAB/DB Responsibilities as a member of the Project team.

- Be available for site visits and hearings;
- Become and remain conversant with project developments;
- Treat the details of the Contract and DAB activities as private and confidential;
- Be available to give advice and opinions;
- Conduct regular visits to the site and meet with the Parties and the Engineer to exercise its role in dispute avoidance and early resolution.



## 2. DAB/DB working

- DAB shall visit the site at intervals of not more than 140 days, including times for critical construction events;
- at request of either the Employer or the Contractor
- timing and agenda for each site visit to be agreed jointly by the DAB and the Parties or in the absence of agreement, be decided by the DAB.
- site visits shall be attended by the Employer, the Contractor and the Engineer.



## 2. DAB/DB working

- The DAB must hold itself available to the Employer and the Contractor to give advisory opinions if asked to do so.
- Critical for Dispute Avoidance Role
- Contractor and Employer should avail themselves of this role, and if not;
- DAB should offer.
- A successful DAB is one that never receives a referral.



## 2. DAB/DB working

- The referral should be a reasoned statement of case submitted by the claimant.
- DAB to review the referral in terms of scope and complicity;
- does it possess the specialized knowledge necessary in order to decide?
  - will the issue require a hearing?
  - decide on the basis of its own knowledge of the Contract and on the document exchanges?
  - will require one or two submission exchanges?
  - Procedural Time Table (84 days?)



## 2. DAB/DB working

Article 8 of the Procedural Rules, DAB powers and duties.

- Establish the procedure to be applied in deciding a dispute.
- Decide upon the DAB's jurisdiction, and the scope of the dispute.
- Conduct a hearing as it thinks fit.
- Take initiative to ascertain the facts and matters required for the decision.

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## 2. DAB/DB working

Article 8 of the Procedural Rules, DAB powers and duties.

- Make use of its own specialist knowledge.
- Decide upon provisional relief such as interim or conservatory measures.
- Open up, review and revise certificates, decisions, or determinations.

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## 2. DAB/DB working

- The DAB to make special effort during regular visits to the site to promote open discussion between the Employer, the Contractor and the Engineer concerning problems causing of delays to progress of the Works and disputes that may arise.
- The DAB to encourage the Parties to seek advisory opinions in respect of problems that occur on the Site.
- The DAB should produce its site visit report before leaving the Site.
- The review of Site Visit Report by Parties and the Engineer.

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## 2. DAB/DB working

The DAB must determine a time table that will allow:

- At least one exchange (more probably two) of position papers.
- The time required to conduct the oral hearing
- The time required to write its decision.
- The DAB to comply with time for giving its decision.

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## 2. DAB/DB working

### The Referral.

- Contractual basis for the claim.
- The facts and analysis in support of the claim.
- The decisions sought.

### The Response

- Contractual argument in response
- Reply to the factual basis of claim.
- The decisions sought.

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## 2. DAB/DB working

### The DAB to determine:

- That it is in possession of sufficient facts in order to make its decision.
- If the DAB has been unsuccessful in leading the Parties to resolve their differences by consultation, it is in a position to use outside experts to resolve the question.
- To take initiatives in ascertaining the facts which might involve referring the matter to outside experts.

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## 2. DAB/DB working

### The DAB to determine the extent

- That it admits evidence statements without opportunity to hear and question witnesses
- It may request "hot tubbing" (or consultations between) experts where conclusions or opinions reached are in conflict.

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## 2. DAB/DB working

### Prehearing requirements.

### The DAB should require:

- Exchange written submissions that set out their positions and respond to the positions of the other Party.
- The Parties comply with the procedural time table.

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## 2. DAB/DB working

Site visit before hearing.

The DAB may require a prehearing site visit if:

- If physical conditions are the cause of the dispute.
- If defective workmanship is the fundamental cause of the dispute.
- Instruct conservatory measures.

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## 2. DAB/DB working

Attendees.

The DAB may decide to limit the persons attending the hearing or require that oral presentations be made by persons familiar with or resident at the site:

- Presence of lawyers?
- Presence of third party experts.

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## 2. DAB/DB working

Conclusion of the Hearing.

The DAB declares the hearing closed when:

- Has received and understood all written submissions
- Is satisfied that it is in possession of sufficient factual evidence presence of third party experts.
- May on occasion require post-hearing submissions

The DAB retires to write its decision.

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## 2. DAB/DB working

Decision.

- The decision of the DAB shall be reasoned.
- The decision of the DAB to the extent possible should be unanimous.
- It should contain at least the following elements;
- an introductory section setting out the generalities of the contract, the names of the parties and the engineer,
- a statement establishing its jurisdiction.

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## 2. DAB/DB working

### Decision.

- It should contain at least the following elements (cont):
- a description of the dispute(s) and the background(s)
- the claimant's position(s)
- the respondent's position(s)
- the DAB analysis and findings, and
- the decision(s).

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## 2. DAB/DB working

### Enforcement of Decisions.

- The DAB decisions are not directly enforceable.
- A decision is immediately binding on the Employer and the Contractor.
- Unless and until the decision is overturned in arbitration the Employer and the Contractor shall comply.

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## 2. DAB/DB working

### Enforcement of Decisions.

- Whether the substantive law of the Contract is Common, Civil or Islamic;
- the final authority in all three jurisdictions will give significant weight to the fact that the Parties have freely entered into a contract setting out the powers of the DAB, and
- in the majority of the cases DAB decisions have been upheld by the judicial authority.

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## Costs

30  
8

### Base Cost of DAB

Project Value	\$ 450,000,000	54 months												
Contract Time														
Base Cost of DAB														
<b>Retainer Costs</b>			no members	days per month	daily fee \$	months				total				
construction period		3	3	3,000		46				1,242,000				
defects notification period		3	3	1,500		12				162,000				
<b>Total Retainer Fees</b>										1,404,000				0.31%
<b>Site Visit Costs</b>			no members	days per site visit	daily fee \$	days per visit				total				
Site Visit Costs		3	18	3,000		5				810,000				
Daily fees		3	18	5,100						275,400				
Expenses		3	18											
<b>Total Site Visits</b>										1,085,400				0.24%
<b>Question 1 total base cost of DAB</b>										2,489,400				0.55%
<b>Referral Costs</b>			no members	days	daily fee \$					total				
read-in costs		3	5	3,000						45,000				
decision costs		3	10	3,000						90,000				
<b>Total Referral Cost</b>										135,000				0.03%
<b>Total Base Cost of DAB</b>										2,624,400				0.58%

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### Arbitration Costs

- ❖ The Cost of an ICC Arbitration (2006).
  - ICC Administration Fee varies from \$2,500 to \$88,000.
  - ICC Arbitrator Costs (each) varies between 0.01 and 0.056% of the claim.

Amount Claimed (up to)	Administration Cost	Cost of Arbitrators (3)	Total
\$2,000,000	23,800	195,000	\$218,800
\$5,000,000	32,800	270,000	\$302,800
\$10,000,000	42,800	300,000	\$342,800
\$50,000,000	70,800	450,000	\$520,800

Values in United States Dollars

www.iccwbo.org

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### Base Cost of DAB

Project Value	\$ 450,000,000							
Contract Time	54 months							
Base Cost of DAB								
<b>Retainer Costs</b>		no members	days per month	daily fee \$	months	total		
construction period		3	3	4,000	34	1,224,000		
defects notification period		3	3	2,000	12	216,000		
<b>Total Retainer Fees</b>						<b>1,440,000</b>	<b>0.32%</b>	
<b>Site Visit Costs</b>		no members	no site visits	daily fee \$	days per visit	total		
Site Visit Costs		3	14	3,000	5	630,000		
Daily fees		3	14	5,100		214,200		
Expenses								
<b>Total Site Visits</b>						<b>\$84,200</b>	<b>0.19%</b>	
<b>Question 5 - Total base cost of DAB</b>						<b>2,298,200</b>	<b>0.51%</b>	
<b>Referral Costs</b>		no members	days	daily fee \$		total		
read-in costs		3	20	4,000		240,000		
decision costs		3	40	4,000		480,000		
<b>Total Referral Cost</b>						<b>720,000</b>	<b>0.16%</b>	
<b>Total Base Cost of DAB</b>						<b>3,024,200</b>	<b>0.67%</b>	

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### Arbitration Costs

#### THE DB PROCESS IS COST EFFECTIVE

- ❖ 2004 ICC Statistical Data.
  - Approx. 140 Construction /Engineering Arbitration Requests.
  - If Average Claim is \$ 10 million, then :
    - total arbitration costs for both Parties will be about \$364 million.
  - Total Cost of 140 ea., 3 yr, 3-man DB's with 3 referrals will be about \$150 million.

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### Arbitration Costs

- ❖ An Example of a typical construction dispute.

Amount Claimed	\$ 50 million
ICC Administration and Arbitrators	\$550,000
Legal Counsel and Experts	\$2,000,000
Claimant's In-house Personnel	\$300,000
Cost of Hearings (travel and accommodation)	\$150,000
<b>Total Estimated Cost for Each Party</b>	<b>\$3,000,000</b>

- ❖ Total amount at Risk is \$3.0m plus all or part of the opposing party's cost (~ \$2.45m) or ~ \$5.5 million.

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Results of Dispute Boards 31  
3

Clause 20 – Dispute Board  
Results

- ❖ Ertan Hydroelectric Project (China)
  - Number of contracts involved : 2
  - Number on DRB : 3
  - Nature of determinations : Recommendation
  - Number of referrals : 40
  - Disputes referred to arbitration : 0
- ❖ Katse Dam (Lesotho)
  - Number of contracts involved : 1
  - Number on DRB : 3
  - Nature of determinations Recommendation
  - Number of referrals : 12
  - Disputes referred to arbitration : 1 (DRB upheld)

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Results of Dispute Boards 31  
5

Clause 20 – Dispute Board  
Results

- ❖ Xiaolangdi Hydroelectric Project (China)
  - Number of contracts involved : 2
  - Number on DRB : 3
  - Nature of determinations Recommendation
  - Number of referrals : ~ 10
  - Disputes referred to arbitration : 0
- ❖ Gigele Gibe Hydroelectric Project (Ethiopia)
  - Number of contracts involved : 2
  - Number on DRB : 3
  - Nature of determinations Recommendation
  - Number of referrals : 3
  - Disputes referred to arbitration : 3

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Results of Dispute Boards 31  
4

Clause 20 – Dispute Board  
Results

- ❖ Hong Kong Airport (China)
  - Number of contracts involved : 22
  - Number on DRB : Convenor + 6
  - Nature of determinations : Decision
  - Number of referrals : 6
  - Disputes referred to arbitration : 1 (DRB upheld)
- ❖ Channel Tunnel Rail Link (UK/France)
  - Number of contracts involved : 1
  - Number on DRB : 3
  - Nature of determinations : Decision
  - Number of referrals : 1
  - Disputes referred to arbitration : 0

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Claims and the Resolution of Disputes: 4 – Arbitration Claims

**Session 4**

**Arbitration Claims**

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## Arbitration Claims

1. UNCITRAL/ ICC Rules
2. Selecting Arbitrators
3. Applicable Law and Procedural Rules
4. Arbitration, DB/DABs, and the Engineer
5. Use of Experts

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## 1. UNCITRAL/ ICC Rules

- FIDIC Contracts call for arbitration as the vehicle for settling disputes if they cannot be settled amicably or if the DB's decision has not become final and binding.
- Under the RB, Sub-Clause 20.6 calls for the Rules of Arbitration of the International Chamber of Commerce and a three person Arbitral Tribunal. The process is overseen by the International Court of Arbitration.
- Under the MDB, the process is different based on whether the Contractor is foreign or domestic.
- In the case of foreign contractors, Sub-Clause 20.6 calls for international arbitration administered by the institute appointed in the Contract Data.



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## 1. UNCITRAL/ ICC Rules

- The applicable procedural rules will be those of the appointing institution, if any, or in accordance with the UNCITRAL arbitration rules, at the choice of the appointing institution.
- For contracts with domestic contractors, arbitration shall be under proceedings conducted in accordance with the laws of the Employer's country.
- This later provision may cause confusion. The laws of the country may be very broad with respect to arbitration, and thus the question of how to appoint a tribunal when the parties cannot agree on the arbitrators may be difficult.

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## 2. Selecting Arbitrators

- Under the ICC Rules, if the parties cannot agree upon either a sole arbitrator or the chairman will be appointed by the ICC Court.
- Under the UNCITRAL Rules, in the foregoing case, the Secretary General of the Permanent Court of Arbitration at The Hague will designate an appointing authority.
- If the parties cannot agree to a sole arbitrator there will be three arbitrators.
- The appointing authority will either name the sole arbitrator or the presiding arbitrator in case no agreement is reached.

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## 2. Selecting Arbitrators

- The arbitrators are to be independent, and usually have to submit a statement to that effect including disclosure of any reasons why such independence might be called into question.
- A Party appointed arbitrator's independence may be challenged by the other Party, at which point the other Party may typically withdraw the nomination, the candidate may withdraw, or ultimately the appointing authority will decide on the challenge.
- Later challenges can be made usually only for reasons which become known after appointment.

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## 3. Applicable law and procedural rules

- The substantive law of to be applied in the dispute shall be the applicable law stated in the Contract.
- The procedural law shall be the law of the place, or seat, of the arbitration.
- Under the MDB contract the place of arbitration shall be the city where the headquarters of the appointing arbitration institute is located.
- The place of arbitration under the RB is not specified, and should be put in the Particular Conditions. If a seat is not specified the ICC Court will choose a seat.
- The language of the arbitration shall be as specified in the Contract.

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## 3. Applicable law and procedural rules

- Arbitration is a private procedure and confidential.
- The arbitrators shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB/DB, relevant to the dispute.
- "Competence – Competence." In case of a dispute over the Tribunal's jurisdiction, the arbitrators shall decide the matter.

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## 3. Applicable law and procedural rules

- Arbitration is based on the New York Convention of 1958.
- As of 1 October 2009, 142 of 192 nations have signed the convention.
- Enabling legislation is usually required in each contracting State.
- The Convention requires courts of contracting States to give effect to an agreement to arbitrate when seized of an action in a matter covered by an arbitration agreement and also to recognize and enforce awards made in other States, subject to specific limited exceptions.

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#### 4. Arbitration, DB/DABs and the Engineer

- The Parties are not limited in the proceedings before the arbitrator(s) to the evidence or arguments previously put before the DB/DAB to obtain its decision.
- Likewise arbitration is not an appeal of the DB/ DAB decision.
- However any decision of the DB/DAB shall be admissible in evidence and the Engineer is not disqualified as a witness.
- Under the tripartite agreement, a DB/DAB member shall not be called to give evidence in arbitration.

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#### 4. Arbitration, DB/DABs and the Engineer

- What happens to the DB/DAB decision when a there is a notice of dissatisfaction, and an arbitration commenced, but the losing Party fails to comply?
- Sub-Clause 20.4 states that: "The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below."
- A normal interpretation of the above would be that a Party could request the arbitrators to issue an Interim Award in summary proceedings enforcing the DB/DAB decision pending Final Award.

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#### 4. Arbitration, DB/DABs and the Engineer

- This is the view taken in an ICLR article entitled: "Enforcement by Arbitral Award of a Binding but Not Final Engineer's or DAB's Decision Under the FIDIC Conditions" (The International Construction Law Review, Volume 26, Part 4, October 2009, by Christopher R. Seppälä)
- There has been some uncertainty as to this conclusion however due to the language in Sub-Clause 20.7.
- The MDB version states: "In the event that a Party fails to comply with a final and binding DB decision, then the other Party may... refer the failure itself to arbitration under Sub-Clause 20.6..."

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#### 4. Arbitration, DB/DABs and the Engineer

- The confusion stems from the difference between a Final Award and an Interim Award.
- Sub-Clause 20.7 is intended to refer to a situation where a summary Final Award is sought from the arbitrators when the DB decision is final and binding.
- It should not preclude an Interim Award instructing a Party to comply with a decision, subject of a notice of dissatisfaction, pending the final outcome of arbitration.
- In the FIDIC Gold Book 2008, the corresponding language has been modified to eliminate any potential claims of ambiguity on this issue.

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#### 4. Arbitration, DB/DABs and the Engineer

Gold Book Sub-Clause 20.9

- "In the event that a party fails to comply with a decision of the DAB, whether binding or final and binding, then the other Party may, without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 20.8 [Arbitration] for summary or other expedited relief, as may be appropriate. Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.7 [Amicable Settlement] shall not apply to this

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#### 5. Use of Experts

- In arbitration, the Parties are likely to seek an independent expert's report for such issues as the analysis of delay, quantum and defects.
- Typically if one Party has retained an expert, the other Party will do likewise.
- While the expert is paid by one of the Parties, his/ her duty is to the tribunal.
- This is the common law system, which is based on contradictory evidence. It is usually followed in arbitration even in civil law.

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#### 5. Use of Experts

- Court cases in civil law would not use the contradictory method, but rather the interrogatory method of expertise.
- Under the civil law tradition, the court appoints an expert, who is delegated some of the judges authority, and is in effect an officer of the court.
- The expert then conducts his own hearings and procedures, including ordering tests etc... and reports his findings of fact back to the judge.
- The judge usually accepts these findings.

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#### 5. Use of Experts

- The civil law method is rarely used in arbitration, perhaps because the arbitrators themselves are supposed to have experience in the subject matter of the dispute.
- Both methods can be criticised.
- The common law method is often criticised because the experts' reports tend to favour the Party who has paid for the report.
- The civil law method can be criticised because the sole expert/ judge may get it wrong, and there is no one to truly push back on his views.

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## 5. Use of Experts

- In order to help overcome the flaws in the common law system, arbitrators have begun to use a method called witness conferencing or "hot tubbing."
- Under this method the experts witnesses are opposed in open hearings and debate each other, guided by the arbitrators.
- This encourages experts to take a more balanced position in their initial reports.
- A good expert, with a credible reputation with the arbitrators, will not want to take an untenable position just for the sake of one assignment.

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FIDIC CONTRACT DOCUMENTS  
AND  
JICA ODA LOAN PROJECTS



Seminar on Contract Management for International Construction

## FIDIC Contract Documents and JICA ODA Loan Projects

24 February, 2010

Japan International Cooperation Agency (JICA)

Yukinobu Hayashi  
Nippon Koei Co., Ltd.



JICA Contract Seminar 2010

2

## Presentation Topics

- Overview of FIDIC Rainbow of Contract
- Overview of JICA Procurement Documents
- Relevance between FIDIC Doc. and JICA Doc.
- Why FIDIC Contract is used?
- Introduction of "Check List for One-sided Contracts"

3

## Overview of FIDIC Rainbow of Contract

Color	Title	Edition	Year	Design	Engineer
Red	CC for Construction	1	1999	Emp.	Y
Pink	MDB Harmonized Edition CC for Construction	2	2006	Emp.	Y
Yellow	CC for Plant and Design Build	1	1999	Cont.	Y
Silver	CC for EPC/Turnkey Projects	1	1999	Cont.	N

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4

## Overview of FIDIC Rainbow of Contract

Color	Title	Edition	Year	Design	Engineer
Green	Short Form of Contract	1	1999	Emp. or Cont.	N
Blue	CC for Dredging and Reclamation Work	1	2006	Emp. or Cont.	N
Gold	CC for Design, Build and Operate Projects	1	2008	Cont.	N
White	Client/Consultant Model Services Agreement	4	2006	-	-

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## JICA Documents (Procurement of Works)

1. Guidelines for Procurement under Japanese ODA Loan (2009)
2. Sample Bidding Documents
  - Prequalification Documents (2007)
  - **Procurement of Works (June 2009)**
  - Supply and Installation of Plant and Equipment (2009)
  - Civil Works – Smaller Contract (2000)
3. Guide Book and Check List
  - Handbook for Procurement under Japanese ODA Loans (2009)
  - Evaluation Guide for Prequalification and Bidding (2007)
  - Check List for One Sided Contracts (2006)



## JICA Documents (Employment of Consultants)

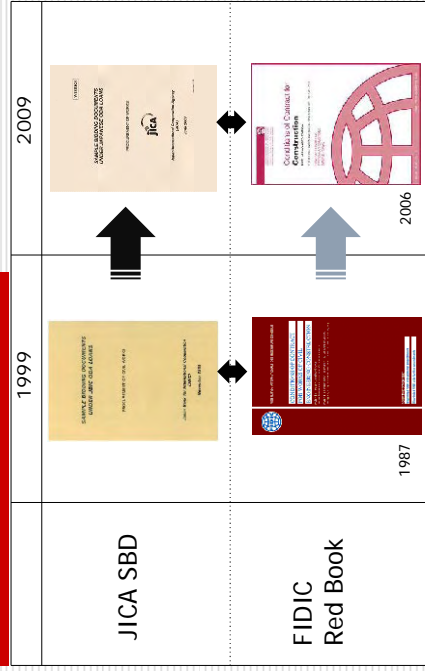
1. Guidelines for Employment of Consultant under Japanese ODA Loan (2009)
2. Sample Bidding Documents
  - Sample Request for Proposal under Japanese ODA Loan – Selection of Consultants (2009)
3. Guide Book
  - Guide for Evaluation Procedures for Employment of Consultants under Japanese ODA Loans (2009)

(All available at JICA WEB site)

[http://www.jica.go.jp/english/operations/schemes/oda\\_loans/oda\\_op\\_info/guide/](http://www.jica.go.jp/english/operations/schemes/oda_loans/oda_op_info/guide/)



## FIDIC Contract and JICA Sample Bidding Document



## Sample Bidding Documents under Japanese ODA Loans Procurement of Works (1999)

- Part 1- Bidding Procedure
  - Section I Instructions to Bidders (ITB)
  - Section II Bid Data Sheet
  - Section III Evaluation and Qualification Criteria
  - Section IV Bidding Form
  - Section V List of Eligible Countries of Japanese ODA Loans
- Part 2- Works Requirements
  - Section VI Works Requirements
- Part 3- Conditions of Contract and Contract Forms
  - Section VII **General Conditions (GC)** ← **MDB2006+ minor modification**
  - Section VIII Particular Conditions
    - Part A Contract Data
    - Part B Specific Provisions
- Section IX Annex to the Particular Conditions - Contract Forms





## Why FIDIC Conditions of Contract?

1. FIDIC CC has a long history and has been widely used in the international projects.

	JICA	World Bank	ADB
At present	Red Book MDB (from 2009)	Red Book MDB (from 2003)	Red Book MDB (from 2005)
In the Past	Red Book 4th	Red Book 4th	Red Book 4th and Orange Book



## Why FIDIC Conditions of Contract?

If unique documents other than internationally recognized standard documents is used, problems may be encountered:

- ✓ Examination of the specially drafted conditions of contract takes a great deal of time for Employer, Contractor and Financier
  - ✓ The provisions may deviate from usual international standard contractual practice.
  - ✓ The contract document may not be complete.
2. FIDIC is a consultant association which is independent from Contract Parties (i.e. Employer and Contractor).



## Why FIDIC Conditions of Contract?

3. FIDIC CCs have been continuously revised and improved by its Contract Committee.

Year	Red Book
1957	Red Book (1st Edition) CC for works of civil engineering construction
1969	Red Book (2nd Edition)
1977	Red Book (3rd Edition)
1987	Red Book (4th Edition)
1996	Supplements to 4th Edition
1999	New Red Book (1st Edition) CC for construction
2005	MDB Edition
2006	MDB Edition (revised)
201?	New Red Book (2nd Edition)



## Why FIDIC Conditions of Contract?

### How FIDIC updates Contract Documents?

- Setting up of Task Force for Updating work
- Worldwide Questionnaire Survey
- Trial with Test Edition
- Hearing from Construction Industries (Employer, Contractor, Consultants, Lawyer, Banks)
- Issue of Revised Documents



### Why FIDIC Red Book?

- It is drafted for Design-Bid-Build project.
  - The project is designed by the Employer.
  - Unit Price/Re-measurement method for payment
- Balanced Risk Allocation between Contract Parties → [Go to 14](#)
  - The party who can best manage the risk, takes such risk.
  - Risks for which neither the Employer nor the Contractor can control, is in principle taken by the Employer as the initiator of the project.
- Presence of the Engineer → [Go to 16](#)
  - The Engineer is not a Contract Party but his duties and authority are stipulated in the Contract.
  - The Engineer plays an essential roles in the administration of the Contract.
- Detailed Claim and Dispute Resolution Procedure → [Go to 19](#)



### Characteristics of Construction Projects

- Production at the site
- Large influence from natural environment (topography, site geology, climate, flood, etc.)
- Tailor made
- Large initial investment
- Long time for completion
- Unavoidable design change (limitation of site investigation)
- Great diversity of stakeholders
- Concurrent work with other contractors
- Environmental impact



### High Complexity and High Uncertainty



### Requirements for Construction Contract

#### High Uncertainty



It is impossible to stipulate remedies specifically against every possible situations to be encountered.

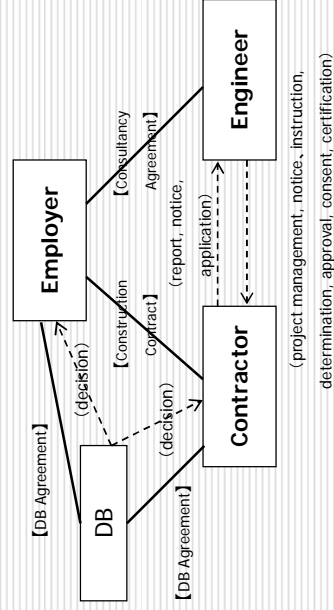
Stipulation of rules to cope with an unforeseeable event in the contract is most realistic.



- ✓ Variation clause
- ✓ Claim and dispute resolution procedure
- ✓ Independent Engineer → [Back to 13](#)

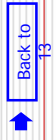


### Three Actor System and Dispute Board in FIDIC



### Engineer's Role in Claim and Dispute Resolution

- ❑ Red Book 1987
  - The Engineer makes determination of claim and decision of dispute
  - Same in Yellow Book 1987
- ❑ Red Book 1999 and MDB edition
  - The Engineer makes determination of claim, and Dispute Board makes decision of dispute
  - Same in Yellow Book 1999



### Requirement on Engineer's Determination

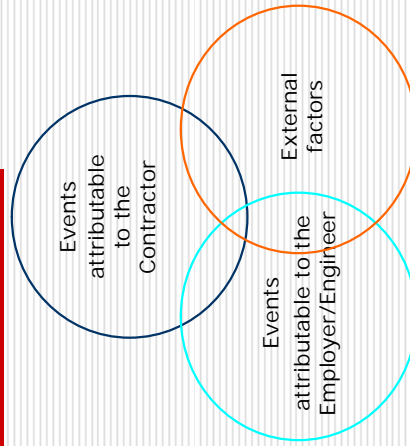
- ❑ to be fair (unbiased) and professional
- ❑ with proper interpretation of the Contract
- ❑ after due consultation with the Employer and Contractor



These requirements in MDB remain unchanged from FIDIC Red Book 1987 version.



### Causes of Cost Increase and Delay in Progress



### Events Attributable to the Contractor

- ❑ Insufficient understanding of contract conditions (Conditions of Contract, Scope of Work, Drawing, Specifications, BO, Work Schedule)
- ❑ Insufficient investigation, analysis and understanding of site conditions
- ❑ Too low bid price and/or error in cost estimate
- ❑ Insufficient construction resources
- ❑ Delay in procurement of subcontractor or goods
- ❑ Inefficient work/Re-work
- ❑ Improper risk assessment
- ❑ Improper project management

➡ No entitlement to Claim



## Events Attributable to the Employer/Engineer

- ❑ Variation order by the Engineer
- ❑ Breach of contract by the Employer
- ❑ Improper instructions by the Employer/Engineer
- ❑ Delay in issuing instruction, approval and consent by the Employer/Engineer
- ❑ Suspension of the Works
- ❑ Interference from other contractors at the Site (if Employer/Engineer is responsible for them)

➔ Entitlement to Claim



## External Factors

- ❑ Increase of work quantity from BQ
- ❑ Unforeseeable physical conditions
- ❑ Exceptionally adverse climatic conditions
- ❑ Employer's Risk event
- ❑ Force Majeure
- ❑ Price escalation
- ❑ Change in legislation

➔ Entitlement to Claim, in principle



## Unforeseeable Physical Conditions (clause 4.12)

### Why this risk is allocated to the Employer?

- ❑ The Employer select the site and determined the layout of the Works.
- ❑ The Employer carried out the design.
- ❑ The Employer determined timing of commencement of the work.
- ❑ The Employer carried out site investigation whatever level he considered necessary.



## No other Choice than FIDIC Red Book for ODA Projects?

For Design-Build Project, the following books might be candidates to be considered.

1. FIDIC Yellow Book  
(Plant and Design-Build)
2. FIDIC Silver Book  
(EPC and Turnkey Projects)



### Introduction of "Check List for One-sided Contracts"

- Issued by JICA (JBIC) in 2006
  - For use with JICA SBD 1999 (Red Book 1987)
  - Purpose of Check List
1. Elimination of one-sided provisions from the contract to ensure smooth implementation of the Projects financed by JICA (JBIC)
  2. Reference guide to the executing agency in preparation of Bid Documents.
  3. Other potential users:
    - Consultants
    - Contractors
    - Financier



### What is One-sided Contract?

1. The One-sided contracts has imbalanced setting of contractual rights, obligations and risks between contracting parties.
2. The One-sided contracts are not considered good business practice.
3. Also called as "unbalanced contract, "unfair contract", "unilateral contract", "onerous contract", etc.



### Effect of One-sided Contract?

1. Higher bid price
2. Bid failure and disruption of project implementation
3. Non-participation in the bid of conscientious and capable contractors
4. Contract award to a bidder who fails or was not capable of estimating the risks properly
5. Poor construction quality and delay to the progress of the work due to lack of risk contingency
6. Undermining the relationship of mutual trust between the Employer and the Contractor
7. Repetition of groundless claims from the Contractor
8. Frequent disputes between the Employer and the Contractor
9. In an extreme case eventual termination of the contract



### Cause of One-sided Effect to the Contract

- Type A : Unreasonable limitation of the Contractor's contractual rights
- Type B : Unreasonable expansion of a Contractor's contractual responsibilities
- Type C : Restriction of the Engineer's powers, discretions and/or authority



### Type A Example : Limitation of Contractor's Rights

The entitlement to claim (if an unforeseeable event occurs, or when there is a deviation from the contract provision not attributable to the Contractor) is one of the most important contractual rights given to the Contractor.

If such entitlement is unreasonably restricted then the risk taken by the Contractor would be increased.



### Type B Example : Expansion of Contractor's Responsibility

- ❑ The Contractor's contractual responsibility is considered to be increased unreasonably if no maximum amount is set for Liquidated Damages or an excessively long Defects Liability Period is stipulated.
- ❑ If Employer's obligations are excluded entirely or partially or if such responsibilities are transferred to the Contractor, then the Contractor's contractual responsibilities would be increased unreasonably.

Example:

- to give possession of the site to the Contractor under Sub-clause 2.1,
- to give necessary instructions, consents, approvals and notices to the Contractor under various clauses,
- to pay the Contractor according to Clause 14



### Type C Example : Restriction of Engineer's Power/Authority

- ❑ The Engineer is required to exercise his authority independently/fairly in giving approval, consent, certification and determination.
- ❑ However, under Sub-clause 3.1 of General Conditions, it is possible to impose the Employer's prior approval as a precondition for the exercising of such Engineer's authority to the specific clauses.
- ❑ Excessive use of Employer's prior approval as a precondition for the exercise of the Engineer's authority may tend to bias the Engineer's independent decision making ability and thereby increase the unilateral effect in a contract.



Thank you for your attention.

FIDIC CONTRACT DOCUMENTS  
AND  
DISPUTE RESOLUTION  
  
PREVENTION OF CORRUPTION



Seminar on Contract Management for International Construction

## FIDIC Contract Documents and Dispute Resolution -Prevention of Corruption-

24 February, 2010

Japan International Cooperation Agency (JICA)

Professor Toshihiko Omoto, Dr.Eng.  
Graduate School of Management  
Kyoto University

JICA Contract Seminar 2010  
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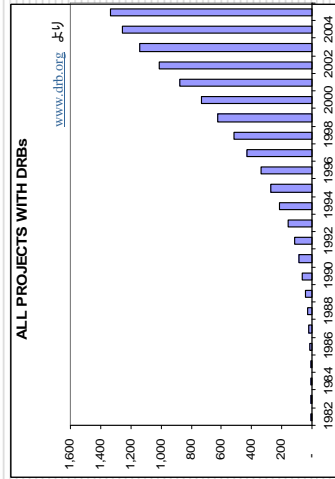
## Today's Topics: Dispute Boards

- Present State of DB's Dissemination
- Operation of DB
- Effects of DB
- Costs of DB
- Examples of DB

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## Present State of DB's Dissemination DRBF's Report



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## The Present State of DB's Dissemination DRBF's Report

- Reported projects are almost in USA
- DB is widely used in public sectors
  - California: The authority of transportation
  - Florida: The authority of transportation
  - Seattle: Metro
  - Alaska: The authority of electricity
- Federal government: The ministry of energy
- DRB used in 1,200 projects in 2005
  - 1.2 references/ project to DRB
  - 2% of references to arbitration/litigation
  - 1% of above resolved before award/judgment

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## The Present State of DB's Dissemination outside the USA

- Urtan Hydropower Project (China)**
  - US\$2 billion: 3,300 MW
  - 40 references to DAB; no claim to arbitration
- Hong Kong International Airport**
  - US\$: 15 billion
  - 6 references to DAB; 1 to arbitration, upheld
- Katse Dam (South Africa)**
  - US\$2.5 billion
  - 12 references to DAB; 1 to arbitration, upheld
- Docklands Light Railway, UK**
  - US\$500 million
  - No reference to DAB
- Saltend Private Gas Turbine Power Plant, UK**
  - US\$200 million
  - No reference to DAB
- Many, Many more!**

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## Operation of DB

### Difference Between Other Means of Dispute Resolution

- DB is established before disputes take place
- Selection of DB members is agreed by both parties
- DB provides on-site dispute resolution
- Preventing disputes from taking place or escalating to formal disputes
- Early settlement of disputes
- DB provides regular Site visits and documents review to remain conversant with project development
- DB is more like part of project management, rather than means of dispute resolution
- Key to a successful DB: DB members to gain trust and regards for their neutrality, impartiality and capability

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## Operation of DB Qualifications of DB members

- FIDIC/MDB Harmonized Edition Rules**
  - Language ability
  - experience in the kind of Work
  - experience in interpreting contract documents
  - Availability for site visits
  - Impartial and independent of contracting parties and Engineer
  - no interest financial or otherwise with contracting parties and Engineer and with the contract itself
  - Nationality
- Engineers or lawyers?**

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## Operation of DB Selection of DB Members/Establishment of DB

- Each party nominate one for the other party's approval, two members nominate the third member for both parties' approval  
→ Chairperson  
(The chairperson should be of different nationality from the two contracting parties.)
- The parties can make the selection together with the Engineer.
- DB members can be selected from a ballot of several candidates.
- Qualifications can be set down in advance (Example)
  - Selecting from FIDIC President's List
  - 2 Engineers + 1 Lawyer (chairperson)
  - 1 member shall be experienced in TBM tunneling work

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## The Operation of DB

Information to be disclosed in making DB contracts

- Records of any professional or personal relationships with any director, officer or employee of the Employer, the Contractor or the Engineer, and any previous involvement in the overall project of which the contract forms part
- Records of any employment as a consultant or otherwise by the Employer, the Contractor or the Engineer
- Besides, information about the warranty on the impartiality and independence from the Employer, the Contractor and the Engineer

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## Operation of DB

Example of Disclosure

- In this case, the candidate had been employed by one of the parties until 10 years ago for 7 years then no involvement since then
- The candidate warrants his independence on the party

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Dear Sir,  
Thank you for your letter dated [redacted] regarding the statement of availability to provide DB services under the Contract. We have reviewed the information you provided and we are pleased to advise you that you are eligible to participate in the bidding process for the Contract and you are invited to submit a bid for the Contract and you are invited to submit a bid for the Contract and you are invited to submit a bid for the Contract.

1. There are no financial interests with, and no independence of the Parties and the Engineer.
2. I am familiar with the Conditions of Contract.
3. I am fluent in the language of the Contract.
4. I have extensive experience in the type of work that is being undertaken.

I understand that you have obtained the CV form for the type of work that is being undertaken.

As a matter of disclosure, the Parties and the Engineer should be made aware that between the years 1997 and 2000, I was employed by the Contractor as a member of the DB team for the project. I was involved in the design and construction of the project and I was involved in the design and construction of the project and I was involved in the design and construction of the project.

Yours faithfully,  
[redacted]

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## Operation of DB

Three-Party Agreement

- Three-Party Agreement**
  - Signatures of the 3 parties
    - Each Member
    - Two Parties
  - Assignment of DAB procedures
  - Payment
    - Retainer Fee
    - Daily Fee

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## Operation of DB - Acquaintance With the Project First Site Visit

- Logistics**
  - Basis: the DB should be seen as a member of the project team
  - Introduction of DB members (The participation of the head office?)
  - Participants' roles in the DB meeting
  - Confirmation of contract documents
    - Contract Agreement/Conditions of Contract/Bills of Materials/Drawings/Programme/other relevant documents
  - Secure contract documents for DB
    - One set of copies on the site
    - An A-5 sized version for each DB individual
  - Building of communication network
  - Arrangements & Preparations (Arrangement of hotel, vehicles, meeting rooms and equipments)
  - Deciding the date of Site Visits (based on the expected progress of the project)

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Dear Sir,  
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Yours faithfully,  
[redacted]

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Operation of DB-Acquaintance With the Project  
First Site Visit (continued)

- Discovering potential disputes areas**
  - Seeds of problems planted at bidding, contract negotiation and signing stage
  - Incompletion in the changed or added terms
  - Problems appear right after signing of the contract
    - Corporation registration
    - Work permit
    - Issues in relation to local labors or subcontractors
    - Problems of Importing and exporting materials and equipments
    - Delay of preceding construction
    - Delay of drawing issuance
    - Delay in mobilization
- Establishing Problem Solving Project Team**
  - for the project
  - Documentations (Claims) come later

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Operation of DB - Acquaintance With the Project  
Site Visits

- Frequency: Every 3~4 months**
- Length-of-stay: No shorter than three days**
  - Day 1: Site inspection
  - Day 2: Hearing
    - Employer, Contractor, Engineer
    - The persons concerned besides the parties (if necessary, the subcontractors, the designer etc. )
  - Day 3: Site Visit Report
    - Draft and Review/Correction
    - Signing and Distribution before leaving Site
    - Deciding the date of next Site Visit

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Site Visit Agenda (6 – 10 July 2008)

Date	Time	Place	Contents	Responsible	Participants
Monday 7	08:00	Hotel	DB picked up to Site I	Mr. X	DB, Emp. Cont, Eng
	12:30	Site Office	Briefing & tour Lunch	Mr. Y	DB, Emp. Cont, Eng
	13:30		Tour to Site II & III	Mr. X	DB, Emp. Cont, Eng
Tuesday 8	18:30	Camp Canteen	Dinner & to Hotel	Mr. Y	DB, Emp. Cont, Eng
	09:00	Hotel	DB picked up to Site I Emp office for meeting	Mr. X	DB, Emp. Cont, Eng, Sub A&B
	12:30	Site Canteen	Lunch	Mr. Y	DB, Emp. Cont, Eng, Sub A&B
Wednesday 9	13:30 18:30		Afternoon session & to Hotel	Mr. X	DB, Emp. Cont, Eng, Sub A&B
	09:00	Hotel	DB picked up to Site office & prepare report		DB
	16:00		Deliver/reviaw of report & to Hotel	DB	DB, Emp. Cont, Eng, Sub A&B

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Operation of DB-Acquaintance With the Project

Work Between Site Visits

- Sending of Documents**
  - Monthly reports
  - Main Variations
  - Claim Notices/Submissions
  - Updated Programme
  - Important Letters other than claim related
- Methods of Sending**
  - File sending service
  - Opening of ftp: // sites

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## Methods of Sending (Sample)



- ❑ Put on to the web site
- ❑ Use file sending service  
such as [www.yousendit.com](http://www.yousendit.com) etc.  
(Not expensive, free up to 100MB)

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## Effects of DB Dispute Resolution

- ❑ Disputes that cannot be solved among the parties and engineers are referred to DB (Referral)
- ❑ DB being well informed of progress/contractual issues
  - Taking advantage of regular Site Visits
  - Voluminous documents and formal presentation unnecessary (Simple Position Papers suffice)
  - Solves disputes at the site level
  - Legal representatives are unnecessary (Should lawyers be permitted to participate?)
  - Swift decisions
- ❑ Claims and disputes will not be left unsolved
  - The progress of construction will not be hindered
  - Disputes will not escalate
  - Collaborative relationship is established and maintained between the parties (for the project)

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## Effect of DB Prevention of Disputes

- ❑ Effects of Site Visits
  - The first Site Visit
    - ❑ Identifying, and efforts for solving, the problems appeared before and right after the signing of the contract
    - ❑ Discovering potential dispute areas and promoting dispute prevention
  - Site Visits
    - ❑ Discovering problems and efforts for dispute prevention
    - ❑ Sometimes technical advices are also available (sensitive to the parties' obligation)
    - ❑ Improvement of the relationships (individuals and groups) among the parties, the Engineer and other concerned persons
    - ❑ Make use of the influence to the third person (subcontract, designer, relevant government offices and others departments)
    - ❑ Helps maintaining parties' integrity

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## Effect of DB Prevention of Disputes (continued)

- ❑ DB to be kept informed between Site Visits
  - Sensing the parties' changes in attitude and provide advices about improvement
  - Improving understanding of the contract by Q&A
- ❑ Informal/advisory opinion
  - DB obtains the trust on neutrality and fairness through Site Visits etc.
  - Informal/advisory opinions are easy to be accepted.

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## Effect of DB Informal/advisory opinion

- Informal/Advisory Opinion**
  - DB is not a consultant
  - But DB may give advice under the parties' mutual agreement
  - No binding effect (neither on the two parties/Engineer nor on DB)
  - Can become base for negotiations between the parties
  - Disputes are settled before escalating
  - Is not equal to DRB's recommendation
- For example**
  - Incompletion in the changed or added terms:  
Adjustment of interpretation and making of new draft
  - Advice on solution that involves the third party (such as the subcontractor)

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## Engineer's Role

- Nothing changed except for Engineer's Decision
- Definition
  - Under Old Red Book
    - SC 2.3: "act impartially"
  - Under 1999 Red Book/MDB HE:
    - SC 3.1: "act for the Employer"
    - SC 3.5: "make a fair determination"
- Engineer can do proper jobs with existence of a DB

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## Maintaining Integrity & Prevention of Corruption

- DB is neither a consultant nor an auditing agency but,
  - Process of variation, additional payments, extension of time etc. kept open and transparent among the Parties, Engineer and DB
- Openness and transparency helps maintenance of Parties' Integrity and prevention of corruption

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## The cost of DB FIDIC's Explanation

- Retainer**
  - If required, a business trip to the Site within 28 days is possible
  - DB members are to be conversant with the situation of the site, and maintain the related documents.
  - Covers office expenditure and other costs
- Daily Fee**
  - Daily fee for site visit
  - Days of stay + maximum two days for each way for travel
  - Days needed for documents reviewing for the referral
- Reasonable expenses** such as airfare, hotel fee etc.

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## Cost of DB

### Difference Between FIDIC 1999&MDB Edition

- About the Retainer Fee During the Warranty period
  - 1999: "shall be reduced by 50%"
  - MDB: "shall be reduced by one third"
- About the Retainer/Daily Fee, when no description in the contract, and agreement cannot be reached between the parties
  - 1999: No description
  - MDB: the "appointing entity/official" may make the decision

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## Cost of DB: ICSID (International Centre for Settlement of Investment Disputes) 's Rule

- FIDIC: Fee by ICSID can be agreed

#### Arbitrators Fees:

FIDIC does not recommend fee scales for either arbitrators or for the administration for arbitrators. An indication of acceptable terms and conditions is provided by the World Bank's International Center for Settlement of Disputes (ICSID) - see Memorandum of Fees and Expenses for ICSID Arbitrators, 6 March 2004 - that applies for members of Arbitral Tribunals constituted under the ICSID Convention.

- ICSID's Rule: US\$3,000/day

#### Fees and Expenses of Conciliators, Arbitrators and ad hoc Committee Members

3. In addition to receiving reimbursement for any direct expenses reasonably incurred, conciliators arbitrators and ad hoc Committee members are entitled to receive, unless otherwise agreed between them and the parties, a fee of US\$3,000 per day, of meetings or other work performed in connection with the proceedings, as well as subsistence allowances and reimbursement of travel expenses within limits set forth in Administrative and Financial Regulation II.

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## Cost of DB

### Payment to DB members

- Retainer
  - Payment of three months in advance
  - If no special mutual agreement, no change for 24 months
- Daily Fee/Actual expenses such as the travel expenses
  - Right after the end of the Site Visit
- Methods of payment
  - The Contractor pays 100% at first
  - Reimbursement of 50% through progress payment
  - In other words, the Employer can pay by loans

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## Cost of DB Cost-effectiveness

- Project without DB - 1
  - The exchange of letters is a heavy work, hindering problems from being solved
  - Each one pursues his own profit
  - The contracting parties/Engineer don't get along well with each other
  - Claims are left unsolved
  - Tiny disputes may also escalate (global claims, additional problems of interest and exchange rates)
  - Production and assessment of claim packages

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## Cost of DB

### Cost-effectiveness (continued)

- Project without DB - 2
  - Production and assessment of claim packages
    - Additional costs for lawyers, experts and employees (for long time)
    - Enormous cost occurs even if there is no litigation or arbitration
  - Disputes arise between the Employer and the Consultant on the additional cost of claim assessment/evaluation work

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## Cost of DB

### Cost-effectiveness – (continued)

- Project without DB - 3
  - More enormous cost occurs if disputes escalate into litigation and arbitration (lasts for years)
    - (Example) Japan: 5 lawyers for each side
    - (Example) International: 2 Barristers+3 Solicitors for each side
  - 2 Experts (1 geologist + 1 consulting firm)

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## Cost of DB

### Cost-effectiveness (Continued)

- Projects with DB
  - The cost of DB will be no more than the cost estimated by experienced Employer/Engineer and Contractor for production and assessment of claim packages
    - Prevention of gambling in contract management, improvement of certainty
  - Prevention of irrational assessment by the Employer/Engineer
  - Engineer acts fairly and reasonably
  - Prevention of the Contractor's unjustified claims
  - Helps maintaining integrity of the parties
  - Stability of bidding price

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## Cases of DB

### Cases of DAB, Example of wisdom

- Water-supply tunnel project in China**
  - JBIC loans
  - 13 times of site visits from Mar 2003 to Mar 2007
  - The defect liability period ended in Feb 2008
  - **The DAB contract was extended from Mar 2008 to the end of final discharge of all obligation**
- Selecting of DAB members**
  - The Employer: A Japanese engineer (FIDIC President's List, advised by Japanese consulting firm)
  - The Contractor: An American engineer (DRBF President)
  - The Chairman: International construction lawyer (FIDIC President's List, American)
  - Recommended by co-members' agreement
  - Chosen by the agreement between the parties

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## Cases of DB

### Cases of DRB, Example of wisdom

- Port construction project in Madagascar
  - World Bank (20%) and private co-financing
  - Site visits were discontinued after the third time
  - **However, retainer contract being maintained**
- Selecting of DB members
  - Parties agreed to select from FIDIC President List
  - The Employer and the Contractor agreed on the selection, with assistance by the Engineer

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## Cases of DB

### Cases of DRE (One-person DRB)

- Japan
  - A gas turbine plant operation and maintenance (o/m) contract for 15 years
  - Apply DRE (Dispute Review Expert) or One Person Dispute Review Board for the last 10 years
  - Meetings are held once every three months
  - No retainer fee, but documents review/drafting recommendation etc. will be paid by hourly rate
- Selecting of the Experts
  - A mediation was held on the fifth year of the contract under the ADR rule of ICC
  - **After the mediation concluded successfully, the Neutral was selected for the DRE**

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## Enforcement of DB's Decision

- DAB (1999 Red Book) / DB (2005 MDB Harmonised Edition)
  - The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised on an amicable settlement or an arbitral award. (emphasis added)
  - Therefore, Parties shall comply with the decision immediately whether or not a notice of dissatisfaction has been issued.
  - If the decision has not been complied with, the aggrieved party may invoke arbitration for non-compliance itself. (see an article of Mr. Christopher Seppälä)

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## Amicable Settlement

- After obtaining a DB's decision, Parties are encouraged to make efforts to reach an amicable settlement.
- This does not allow Parties to defer the compliance with the decision.

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## An Article by Mr. Christopher Seppälä (White \$ Case)

### **An Engineer's/Dispute Adjudication Board's Decision is Enforceable by An Arbitral Award**

Contrary to widespread belief, a "binding" but not "final" decision of an Engineer under the FIDIC Conditions is enforceable by an arbitral award, in appropriate circumstances. This has been established for the first time by the interim award in ICC Case No. 10619. By analogy, a "binding" but not "final" decision of a FIDIC Dispute Adjudication Board should also be enforceable by an arbitral award in such circumstances.

(There should be no issue that a "final and binding" decision of an Engineer or Dispute Adjudication Board is enforceable by an arbitral award)



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## Practice of Dispute Board

*Thank you for your attention*

*The End*



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