



FIDIC Latin America Contract Users' Conference

Panama City, 2-3 October 2018

Dr. Sebastian Hök, PHD (Göttingen)
Adjudicator, FIDIC President's List
FIDIC Accredited Trainer
Member TG 9, 11
Friendly Reviewer FIDIC Updates, 2nd Edition



Dr. Götz-Sebastian Hök



International Federation of Consulting Engineers
The Global Voice of Consulting Engineers




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Guidance on Modifying FIDIC Conditions – FIDIC Golden Principles

- Potential Areas of Adjustment
 - Commercial constraints
 - Project risks
 - Legal constraints
 - Understanding the commercial needs
 - Markets, competition,
 - Understanding typical project risks
 - Dealing with risk
 - Understanding legal constraints
 - Dealing with legal constraints
- Tools, Approaches & Guidance
 - Using the tools the FIDIC contract gives you
 - Different approaches under the civil and common law
- The requirements for notices of claim
- How best to prevent claims becoming disputes



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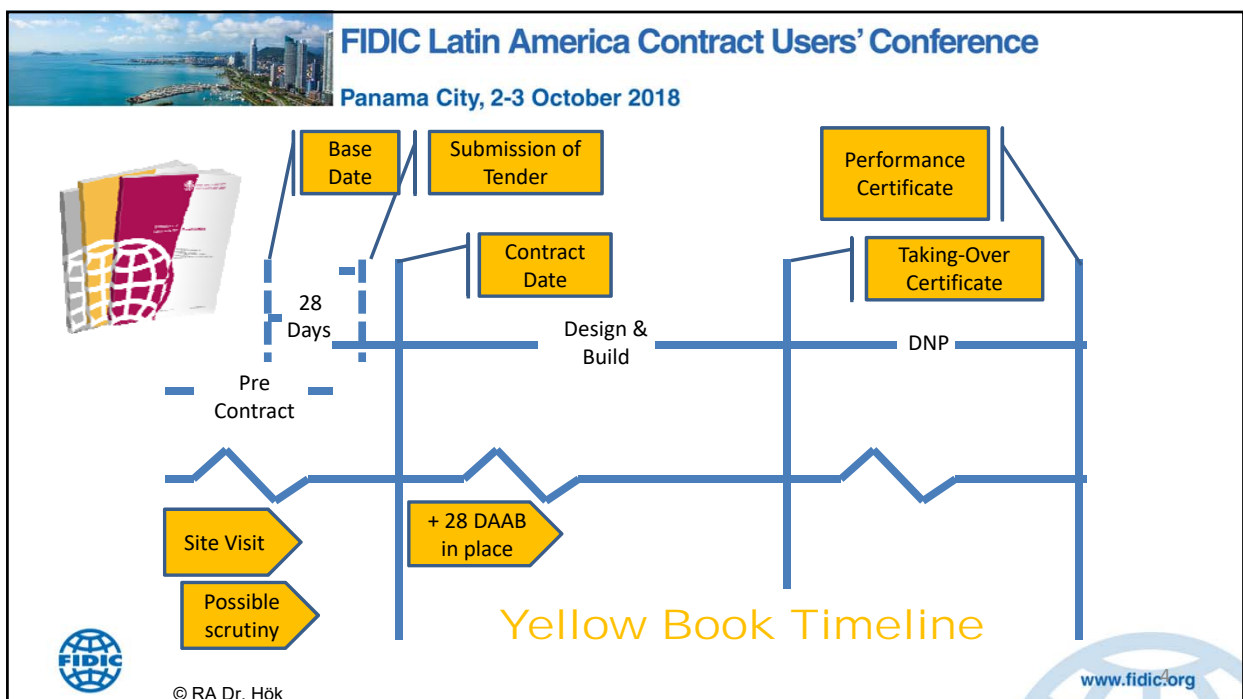
- Observations






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[Introductory] Notes [FIDIC Rainbow 2017]



- The Second Edition of the FIDIC Red Book continues FIDIC's fundamental principles of balanced risk sharing while seeking to build on the substantial experience gained from its use over the past 18 years. For example, this edition provides:
 - 1) greater detail and clarity on the requirements for notices and other communications;
 - 2) provisions to address Employers' and Contractors' claims treated equally and separated from disputes;
 - 3) mechanisms for dispute avoidance and
 - 4) detailed provisions for quality management, and verification of Contractor's contractual compliance.
- These Conditions of Contract for Construction include conditions, which are likely to apply to the majority of such contracts. Essential items of information which are particular to each individual contract are to be included in the Particular Conditions Part A – Contract Data.
- In addition, it is recognised that many Employers, especially governmental agencies, may require special conditions of contract, or particular procedures, which differ from those included in the General Conditions. These should be included in Part B – Special Provisions.

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Potential Areas of Adjustment

- Don Charret (a member of TG 15) has observed:
 - GCs prepared for use in a wide range of projects and jurisdictions inevitably require supplementation with Particular Conditions (PCs) that address the particular requirements of the Site and unique features of the specific project. PCs may also be necessary to amend the GCs to comply with mandatory law that applies to the Site or legal jurisdiction.
- are:
 - **Project related Risk**
 - **Commercial Needs**
 - **Legal Constraints**
 - **proper law of the Contract**
 - **Applicable Laws**



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Dealing with Risk

- Identify Project Risk
 - Select suitable contract form!
- Does it address the project risk?
 - Spot the relevant set of GC clauses!
- How does it address the project risk?
 - Address the relevant set of GC clauses
- Adjust and amend the GC, if necessary



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Dealing with Commercial Needs

- Identify Commercial Needs
 - Strong bargaining powers of contractors
 - Budgets constraints
- Select suitable contract form
- Does it address the needs?
 - Spott the affected set of GC clauses
- How does it address the needs?
 - Address the relevant set of GC clauses



Adjust and amend the GC, if necessary





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Dealing with Legal Constraints

- Identify the legal constraints
 - Nominated contracts ... / no nominated contracts
- Does the selected form comply with the governing law of the Contract?
 - Understand the FIDIC wording
 - Understand the law
 - Test consistency



Adjust and amend the GC, if necessary

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Example: Civil Code of Panama

Art. 2060. Contracts for the construction of buildings, celebrated with a contractor, who undertakes the entire work for a lump sum fixed in advance, are subject, furthermore, to the following rules :

1. The contractor cannot demand an increase of the price, under the pretext of labor or material having increased in price, or of additions to or modifications in the original plan ; unless a special price for such additions or modifications shall have been stipulated.
2. If unknown conditions, as a hidden defect in the soil should occasion expenses which could not be foreseen, the contractor must receive authorization therefor from the owner; and if the latter should refuse, he may appeal to the Judge or Prefect to decide whether or not the additional labor should have been foreseen, and to fix the increase in price which may be proper by reason hereof.
3. If the building is destroyed or threatens to collapse in whole or in part, during the ten years following the delivery thereof, on account of a defect in construction or in the soil which the contractor or the persons employed by him should have been aware of by reason of their trade, or on account of defective material, the contractor shall be liable; if the material shall have been furnished by the owner, the liability of the contractor shall lie only in accordance with article 2041, last paragraph.*
4. The receipt given by the owner, after the conclusion of the work, signifies only that the owner approves it, as apparently in accordance with the plan and the rules of the trade, and does not relieve the contractor of the liability imposed upon him by the preceding paragraph.
5. If the artificers or laborers employed in the construction of the building shall have contracted directly with the owner for their respective wages, they shall be considered as independent contractors, and shall have a direct right of action against the owner; but if they shall have contracted with the contractor, they shall have no right of action against the owner, except subsidiarily to the extent of what the latter owed the contractor.



- The citation to article 2041 is incorrect; it should be 2057, last paragraph.

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- Tools, Approaches & Guidance



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Tools - Assets

- **FIDIC**
 - **FIDIC Golden Principles**
 - Guidance for the Preparation of Particular Conditions
 - FIDIC Characteristics
 - Definitions (Clause 1)
 - References
 - Consistency
 - Assumptions
- **Other Tools**
 - JICA Check List for One Sided Contracts
 - UNIDROIT Principles in Commercial Contracts
 - SCL Delay & Disruption Protocol, 2nd Edition 2017








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Legal Framework

- Commonalities
 - Proper law of the Contract applies
 - Mandatory and/or compulsory law prevails
 - Matters of interpretation are governed by the proper law of the Contract





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Civil Law vs. Common Law

<p>Civil Law</p> <ul style="list-style-type: none"> • Nominated Contracts providing default & gap filling law <ul style="list-style-type: none"> – e.g. sophisticated liability for defective works • Lawyers are trained to shape the law • Little express wording necessary (essentialia negotii) • Codified or similar law • Specific performance is a normal relief • Penalties enforceable • Human rights codified e.g. access to the courts 	<p>Common Law</p> <ul style="list-style-type: none"> • No nominated contracts • Lawyers are trained to design the whole contract (using standard terms) • Plenty of express terms are necessary <ul style="list-style-type: none"> – Courts are reluctant to adopt terms implied by fact • Case law prevails, statutory law is the exception not the rule • Specific performance is an extraordinary relief • Penalties enforceable • Human rights not codified
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Contract Law Principles

- The Contract must determine the essentialia negotii (the fundamental terms of the contract) → by achieving consent.
 - The content of other elements of the contract can be derived from the parties' statements and behavior, or determined by a court, arbitrator or third person.
 - I. essentialia negotii (terms without which the contract would have no sense) → too much uncertainty;
 - II. naturalia negotii (terms which regulate the parties' obligations logically stemming from the contract itself); and
 - ❖ are referred to in the common law tradition as "implied terms"
 - III. accidentalia negotii (terms which are not common for the type of contract in question but which could be the subject of its terms).



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Advise

- FIDIC forms of Contract are recommendations only
- General Conditions are prepared based on assumptions [on-shore, green-field, etc.]
 - (which may not always match the actual conditions)




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(some further) Assumptions -Guidance Notes

- Sub-Clause 14.2.3 [*Repayment of Advance Payment*] of the General Conditions are based on the assumption that the advance payment is less than 22% of the Accepted Contract Amount.
- Many Sub-Clauses in the General Conditions make reference to data being contained in the Contract Data (Particular Conditions – Part A).
 - This data must be provided in the tender documents, and these Conditions of Contract assume that all such data will be provided by the Employer, except as expressly noted in the example form of Contract Data included in this publication. If the Employer requires tenderers to provide any of the other information required in the Contract Data, the tender documents must make this clear.
- Each time period stated in the General Conditions is what FIDIC believes is reasonable, realistic and achievable in the context of the obligation to which it refers, and reflects the appropriate balance between the interests of the Party required to perform the obligation, and the interests of the other Party whose rights are dependent on the performance of that obligation.
 - If consideration is given to changing any such stated time period in the Special Provisions (Particular Conditions – Part B), care should be taken to ensure that the amended time period remains reasonable, realistic and achievable in the particular circumstances.



Guidance Notes, RB at page 40, 11, 9 www.fidic.org




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Guidance
Notes:

FIDIC Advice → GP

- **FIDIC strongly recommends that the Employer, the Contractor and all drafters of the Special Provisions take all due regard of the five FIDIC Golden Principles:**
 - **GP1:** The duties, rights, obligations, roles and responsibilities of all the Contract Participants must be generally as implied in the General Conditions, and appropriate to the requirements of the project.
 - **GP2:** The Particular Conditions must be drafted clearly and unambiguously.
 - **GP3:** The Particular Conditions must not change the balance of risk/reward allocation provided for in the General Conditions.
 - **GP4:** All time periods specified in the Contract for Contract Participants to perform their obligations must be of reasonable duration.
 - **GP5:** All formal disputes must be referred to a Dispute Avoidance/Adjudication Board (or a Dispute Adjudication Board, if applicable) for a provisionally binding decision as a condition precedent to arbitration.



Guidance Notes, RB at page 8 www.fidic.org






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General Advice

- One of the following terms in a GC generally indicates that it may be amended by the PCs without being in conflict with the GPs:
 - or as otherwise agreed’;
 - ‘except as otherwise agreed’;
 - ‘unless otherwise agreed’;
 - ‘unless otherwise agreed by both Parties’;
 - ‘unless otherwise stated in the Particular Conditions’ / Specifications;
 - ‘except as otherwise stated in these Conditions’; or
 - ‘unless otherwise stated in the Contract’; however, this is ambiguous because it does not necessarily refer to the PCs.

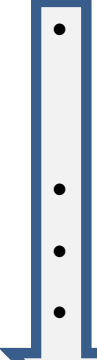







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General Advice



- Understand the FIDIC wording & FIDIC concepts
 - Prevention principle & EOT, specific performance & duty to remedy, certainty & clarity, role of the Engineer
- Avoid changes whenever possible
- Drafted by engineers for engineers [everything must be manageable]
- Change consistently & in a consistent manner
- Consider defined terms when changing, amending or omitting wording





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Example

- Consistency, clarity & certainty may have guided FIDIC to link the DNP to the Taking-Over for Parts of the Works [see S-C 1.1.27]
- If it had been intended to re-allocate risk for other reasons Employers „may“ wish to revert to FIDIC 1999:
 - Delete the references to „Part“
 - Modify the last sentence in the DNP definition:
 - This period is calculated from the Date of Completion of the Works or Section [& delete the reference to Part]
 - Reasons:
 - Consistency with S-C 13.1 1st paragraph → reference to TOC for Works
 - DNP for the „parts“ should start after Tests of Completion for the Works have been carried out and not earlier



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- Hot Topic: Claims




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- FIDIC contracts “are aimed at the early resolution of any queries at the time when the claim arises, with the strong likelihood that plant, manpower, experts and witnesses are still on site”. It is designed to avoid prolonged disputes.
 - Judge Sanders in Falkland Islands v. Gordon Forbes Construction




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Preliminaries

- Claims and Disputes are more or less indispensably interrelated
 - Only a claim (**C**laim & other matter) can become a **D**ispute
 - The outcome of a claim procedure shall be rapidly determined (S-C 3.7 + S-C 21.4 + 1.3)
- in the interest of clarity and certainty








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Claims

 The Contract requirements for notices of claim

- Notices:
 - “**Notice**” means a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3 [*Notices and Other Communications*]
 - eg:
 - NOD, Notice of no-objection, S-C 1.5, S-C 3.5, S-C 20.2, etc.
 - Notice shall be identified as a “Notice” [see S-C 1.3]









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Details on Claim Notices




- No Notice required
 - S-C 13.3.1:
 - ...
 - The Contractor shall be entitled to such EOT and/or adjustment to the Contract Price, without any requirement to comply with Sub-Clause 20.2 [*Claims For Payment and/or EOT*].
 - However, discrepancy with S-C 8.5 (a)





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Details on Claim Notices

- Claim Notice:
 - Notice
 - S-C 1.1.56 „as defined“
 - Describe event or circumstance
 - Include & indicate the „remedy“ (details on quantum are not required)





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Details on Claim Notices

Time Period

- Notice → .. as soon as practicable but not later than 28 days
 - FIDIC Guidance Notes (RB at page 9):
 - *Each time period stated in the General Conditions is what FIDIC believes is reasonable, realistic and achievable in the context of the obligation to which it refers, and reflects the appropriate balance between the interests of the Party required to perform the obligation, and the interests of the other Party whose rights are dependent on the performance of that obligation. If consideration is given to changing any such stated time period in the Special Provisions (Particular Conditions – Part B), care should be taken to ensure that the amended time period remains reasonable, realistic and achievable in the particular circumstances.*
 - **Change to the time period:** → time periods should „be reasonable, realistic and achievable in the context of the obligation to which it refers“






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Details on Claim Notices

How best to prevent claims becoming disputes?


- Avoid uncertainty
- Avoid unclarity
- Use dispute avoidance option







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Claims



Guidance Notes (RB, at page 50)

- include guidance on the meaning of „another entitlement or relief“ → S-C 20.1 (c). It could mean the following
 - interpretation of a provision of the Contract,
 - rectification of an ambiguity or discrepancy found in the Contract documents,
 - a declaration in favour of the claiming Party,
 - access to the Site or to places where the Works are being (or to be) carried out, and/or
 - any other matter of entitlement under the Conditions of Contract or in connection with, or arising out of, the Contract that does not involve payment by one Party to the other Party and/or EOT and/or extension of the DNP
- **do not include special advice or guidance on modifications of Sub-Clause 20.2**





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- Advice & Recommendations



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Employer's Claims

- Longer Periods
- No time bars
- Excuses (justification of late submission)
- Possible
- Difficult due to deemed as provisions
- FIDIC does not give detailed guidance



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GH1

Excuses

- Generally, it is no excuse for missing a notice or limitation period for the claimant to say that he or she did not know of the notice or limitation period.
- 2nd Edition: Excuses are allowed: S-C 20.2.2 + 20.2.5: taking in account details included in the fully detailed claim, such circumstances may be:
 - whether or to what extent the other Party would be prejudiced by acceptance of the late submission;
 - in the case of the time limit under Sub-Clause 20.2.1 [*Notice of Claim*], any evidence of the other Party's prior knowledge of the event or circumstance giving rise to the Claim, which the claiming Party may include in its supporting particulars; and/or
 - in the case of the time limit under Sub-Clause 20.2.4 [*Fully detailed Claim*], any evidence of the other Party's prior knowledge of the contractual and/or other legal basis of the Claim, which the claiming Party may include in its supporting particulars.
- Sufficient clarity & certainty achieved? Interpretation "ejusdem"?
- Further Guidance by Law:
 - The fact that a claimable event turns out to be more serious than the claimant had previously realised has long been recognised as capable of being a "material fact" capable of enlivening a "courts" discretion to grant an extension.
 - The "material fact" must produce the conclusion that the action would result in granting relief sufficient to justify the bringing of the claim which was previously not worth bringing.







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GH3

Excuses – cont'd

- Other reasons:
 - The foreseeability of the incapacity to undertake action in time requires that the responsible has a plan a plan in place to ensure that his duties are taken over by somebody else who will be able preserve the claimant's rights.
 - The parties are engaged in good-faith negotiations to resolve a dispute without litigation when the statute of limitations expired. GH4
 - Lack of prejudice to the other party
 - Reasonable good faith conduct on part of the claimant.

Folie 33

GH1 Morgan v JBS Australia PTY Limited [2016] QDC 226:

The fact that a Plaintiff's injury turns out to be more serious than he or she had previously realised has long been recognised as capable of being a "material fact" capable of enlivening a courts discretion to grant an extension.

The "material fact" must produce the conclusion that the action would result in an award of damages sufficient to justify the bringing of an action which was previously not worth bringing.

Götz-Sebastian Hök; 23.09.2018

Folie 34

GH3 Cabrera v. Collazo, 979 N.Y.S.2d 326 (2014):

Here, the foreseeability of death from cancer was the key factor. If an attorney has a disease that makes death foreseeable, that attorney should have a plan in place to ensure that the attorney's cases are taken over by counsel who will be able preserve the client's rights.

Götz-Sebastian Hök; 23.09.2018

GH4 Tolling is a legal doctrine that allows for the pausing or delaying of the running of the period of time set forth by a statute of limitations, such that a lawsuit may potentially be filed even after the statute of limitations has run. Although grounds for tolling the statute of limitations vary by jurisdiction, common grounds include:[1][2]

The plaintiff was a minor at the time a cause of action accrued.

The plaintiff has been deemed mentally incompetent.


The plaintiff has been convicted of a felony and is imprisoned.

The defendant has filed a bankruptcy case triggering a stay of other lawsuits.

The defendant is not physically present in a state.

The parties were engaged in good-faith negotiations to resolve a dispute without litigation when the statute of limitations expired.

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Contractor's Claims

- Additional requirement to give a Notice regarding EOT as a result of a Variation →
 - No Notice required acc. to S-C 13.3.1
- Shorter Periods for Notices etc.
- → may make sense because the Engineer may not understand any impact on Time for Completion unless he receives a **new programme**
- are likely to be unbalanced and unfair – purpose was to make it assessable early [breach of GP?]






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Engineer's Claim related powers


- Give initial Notice
 - Claim Notice is not deemed to be valid
 - Late Claim Notice
 - Late submission of fully detailed Claim
- Consultation
- Determination
- Dispute Avoidance Activities are allowed
 - e.g. during NOD period & before referral was made
- except during the period that the Engineer is carrying out duties under S-C 3.7
 - Consultation
 - Determination




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Conclusions

- Commercial needs, legal constraints and project conditions may require changes [if they deviate from assumptions]
- FIDIC recommends that the tender documents should be prepared by suitably qualified engineers who are familiar with the **technical aspects** of the required works and the **particular requirements and contractual provisions** [the FIDIC form of Contract]* of a construction project. Furthermore, a review by suitably-qualified lawyers is advisable.
- Golden Principles give (some) general guidance [mostly of what shall be avoided]*
- Read & understand the relevant set of Conditions of Contract and the related special guidance
 - *[...] added by Speaker





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- I kindly thank you for your attention.

• Dr. Götz-Sebastian Hök

• Eschenallee 22

• 14050 Berlin

• kanzlei@dr-hoek.de

• www.dr-hoek.de








kanzlei@dr-hoek.de



Dr. Götz-Sebastian Hök





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