

# FIDIC Latin America Contract Users' Conference



**Panama City, 2-3 October 2018**

**Luis Pablo Cobar Benard**  
**Integrum**  
**Partner**



**International Federation of Consulting Engineers**  
The Global Voice of Consulting Engineers





## Arbitration & Alternative Dispute Resolution

### Background:

- Lawyer and Notary Public
- Master degree in Economics
- Competition Law
- Design of public policies
- Experience in civil and commercial contracting



# Arbitration & Alternative Dispute Resolution

- Along with the sale and transport, construction is one of the most important operations on which international trade is based.
- The last four decades have been characterized by a very significant increase in the use of these financing systems.
- Large infrastructure projects incorporate, as a general rule, have a complex contractual structure



# The problem of risk

- Large projects are considered games of chance characterized by the great amount of commitments acquired by the parties
- The concept of risk, although it may be known to the contracting parties, is rarely discussed and approached in an appropriate manner.
- Risk is an abstract concept, quite complicated to define and in many cases impossible to measure accurately.



# Employer risks

- Impossibility to obtain financing
- Breach of the financiers
- Defective design
- Defective construction
- Delays in construction due to causes beyond the control of the builder
- Cost overruns in the execution of the works
- Events of force majeure



# Engineer's Risks

- Misinterpretation of the intention or objectives of the owner of the works
- Defective design (in those events in which this subject has been commissioned to carry out the design)
- Inadequate estimation of project costs
- Negligent inspection or supervision
- Unforeseen conditions



# Risks of main constructor

- Inadequate estimation of project costs (in those cases in which the contract does not allow readjusting or revising that price).
- Defective construction due to causes attributable to him
- Breach of subcontractors and suppliers of goods chosen by the same
- Unforeseen conditions
- Destruction of the works during the construction period
- Faulty or insufficient drawings and specifications





# Risks example



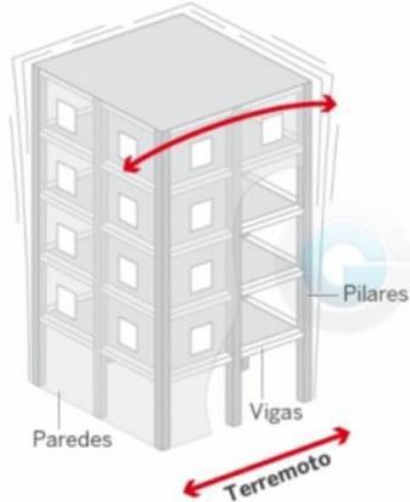


# Risks example

## CÓMO AFECTA UN SEÍSMO A UN EDIFICIO

Fallos que suelen producirse en un inmueble no sismorresistente

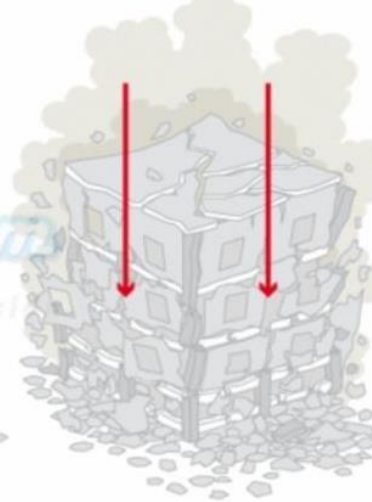
- 1 El terremoto produce **movimientos laterales**, para los que el edificio no está preparado



- 2 Los daños del edificio **se concentran en una planta** (muchas veces, la planta baja)



- 3 La planta dañada deja de poder soportar las cargas verticales y el edificio **se desploma**



# Ways to address the problem

- Evasion of risk, by implementing different project alternatives that do not suffer from or are not exposed
- Reduce the probability of materialization of the risk, taking actions to reduce the probability of occurrence
- Reduce the negative impact of a certain risk, transferring it to a third party or taking insurance that covers the negative effects of the risk.



# FIDIC Contracts

Cláusula	Riesgo	FIDIC		
		Red	Yellow	Silver
1.9	Delayed drawings or instructions			
	Errors in the Employer's requirements			
5.1	Errors in the Employer's requirements			
2.1	Right of access to the Site			
4.7	Setting Out			
4.12	Unforeseeable physical conditions			
4.24	Fossils			
7.4	Testing delays by Employer			
7.5	Rejection of materials			
7.6	Remedial work			
8.4	Extension of Time for Completion			
8.4(a)	Variation			
8.4(b)	Delay living entitlement to an EOT			
8.4(c)	Exceptionally adverse climatic conditions			
8.4(d)	Unforeseeable shortages and the availability of personnel or Goods caused by epidemic or government actions			
8.4(e)	Delay, impediment or prevention caused by the Employer its personnel or other contractors			8.4 ( c )
8.5	Delay caused by Authorities			
8.6	Rate of progress			



# Recommendation on Silver Book

It is not recommended to use Silver Book when contractors do not have enough time or information to:

- Scrutinize and check the Employer requirements
- To develop projects or studies of valuation and risk estimation
- When construction entails substantial work underground or work in other areas that bidders can not inspect



# The turnkey clause

*"The works must be adapted to the intended purposes defined in the Contract and must include any work necessary to satisfy the Employers Requirements and ensure the proper operation of the works"*

Importance on how to avoid problems of extensive or restrictive interpretation between parties



# Conflicts: main object of contract

- Scope of the Work
- "Poor" definitions of responsibilities and rights of the parties
- Interpretation of the parties on aspects not foreseen
  - Modification of Plans
  - Finishes



# Conflicts: peremptory deadlines

Delivery of the work

- Delays due to poor estimation during the construction period
- Delays due to weather conditions
- Delays due to changes in the work
- Delays due to unforeseeable circumstances or force majeure





# Dispute Boards: ¿What do they do?

Encourage the parties to resolve Disagreements by themselves

Help the parties solve Disagreements

Resolve Disagreements



# Type of Dispute Boards

Dispute Adjudication Board (DAB)

*They make decisions that must be followed immediately*

Dispute Review Board (DRB)

*They issue non-binding Recommendations but they can be*

Combine Dispute Board (CDB)

*Issue Recommendations or Decisions*



# Advantages

DAAB is familiar with the work from the beginning

Disputes can be prevented or resolved more efficiently

Ad-hoc members are chosen for the project



# Disadvantages

The Conclusions are not executable by the DAAB itself

Conclusions of the DB are not binding for Judicial or Arbitral Tribunal

In the case of a decision if it is "wrong", it must be respected until a decision is issued to the contrary



# THANK YOU!

