

FIDIC Middle East Contract Users' Conference

Dubai,
24-27 February 2020

Patrick McPherson, Partner, CMS

Courtney Rothery, Legal Director, CMS



International Federation of Consulting Engineers
The Global Voice of Consulting Engineers



Dos and Don'ts for Effective Claims Management Under FIDIC – Avoiding, Containing and Handling Claims

Understanding typical project risks

Tools to avoid and manage claims

FIDIC's requirements for notices of claim

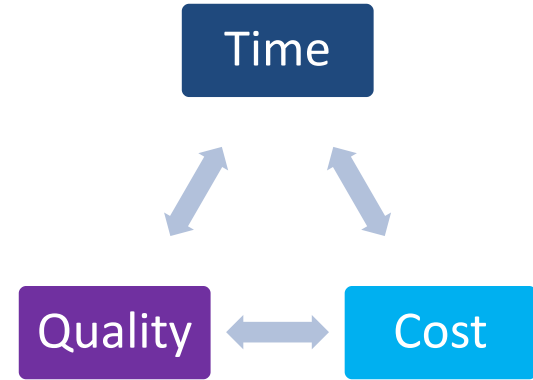
Handling time bar provisions under civil law

Preventing claims from becoming disputes

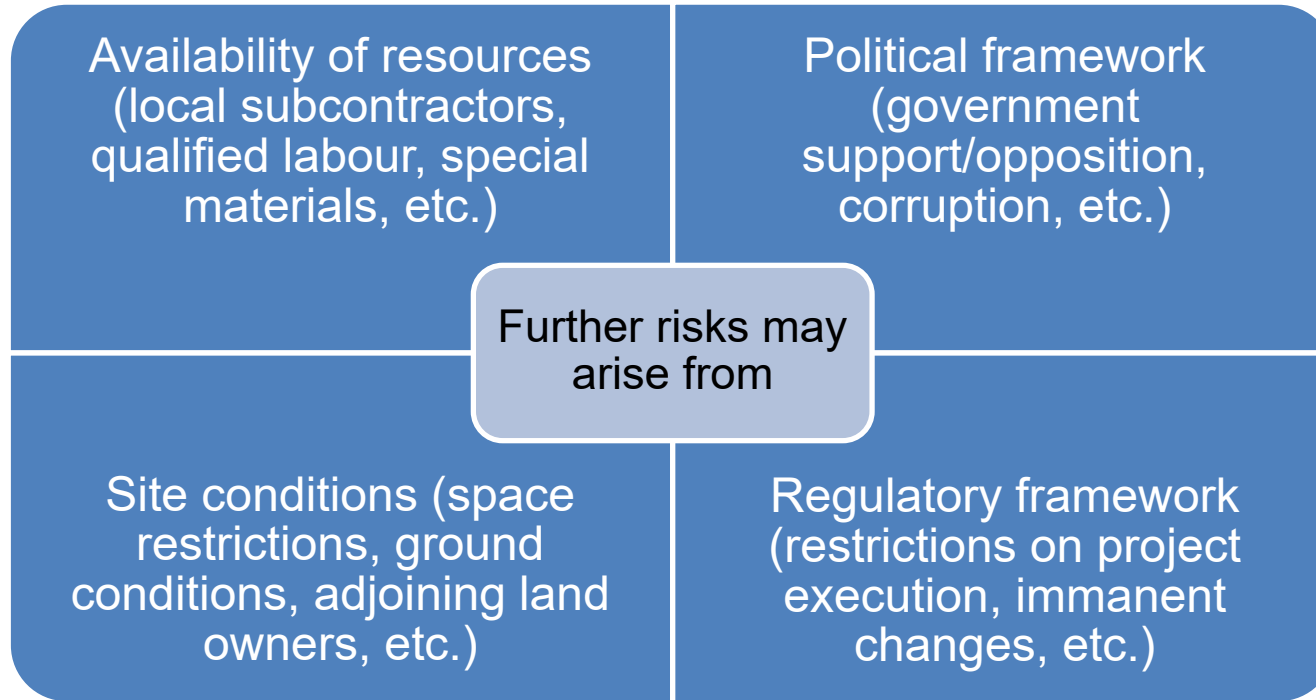


Understanding typical project risks

- Risk is '*possible adverse consequences of uncertainty*'
- Key project risk factors are
 - Time
 - Cost
 - Quality
- Risk management is key to successful completion
- One of the most common causes of disputes is *inadequate project management and administration*



Understanding typical project risks



Understanding typical project risks

- FIDIC's risk management methodology is 'risk allocation' whereby certain risks are allocated to certain parties.
- For example, FIDIC 2017 provides for
 - the client to make available to the contractor all relevant data *'in the Employer's possession on the topography of the Site and on sub-surface, hydrological, climatic and environmental conditions at the Site'*,
 - but makes the contractor *'responsible for interpreting all data referred to'*.

Understanding typical project risks

Risk allocation is achieved through a number of tools:

- Standard of care: reasonable skill and care vs fitness for purpose
- Single point responsibility for design and installation (ie EPC vs EPCm or traditional procurement)
- Lump-sum price
- Assumption (deeming) of responsibility for Employer Requirements
- Delay damages
- Retention
- Defect rectification provisions

Understanding typical project risks

Standard of care: reasonable skill and care vs fitness for purpose

- 2017 Red Book (cl 4.1):

"The Contractor shall execute the Works in accordance with the Contract. The Contractor undertakes that the execution of the Works and the completed Works will be in accordance with the documents forming the Contract as altered or modified by Variations."

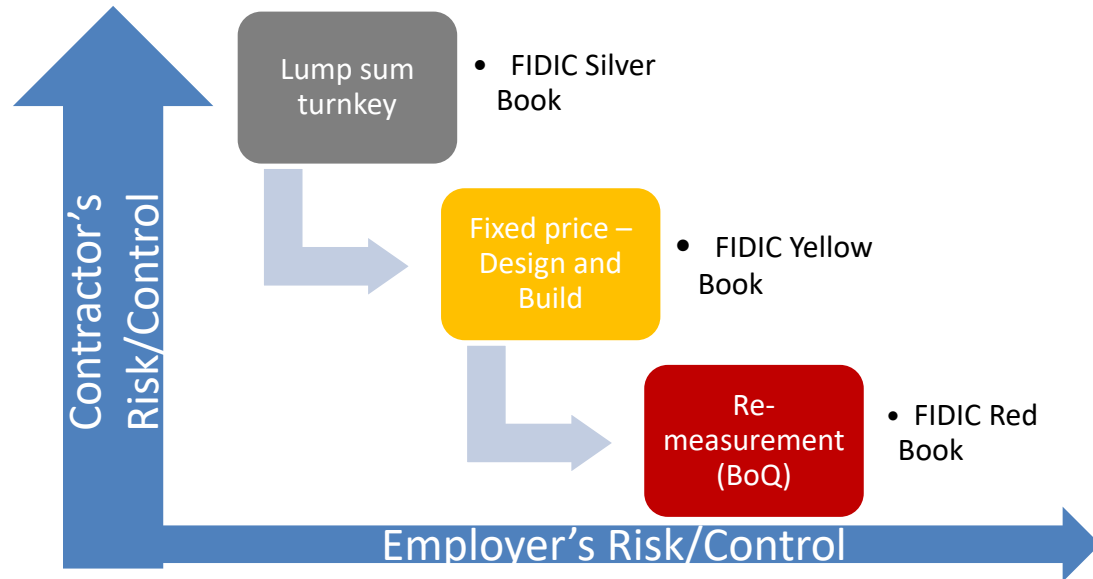
- 2017 Silver Book (cl. 4.1):

"The Contractor shall execute the Works in accordance with the Contract. When completed the Works (or Section or major item of Plant, if any) shall be fit for the purpose(s) for which they are intended as described in the Employer's Requirements or, where no purpose(s) are described, fit for their ordinary purposes(s)"

Understanding typical project risks

FIDIC forms reflect different risk profiles.

Risk allocation will affect price and will depend on parties' bargaining positions



Understanding typical project risks

- **Diligent risk assessment and monitoring is the basis of effective claims management**
- FIDIC forms include a number of tools to avoid, contain and handle claims
- Care must be given to identifying and implementing these tools in order to achieve successful management and completion of the Project



Tools to avoid and manage claims

- FIDIC 2017 cl. 3.8:

“Engineer or Contractor’s Representative may require the other to attend a management meeting to discuss arrangements for future work and/or other matters in connection with the execution of the Works”

- Project level discussions which can be triggered by either party
- Opportunity for claim avoidance and exchange of information
- Parties are obliged to attend
- Although no express sanction for non-compliance remember DAAB/arbitral tribunal will expect to see parties acting reasonably

Tools to avoid and manage claims

- FIDIC 2017 cl. 4.20: Monthly progress reports
 - Detailed reports including detailed description of progress and photographs
 - Must include as planned vs as built programmes
 - Must identify events or issues likely to affect progress
 - Matters set out in monthly report are **not** a Notice



Tools to avoid and manage claims

- Clause 13: Process and substantiation of Variation
 - Either party can initiate Variation
 - Mechanism for the notification and valuation of Variations
 - Alternative route to EOT without giving Notice under cl. 20.2
 - Covers change in law and adjustment for changes in costs
- Variations are a major source of disputes – strict compliance with notice requirements and time limits is essential



Tools to avoid and manage claims

- Final date for payment
- Payment is a major source of disputes
- If withholding amounts document the reasons why and be prepared for challenge
- Properly substantiated invoices are easier to defend
- Strict compliance with time limits is essential for both parties
- Understand when the contract requires “pay now argue later” and when amounts can be withheld
- Be practical Clause 14: Payment procedure – applications, notices, timing, certification,— cash flow is vital to completing the Project



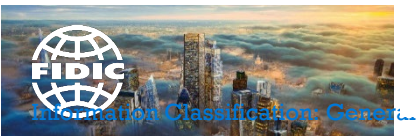
Tools to avoid and manage claims

- FIDIC 2017 cl. 4.9: Quality Management and Compliance Verification System
- Important to get these systems right – Contractors often criticised for failure to do so
- A good quality and compliance system can avoid problems on the Project and help show that Contractor acted diligently
- Remember the Engineer has oversight of quality and compliance documentation – additional source of information for Employer



Tools to avoid and manage claims

- Main changes FIDIC 2017 vs. FIDIC 1999 re claims/disputes procedure:
 - Two separate clauses for claims (cl. 20) and disputes (cl. 21)
 - Contractor and Employer claims are treated the same
 - Notices must be designated as such and incl. reference to cl. 20.1 (cl. 1.3)
 - DAAB may be engaged to assist with, discuss and informally resolve any issues or disagreement (cl. 21.3)
 - Reference to DAAB must be made within 42 days of NOD with Determination or NOD will lapse (cl. 21.4.1)
 - Clarification that DAAB decision is (preliminarily) binding on parties and can be enforced through summary or expedited procedure (cl. 21.7)



Tools to avoid and manage claims

- FIDIC 2017 cl. 20 & 21: keep a record of claims Notices and claims (FIDIC 2017 cl. 4.20(f), a requirement of monthly progress reports)
- Claims need to be notified in time and in sufficient detail
- Time bar provisions encourage notification and early resolution of claims
- Tiered claim and dispute resolution procedure – in FIDIC 2017 now divided between cl. 20 and cl. 21
- Engagement with early stages of DRP can avoid costly arbitration
- Best placed for all stages if all records and Notices are in place



Tools to avoid and manage claims

Objectives of the Dispute Resolution Procedure

- Not the same for every project, may include:
 - Speed
 - Cost
 - Justice
 - Enforceability
 - Maintain commercial relationships
 - Complete the project
 - Certainty
- Need to understand the project and the parties in order to decide on priorities
- Consider need for rights of review and appeal as well as international enforcement

Tools to avoid and manage claims



Consensual

- Advantages
 - Preserves relationship
 - Parties retain control
 - Often cheaper
 - Often quicker
- Disadvantages
 - No guaranteed decision
 - May be difficult to enforce
 - Depend on parties' relative bargaining power

Determinative

- Advantages
 - Guaranteed decision
 - Enforceable
- Disadvantages
 - Slower
 - Often more costly
 - Often damages relationship
 - Parties lose control

Tools to avoid and manage claims

Tiered Dispute Resolution Procedures

Project level process

- Discussion between representatives
- Engineer's determination
- Notification requirements
- Meetings of senior managers

Consensual procedure

- Negotiation
- Mediation
- Early Neutral Evaluation

Interim binding procedure

- Adjudication
- Dispute Avoidance / Adjudication Board

Determinative procedure

- Expert Determination
- Litigation
- Arbitration

FIDIC's requirements for notices of claim

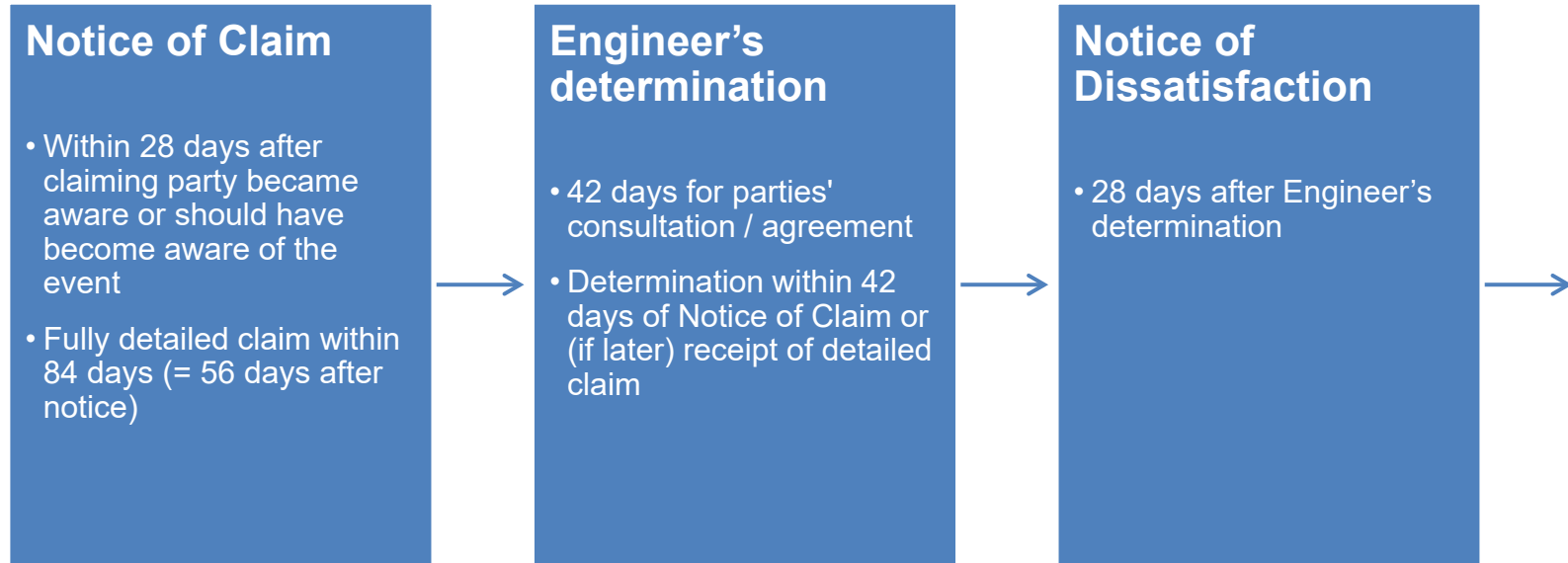
- Under cl. 1.1.56 FIDIC 2017 a Notice means
"a written communication identified as a Notice and issued in accordance with Sub-Clause 1.3"
- Requirements of cl. 1.3
 - Written paper/electronic original cl. 1.3(a)
 - Identified as a notice and refers to the relevant contractual provisions cl. 1.3(b)
 - Delivered or transmitted in accordance with cl. 1.3(c)



FIDIC's requirements for notices of claim

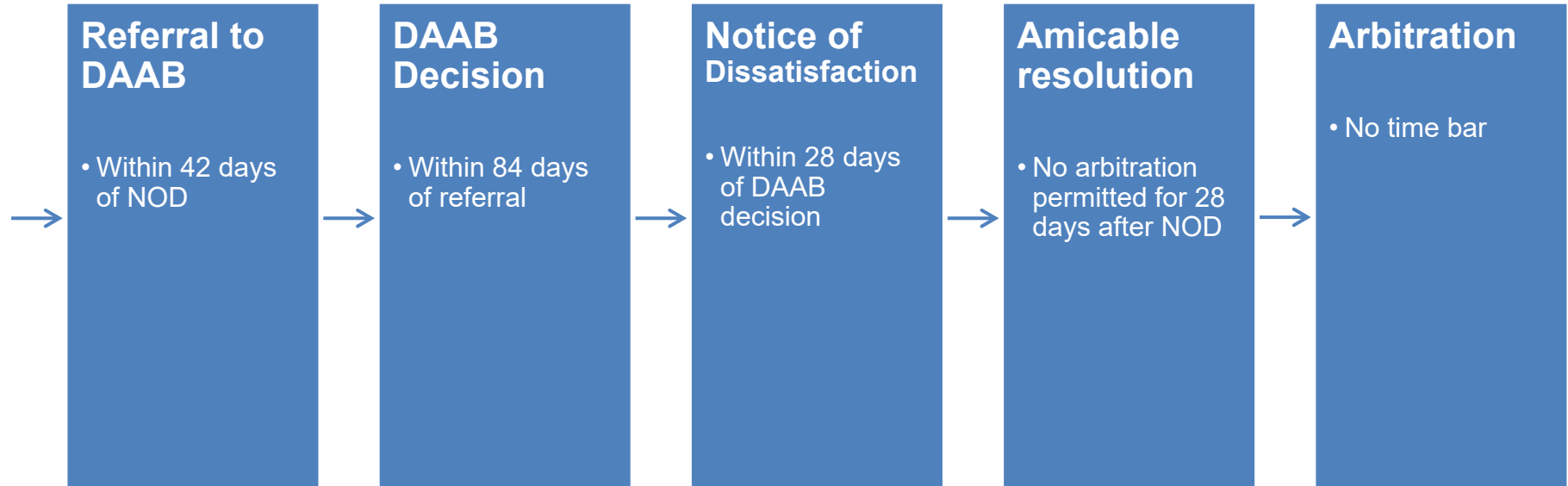
- Low requirements regarding contents (cl. 20.2.1):
"... Notice ... describing the event or circumstance giving rise to the cost, loss, delay or extension ..."
 - But: Requirement of fully detailed claim (cl. 20.2.4)
- Compare with requirement for variation (cl. 13.3.1)
"Contractor shall be entitled 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]"

FIDIC's requirements for notices of claim



- Timeline: 28 + 56 + 42 + 42 + 28 = 196 days until DAB procedure!

FIDIC's requirements for notices of claim



- ADR Procedure: $42 + 84 + 28 + 28 = 182$ days until RfA

Handling time bar provisions under civil law

- If the Employer/Contractor fails to meet the notice requirement under cl. 20.2.1 FIDIC:
"the claiming Party shall not be entitled to any additional payment, the Contract Price shall not be reduced ..., the Time for Completion ... or the DNP ... shall not be extended, and the other Party shall be discharged from any liability ..."
- On its face, the time bar in cl. 20.2.1 fully excludes the Employer's/Contractor's claims, while releasing the other party from all related liability

Handling time bar provisions under civil law

- But: requirement to submit fully detailed claim (cl. 20.2.4 FIDIC) – in case of failure:
 - *"... the Notice of Claim shall be deemed to have lapsed, it shall no longer be considered as a valid Notice,..."*
 - *"and the Engineer shall, within 14 days after this time limit has expired, give a Notice to the claiming Party accordingly."*
 - *"If the Engineer does not give such a Notice within this period of 14 days, the Notice of Claim shall be deemed to be a valid Notice."*
- New: Exception that engineer can waive time-bar if circumstances justify late submission (cl. 20.2.4 / 2.2.5)

Handling time bar provisions under civil law

- Under UAE law contractual time bar provisions are generally valid
- However, this need to be reconciled with the Shari'ah principle that a valid claim does not expire and the duty to act in good faith
- Possible scenarios include:
 - Employer knows of or is responsible for circumstances giving rise to Contractor's claim
 - Parties engaged in negotiations regarding matters related to claim, without the Contractor giving an express notice
 - Parties handled (multiple) previous claims without the Employer invoking time bar provisions even though it could have done.

Vote

If the employer was at all times fully aware of the facts and circumstances giving rise to a claim, should it nevertheless be allowed to rely on the preclusion effect of cl. 20.1, if the contractor fails to give a timely notice of claim?

1. Yes
2. No

Preventing claims from becoming disputes

- Claims and (to a certain degree) disputes are normal in construction projects
- They are not per se bad, but simply need good management to prevent their escalation
- Therefore:
 - Install an effective claim management system from day-one and maintain it properly throughout the entire project
 - Ask the other side to provide clear contacts for claim related issues and decisions
 - Make sure the FIDIC dispute management bodies (standing DAABs) are set up at the beginning of the project and not only after a claim has escalated



Preventing claims from becoming disputes

- Claims tend to turn into disputes where the result is uncertain
- Thus, an effective claim management should:
 - ensure claims are well founded – such claims tend to remain undisputed
 - keep good records – allocate sufficient resources to "paper trail" / minimise staff changes
 - ensure strict compliance with notice requirements – Contractors should not fear to issue notices and Employers should not be affronted to receive them
 - seek legal and/or expert advice early – this can clarify viability of claim and help to make claim more robust
 - keep commercial channels open – stay open to pragmatic solutions

Preventing claims from becoming disputes

- Were escalation is inevitable use early stages of FIDIC's dispute resolution procedure to full effect, in particular:
 - involve standing DAAB early on / set up good quality ad-hoc DAAB fast
 - consider mediation instead of amicable resolution by negotiation
 - keep feeding the paper trail
 - make sure to meet all relevant deadlines
- **Following the above steps also gives you the best chance of success at arbitration if full dispute cannot be avoided**

Questions



FIDIC Middle East Contract Users' Conference

Dubai,
24-27 February 2020

MDB Procurement and Evolution of The FIDIC Forms of Contract: Key Experiences and Conclusions

Aisha Nadar
FIDIC BOARD

Lina Tutunji
WORLD BANK



International Federation of Consulting Engineers
The Global Voice of Consulting Engineers

