

March 17, 2005

[This paper is to be published in the
Construction Law Journal, London, in 2005]]

International Construction Contracts and Dispute Resolution

Co-Hosted by ICC and FIDIC

**In partnership with
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Semiramis Intercontinental Hotel, Cairo, Egypt

April 9 – 10, 2005

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The FIDIC Contracts For Major Works**

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I. INTRODUCTION

More than sixty years ago, well before the contracts of the *Fédération Internationale des Ingénieurs-Conseils* (“**FIDIC**”)¹ existed, an English civil engineer and barrister, E.J. Rimmer, attempted to summarize what is unique about civil engineering contracts and, therefore, what distinguishes them from other contracts. This is what he said:

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¹ FIDIC means in English the International Federation of Consulting Engineers, whose address is World Trade Center II, Geneva Airport, 29 Route de Pré-Bois, Cointrin, CH-1215 Geneva 15, Switzerland. Its e-mail address is fidic@fidic.org and its website is www.fidic.org.

“The subject-matter of an engineering contract is generally such as necessitates that the documents of which the contract is composed must make provision for contingencies and events of a special nature, and it is chiefly in this respect that it has peculiarities not to be found in other forms of contract, and is often inevitably of considerable length”.

What are these contingencies? While the reader will be familiar with them, this is what he said:

“the facts that contract works are to be constructed in or erected and fixed on to land, and cannot be rejected and sent back to the Contractor if they prove to be unsatisfactory; that the works are to be carried out in open air under unstable conditions with material and labour of varying quality; that the conditions of excavation and foundation cannot be entirely foreseen until the ground is opened up; that execution of the works may result in damage to property belonging to other persons; that works of specialists may have to be carried out concurrently with work done by the general contractor; that the period of the contract may extend over several years and the Employer may desire the use of completed parts of the work before final completion of the whole; and that the amount of money involved is often such as to imperil the financial resources of a contractor who has made an unwise tender.”

All these things, this author said:

“necessitate that terms should be inserted in engineering contracts which would be superfluous to ordinary commercial contracts of purchase and sale.”²

² E.J. Rimmer, *The Conditions of Engineering Contracts*, Journal of The Institution of Civil Engineers (London, England) No. 4 1938-39, February 1939, p. 3. Mr. Rimmer's paper led to the first edition of the Conditions of Contract of the Institution of Civil Engineers in the United Kingdom (“ICE”) in 1945 (see J. Uff, *Keating Chambers: A Short History 1873-2001*, Tourcrete Ltd., England, p. 54). The first edition of the FIDIC Red Book, published in August 1957, was based on the Overseas (Civil) Conditions of Contract published in August 1956 by the Association of Consulting Engineers in the United Kingdom (“ACE”) and others, which was based upon fourth edition of the ICE Conditions of Contract, published

(... to continue)

Mr. Rimmer was writing about domestic construction in England in the 1930s and not international construction as we know it today (his article was the precursor for the first English standard form of civil engineering contract). However, not only, as you know, do all these same contingencies apply to international construction but, in any standard form of international construction contract, additional ones must be provided for, such as for: war, hostilities or other political events in the Employer's country or elsewhere; natural catastrophes of every kind (earth-quake, hurricane, volcano, flood and the like); world economic events (such as inflation); and changes in laws not only in the Contractor's country but in the Employer's country (*e.g.* foreign exchange, tax laws and customs duties) and possibly elsewhere. All of these events and others may drastically affect the cost and time of executing the works and, thus, upset the Contractor's tender calculations.

How do the current (1999) editions of the FIDIC Contracts for major works, namely, the:

- (1) Conditions of Contract for Construction (for building and engineering works designed by the Employer) (the "**Red Book**"),
- (2) Conditions of Contract for Plant and Design-Build (for electrical and mechanical plant, and for building and engineering works, designed by the Contractor) (the "**Yellow Book**"), and
- (3) Conditions of Contract for EPC/Turkey Projects (the "**Silver Book**").

make provision for these kinds of special contingencies?

(continued)

in January 1955 (*see* N.G. Bunni, *The FIDIC Form of Contract*, 2nd Edit., Blackwell Science (Oxford 1997), England, pp. 3 to 6).

One of the principal ways that they do so is by providing for specified claim rights for the Contractor if and when such contingencies arise. While requiring the Contractor to execute the works for an agreed price (which may be a unit price³ or a lump sum price⁴) and within a specific time period, they at the same time provide that the Contractor may have the right to claim additional money or time, or both, from the Employer in specifically defined circumstances.

In addition to providing the Contractor with defined claim rights, they provide procedures for the enforcement of those rights. For example, the Red and Yellow Books confer upon a third party – the Engineer – the power and authority to decide on the Contractor's claims in the first instance. If the Contractor is dissatisfied with the Engineer's ruling, the Contractor may thereafter refer it to a Dispute Adjudication Board (“DAB”), under the FIDIC Books, and, if still dissatisfied, thereafter to international arbitration.

This paper will discuss, **first**, the various kinds of claims that the Contractor may assert under, or in connection with, the new FIDIC contracts and then, **second**, the procedure that the Contractor is required to follow to assert claims and to get them paid.

II. CONTRACTOR'S CLAIMS UNDER, OR IN CONNECTION WITH, THE NEW FIDIC CONTRACTS

Essentially, a Contractor may assert two types of claims under or relating to a FIDIC contract:

First, there are “contractual” claims, that is, claims which the Contractor is entitled to assert by virtue of the specific provisions of the contract and, **second**, there are “legal”

³ As under the Red Book (*see* Sub-Clause 14.1), whereby the Employer accepts the risk of changes in the quantities of the work from those estimated when the contract was signed.

⁴ As under the Yellow and Silver Books (*see* Sub-Clause 14.1), whereby the Contractor accepts the risk of changes in the quantities of the work from those which he may have originally foreseen.

claims, that is, claims which the Contractor may be entitled to assert under the law governing the contract, the most obvious one being breach of contract. I shall deal with each of these types of claims in turn.

A. "Contractual" Claims

Since the first edition of the FIDIC Red Book was published in 1957, the FIDIC contracts have contained provisions entitling the Contractor to claim additional money or time (or both) from the Employer when the Contractor encounters specifically defined unforeseeable conditions.⁵ The 1999 edition of the Red and Yellow Books each contain about 30 sub-clauses specifying events which, should they occur, will entitle the Contractor to claim from the Employer. The Silver Book, which places greater risk on the Contractor, contains only about 20 such sub-clauses.

The sub-clauses in the new Red and Yellow Books which entitle the Contractor to claim additional money or time are listed below (when a sub-clause applies to only one of these two Books, this is specified, and when a Sub-Clause is marked with an asterisk, this indicates that it is also contained in the Silver Book):

⁵ For commentaries on Contractor's claims under the third and fourth editions of the FIDIC Red Book, see the author's (i) *Contractor's Claims under the FIDIC International Civil Engineering Contract*, Vol. 14 International Business Lawyer (June 1986) 179, and (ii) *Contractor's Claims Under The FIDIC Civil Engineering Contract, Fourth (1987) Edition*, Vol. 19 of the International Business Lawyer (September and October 1991) at 395 and 457, respectively.

	<u>Sub-Clause Title</u>	<u>Contractor's Entitlement</u>
1.9	[Red Book only] Delayed Drawings or Instructions	Contractor may claim extension of time, Cost and reasonable profit if Engineer fails to issue a notified instruction or drawing within a reasonable time
1.9	[Yellow Book only] Errors in the Employer's Requirements	Contractor may claim extension of time, Cost and reasonable profit for error in Employer's Requirements which was not previously discoverable
2.1	Right to Access to the Site*	Contractor may claim extension of time, Cost and reasonable profit if Employer fails to give right of access to Site within time stated in the Contract
4.7	Setting Out	Contractor may claim extension of time, Cost and reasonable profit for errors in original setting-out points and levels of reference
4.12	Unforeseeable Physical Conditions	Contractor may claim extension of time and Cost if he encounters physical conditions which are Unforeseeable
4.24	Fossils*	Contractor may claim extension of time and Cost attributable to an instruction to Contractor to deal with an encountered archaeological finding
7.4	Testing*	Contractor may claim extension of time, Cost and reasonable profit if testing is delayed by (or on behalf of) the Employer
8.4	Extension of Time for Completion*	Contractor may claim extension of time if completion (<i>see</i> Sub-Clauses 8.2 & 10.1) is or

<u>Sub-Clause Title</u>	<u>Contractor's Entitlement</u>
	will be delayed by a listed cause
8.5 Delays Caused by Authorities*	Contractor may claim extension of time if Country's ⁶ public authority causes Unforeseeable delay
8.9 Consequences of Suspension*	Contractor may claim extension of time and Cost if Engineer instructs a suspension of progress
10.2 Taking Over of Parts of the Works	Contractor may claim Cost and reasonable profit attributable to the taking over of a part of the Works
10.3 Interference with Tests on Completion*	Contractor may claim extension of time, Cost and reasonable profit if Employer delays a Test on Completion
11.8 Contractor to Search*	Contractor may claim Cost and reasonable profit if instructed to search for cause of a defect for which he is not responsible
12.2 [Yellow Book only] Delayed Tests*	Contractor may claim Cost and reasonable profit if Employer delays a Test after Completion
12.3 [Red Book only] Evaluation	Contractor's entitlement to new rates or prices for work whose quantity has been changed or which is varied

⁶ "Country" is defined as being where the Site is located, *see* Sub-Clause 1.1.1 of the new Books.

	<u>Sub-Clause Title</u>	<u>Contractor's Entitlement</u>
12.4	[Red Book only] Omissions	Contractor may claim a Cost which, although it had been included in a BoQ item, he would not recover because the item was for work which has been omitted by Variation
12.4	[Yellow Book only] Failure to Pass Tests after Completion*	Contractor may claim Cost and reasonable profit if Employer delays access to the Works or Plant
13.2	[Red Book only] Value Engineering	Contractor may claim half of the saving in contract value of his redesigned post-contract alternative proposal, which was approved without prior agreement of such contract value and of how saving would be shared
13.3	Variation Procedure*	The Contract Price shall be adjusted as a result of Variations
13.7	Adjustments for Changes in Legislation*	Contractor may claim extension of time and Cost attributable to a change in the Laws of the Country
14.4	Schedule of Payments*	If interim payment instalments were not defined by reference to actual progress, and actual progress is less than that on which the schedule of payments was originally based, these instalments may be revised
14.8	Delayed Payment*	Contractor may claim financing changes if he does not receive payment in accordance with Sub-Clause 14.7
16.1	Contractor's Entitlement to Suspend Work*	Contractor may claim extension of time, Cost and reasonable profit if Engineer fails to certify or if Employer fails to pay amount certified or fails to evidence his financial arrangements, and Contractor suspends work

<u>Sub-Clause Title</u>	<u>Contractor's Entitlement</u>
16.4 Payment on Termination*	Contractor may claim losses and damages after terminating Contract
17.1 Indemnities*	Contractor may claim cost attributable to a matter against which he is indemnified by Employer
17.4 Consequences of Employer's Risks*	Contractor may claim extension of time, Cost and (in some cases) reasonable profit if Works, Goods or Contractor's Documents are damaged by an Employer's risk as listed in Sub-Clause 17.3
18.1 General Requirements for Insurances*	Contractor may claim cost of premiums if Employer fails to effect insurance for which he is the "insuring Party"
19.4 Consequences of Force Majeure*	Contractor may claim extension of time and (in some cases) Cost if Force Majeure prevents him from performing obligations
19.6 Optional Termination, Payment and Release*	Contractor's work and other Costs are valued and paid after progress is prevented by a prolonged period of Force Majeure and either Party then gives notice of termination
19.7 Release from Performance	If it becomes impossible or unlawful to perform contractual obligations, Contractor may be released and can claim as in 19.6 ⁷

⁷ This list is based upon, but is not identical to, a list contained in *The FIDIC Contracts Guide*, published in 2000 by FIDIC, pp. 90-93.

B. Standard Format of Claims Clause

To illustrate how these clauses operate, let us take as an example Sub-Clause 2.1 [Right of Access to the Site] which is contained, subject to minor modifications, in all three Books for major works (the Red, Yellow and Silver Books). Sub-Clause 2.1 provides that if the Contractor suffers delay and/or incurs costs as a result of failure by the Employer to give access to, or possession of, the site within the time agreed, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 (which we will be discussing) to an extension of time and its additional cost inclusive of reasonable profit.⁸ After receiving this notice, the Engineer (or the Employer, in the case of the Silver Book) is then required to proceed in accordance with Sub-Clause 3.5 (which we will be discussing).⁹

Like Sub-Clause 2.1, each of the 20 or 30 claims' sub-clauses in each of the FIDIC contracts typically states that, having given a notice to the Engineer (or to the Employer, in the case of the Silver Book) under the relevant Sub-Clause:

- (1) the Contractor is entitled "subject to Sub-Clause 20.1 [Contractor's Claims]" to an extension of time and additional payment and that

⁸ While the Contractor is normally only entitled, under a claims clause, to recover its additional costs and/or additional time, where the Employer fails to give timely access to the site, the Employer is in breach of contract and, consequently, the Contractor is entitled to recover "reasonable profit" on its additional costs as well.

⁹ Sub-Clause 2.1 provides, in relevant part, as follows:

"If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Employer to give any such right [of access] or possession within such time, the Contractor shall give notice to the Engineer and shall be entitled subject to Sub-Clause 20.1 [Contractor's Claims] to:

- (a) an extension of time for any such delay, if completion is or will be delayed, under Sub-Clause 8.4 [Extension of Time for Completion], and
- (b) payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.

After receiving this notice, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters."

- (2) after receiving the notice, the Engineer “shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine these matters”.

Accordingly, it is appropriate to examine the general claims procedure provided for in Sub-Clause 20.1 and then to see how the Engineer (or the Employer, in the case of the Silver Book) is expected to address the claim under Sub-Clause 3.5.

However, before examining these procedures, it is necessary to say a word about “legal” claims (mentioned earlier) or claims based in law.

C. Claims under the Governing Law

The claims clauses in the FIDIC contracts are not exclusive of remedies that may be available under the law which governs the contract. If the Contractor considers that it would be more advantageous to claim, for example:

- (1) that the Employer had, under the governing law, “misrepresented” the conditions at site rather than to claim for unforeseeable physical conditions under Sub-Clause 4.12 of the Red and Yellow Books, or
- (2) where the Employer has wrongfully terminated the contract, upon the basis of breach of contract under the governing law rather than upon the basis of the termination clause in the contracts [Clause 15], or
- (3) assuming the contract was governed by the law of a civil law country, such as France or many countries in the Middle East, upon the basis of such legal

doctrines as *sujétions imprévues*, *imprévision* or *fait du prince*¹⁰ rather than upon the basis of the unforeseeable site conditions clause, the *force majeure* clause [Clause 19] or other clauses in the contracts,

the Contractor is free to do so. Nothing in the FIDIC Books for major works expressly precludes the Contractor from making claims based on the law governing the contract.¹¹

However, as a general rule, during the execution of the works, it will be in the Contractor's interest to claim under one or more clauses of the contract wherever feasible. As mentioned earlier, the Red and Yellow Books confer upon the Engineer the power and authority to decide the Contractor's claims in the first instance. The Engineer certifies interim payments to the Contractor,¹² and a claim based on a contractual clause is readily susceptible to evaluation by the Engineer. On the other hand, the Engineer will be unable to evaluate a claim based in law without obtaining legal advice and the Engineer will ordinarily not have a budget for this.¹³ Consequently, it is ordinarily preferable for the Contractor to

¹⁰ Recourse to these legal doctrines as a basis to claim may be available in the case administrative contracts (*e.g.* a contract with a State or State agency) in France and countries that derive their law from French law such as Egypt).

¹¹ On the contrary, Sub-Clause 19.7 of the FIDIC contracts (for major works) expressly recognize that, in the exceptional circumstances provided for in that Sub-Clause, a party may seek to be released from performance of the contract by reference to the law governing the contract. In this connection, compare Sub-Clause 30.12 of the old (1987) Yellow Book which provided that:

“Except in the case of Gross Misconduct (as defined), the Employer's remedies under this Clause [Clause 30 - Defects after Taking Over] shall be in place of and to the exclusion of any other remedy in relation to defects whatsoever”,

purporting thereby to exclude implied or other warranty-type claims under the relevant governing law.

¹² Sub-Clause 14.6 of the Red and Yellow Books.

¹³ However, the FIDIC Books expressly recognize that the Contractor may make a claim based in law, *see* Sub-Clause 14.3(f) of the Red and Yellow Books (Sub-Clause 14.3(e) of the Silver Book) which provides that the Contractor's applications for interim payment may include:

“any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration]”
[Emphasis added]

and Sub-Clause 20.1 (first sentence) which provides as follows:

(... to continue)

refrain from asserting claims based in law except if he is required to refer the claim to international arbitration. In international arbitration, both parties are likely to be represented by lawyers and the arbitral tribunal is likely to consist mainly of lawyers and, thus, will be readily able to evaluate claims made on legal, as well as solely on contractual, grounds.

III. THE CLAIMS PROCEDURE THE CONTRACTOR MUST FOLLOW

A. General Claims Procedure [Sub-Clause 20.1]

In the current (1999) FIDIC Contracts for major works, the Sub-Clause dealing with Contractor's claims [Sub-Clause 20.1] is more detailed than in the old fourth edition (1987) of the Red Book or in FIDIC's Conditions of Contract for Design-Build and Turnkey, 1995 (the "**Orange Book**").¹⁴ Moreover, unlike the old FIDIC Books, not only does this Sub-Clause regulate claims for additional payment, as in the past, but it also very sensibly regulates claims for extension of time, as there appeared no good reason not to have the same procedure apply to the Contractor's claims for time and claims for money. Sub-Clause 20.1 is the same in all three Books for major works except that as, in the Silver Book, there is no Engineer, his role is performed there by the Employer.

I would like **first** to describe the relevant claims procedure and then **second** make some comments upon it.

(continued)

"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 circumstance giving rise to the claim." [Emphasis added]

¹⁴ Both the old Red Book [Clause 53] and the Orange Book [Sub-Clause 20.1] had contained special clauses dealing with the procedure for claims for "additional payment" by the Contractor.

(1) **The Claims Procedure**

The new Sub-Clause [Sub-Clause 20.1] provides for the following procedure:

- (1) If the Contractor considers himself to be entitled to an extension of the Time for Completion and/or additional payment under any clause of the Conditions or otherwise, the Contractor must give notice to the Engineer (or to the Employer, under the Silver Book) as soon as practicable and “not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance” giving rise to the claim.

The Contractor has merely to give a bare notice of claim within 28 days. A one- or two-sentence letter will do. The Contractor does not need to state the amount or time claimed nor the contractual basis of the claim nor provide any supporting documents.¹⁵

If the Contractor fails to give such notice of claim within 28 days:

“the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim” [Sub-Clause 20.1].¹⁶

¹⁵ Equally, the Engineer is not required to respond to the Contractor's notice of claim, only to the fully detailed claim with supporting particulars, *see* point (4) below.

¹⁶ A similar sanction was contained in the Orange Book where the Contractor failed to give timely notice of a claim for additional payment [*see* Sub-Clause 20.1, last sentence]. On the other hand, under the old fourth edition (1987) of the Red Book, where the Contractor failed to comply with the provisions for notices of claim, the Contractor's entitlement to payment was limited to the amount which the Engineer or any arbitrator(s) considered could be verified by contemporary records [Sub-Clause 53.4]. For a recent English court decision interpreting this provision of the old Red Book, *see Her Majesty's Attorney General for the Falkland Islands v. Gordon Forbes Construction (Falklands) Limited* [2003] BLR 280.

Each notice of claim under Sub-Clause 20.1 must be in writing and properly delivered (*see* Sub-Clause 1.3). In addition, it must be listed in the monthly progress reports which are required to accompany the Contractor's applications for interim payment certificates pursuant to Sub-Clause 14.3.¹⁷

- (2) When the Contractor gives such a notice under the new Sub-Clause, he is required, as in the case of the old Red Book and the Orange Book, to “keep such contemporary records as may be necessary to substantiate any claim” and the Engineer (or the Employer, under the Silver Book) is authorized to monitor the Contractor's record-keeping and/or instruct the Contractor to keep additional contemporary records¹⁸ [Sub-Clause 20.1].

¹⁷ *See* Sub-Clause 4.21(f) and Sub-Clause 14.3.

¹⁸ In his book, *The FIDIC Form of Contract*, 2nd Edit., Blackwell Science (Oxford 1997), England, Dr. Nael Bunni provides the following useful list of what could constitute “contemporary records” for purposes of Sub-Clause 53.2 of the old (1987) Red Book, which corresponds to Sub-Clause 20.1 of the new Red Book:

- Clause 14 programme setting out what the contractor had intended for the order, sequence and timing of the various activities at the time of tender.
- An estimate of resources and anticipated expenditure in units of time, which are required to achieve the clause 14 programme.
- Any update and revision programmes in accordance with events which may occur during the progress of the works, as required in sub-clause 14.2.
- Progress programmes setting out the progress of the various activities against the clause 14 programme.
- Records of actual resources and actual expenditure based on progress.
- Records of any resources which were standing or uneconomically employed.
- Records of overtime worked, and the cost thereof.
- Progress photographs and/or videos.
- Drawings register (with details of amendments and updates, if any).
- Site diaries.
- Approved minutes of meetings.
- Labour allocation sheets.
- Plant allocation sheets.”

See his book, page 335.

- (3) Within 42 days after the Contractor became aware, or should have become aware, of the event or circumstance giving rise to the claim, or within such other period as the Engineer (or the Employer, under the Silver Book) may approve, the Contractor is required to send to the Engineer (or Employer) “a fully detailed claim” which includes “full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed”. If the event or circumstance giving rise to the claim has “a continuing effect”, further procedures need to be complied with.¹⁹
- (4) Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer (or the Employer, under the Silver Book) and approved by the Contractor, the Engineer (or Employer) must respond “with approval, or with disapproval and detailed comments”. He may also request any necessary further particulars “but shall nevertheless give his response on the principles of the claim within such time”.

This is the first time a FIDIC contract has required the Engineer or the Employer to respond to the claim of a Contractor within a given time period or in a given manner.

- (5) The requirements of Sub-Clause 20.1 are expressly stated to be “in addition to those of any other Sub-Clause which may apply to a claim”. Thus, the Contractor must comply with the claims procedure provided for in Sub-Clause 20.1 in addition to the requirements of the clause in the contract which may have given him the substantive right to claim (*see* the list of such Clauses in Section II.A above).

¹⁹ *See* Sub-Clause 20.1(a), (b) and (c) for details.

(6) Sub-Clause 20.1 further provides in part that:

“If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim...”

Thus, the extension of time or additional payment is required to take account of any damage the Employer may have suffered as the result of the Contractor's failure to comply with the claims procedure in the contract.

(2) **Comments on Claims Procedure**

After much reflection, the conclusion of the FIDIC drafting committee was that there must be a notice of claim within 28 days for there to be a valid claim so that all involved are aware that there is an event or circumstance where extra payment or time may be due to the Contractor. Twenty-eight (28) days appeared to us to be a reasonable period. International contractors tend to be fairly large companies, or consortia of companies, that employ a staff that is experienced in claims and, therefore, are fully capable of recognizing a claim situation when it arises. Consequently, if the Contractor has a *bona fide* claim, there would seem to be no good reason why he should not be required, under pain of forfeiting the claim, to give a notice of claim within 28 days (or 4 weeks) of the event or circumstance giving rise to the claim.

The notice of claim alerts the Engineer and the Employer to the fact that the Employer may have to pay the Contractor additional money or grant him an extension of time by reason of a specified event or circumstance. The requirement to keep contemporary records is intended to ensure that there will be contemporary documentary evidence to support the

claim. Once a notice of claim has been given, the parties can then agree on the particular contemporary records the Contractor must keep, to avoid future argument, and there may still be time for the Engineer to instruct alternative measures to reduce the effects of the claim. When claims are notified early, they may be resolved early, in the interests of both parties.²⁰

In this connection, a recent English court decision has defined “contemporary records” (as used in Clause 53 of the FIDIC Red Book, fourth edition) to mean:

“original or primary documents, or copies thereof, produced or prepared at or about the time giving rise to the claim, whether by or for the contractor or the employer.”²¹

They were held not to mean:

“witness statements produced after the time giving rise to the claim where such statements cannot be considered to be original or primary documents prepared at or about the time giving rise to the claim.”²²

Provided that such a notice of claim were given, it appeared to FIDIC to be less essential for the Contractor to have to comply with the other claims procedures in Sub-Clause

²⁰ As a legal matter, there are also often, depending upon the law governing the relevant contract, limitations on the enforceability of notice provisions. Thus, under U.S. law, for example: (i) as the failure to comply with such provisions can result in the forfeiture of rights, they tend to be strictly construed by courts and arbitral tribunals, (ii) when a contract requires that such notices be made and delivered in a particular way (as the FIDIC contracts often do), such requirements may be ignored by courts or arbitral tribunals if the substance of the message has been communicated, (iii) if the party entitled to notice (*e.g.* the Employer) has actual knowledge of a condition or occurrence, or suffers no prejudice as the result of not receiving a notice, courts and arbitral tribunals have sometimes held that formal notice under the contract is not required, and (iv) a party may through its own conduct waive the right to enforce a notice requirement. *See, e.g., Limitations on the Enforcement of Notice Requirements in Construction Claims Monthly* (Business Publishers Inc., Maryland, U.S.A.) Vol. 24, No. 2 December 2002, 1.

²¹ Her Majesty's Attorney General for the Falkland Islands v. Gordon Forbes Construction (Falklands) Limited [2003] BLR 208, 285.

²² *Ibid.*

20.1. Therefore, a failure of the Contractor to comply with these is not fatal to the claim. Instead, the Contractor's claim (if otherwise valid) would be reduced by the damage, if any, which this may have caused to the Employer. This was the rationale for the new final paragraph of Sub-Clause 20.1 (quoted above) which provides that:

“If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim...”.

B. The Determination of Claims by the Engineer (or the Employer, under the Silver Book) [Sub-Clause 3.5]

Both the standard form of claims clause (*e.g.* Sub-Clause 2.1) and the general claims procedure (Sub-Clause 20.1) provide that, after the Engineer (or the Employer, in the case of the Silver Book), has received a notice of claim, the Engineer (or the Employer) “shall proceed in accordance with Sub-Clause 3.5 [Determinations]”.

Sub-Clause 3.5 in the new Red and Yellow Books provides, in its entirety, as follows:

“Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.

The Engineer shall give notice to both Parties of each agreement or determination, with supporting particulars. Each Party shall give effect to each agreement or determination unless and until revised under Clause 20 [Claims, Disputes and Arbitration].”
[Emphasis added]

As can be seen above, Sub-Clause 3.5 provides that the Engineer (or the Employer, in the case of the Silver Book) shall, after consulting each party in an endeavor to reach agreement, make:

“a fair determination [of the claim] in accordance with the Contract, taking due regard of all relevant circumstances.”

The Engineer (or the Employer) is required to decide the claim in a balanced way, taking account of the interests of the Contractor and the Employer. Any such determination by the Engineer (or the Employer) must be accompanied by “supporting particulars”²³ and “shall not be unreasonably withheld or delayed”.²⁴

Sub-Clause 3.5 further provides that the decision of the Engineer (or the Employer, in the case of the Silver Book) is binding on the parties (“Each Party shall give effect to each agreement or determination...”) unless later revised by the DAB or international arbitration pursuant to Clause 20.

In the old Red and Yellow Books, if the Contractor was dissatisfied with the Engineer's response to his claim, with the result that there was a dispute, then he could ask for the Engineer's “decision” (old Red Book, Clause 67 and old Yellow Book, Clause 2.7). In the current FIDIC contracts, the Engineer is no longer empowered to render a pre-arbitral decision. Instead, this task has devolved upon the DAB.²⁵

²³ Sub-Clause 3.5.

²⁴ Sub-Clause 1.3, last paragraph.

²⁵ But, as an option, if agreed, the Engineer may still be given this task, *see, e.g.*, the commentary on Clause 20 in the *Guidance for the Preparation of Particular Conditions*, in the current edition of the Red Book.

In connection with DABs, *see* the author's “The New FIDIC Provision for a Dispute Adjudication Board” (1997) 14 ICLR 443.

C. Payment of Claims by the Employer [Sub-Clauses 14.3 Through 14.8]

Where the Engineer (or the Employer, in the case of the Silver Book) has determined an amount to be due to the Contractor under Sub-Clause 3.5, the Contractor is entitled to apply for it to be paid by way of an interim payment certificate pursuant to Clause 14.²⁶ Thus, Sub-Clause 14.3 provides that the Contractor's application for payment (called a "Statement") shall include, among other things:

"any other additions or deductions which may have become due under the contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration]."

If, after certifying the Contractor's payment application, the Contractor does not receive timely payment from the Employer, the Contractor is entitled to receive financing charges "compounded monthly on the amount unpaid during the period of delay". These financing charges are calculated at the "annual rate of three percentage points above the discount rate of the central bank of the currency of payment",²⁷ according to the FIDIC contracts, which (it will be recalled) were issued in 1999 when interest rates were higher than they have been recently.

D. Cut-Off Date for Submission of Claims [Sub-Clauses 14.10 Through 14.14]

As in the case of the old Red, Yellow and Orange Books, the Contractor must submit all his claims to the Engineer (or the Employer, in the case of the Silver Book) by a certain date, otherwise they may be cut off. Under the new Books for major works, the Contractor must submit his claims to the Engineer (or the Employer, in the case of the Silver Book) in a

²⁶ In the case of a claim for an extension of time, where the Engineer (or the Employer, in the case of the Silver Book) has determined that the Contractor is entitled to such extension under Sub-Clause 3.5, the Contractor's right thereto would be established thereby and no further action would be necessary.

²⁷ Sub-Clause 14.8.

“Statement at Completion” within 84 days after receiving the Taking Over Certificate for the Works, except for matters or things arising after the issue of such Certificate which would then need to be included in the Contractor’s draft final statement and “Final Statement”,²⁸ (which must be accompanied by a written discharge of the Employer) which are issued after issuance of the “Performance Certificate” constituting acceptance of the works.²⁹

IV. CONCLUSION

With each new edition, the FIDIC contracts have dealt with claims and claims’ procedures more explicitly and in greater detail. While this has inevitably made for longer and more complex forms of contract, this is, nevertheless, a good development. During the execution of an international construction contract, a wide range of special contingencies may arise that increase the cost and/or time of performing the works. The more specifically and clearly such contingencies are recognized, their consequences (in money and time) addressed, and the risks of them assigned to one of the parties, by the contract, the more easily and swiftly they can be dealt with by procedures within the contract, and injustices avoided. ⊕

²⁸ See Sub-Clauses 14.10 through 14.14.

²⁹ Sub-Clause 11.9.