

## **KLEE, L. (2011). FIDIC Conditions of Contract. First Edition. Wolters Kluwer. Prague.**

### **ABSTRACT** **Chapter 14 (page 176-178)**

The Fédération Internationale des Ingénieurs-Conseils (International Federation of Consulting Engineers) was founded in 1913 by members from France, Belgium and Switzerland. The first edition of the Conditions of Contract for Works of Civil Engineering Construction was published in August 1957 having been prepared on behalf of FIDIC and the Fédération Internationale des Bâtiment et des Travaux Publics (FIBTP).

Nowadays, FIDIC forms of contract are intended to be suitable for projects being carried out around the world by all types of employers, often in a civil law environment. However, the forms are not only written in formal legal English, they are obviously drafted with a common law background in mind as well which will typically affect their interpretation.

FIDIC recommends its conditions for international use and that is why they are created on a two part basis. There are the specific and general conditions. FIDIC warns from changing the general part and recommends to do all the changes because of local law requirements or project specialities in the specific part. Nevertheless, the FIDIC standard forms are helpful for the domestic use as well.

FIDIC documents are used as contract conditions in the Czech Republic and Slovakia for public procurement mainly within the area of infrastructure construction projects.

The purpose of this book is to analyse the influence of the FIDIC conditions both on the domestic construction market and within the area of international trade. Specifically, I would like to point out the positive influence on the Czech and Slovak construction business. There is no doubt about such an effect.

This book deals mainly with the First Edition 1999 FIDIC CONS (Conditions of Contract for Construction; so called „Red Book“), FIDIC P&DB (Conditions of Contract for Plant and Design-Build; so called „Yellow Book“) and FIDIC EPC (Conditions of Contract for EPC/Turnkey Projects; so called „Silver Book“).

Accordingly, this book is set out in the following sections providing firstly a brief overview of the history and development of the FIDIC forms in the first chapter, continuing with the description of the contract conditions in construction industry in the chapter two and the description of the FIDIC

standard forms of contracts in the chapter three. The next section 4 describes some interesting issues and pitfalls in terms of the use of the FIDIC conditions in the Czech legal system. I thoroughly analyse some of these specific institutes originating often from the Anglo-American law system. I try to shed light on them and tackle the redundant confusion caused by the use of these institutes in „Civil Code” legal environments.

The structure of *lex mercatoria* is far from clear and the same we could mention about the position of FIDIC conditions within this structure. This position is not obvious and I am not satisfied with the opinions considering these conditions to be nothing but a sample or guide. In my opinion there is much more about it. Furthermore, I would like to share my opinion in regard to the *lex constructionis* issue. Whereas it is submitted that there is much about international construction which is unique and growing, *lex constructionis* deserves separate consideration. I continue with these international trade matters including *lex mercatoria* aspects in the chapter 5.

Next section 6 deals with risk allocation and insurance. The FIDIC contract conditions are well known for internal cohesion mainly in terms of risk allocation, claims and dispute settlement. The basic aim of my respective analysis has been to describe precisely the allocation of risks of both the contractor and the employer within the FIDIC CONS, P&DB and EPC in civil law context.

The knowledge of risk allocation is important not only for lawyers but also for all the project team members both in the stage of realization and the stage of tender preparation.

The chapter 7 deals with the contract price; chapter 8 with time for completion, chapter 9 provides the claims and the chapter 11 the claim management. Claim is *inter alia* a technical term used in construction industry. A specific definition of FIDIC claim could sound as follows: „Claim is a specific requirement of one contracting party for extension of time for completion and/or additional payment that could be noticed to the Engineer on the basis of an event or circumstance that is foreseen in a contract clause or otherwise in connection with the contract. The contract provides special rules for claim procedures and compliance with these rules is a condition for successful achievement of the requirement.” Claim management is than a system for early solution of changes and obstructions. It helps to monitor and assess variation and change and their economic impact for the purpose of claim preparation and enforcement. In addition, claim management brings proactivity, thus higher quality of project management and budgetary clarity.

One of the most important aims of this book was to analyse and create an effective claim management system for contractors. The formal output of

this system has been arranged in 5 parts. The first part is formed by a processes description, the second creates a checklist of the contractor's claims, the third part forms the team structure, the fourth the model letters and the fifth the operations descriptions. However, the true essence of an efficient claim management is not a formal prescriptive system. Such a system could make both implementation and use easier and lay down some basic rules. It can help to facilitate the orientation via sample documents and checklists.

Chapter 10 refers to the disputes resolution. The FIDIC conditions provide special clauses for dispute settlement creating an independent system. Whereas this system is rather based on an Anglo-American law tradition, there are some specific matters to be dealt with. The last section includes a vocabulary of specific construction industry terms in four languages.

## **CONTENT**

|   |             |
|---|-------------|
| <b>ACKNOWLEDGEMENTS.....</b>                                    | <b>XI</b>   |
| <b>ABOUT AUTHOR.....</b>  | <b>XII</b>  |
| <b>INTRODUCTION.....</b>  | <b>XIII</b> |
| <b>ABBREVIATIONS.....</b>                                       | <b>XVI</b>  |
| <b>FIDIC.....</b>   | <b>1</b>    |
| 1.1 Fédération Internationale des Ingénieurs-Conseils.....      | 1           |
| 1.2 Czech Participation in FIDIC.....                           | 2           |
| <b>DOMESTIC STANDARD FORMS OF CONTRACT.....</b>                 | <b>4</b>    |
| 2.1 Conditions of Contract: A Czech Law Approach.....           | 4           |
| 2.2 Domestic Conditions of Contract.....                        | 5           |
| 2.2.1 Domestic Conditions of Contract Based on FIDIC Forms..... | 6           |
| 2.2.2 Rules for Interpretation According to Czech Law.....      | 6           |
| 2.2.3 Conditions of Contract within Public Procurement.....     | 7           |
| <b>FIDIC CONTRACT DOCUMENTS.....</b>                            | <b>9</b>    |
| 3.1 Distinction of FIDIC Conditions of Contract.....            | 9           |
| 3.2 Basic Structure of the Contract.....                        | 11          |
| 3.2.1 Contract Agreement.....                                   | 11          |
| 3.2.2 Particular Conditions.....                                | 11          |
| 3.2.3 Employer's Requirements.....                              | 12          |
| 3.2.4 Contractor's Proposal.....                                | 13          |
| 3.2.5 Drawings.....   | 13          |
| 3.2.6 Specifications and Bill of Quantities.....                | 14          |
| 3.3 Design Responsibility.....                                  | 14          |
| 3.4 CONS.....   | 16          |
| 3.4.1 CONS Structure.....                                       | 17          |
| 3.5 P&DB.....   | 18          |

|             |   |           |
|-------------|---|-----------|
| 3.5.1       | P&DB Structure .....                          | 18        |
| <b>3.6</b>  | <b>EPC .....</b>                              | <b>19</b> |
| 3.6.1       | EPC Structure.....                            | 20        |
| <b>3.7</b>  | <b>Short Form of Contract .....</b>           | <b>21</b> |
| 3.7.1       | Short Form of Contract Structure.....         | 21        |
| <b>3.8</b>  | <b>DBO.....</b>                               | <b>21</b> |
| 3.8.1       | DBO Structure .....                           | 22        |
| 3.8.2       | Public Private Partnership and FIDIC DBO..... | 23        |
| <b>3.9</b>  | <b>Construction Subcontract.....</b>          | <b>23</b> |
| 3.9.1       | Construction Subcontract Structure .....      | 24        |
| <b>3.10</b> | <b>Further FIDIC Documents .....</b>          | <b>25</b> |

## **FIDIC CONDITIONS OF CONTRACT IN THE CZECH REPUBLIC .....**

**27**

|             |  |           |
|-------------|--|-----------|
| <b>4.1.</b> | <b>FIDIC Conditions of Contract within the Czech Legal System ...</b>                          | <b>27</b> |
| 4.1.1.      | Engineer .....   | 27        |
| 4.1.2.      | Additional Works According to Law 137/2006 Coll.<br>on Public Procurement .....                | 30        |
| 4.1.3.      | Variations and Adjustments .....   | 35        |
| 4.1.4.      | Variations and Adjustments in the Context of Law 137/2006 Coll.<br>on Public Procurement ..... | 39        |
| 4.1.5.      | Site Diary .....   | 40        |
| 4.1.6.      | Ownership and Contractor's Care of the Works .....   | 42        |
| 4.1.7.      | Sequence of Events during FIDIC Contracts for Construction.....                                | 42        |
| 4.1.8.      | Delay .....  | 44        |
| 4.1.9.      | Disruption.....  | 44        |
| 4.1.10.     | Termination.....   | 45        |
| 4.1.11.     | Defects Notification Period .....  | 47        |
| 4.1.12.     | Intellectual and Industrial Property Rights .....  | 48        |
| 4.1.13.     | Direct Payments to the Subcontractors .....  | 50        |
| 4.1.14.     | Limitation of Liability .....  | 52        |
| <b>4.2.</b> | <b>Particular Conditions Preparation.....</b>  | <b>53</b> |

|   |           |
|---|-----------|
| <b>4.3. FIDIC Conditions of Contract: Implementation in the Czech Republic</b> .....            | <b>53</b> |
| 4.3.1. European Union Funds.....  | 53        |
| 4.3.2. European Investment Bank.....  | 54        |
| 4.3.3. Conditions of Contract used by Road and Motorway Directorate in the Czech Republic ..... | 54        |

**FIDIC FORMS OF CONTRACT WITHIN INTERNATIONAL PRIVATE LAW ..... 56**

|   |           |
|---|-----------|
| <b>5.1. Purpose of Standard Forms of Contract in Construction</b> .....       | <b>56</b> |
| <b>5.2. FIDIC and Lex Mercatoria Interconnections</b> .....                   | <b>56</b> |
| <b>5.3. Standard Forms of Contract as a Source of Non-Mandatory Law</b> ..... | <b>59</b> |
| <b>5.4. Influence on Dispute Resolution</b> .....                             | <b>63</b> |
| <b>5.5. Applicable Law</b> .....  | <b>65</b> |
| <b>5.6. Choice of Law</b> .....   | <b>66</b> |
| <b>5.7. Interpretation</b> .....  | <b>69</b> |
| <b>5.8. Usage of Trade</b> .....  | <b>71</b> |
| <b>5.9. Contract Law Unification in Construction</b> .....                    | <b>73</b> |
| <b>5.10. Lex Constructionis Principles</b> .....                              | <b>75</b> |
| 5.10.1. Proactivity and Bona Fide Protection in Terms of Time Control....     | 76        |
| 5.10.2. Directed Variation .....  | 79        |
| 5.10.3. Early Warnings .....  | 80        |
| 5.10.4. Rebus Sic Stantibus .....   | 81        |
| <b>5.11. Research</b> .....   | <b>83</b> |

**RISK ALLOCATION ..... 86**

|   |           |
|---|-----------|
| <b>6.1. Risk Allocation According to FIDIC Conditions of Contract</b> ..... | <b>86</b> |
| <b>6.2. CONS Risk Allocation</b> .....                                      | <b>88</b> |
| 6.2.1. Employer’s Risk.....   | 88        |
| 6.2.2. Contractor’s Risk .....  | 90        |
| <b>6.3. P&amp;DB Risk Allocation</b> .....                                  | <b>91</b> |

|   |            |
|---|------------|
| <b>6.4. EPC Risk Allocation</b> .....   | <b>91</b>  |
| <b>6.5. Risk Analysis</b> .....   | <b>92</b>  |
| <b>6.6. Insurance</b> .....   | <b>93</b>  |
| 6.6.1. General Requirements for Insurance.....  | 94         |
| 6.6.2. Insurance for Works and Contractor’s Equipment.....  | 94         |
| 6.6.3. Insurance against Injury to Persons and Damage to Property.....                                  | 95         |
| 6.6.4. Insurance for Contractor’s Personnel.....  | 95         |
| <br>  |            |
| <b>CONTRACT PRICE</b> .....   | <b>96</b>  |
| <br>  |            |
| <b>7.1. Contract Price Determination</b> .....  | <b>96</b>  |
| <b>7.2. Methods of Contract Price Determination in Construction</b> .....                               | <b>98</b>  |
| <b>7.3. Methods of Contract Price Determination According to FIDIC<br/>Conditions of Contract</b> ..... | <b>100</b> |
| <br>  |            |
| <b>TIME FOR COMPLETION</b> .....  | <b>102</b> |
| <br>  |            |
| <b>8.1. Time for Completion According to<br/>FIDIC Conditions of Contract</b> .....                     | <b>102</b> |
| <b>8.2. Programme</b> .....   | <b>104</b> |
| 8.2.1. Critical Path .....  | 106        |
| <b>8.3. Extension of Time for Completion</b> .....  | <b>107</b> |
| <br>  |            |
| <b>CLAIM</b> .....  | <b>108</b> |
| <br>  |            |
| <b>9.1. Claim According to FIDIC Conditions of Contract</b> .....                                       | <b>108</b> |
| <b>9.2. CONS Claims</b> .....   | <b>113</b> |
| 9.2.1. Contractor’s Claims .....  | 113        |
| 9.2.2. Employer’s Claims.....   | 114        |
| <b>9.3. Lapse of Claims: Time Bar Clauses</b> .....   | <b>115</b> |
| 9.3.1. Lapse of Contractor’s Claims .....   | 115        |
| 9.3.2. Lapse of Employer’s Claims.....  | 122        |
| <b>9.4. P&amp;DB Claims</b> .....   | <b>122</b> |
| <b>9.5. EPC Claims</b> .....  | <b>123</b> |

|  |            |
|--|------------|
| <b>9.6. Dispute Determination Approaches: Common Law versus Civil Law .....</b>  | <b>124</b> |
| <b>9.7. EOT Claims .....</b>   | <b>125</b> |
| 9.7.1. Lapse of EOT Claims.....  | 127        |
| <br>   |            |
| <b>DISPUTE RESOLUTION .....</b>  | <b>128</b> |
| <br>   |            |
| <b>10.1. FIDIC Dispute Resolution: History and Evolution .....</b>   | <b>128</b> |
| <br>   |            |
| <b>10.2. Dispute Review and Dispute Adjudication.....</b>  | <b>129</b> |
| 10.2.1. DRB/DAB: Pros and Cons .....   | 129        |
| <br>   |            |
| <b>10.3. FIDIC Dispute Resolution: Actual State .....</b>  | <b>130</b> |
| 10.3.1. Dispute Procedures after Engineer’s Determination.....   | 132        |
| <br>   |            |
| <b>10.4. Arbitration in the Czech Republic.....</b>  | <b>132</b> |
| 10.4.1. Arbitration Court attached to the Economic Chamber of the Czech<br>Republic and Agricultural Chamber of the Czech Republic ..... | 133        |
| 10.4.2. Arbitration Rules .....  | 134        |
| <br>   |            |
| <b>10.5. ICC International Arbitration .....</b>   | <b>135</b> |
| <br>   |            |
| <b>CLAIM MANAGEMENT .....</b>  | <b>136</b> |
| <br>   |            |
| <b>11.1. Claim Management According to FIDIC Conditions<br/>of Contract.....</b>   | <b>136</b> |
| <br>   |            |
| <b>11.2. Claim Management: Economic Facets .....</b>   | <b>137</b> |
| 11.2.1. Claim Submission .....   | 137        |
| 11.2.2. EOT Claim Submission.....  | 138        |
| 11.2.3. Money Claim Submission .....   | 139        |
| 11.2.4. Cost and Profit.....   | 141        |
| <br>   |            |
| <b>11.3. Measurement and Evaluation.....</b>   | <b>143</b> |
| 11.3.1. Measurement.....   | 143        |
| 11.3.2. New Rate or Price.....   | 144        |
| 11.3.3. Statement Submission .....   | 145        |
| 11.3.4. Statement Acceptance by the Engineer.....  | 145        |
| 11.3.5. Invoicing of New Rates or Prices before their Determination.....   | 145        |
| <br>   |            |
| <b>11.4. Contractor’s Claim Management .....</b>   | <b>146</b> |
| 11.4.1. Process Description – before Claim Notice.....   | 147        |



|  |            |
|--|------------|
| 11.4.2. Process Description – after Claim Notice ..... | 148        |
| 11.4.3. Contractor’s Claims Checklist.....             | 149        |
| 11.4.4. Project Team Structure .....                   | 150        |
| 11.4.5. Model Letters – Claim Notice.....              | 152        |
| 11.4.6. Model Letters – Claim Submission .....         | 153        |
| 11.4.7. Operations Description .....                   | 154        |
| <b>DICTIONARY .....</b>                                | <b>157</b> |
| <b>12.1. Translation Issues.....</b>                   | <b>157</b> |
| 12.1.1. Dictionary – General Part .....                | 164        |
| 12.1.2. Dictionary – Contractor’s Claims .....         | 168        |
| 12.1.3. Dictionary – Employer’s Claims.....            | 170        |
| <b>CONCLUSION.....</b>                                 | <b>172</b> |
| <b>ABSTRACT (ENGLISH).....</b>                         | <b>176</b> |
| <b>ABSTRACT (CZECH).....</b>                           | <b>179</b> |
| <b>APPENDIX.....</b>                                   | <b>183</b> |
| <b>LIABILITY .....</b>                                 | <b>425</b> |
| <b>REFERENCES.....</b>                                 | <b>426</b> |
| <b>INDEX.....</b>                                      | <b>435</b> |