The New FIDIC Suites of Contract in 2017

Speaker: András Rév, Z & Partners Consulting Engineers
www.zandpartners.com
The ‘Evolution’ of FIDIC Conditions of Contract

- Construction (1957)
- Design - Build (1987)
- Turnkey (1999)
- Design - Build - Operate (2008)
- Updates (2017)

© 2015 schoenherr
FIDIC’s Contracts Committee

Main responsibility:

✓ to recommend to the Executive Committee which Conditions of Contract and related documents should be prepared or updated by FIDIC

✓ To set up and operate different task groups to draft and produce these new and updated contract forms

This conference presentation introduces the current status and phase of these Task Groups’ activities – all for indication/ information only.

FIDIC withholds the right to change the constitution of any of its Committees, Task Groups including their Terms of Reference as well as the publication of any new or updated contract documents.
FIDIC CC Task Group’s activities

Task Group 4: Consultancy Agreements (Updates)

These will be published as an updated suite of Agreements:
Consultancy, Sub-consultancy and Joint Venture

These updates will be released very soon (early next year).

The White Book was published as “Conference Edition” at FIDIC Annual Conference in Marrakech.

For the White Book one of the aims was to provide for Clients who are Contractors – but raises questions re “fitness for purpose” vs. “due care and diligence”.
Task Group 6: **Update of Rainbow Suite**
(1999 Yellow-, Red- and Silver Book)

“The Updates” YB is in its very last stage. RB and SB is under finalisation for friendly review to take place early 2017. The updates (YB, RB, SB) are aimed to be published first half of 2017.

**Key features:**

- Claims and disputes separated (hence, 21 main clauses)
- Dispute prevention
- More structured procedures (= clarity)
- Engineer’s position strengthened
- No. of minor changes to increase accuracy and obviousness
- Improved procedures for design and quality control and assurance + also time programming
FIDIC CC Task Group’s activities

Task Group 7: **Update of Dredging Form of Contract**
(with International Association of Dredging Companies)

Published as “Conference Edition” in Marrakech. This update will be released very soon (early next year). The update considered the most recent changes to the latest contract forms – harmonisation.

Task Group 9: **Yellow- / Silver Book Subcontract Forms**

This progress is currently put on hold, as there are different priorities with FIDIC. Once prepared, the document will be similar to the RB Sub-contract, but aiming YB and SB main contracts.
FIDIC CC Task Group’s activities

Task Group 10: Tunnelling and Underground Works Contract (with International Tunnelling and Underground Space Association - ITA)

Brand new form, set up especially for high underground risk projects (tunnelling and alike). Although it is based on the Yellow Book (update), but will very likely be including “re-measured parts” as in the red Book. It is being finalised for friendly review – planned to be published after the Updates of the 1999 forms.

Task Group 11: Operation-Design-Build-Operation Form of Contract - ODBO

This specific form of contract is “stemming from” the DBO form, but it is intended for “Brown Field Scenario” projects. The document is being finalised for friendly review and expected to be published shortly after the Update of the 1999 forms. This form is meant for projects, where an old facility is to be renewed and extended.
**FIDIC CC Task Group’s activities**

**Task Group 14: A “Plug-in” for the Renewables Industry**

Task Group under construction: the aim is to provide a set of “standardised” PCC-s, which could be used together with the Yellow Book (as GCC) – made it tailored (especially) for off-shore wind farms.

**Task Group 15: “Golden Principles” of FIDIC**

The aim is to define those principles (and items in the conditions of contracts), which are considered “immutable” – NOT to be changed through PCC-s. The TG shall develop the ways, how these “Golden principles” are communicated, and also the consequences, if of these principles occur.
The New FIDIC Suites of Contract in 2017

THANK YOU FOR YOUR KIND ATTENTION

András Rév
andas.rev@zandpartners.com
www.zandpartners.com
Schoenherr is one of the top corporate law firms in central and eastern Europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service. www.schoenherr.eu
Paperless Projects

New trends in construction technology and future impact to construction contracts and project implementation

Speaker: Nikola Matic, Member of the Board of Directors at EFCA - European Federation of Engineering Consultancy Associations
Outlines

• Digital transformation
• Drivers for change
• Legal framework
Clients are expecting

GOOD ○ FAST ○ CHEAP

In reality one can deliver two of expected

• Good & Fast won’t be Cheap
• Fast & Cheap won’t be Good
• Good & Cheap won’t be Fast

... but not necessarily without smart devices
In 2016 we are in 5\textsuperscript{th} Tech Revolution (as of 1971)
1999

TODAY

End of an era as Blackberry stops making phones
Digital Platforms in use today

Disruption is upon us.

The biggest taxi company owns no cars.

The largest accommodation company owns no real estate.

Alibaba

The largest retailer carries no inventory.

The biggest media company owns no content.
WTF ?
WTF – What is the Future?

How will platform for Engineering look like?

What will be the role of Engineers and Lawyers in Future Construction business?

Will our services be needed in the next 5 years?

Will number and complexity of the Claims and Disputes increase or decrease?
Digital transformation changing industry logics

**Industrial age logics:**
- Value-chains
- Products & services
- In-house innovation
- Customer solutions
- Scale with assets
- Transactional partnerships

**Digital society logics:**
- Value & ecosystems
- SW & platforms
- Collaborative innovation
- Customer value creation
- Scale with scope and speed
- Strategic partnerships
NEW Engineering platform - BIM platform
# Life Cycle of Build Assets - LCBA

<table>
<thead>
<tr>
<th>Stages</th>
<th>Sub Stages</th>
</tr>
</thead>
<tbody>
<tr>
<td>0. Initiative</td>
<td>0.1 Market Study</td>
</tr>
<tr>
<td></td>
<td>0.2 Business Case</td>
</tr>
<tr>
<td>1. Initiation</td>
<td>1.1 Project Initiation</td>
</tr>
<tr>
<td></td>
<td>1.2 Feasibility Study</td>
</tr>
<tr>
<td></td>
<td>1.3 Project Definition</td>
</tr>
<tr>
<td>2. Design</td>
<td>2.1 Conceptual Design</td>
</tr>
<tr>
<td></td>
<td>2.2 Preliminary Design and Developed Design (B&amp;I)</td>
</tr>
<tr>
<td></td>
<td>2.3 Technical Design or FEED</td>
</tr>
<tr>
<td></td>
<td>2.4 Detailed Engineering</td>
</tr>
<tr>
<td>3. Procurement (IF)</td>
<td>3.1 Procurement</td>
</tr>
<tr>
<td></td>
<td>3.2 Construction Contracting</td>
</tr>
<tr>
<td>4. Construction</td>
<td>4.1 Pre-construction</td>
</tr>
<tr>
<td></td>
<td>4.2 Construction</td>
</tr>
<tr>
<td></td>
<td>4.3 Commissioning</td>
</tr>
<tr>
<td></td>
<td>4.4 Hand Over</td>
</tr>
<tr>
<td></td>
<td>4.5 Regulatory Approval</td>
</tr>
<tr>
<td>5. Usage</td>
<td>5.1 Operation</td>
</tr>
<tr>
<td></td>
<td>5.2 Maintenance</td>
</tr>
<tr>
<td>6. End of Life</td>
<td>6.1 Revamping</td>
</tr>
<tr>
<td></td>
<td>6.2 Dismantling</td>
</tr>
</tbody>
</table>

Go-or-no-go Decisions per Sub Stage

- on the basis of assessments of cost, organisation, scheduling, information, quality, risk, environmental impact, etc.
New technology enabler

5G USE CASES

- Sensors Everywhere
- Broadband and Media Everywhere
- Smart Vehicles, Transport
- Infrastructure, Monitor and Control
- Critical Control of Remote Devices
- Interaction Human-IoT

Source: Ericsson
AR – Augmented Reality
Human shall remain ... human?!

Future Site Engineer?

Lawyer from the Future ??
Drivers – Client’s concerns

• **Minimizing theft through better site security** ... Site security is the main driver for the deployment of IoT monitoring applications. Theft of equipment and materials is a major issue for construction companies of all sizes and, while the sector has historically been slow to adopt new technologies, IoT is now gaining traction.

• **Extending the life of plant and equipment – Life cycle Approach** ... Using IoT to connect plant and equipment provides an opportunity to extend their lifetimes through more timely maintenance, facilitated by remote diagnostics and monitoring.

• **Noise pollution regulation – Environment protection** ... Regulation is becoming another driver as Europe and the US are introducing regulations covering noise pollution that require noise and vibration levels generated by equipment on building sites to be monitored. Such monitoring also provides data that can be used to respond to complaints or as evidence should legal action be taken against construction companies.

• **Monitoring the construction process** ... Use of sensors can help to eliminate mistakes such as pouring concrete when the weather is too cold, which can help projects to come in on time and on budget. Since construction contracts often include significant penalties for overruns, this is valuable functionality.
Regulatory Drivers for Change

Among others, EC already issued number of Directives as of 2015 for the Public Procurement

... some of the Directives has became drivers for change in the Construction business:

• Use of BIM for the Design preparation

• Cost for O&M should be included in the project Budget

... meaning Emphasize is on BIM and Life cycle approach …
The overall Aim - Improve Quality of life

Game changers (in this moment)

- Life Cycle Approach
- IoT (Internet of Things) and its impact on Engineering Industry
- BIM and its impact on (FIDIC) Contract Management
- "E" Procurement and “E” governance/administration
CONCLUSION
impacts on Construction Contracts
(do not be afraid)

1. More education and trainings regarding use of the new technologies in Construction business

2. Change of Business Models, change of responsibility matrix between stakeholders

3. New Contract strategy should include new topics and new approach in the risk assessment:
   - liability for smart devices operation
   - Responsibility for connectivity, reliability on Broadband & Cloud
   - Security of Data (transmission and storage)
   - Availability for Power Supply
   - Intellectual Property Rights

4. Enhanced collaboration between Engineers and Lawyers
Good, Cheap & Fast might be accessible!

Nikola Matic
VMS Consulting Engineers

Mailto: nma@vms.rs

Internet: www.vms.rs
schoenherr is one of the top corporate law firms in central and eastern europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service, www.schoenherr.eu
Dispute Adjudication Board yes or no?
Will FIDIC changes affect future use of Dispute Adjudication Boards in construction industry

Panelists: Nikola Matic, Anne-Karin Grill, András Rév, Ivana Panic, Schoenherr Serbia
Moderator: Christoph Lindinger, Schoenherr Austria
Questions

- How popular ADR/DAB procedures are at the moment?

- How and when to structure DAB?

- How often do parties act upon DAB decision or rather go straight to arbitration? Issue of enforceability

- Will FIDIC amendments affect DAB application? Issue of alternative types of DAB/DRBs
Thank you!
schoenherr is one of the top corporate law firms in central and eastern europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service. www.schoenherr.eu
Financing and management of construction projects - Regional trends and common practice

Panelists: Gabriela Tegeltija Reyes Vidrio, Head Real Estate Section UniCredit Bank Serbia JSC, Alexander Hohendanner, Deloitte

Moderator: Robert Bachner, Schoenherr Austria
Thank you!
schoenherr is one of the top corporate law firms in central and eastern europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service. www.schoenherr.eu
Tax & X-border projects

Speaker: Theodor Artenie, Schoenherr Romania
Base Erosion Profit Shifting

- Double non-taxation
- Aligned international PE and transfer pricing standards
- Increased focus on transfer pricing
  - Tax planning
- New BEPS associates: Romania, Bulgaria and Croatia
- CEE countries among initial BEPS associates: Austria, Czech Republic, Hungary, Poland, Slovakia, Slovenia, Turkey
Market access

• Legal entities vs Branches vs Partnerships

• What makes the difference?
  • tax registration
  • repatriation of profits
  • VAT rules
  • intra-group financing
  • intra-group charges (e.g. management fees)
  • future exit
## PE & VAT establishments

<table>
<thead>
<tr>
<th>Corporate income tax</th>
<th>VAT</th>
</tr>
</thead>
<tbody>
<tr>
<td>• The right to tax the profits of a non-resident</td>
<td>• Sufficient degree of permanence</td>
</tr>
<tr>
<td>• Use of OECD commentaries</td>
<td>• Suitable structure in terms of human and technical resources in Romania</td>
</tr>
<tr>
<td>• Building sites / construction project which lasts more than 12 months</td>
<td>• Continuous supply of goods and services</td>
</tr>
<tr>
<td>• More favorable provisions in the DTT?</td>
<td></td>
</tr>
</tbody>
</table>
People

- EU coordination of the social security system
- resident employees vs posted employees
- tax residency for foreign employees
Local operation

- withholding tax vs local tax
- participation exemption: dividends
- Interest & Royalty Directive
- VAT cash flow
- KYP checks
Action plan

Assessment of:

- local presence
- HR requirements
- local operational tax requirements
Thank you!
schoenherr is one of the top corporate law firms in central and eastern europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service, www.schoenherr.eu
Energy projects in AT and CEE - Recent Regulatory Developments

Speaker: Bernd Rajal, Schoenherr Austria
Content

(1) NEWLY RELEASED: Clean Energy Package!

(2) New “Environmental Impact Assessment” for projects
European Commission
Clean Energy Package
30 November 2016
CLEAN ENERGY PACKAGE

- 30 November 2016 - “the day of the energy revolution” (Miguel Arias Canete)
- New regulations for renewable energy (projects)
- Revision of the Energy Efficiency Directive – extension of saving obligations
- Proposal for a “new” electricity market design
“NEW” RES DIRECTIVE

- EU target 2030: 27% RES
- No binding national targets (!)
- National 2020 targets serve as “baseline”
“NEW” RES DIRECTIVE

- New principles for designing national support schemes
  - Cost-effective
  - market-orientated
  - Competitive access
  - Non-retroactivity

Note: This map does not include secondary support instruments like tax incentives, investment grants, etc.

Source: Ecofys
“NEW” RES DIRECTIVE

- Simplification of administrative procedures for RES projects
  - “one-stop-shop”
  - time limit for the RES permit granting process (similarly to TEN-E Regulation)
  - a simple notification procedure to facilitate repowering of existing renewables plants and small scale projects
“NEW” RES DIRECTIVE

- Mandatory increase of RES share in heating and cooling (1%)
- Individual Member States may implement National Obligation Schemes

- The sustainability criteria for biofuels are going to be amended
- Introduction of a new sustainability criterion on forest biomass (ensuring that the production of wood-fuel continues to be sustainable)
Energy Efficiency to be continued

- Binding EU target of 30%
- Saving obligations extended to 2030
- No mandatory EE Obligation Schemes
- Alternative policy measures are subject to verification system
- No eligibility criteria for efficiency measures
- Long-term renovation strategies are incorporated in the EPBD (decarbonisation of building stock by 2050)
- E-mobility will be promoted by boosting the installation of recharging points for electric vehicles where they are most needed (private spaces)
“NEW” ENERGY MARKET DESIGN

• Wholesale price caps will be removed

• 5 years transition period existing price cap regulations

• Dispatch rules will be adapted

• No priority dispatch for new RES (existing plants and small-scale RES will continue to benefit from priority access)
What does that mean for projects?

- New energy projects will no longer benefit from fixed feed-in tariffs granted on a non-competitive basis
- Auctioning of new RES capacities might make RES projects less profitable (competition)
- RES tariffs become more “flexible” (market-orientated) – market risk exposure
- Not sure if RES projects will benefit from rules on accelerated permitting proceedings
- Remove of wholesale price caps may trigger new investments opportunities / projects in the CEE region
Amendments to Environmental Impact Assessments
Amendment of the EIA Directive

- EIA Directive (85/337/EEC) on the assessment of the effects of certain public and private projects on the environment
- Frequently amended over the past 30 years
- Codified by EIA Directive (2011/92/EU)

- Key regulations
  - Mandatory EIA: all projects listed in Annex I
  - Discretion of Member States (screening): for projects listed in Annex II, the national authorities have to decide whether an EIA is needed
  - EIA results must be taken into account in “permitting”
  - EIA rules are of mere procedural nature (ie do not include substantive requirements)
Amendment of the EIA Directive

- EIA Amendment Directive 2014/54/EU

- Harmonization

- Stricter regulations on the procedural design of national EIA regimes

- Transposition deadline: 17 May 2017

- Who is affected?
  - EU Member States
  - Members of Energy Community
  - Project Developers

© 2015 schoenherr
Selected key amendments to EIA

- More detailed requirements for EIA
  - EIA-Report
  - Mandatory public consultations
  - EIA-Report reviewed by the authority
  - Reasoned conclusion on the significant effects
  - Integration of conclusions into any "permit" within the meaning of Art 8
Selected key amendments to EIA

- Mandatory involvement of competent environmental experts
- No exemptions for projects permitted by special national laws
- Principle of coordinated EIA and NATURA 2000 proceedings
- Enlargement of the scope of relevant environmental factors, e.g.:
  - “land and soil”
  - “climate change”
Selected key amendments to EIA

• Vulnerability of the project to risks of major accidents and/or disasters

• New Annex III assessment criteria
  • Cumulating with other existing and/or approved projects and activities

• Mandatory “small” EIA for “screening” proceedings
  • Developers need to actively contribute

• “effective, proportionate and dissuasive” penalties for non-compliance
Selected key amendments to EIA

• Annex IV: detailed content requirements for EIA Reports ("1pager becomes 2pager")

• Detailed description of the project site

• Construction phase in addition to operational phase

• Examination and description of the “baseline” scenario etc
Impacts on construction projects

- Austria: only minor impacts
- CEE: no “revolution”, but rather significant impacts on project development
  - Project developers need to better prepare for and actively contribute to EIA
  - Professional EIA management: From “nice to have” to “must have”
  - Much more higher standard of environmental examinations
  - Development / permitting more time-consuming
  - In any case: increased risk for procedural mistakes and appeals
  - Increase of development costs
Thank you!
schoenherr is one of the top corporate law firms in central and eastern europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service. www.schoenherr.eu
12 Lessons to be Learned from the Use of FIDIC Contracts

Speaker:
Alexander Demblin
Doppelmayr Cable Car GmbH & Co. KG
The 1\textsuperscript{st} Lesson

- **Know your FIDIC Contract**
  
- Sometime one is confronted with the question: what do the FIDIC contract conditions say?
  
- In the first place, don’t forget: Reading a contract makes it much easier to understand the contract.
  
- So: read the contract, and read it for a second or a third time.
  
- If that doesn’t help: see the 2\textsuperscript{nd} Lession.
The 2nd Lesson

• Look for help if you need it

• There are several ways you can get help.
• On way is to buy and read a commentary of the FIDIC contracts.
• Currently there are some ten books (in English) on the market which may be of use to you.
• Four of them I can recommend without any reservation.
The 2nd Lesson (continued)

- Elis Baker / Ben Mellors / Scott Chalmers / Anthony Lavers:
  FIDIC Contracts: Law and Practice
  London 2009
The 2nd Lesson (continued)

The 2\textsuperscript{nd} Lesson (continued)

- Brian Barr / Leo Grutters: 
  3\textsuperscript{rd} edition [1\textsuperscript{st} & 2\textsuperscript{nd} editions written by Brian Totterdill †], London 2014
The 2nd Lesson (continued)

The 2nd Lesson (continued)

• In two cases you will need to **engage a law firm**:

  • (a) if you are not thoroughly familiar with FIDIC contracts, and/or
  • (b) if you are not thoroughly familiar with the applicable law.

• Bear in mind:
  • It is not easy to find a good lawyer who is experienced in construction contracts and FIDIC contracts in particular.
The 3\textsuperscript{rd} Lesson

**FIDIC Contracts are very very British**

- A FIDIC contract at first sight looks quite different from a genuinely “central European” construction contract.

- There are several reasons for that:

  - it is a contract drafted for use in any country of the world and contrary to national standard contracts its drafters did not have the law of a particular country in mind.
The 3rd Lesson (continued)

• The first FIDIC contract published in 1957 was merely a “overseas edition” of an English standard construction contract. Even the 3rd edition in 1977 was still called “Conditions of Contract (International) …”

• Although the word “international” was dropped in later editions, the FIDIC conditions as we know them today are still nothing else than a typical English construction contract adapted with the aim to make them suitable for use in any country. Of course that doesn’t mean that something which is typical English is necessarily not good.
Such a contract would be an exercise to be met with enthusiasm throughout the world, if there wouldn’t be (among others) two great legal systems in the world:

- the common law system which historically is the law of England and Wales, and
- the civil law system which is the law of countries where a substantial part if all norms are codified in civil codes or similar legislation.
The 3rd Lesson (continued)

• To give you an example:

• In a civil law legislation a construction contract basically consists of two phases:
• 1st phase: the Contractor performs constructions works and completes them by a given time when the Employer takes them over,
• 2nd phase: the Contractor is under the obligation to remedy defects in the works which are discovered during a defined period of time after the Employer’s taking over.
The 3rd Lesson (continued)

• The central event between these two phases is the Employer’s taking over (Abnahme and Übernahme in Austrian and German law, reception in French law, recepción in Spanish law).

• No such event exists in English law.

• The problem with FIDIC Contracts is that it uses some expressions which are misleading if one looks at them from a civil law expression.
The 3rd Lesson (continued)

• Look at the headline of FIDIC clause 10: The term “Employer’s Taking-Over” may lead readers with a civil law background to the conclusion that this is taking-over as they know it under their legal system.

• In the past FIDIC has not always taken the same position. When FIDIC published the 1999 edition of its contracts, they used the term “delay damages” rather than the expression “liquidated damages” which is a terminus technicus in English law. This was good as it avoids misunderstandings.
The 3rd Lesson (continued)

• On the other hand, instead of continuing using the term “special risks”, FIDIC’s uses of the words “force majeure” in FIDIC clause 19 of the 1999 FIDIC Contract may lead readers from a civil law country to the conclusion that the term is to be understood as a terminus technicus in the sense of their national civil law system.

• The conclusion of all this is that in order to understand FIDIC contracts, one must carefully check the texts in order to understand it.
The 4th Lesson

In a FIDIC Contract the two Parties are never alone
The 4th Lesson (continued)

• As a true child of generations of English construction contracts a third person is playing a dominant role in the relationship between Employer and Contractor.

• This third person is the Engineer.

• The Engineer plays a dominating role in a FIDIC contract.
The 4th Lesson (continued)

• A FIDIC Contract without an Engineer is not really a FIDIC Contract. This is for two reasons:
• In a FIDIC Contract, the Engineer takes decisions which in other contracts would be decisions of the Employer.
• In a FIDIC Contract it is the Engineer who is the Contractor’s main contact person – and not the Employer.

• The consequence is that an Employer who does not want an independent Engineer, should not use a FIDIC contract.
The 4th Lesson (continued)

• An Engineer under a FIDIC contract is a neutral person who fairly determines any open issue which may arise.
• From what one hears this is a scenario which works perfectly well in England and other countries which for generations were English colonies.
• In some countries, employers often appoint persons as engineers who are not independent from the employer; sometimes even employees of the employer are appointed. Under English law this is a problem. Under a civil law jurisdiction, I am afraid that the Contractor would not be able to anything against it.
The 4th Lesson (continued)

• Two consequences must be drawn from this characteristic element of a FIDIC contract:

• (1) Employers who are unhappy with the strong position of the Engineer under a FIDIC Contract, should not use FIDIC Contracts.

• (2) Contractors must never forget that under a FIDIC Contract any informal agreement with the Employer is of no value unless it is confirmed by the Engineer.
The 5\textsuperscript{th} Lesson

• Know your Contract when you draft a FIDIC Contract

• In practice, FIDIC Contracts are almost always used in an amended form.

• These amendments fall into two categories:

• amendments which are necessary due to mandatory provisions of the law which the parties have chosen to be the applicable law of the contract;
The 5th Lesson (continued)

• amendments which the contract drafter considers to be a better wording or to be to his advantage in comparison to the standard FIDIC wording.

• are necessary due to mandatory provisions of the law which the parties have chosen to be the applicable law of the contract;

• In both cases much chaos is often created when instead of amending the existing FIDIC wording additional clauses are added which deal with subjects with which the standard FIDIC wording deals somewhere else.
The 5th Lesson (continued)

Normally that’s the consequence of contract drafters not being familiar with FIDIC contracts and therefore not realising what harm they risk to create by that method.

Unfortunately, sometimes it is FIDIC itself doing precisely that: in FIDIC’s MDB Harmonized Edition 2010 of the 1999 Red Book the drafters have added sub-clauses 6.12 – 6.24 dealing with issues which are dealt with further up in that very clause 4.
The 5th Lesson (continued)

• limit amendments to those which are absolutely necessary;

and

• when you amend, be as precise as possible and don’t be afraid of such precision being called pedantic.
The 6th Lesson

• Be Prepared when you Negotiate a FIDIC Contract

• If you negotiate a FIDIC contract you must be prepared.

• This of course is true if the person on the other side knows FIDIC contracts quite well.

• But it is no less true if the other side is not familiar with FIDIC contracts and wants you to explain to him a particular clause.
The 6th Lesson (continued)

- There are two situations in a project for which a FIDIC contract is used in which it will be very likely that you need an experienced lawyer to help you unless you are very familiar with and experienced in the performance of FIDIC Contracts:

  (a) In the phase of contract negotiations,

  (b) when a dispute arises.
The 6\textsuperscript{th} Lesson (continued)

• Contract negotiations must be well organised:
  
  • who is the team leader,

  • who is available in the background to be consulted by the negotiations team,

  • don’t leave the negotiations to the engineers,

  • nor leave the negotiations to (in-house or external) lawyers alone.
The 6th Lesson (continued)

• Don’t forget that you always face two aspects of a contract which have a substantial influence on whether the contract is good or bad for your side:

(a) is the risk allocation good for you or is it at least balanced (whatever that is) ?

(b) is the wording of the contract clear, precise and without ambiguities ?
The 7th Lesson

• If you are the Contractor: Don’t Underestimate the Administrative Burden of Performing a FIDIC Contract

• Compared to contracts as they are widely used in central Europe, a FIDIC contract poses a particular burden on the shoulders of the Contractor.

• The burden is contract administration which a FIDIC contract requires.

• Various reports must be submitted to the Engineer, written,
The 7th Lesson (continued)

• A time schedule much more detailed than contractors would submit voluntarily must be prepared by the Contractor and sent to the Engineer and they must be updated from time to time.

• In no less than 46 situations is the Contractor required to send a notice to the Engineer or the Employer or both.

• The consequence to be drawn by Contractors is that the administrative burden must be calculated and must be included in the tender price.
The 8th Lesson

• Organise the Communication

• Some 20 years ago, things were easy:

• In most companies, communications arrived at one place only where letters an telegrams came in. They could easily be recorded in lists or registers of incoming mail. That used to be typed lists on paper and today would be a computerized register.

• The situation was not much different with communications received by telex or, later, by telefax as there machines were rare and expensive.
Today, almost everybody in a company has an e-mail address and communications arrive at different places. Many companies underestimate the risks of not recording and (electronically) storing all communications received and sent – irrespective of where in their communication systems these communications arrive.

At least when an issue becomes a dispute and when the dispute goes to court or arbitration, the problems to gather all communications will be immense.
The 8th Lesson (continued)

• So, the message is:

• Organise your communication by imposing a rigid system which ensures that the company at any time is in a position to precisely know when what communication came in or went out.

• Make sure that you are not dependent on nobody being on holidays or needing to clear up the mess on his desk.
The 8th Lesson (continued)

• If Employer, Contractor and Engineer are using a common electronic communication platform provided by one party involved in the project, are you sure:

  - that you have access to it at any time – even years after project completion?

  - that one single party cannot block access and cannot delete documents from the system?
The 8th Lesson (continued)

• One additional remark: The discovery principle in on the rise. Discovery is the code word for a legal obligation of one party in a dispute to disclose to the other party all documents and other information it has.

• This is a concept deeply rooted in English/American civil procedure and it slowly but steadily creeps into arbitration proceedings in other parts of the world.

• Under American law, when a dispute arises on the horizon, a party to an eventual dispute is no longer allowed to destroy documents or to delete electronically stored information and this not only includes e-mails but also SMS and voicemail messages.
The 8th Lesson (continued)

• Bear that in mind when your company sets your foot on American soil.

• If you are unable to disclose documents which the other side knows to exist, it is assumed under the law that such document is to you disadvantage.

• Example: the handwritten notes you took – under the eyes of the other side – during a meeting three years ago.
The 9\textsuperscript{th} Lesson

The Contract is the central element.

• Forget what a leading manager of a major construction company once said: „Wir machen Verträge, die alles regeln, wir unterschreiben sie und dann sperren wir sie weg.“ (we make contracts regulating everything, we sign them, and then we lock them away) *)

• Locking a contract away is almost an entrance ticket to hell because it is the contract which tells the contractor what to do.

*) Stuttgarter Zeitung, 16. 7. 2013.
The 9th Lesson (continued)

• Forget the „I am only an engineer“ mentality.

• An experienced site manager or a project manager of the contractor must know the contract because it is the contract which tells him what to do.
The 10th Lesson

• Stick to the Contract

• Even if the Contractor is a fan of establishing a good relationship with the Engineer and the Employer, don’t forget to do what the contract requires you to do.

• If you think you have a claim (for time extension and/or additional payment) it may be nice to “sell” that claim to Engineer/Employer in small portions.
The 10th Lesson (continued)

• It might well be that the strategy of solving open issues over a glass of wine or beer or a cup of coffee, weeks or months after the event is successful.

• But even if everybody keeps telling you that the guy on the other side is reasonable and open to a compromise, nobody will give you a guarantee for that. When you find out whether that expectation materializes, it may be too late and you may have lost your claim if you have failed to do what you agreed to do under a FIDIC Contract.
• Under a FIDIC Contract the Contractor needs to send a notice to the Engineer if he intends to come up with a claim. There is a strict time limit of no more than 28 days and if you don’t send the notice in time, there is a severe risk that you loose your claim.

• Under the FIDIC wording you loose that claim and there is no loophole. Even if you are told that under the applicable law of your contract that guillotine clause in 20.1 FIDIC is not valid, avoid that risk. In many cases it may turn out that the invalidity of the time-bar clause merely is the firm opinion of individual lawyers but not the jurisdiction of the country’s supreme court.
The 10th Lesson (continued)

• So don’t fall into the trap of not confronting the Engineer & Employer with a detailed claim and of updating it every month on the basis of contemporary records.

• And realize what “contemporary record” are. They are records produced at the time when the event happened and not months or years later. Under FIDIC you need to provide records to substantiate your claim which are contemporary.
The 11th Lesson

• Never forget the meaning of “scrutinise”

• You may have stumbled over the verb “scrutinize” in sub-clause 5.1 (third paragraph) of the FIDIC Yellow Book:

„Upon receiving notice under Sub-Clause 8.1 [Commencement of Works], the Contractor shall scrutinise the Employer’s Requirements (including design criteria and calculations, if any) and the items of reference mentioned in Sub-Clause 4.7 [Setting Out].”
The 11<sup>th</sup> Lesson (continued)

- Never forget the meaning of “scrutinise”

- You may have stumbled over the verb “scrutinize” in sub-clause 5.1 (third paragraph) of the FIDIC Yellow Book:

  „Upon receiving notice under Sub-Clause 8.1 [Commencement of Works], the Contractor shall scrutinise the Employer’s Requirements (including design criteria and calculations, if any) and the items of reference mentioned in Sub-Clause 4.7 [Setting Out].”
The 11th Lesson (continued)

• The text then goes on:

„Within the period stated in the Appendix to Tender, calculated from the Commencement Date, the Contractor shall give notice to the Engineer of any error, fault or other defect found in the Employer’s Requirements or these items of reference.”
The 11th Lesson (continued)

• What does “scrutinise” mean?
• Is it more than “review” or “check”?
• Yes, it is.
• If you look it up in a dictionary, you will find these definitions:

“… to examine methodically and with close attention …”

The 11th Lesson (continued)

• In other dictionaries you will find similar explanations:

“… examine or inspect closely and thoroughly …” *)

“… to make a detailed examination …” **) 

“… to look at very carefully, examine closely, inspect minutely …” ***)


***) Webster’s New World Dictionary of the American Language, College Edition, Cleveland 1964, p. 1311-1312
The 11\textsuperscript{th} Lesson (continued)

• and finally:

“… observe carefully, examine in detail …” *)


• Now, you may ask: isn’t this just hair-splitting without practical relevance?
The 11th Lesson (continued)

• Here is the answer in the words of the FIDIC conditions (Sub-Clause 1.9):

“If the Contractor suffers delay and/or incurs Cost as a result of an error in the Employer’s Requirements, and an experienced contractor exercising due care would not have discovered the error when scrutinising the Employer’s Requirements [...], the Contractor shall give notice to the Engineer and shall be entitled [...] to:
(a) an extension of time [...], and
(b) payment of any such Cost [...], which shall be included in the Contract Price."
• In other words:

Only if the Contractor does not discover errors in the Employer’s Requirements although it has exercised due care when scrutinising the Employer’s Requirements, will he be entitled to come up with a claim against the Employer.
The 12th Lesson

• **Always Think of the eventual End if Things went Wrong**

• If things go wrong, a dispute will arise.

• Bear in mind that it is a guiding principle of a FIDIC Contract to solve a dispute as quickly as possible.

• This is the reason why FIDIC provides for a Dispute Adjudication Board.
The 12th Lesson (continued)

• If you are a fan of solving disputes only after the construction works are complete, you should not use a FIDIC Contract.

• FIDIC provides for a multi-tier dispute resolution procedure in several distinct steps:
  • 1st step: Dispute Adjudication Board (DAB),
  • 2nd step: amicable settlement,
  • 3rd step: arbitration.
The 12th Lesson (continued)

• Dispute Boards are a characteristic feature in construction contracts. They were invented in the United States in the 1970s and are mandatory in certain (not all) English construction contracts.

• They are widely praised throughout the world but if you look behind the scenes you will see that there is a strong lobby promoting dispute boards. Most of these lobbyists work in their own interest.

• Having said that, one must admit that dispute boards have one great advantage. They are quick.
The 12th Lesson (continued)

• But they also have at least one disadvantage: their decisions are not enforceable.

• To be made enforceable, an arbitrator or an arbitration tribunal must confirm a DAB decision.

• Unfortunately the wording in the 1999 versions of the FIDIC Contracts are unclear on the question whether the job of the arbitrator(s) is simply to formally lift the DAB decision to the level of an enforceable arbitration award or whether the arbitrator(s) are supposed to fully look into the dispute again.
Thank you!
Design Liability, Defective Works and Remedies | Insurance of Risks

Panelist: Ivana Panic, Schoenherr Serbia,
Constantin Benes, Schoenherr Austria, Peter Konwitschka, Schoenherr Austria
Moderator: Silvia Opris, Schoenherr Romania,
Defective works – when, what who?

• When?

  - Outstanding works ➔ take-over
  - Latent (hidden) defects ➔ contractual warranty period/ defects notification period + legal warranty

Before TO

  establishing the cause

  - Burden of proof -

  Contractor ➔ Employer / Owner ➔ Designer?

After TO
Defective works – when, what, who?

• What?
  - Remedial work
  - Compensation
  - Replacement performance

Always required: materials and work

Insolvent contractor?
  - Work?
  - Materials?
  - Warranties (retention money / bank guarantees) – after the contractual warranty has expired?
  - Insurance
Defective works – when, what, who?

• Who?

Basic facts:

• Construction of a plant
• Home-made contract
• Design made by the Employer
• Take-over complete

No problem?

• the missing link between the chilling unit and the plant
• no one noticed the missing design!

To consider:

• Value of the remedial works: EUR 200,000 (mostly materials)
• Overall value of the design of the plant: EUR 70,000
Let’s talk about design liability!

• Responsibility for design may be on Employer (third party) or the Contractor (Design & Build Contracts)

• Liability and responsibility for design is regulated contractually and on the basis of applicable laws (e.g. decennial liability, hidden defects)

• When contracting it is essential to determine:
  ✓ precise interface of liabilities | what may be the consequences?
  ✓ Fitness for purpose vs. due diligence and care
  ✓ input data level;
  ✓ deliverables and approval process;
  ✓ responsibility for determining/proving a design error

• In general construction contracts design error is usually not covered by bank guarantees but insurance | in design & build contracts performance bonds usually cover design error
What if damages happen? Remedies

I. Warranty

II. Damages
Millennium Tower – San Francisco

- 58 floors
- 75,400 sqm total area
- development costs USD 600 Million
- latest apartment sale:
  170 sqm @ USD 3,800,000 – USD 22,400 / sqm
  total sales price generated USD 750 Million

Damage / Issue
- sunk 40cm
- tilt 5-10cm bottom – 35-40cm top
Warranty

• Improvement / Exchange
  – Depends on point in time / stage of development
  – Potentially not feasible

• Reduction of Price
  – Depending on significance of planning costs, potentially of interest
Compensation - prerequisites

- Unlawfully caused
- Culpably caused
- Damage
- Being probable result of unlawful and culpable action
Compensation - amount

• Slight negligence
  – Positive damages

• Gross negligence
  – Lost profit
  – Between entrepreneurs lost profit always claimable according to § 349 Austrian Commercial Code
Why buy insurance in general?

• Insurance means:
  • shifting a potential loss to a third party (the insurer) for a fixed fee (the premium)
  • eliminating a potentially disastrous scenario from a project
  • “sleeping well”

• Insurance is perceived as attractive because
  • we tend to overweight small risks
  • we tend to underweight high probabilities
    (see Kahnemann/Tversky (1979) - “prospect theory” and the “fourfold pattern”)

• Conclusions:
  • Be aware of the perceptual bias
  • When deciding whether to buy insurance, don’t trust your „feelings“. Calculate the potential loss, evaluate the consequences, decide whether the premium is worth it.
Why project insurance?

• Lenders
  • typically want certain risks to be covered
  • Calculate influence on rating

• Sponsors and the SPV
  • typically want to fulfill lender’s requirements

• Mandatory insurance
  • depending on local laws
How can project insurance save you?

- CAR (Construction All Risks)
  - loss or damage to material, supplies, equipment, fixtures and temporary structures

- EAR (Erection All Risks)
  - like CAR with focus on engineering projects

- No exclusion of design risks
  - „DE“ clauses of 1985, revised 1995 with five levels of restriction: DE 1, DE 2, DE 3, DE 4, DE 5,
  - London Engineering Group „LEG“ clauses with three levels: LEG 1/96, 2/96, 3
  - DE 1 and LEG 1/96 exclude all the consequences of defects in design
Thank you!
schoenherr is one of the top corporate law firms in central and eastern europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service. www.schoenherr.eu
Closing Debate

Time Bar Clauses [Should the contractor be entitled to make claim after expiration of term for submittal of claim] | Damage Claims [Should the contractor be entitled to profit lost for works omitted by the employer]

Panelists: Ivana Panic & Silvia Opris
Moderator: Alexander Demblin
Voting: Andras Rev, Nikola Matic and Alexander Demblin
### Topic no.1 Time Bar Claus

*Should the contractor be entitled to make claim after expiration of term for submittal of claim?*

<table>
<thead>
<tr>
<th></th>
<th>yes</th>
<th>no</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ivana Panic</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>Opris Silvia</td>
<td>no</td>
<td>yes</td>
</tr>
</tbody>
</table>

### Topic no.2 Damage Claims

*Should the contractor be entitled to profit lost for works omitted by the employer?*

<table>
<thead>
<tr>
<th></th>
<th>yes</th>
<th>no</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ivana Panic</td>
<td>yes</td>
<td>no</td>
</tr>
<tr>
<td>Opris Silvia</td>
<td>no</td>
<td>yes</td>
</tr>
</tbody>
</table>
Thank you!
schoenherr is one of the top corporate law firms in central and eastern europe. With our wide-ranging network of offices throughout CEE/SEE, we offer our clients unique coverage in the region. The firm has a long tradition of advising clients in all fields of commercial law, providing seamless service that transcends national and company borders. Our teams are tailor-made, assembled from our various practice groups and across our network of offices. Such sharing of resources, local knowledge and international expertise allows us to offer the client the best possible service. www.schoenherr.eu