



**LexisNexis**  
**FIDIC: pitfalls and best practice (2020)**  
12<sup>th</sup> March 2020  
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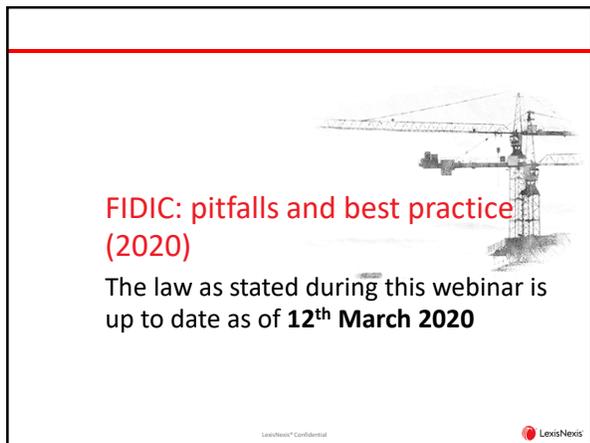
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**FIDIC: pitfalls and best practice (2020)**  
The law as stated during this webinar is up to date as of **12<sup>th</sup> March 2020**

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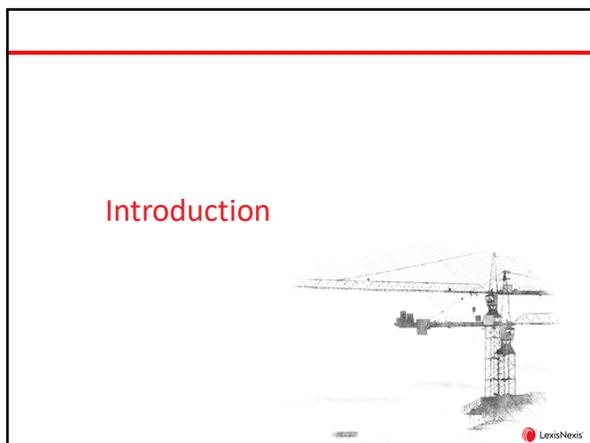
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**Introduction**

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**David Savage**  
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Overview/ Introduction

- FIDIC, the different FIDIC contracts and when they should be used
- Their structure, procurement routes and risk allocation
- Choosing the correct FIDIC contract
- The key changes from the 2017 updates for the FIDIC Red, Yellow, and Silver contracts:
  - Engineer's role
  - Contract management
  - Variations
- Making claims and resolving disputes under the FIDIC Contracts
- Limitations of liability under the FIDIC Contracts
- Design liability
- The future of FIDIC

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What is FIDIC?

- Fédération Internationale Des Ingénieurs - Conseils = the International Federation of Consulting Engineers
- International standards organization for consulting engineering and construction
- Best known for the FIDIC family of contract templates
- First contract published 1957
- Updated – latest Red, Yellow, Silver Books in 2017
- Ratified by international industry bodies
- Translations available
- The 'Rainbow Suite'

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**Introduction to the FIDIC forms**

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The main standard forms used since 1999:

- **Red Book** - Conditions of Contract for Construction for Building and Engineering Works
  - for projects designed by the Employer (or designed on its behalf), with an Engineer administering the Contract
- **Yellow Book** - Conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant, and for Building and Engineering Works
  - for projects designed by the Contractor, with an Engineer administering the Contract
- **Silver Book** - Conditions of Contract for EPC (Engineering Procurement and Construction) / Turnkey projects
  - for turnkey projects designed by the Contractor but with no Engineer. The Employer or the Employer's Representative administers the Contract
- **Green Book** - Short Form of Contract

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**Structure and approach to risk allocation**

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- Structure of the contracts is similar, usually divided into:
  - Part I - general conditions
  - Part II - conditions of particular application (including guidelines for preparation of Part II clauses)
- General approach to construction risks:
  - Contractor best suited to deal with risks associated with:
    - works planning and execution,
    - provision of labour, materials and construction equipment, and
    - safety of site operations.
  - Employer assumes risk of:
    - providing Site (and any information collected) and ensuring it is available for Contractor to carry out his work, and
    - the extra cost incurred by the Contractor due to the occurrence of unforeseeable risks.
- Design risks are borne by party responsible for providing design

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**Choosing the right FIDIC contract**

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- The main factors to consider when making the decision:
  - Value, time scale and nature of the project
  - Who undertakes the design
  - Risk balance between the Employer and the Contractor

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**Procurement routes - FIDIC Golden Principles**

1. Duties, rights, obligations, roles and responsibilities of the contract participants must be generally as defined in the general conditions
2. Any particular conditions must be clear and unambiguous
3. Particular conditions must not change risk allocation in the general conditions
4. All time periods specified in the contract must be of reasonable duration
5. Unless there is a conflict with the governing law of the Contract, all disputes must be referred to the DAAB for a provisionally binding decision as a condition precedent to arbitration or litigation

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**Key changes in 2017 forms**

- Main categories of changes:
  - Changes designed to improve contract management, clarity and certainty
  - Increased reciprocity
  - Enhanced "claims" provisions
  - New good faith provision (clause 1.16)
  - Collaboration between parties and dispute avoidance
  - Changes in terminology, formatting and consistency

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**FIDIC - Engineer's role**

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**Engineer's Qualification and Representative**

- The Engineer must have suitable qualifications, experience and competence, as well as fluency in the language of the Contract (Clause 3.1(a) and (b)).
- The Engineer is nominated in the Contract Data so if Contractor has concerns it must challenge prior to entering into the Contract (Clause 1.1.35).
- However, if there is to be a change in Engineer during the project the Employer cannot replace them with someone against who the Contractor has raised a reasonable objection (Clause 3.6).
- The Contractor is given 42 days' notice of the intended replacement of the Representative after which Contractor has 14 days to set out reasons for objecting to the proposed replacement Engineer otherwise deemed to have accepted the replacement (Clause 3.6).
- The Engineer may appoint an Engineer's Representative. This is a site based role, aiming to increase Engineer's understanding of the project (Clause 3.3).

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**Engineer's Instructions**

- Engineer must act as a skilled professional and is deemed to act for the Employer unless otherwise stated (Clause 3.2).
- Engineer cannot alter the terms of the Contract (Clause 3.2).
- Engineer is entitled to exercise its powers under the Contract without authorisation of Employer, including the issue of instructions, which the Contractor must follow (Clause 3.5).
- Such exercise of its powers cannot relieve Contractor from its responsibilities under the Contract (Clause 3.2).
- If the Contractor believes an instruction by Engineer is a variation they may give notice to the Engineer, and if the Engineer does not respond within 7 days the instruction is deemed to have been revoked (Clause 3.5).

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**Engineer's neutrality during agreement/determination process**

- When making a determination or assisting the parties seek to reach an agreement, Engineer is not deemed to act for the Employer (Clause 3.7).
- A "fair determination" must be made (Clause 3.7).
- Engineer must "act neutrally" (Clause 3.7).
- No Employer consent needed to make a determination under Clause 3.7 (Clause 3.2).

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**Engineer's role in seeking agreements, making determinations**

- The parties have 42 days or any other such time period proposed by the Employer / Engineer's Representative to reach an agreement (Clause 3.7.3).
- If an agreement is not reached, the Engineer will give notice to the Parties (Clause 3.7.1).
- Following that notice, the Engineer shall make a Determination within 42 days (Clause 3.7.3).
- Therefore, an Engineer's Determination may take up to 84 days (Clause 3.7).
- If the Engineer does not give a Determination within 42 days:
  - (i) Claim – deemed determination rejecting the Claim, NOD required.
  - (ii) Matter to be agreed – deemed a Dispute that is referable by either Party to the DAAB, NOD not required (Clause 3.7.3).

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**FIDIC - Contract Management**

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**Notices and Other Communications**

- FIDIC contains a number of mechanisms which promotes and, in some instances, requires compliance with good contract management practices.
- A notice must be labelled as such and state which provisions of the Contract it is issued under (Clause 1.3).
- Communications should be sent to the Parties and/or the Employer / Engineer's Representative in accordance with the requirements set out in the Contract Data (Clause 1.3).
- The Contract contains barring provisions and deeming provisions which activate if one or other party fails to follow certain contract mechanisms – e.g. time limits for making claims (Clause 20.2), issuing notices of dissatisfaction (Clause 3.7.5).

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**Programme Requirements**

- Contractor to submit initial programme within 28 days of the Notice of Commencement (Clause 8.3).
- Contractor to submit revised programme within 14 days if Engineer notifies the Contractor that the programme is out of date (Clause 8.3).
- Engineer must send an objection notice within 21 days of receiving the initial programme or 14 days of the revised programme. If no notice is provided the programme is deemed accepted (Clause 8.3).
- Programme must use the software specified in the Employer's Requirements e.g. Primavera P6 (Clause 8.3).
- All activities must be linked, showing the start and finish dates; float and critical path (Clause 8.3).

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**Advance Warnings**

- Strict obligation for the Parties to notify each other and the Engineer of probable future events which may:
  - (i) adversely affect the work of the Contractor's Personnel;
  - (ii) adversely affect the performance of the Works when completed;
  - (iii) increase the Contract Price; and/or
  - (iv) delay the execution of Works. (Clause 8.4)
- No time limit by which notice should be given (Clause 8.4).
- Employer should consider if an advance warning notice needs to be issued whenever an instruction or notice is given (Clause 8.4).
- No express penalty if the Advance Notice is not given, but would constitute a breach of contract.
- Damage caused might reduce the value of any associated claim.

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**FIDIC - Variations**

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**Key changes - Variations**

- 1999: No prescribed form of variation instruction
- 2017: Clause 1.3 Notice required stating it is a Variation
- Clause 13 substantially updated = Greater detail/ clarity as to how variation can be initiated and procedures that apply
- Variation may now be initiated in one of two ways:
  - an instruction under clause 13.3.1; or
  - a request for a proposal under clause 13.3.2
- New grounds on which Contractor can object to a Variation
- Red Book = Continue to be valued in accordance with rates/ prices in Bill of Quantities
- Yellow and Silver Books = New provisions for valuing Variations

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**FIDIC - Approach to Claims and Disputes**

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**FIDIC Approach to Claims and Disputes**

- FIDIC makes a distinction between Claims and Disputes.
- FIDIC defines Claims as:
  - "a request or assertion by one Party to the other Party for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of the Contract or execution of the Works."
- FIDIC defines Disputes as:
  - "any situation where one party makes a Claim against the other Party (which may be Claim as defined in these Conditions, or a matter to be determined by the Engineer under these Conditions;
  - the other Party (or the Engineer, under sub-clause 3.7.2...) rejects the claim in whole or in part; and
  - the first Party does not acquiesce (by giving an NOD [notice of dissatisfaction] under Sub-Clause 3.7.5 or otherwise."
- The FIDIC provides an escalating regime of claim and dispute resolution.
- Claims resolution regime is set out in Clause 20. Disputes regime is set out in Clause 21.
- In these slides we assume it is a Contractor making a claim against the Employer, but they apply the opposite way too. All clause references to Yellow Book.

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**Clause 20 – Claims**

- If a Contractor seeks relief (additional payment or extensions of time) it must give **Notice** pursuant to Clause 20.2.
- **NOTE:** A failure to follow some of the procedures in Clause 20.2 can be fatal to the validity of the Claim.
- The **Notice** shall include a description of the circumstances giving rise to the Claim and be issued within **28 days** after the claiming party became aware or should have become aware of the event or circumstance giving rise to the Claim. This is crucial.
- If the **Notice** is not issued within 28 days, the Employer shall be discharged from any liability for that particular event or circumstance – a barring provision (Clause 20.2.1).
- Clause 20.2 requires that the Engineer is required to provide **initial response** to a Notice (Clause 20.2.2).
- If the Engineer considers that the claiming Party has failed to comply with 28 day time bar then it shall **notify the claiming Party** within 14 days of receiving the Notice (Clause 20.2.2).
- If the Engineer fails to do this then the time bar shall not apply – **claim remains valid** (Clause 20.2.2) – reverses barring provision in favour of Contractor.

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**Clause 20 – Claims**

- Construction disputes tend to be factually complex.
- Clause 20.2 of the FIDIC form recognises this: a Contractor must keep such **contemporary records** as may be necessary to substantiate its Claims (Clause 20.2.3).
- The Engineer is entitled to **monitor** the Contractor's record keeping and **instruct** the Contractor to keep additional contemporary records (Clause 20.2.3).
- Following the Notice and Initial Response, the Contractor is required to provide a **fully detailed claim** (Clause 20.2.4).
- A "fully detailed claim" means a submission which includes:
  - a detailed description of the **events of circumstances** giving rise to the Claim
  - a description of the **legal basis** for the Claim. Note: this is particularly important.
  - all **contemporary records** which are relied upon to support the Claim
  - **detailed supporting particulars** of the amount of additional payment claimed or EOT claimed.
- The fully detailed claim shall be provided **within 84 days** of the claiming Party of becoming aware or when it should become aware of the events or circumstances giving rise to the Claim (Clause 20.2.4).

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**Clause 20 – Claims**

- **NOTE:** a **failure to provide the description of the legal basis** for the Claim means that the Notice of Claim shall be deemed to have lapsed and shall no longer be considered a valid Notice – a hard bar (Clause 20.2.4) – barring provision.
- **NOTE:** a failure to provide other requirements do not result in barring of the claim (Clause 20.2.4)
- The Engineer shall give notice of this lapse to the Contractor within 14 days of receipt of the Detailed Claim. A failure to do this by the Engineer means the Notice of Claim remains valid.
- **NOTE:** there are important obligations on both the Contractor and the Engineer, which a failure to follow can have significant consequences.
- If a party **disagrees that the claim has lapsed** then it may issue a Notice to the Engineer with details of the disagreement and the issue will be referred to the Engineer for **determination in accordance with Clause 20.2.5 and Clause 3.7** (Clause 20.2.4).

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**Clause 20 – Claims**

- The Engineer is required to **consider (determine)** the Detailed Claim in accordance with the provisions set out in Clause 3.7 (Clause 20.2.5).
- Pursuant to Clause 3.7:
  - the Engineer **shall act neutrally** between the Parties and shall not be deemed to act for the Employer.
  - the Engineer **shall consult with the parties** in an endeavour to reach agreement within 42 days of receipt of the Detailed Claim provided under Clause 20.1.
  - If no agreement is reached then the Engineer shall proceed to **make a determination within a further 42 days**.
  - If the Engineer fails to give a determination within **42 days** then the determination shall be **deemed to be a rejection** of the Claim.
  - If either party is dissatisfied with a determination of the Engineer then the dissatisfied party may give a **Notice of Dissatisfaction (NOD)** to the other Party and the matter shall become a Dispute to be determined in accordance with Clause 21.
  - If no NOD is given by either party within **28 days** of the determination the determination shall be **deemed to have been accepted** by both parties and shall be **final and binding** upon them.

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**Clause 21 - Disputes**

- If a party is dissatisfied with the Engineer’s determination and issues a NOD, the Dispute must be referred to the DAAB within 42 days of the NOD. Otherwise, the **NOD shall lapse and shall no longer be valid**. Engineer’s decision will effectively become final and binding on the parties.
- FIDIC has a two tier dispute resolution mechanism.
- The first tier is the referral of Disputes to a **Dispute Avoidance Adjudication Board (DAAB)**.
- The DAAB can have **two functions**.
- Firstly, it can be used as an **advisor** as to how a Dispute may be resolved without further escalation (Clause 21.3).
- The second role is **determining disputes** (Clause 21.4).
- **NOTE:** DAAB is entirely a creation of the contract. It only exists because the parties have agreed to it in Clause 21.
- DAAB is a short process whereby disputes are determined by an independent sole adjudicator, or panel of adjudicators. **It is not an arbitration**.
- DAAB shall consist of one or three suitably qualified members. **Three is the default**.
- **Each party shall appoint a member**, with the third being appointed by agreement between the two members and the parties.

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**Clause 21 – Disputes**

- The FIDIC forms contain the DAAB Procedural Rules which give the DAAB a set of powers to determine procedure such as meetings, site visits, the nature of submissions and evidence to be presented.
- There is also a DAA agreement which each party and the DAAB members are required to sign.
- The FIDIC draft DAA agreement requires the DAAB member to warrant that they are **impartial and independent** and have no conflict of interest and conduct any DAAB proceedings **fairly giving each Party reasonable opportunity to present their case** and respond to the other party’s case (Clause 3.1, Clause 4 of DAA Agreement and Rule 6 of the DAAB Procedural Rules).

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Clause 21 - Disputes

- DAAB shall issue its decision within **84 days** of receiving the reference or such period as may be agreed with the parties.
- If either party is dissatisfied with the DAAB decision then a further notice of dissatisfaction shall be issued. This **NOD must be issued within 28 days of the DAAB decision**, otherwise the decision shall become final and binding.
- Arbitration may be commenced within **28 days of the date of the NOD**.
- The default is for ICC arbitration.

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Bars to Claim or Defence - Summary

- The key thing to remember when dealing with claims and disputes under a FIDIC contract are the **barring provisions – otherwise valid claims and defences lost** for failing to follow some of the procedures in Clause 20 and 21.
- These can have **significant negative consequences** for the unwary
- Valid contractor **claims for time and money can be lost** if these are not complied with
- Clause 20.2.1: **Notice of Claim**: 28 days from date of knowledge of event or circumstances, or from when should have known of event or circumstance. **BAR**.
- Clause 20.2.2: Failure to notify that Notice of Claim is out of time means **claim is not barred**.
- Clause 20.2.4: Detailed Claim: Must provide **legal basis for claim**, otherwise Notice of Claim is invalidated – may be too late to issue a new Notice of Claim in time.
- Clause 3.5.5 – Clause 21.4.4: **Notices of Dissatisfaction (NODs)**: These need to be issued within 28 days of an Engineer's determination, or a decision of the DAAB otherwise they become final and binding.

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FIDIC – Design liability

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**Design liability under FIDIC**

- 1999: requires the works to be fit for the purpose as defined the Contract
- 2017: as defined in the Employer's Requirements
- If no purpose specified, the works must be fit for their 'ordinary purpose'
- Require careful drafting from Employers = ensure that particular specifications are precisely described
- Backed by an indemnity - clause 17.4, second paragraph
- Indemnity is capped - clause 1.15 (Red and Yellow Books), clause 1.14 (Silver Book)

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**FIDIC – Limitations of liability**

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**Limitations of Liability**

- Damages for breach of contract: No recovery of loss of use (e.g. revenue), loss of profit, loss of any contract or for any indirect or consequential loss or damage, save for specific caveats (Clause 1.15).
- Caveat: Delay Damages (liquidated damages for delay) are recoverable (Clause 8.8).
- Caveat: Costs and profit arising from Variations (Clause 13.3.1)
- Caveat: Costs and lost profit arising from an Employer's termination for convenience (Clause 15.6).
- Caveat: Price of work done (including any Profit therein), lost profit and other loss and damage for termination by contractor (Clause 16.4)
- Caveat: Indemnities for IP infringements, indemnities for injury, sickness, disease and injury, loss or damage to property, design obligations (Clause 17.3 – 17.5).
- Caveat: No limit of liability for fraud, gross negligence, deliberate default or reckless misconduct by defaulting party.

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**Limitations of Liability**

- Overall liability is capped at the sum stated in the Contract Data (e.g. 100% of Contract Price), subject to caveats (Clause 1.15)
- Caveat: Provision of Employer Supplied Materials and Employer Equipment (Clause 2.6)
- Caveat: Provision of Temporary Utilities by the Contractor and Employer (Clause 4.19)
- Caveat: Indemnities provided by Contractor (Clause 17.4)
- Caveat: No limit of liability for fraud, gross negligence, deliberate default or reckless misconduct by defaulting party

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**FIDIC – The future**

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**The future of FIDIC**

- Second anniversary - Uptake of 2017 forms
- Moving to NEC-style, intensive claims and dispute management focus?
- Demand for a 'Red Book lite' – a mid-sized contract for mid-sized projects?
- Effect of FIDIC Golden Principles?

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**Upcoming Construction webinars**

- Dispute boards in construction projects (2020) – 13<sup>th</sup> May 2020



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