

# International Federation of Consulting Engineers FIDIC

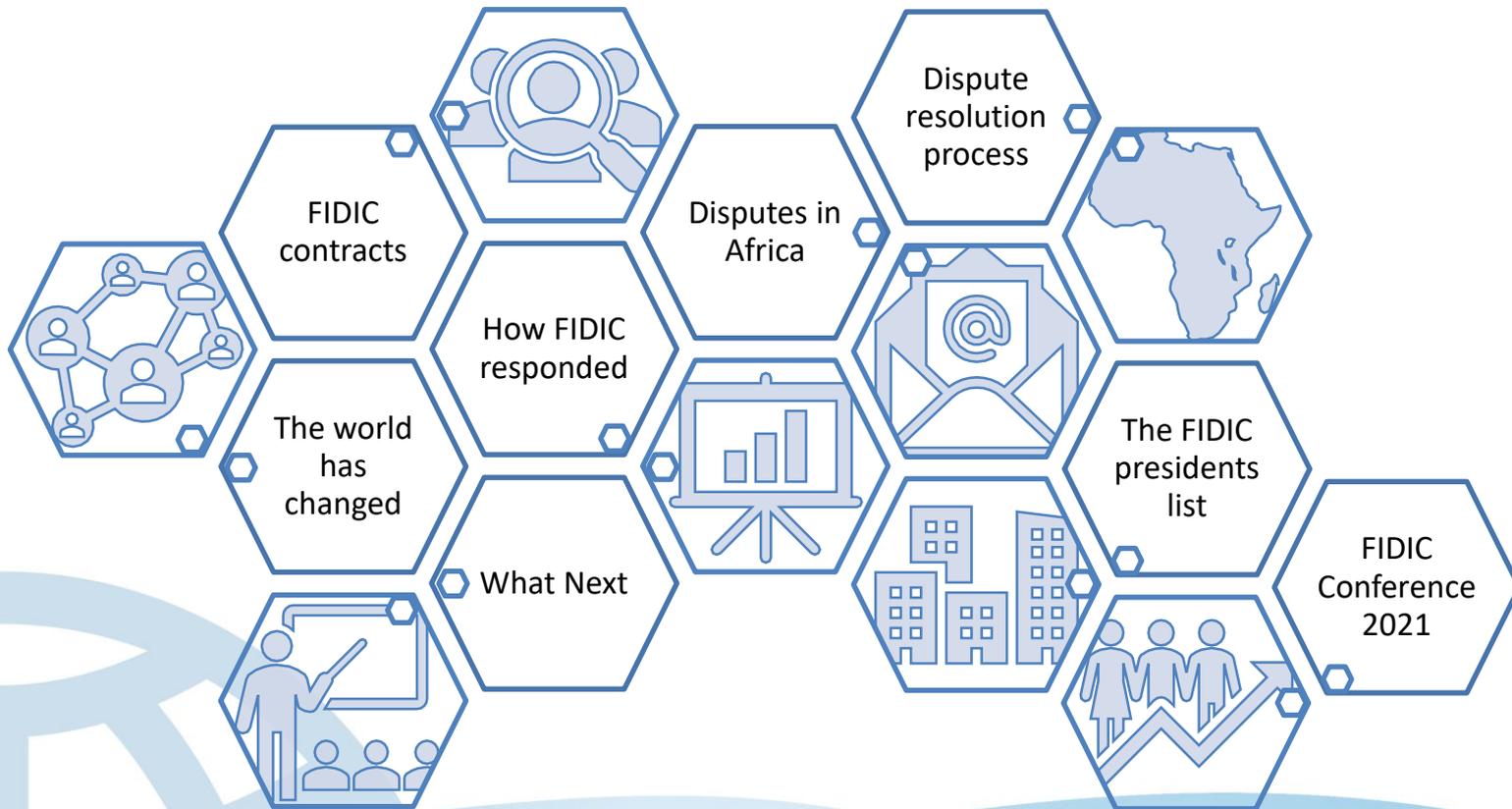


Dispute Management in African Infrastructure Projects (DIMAP)

Dr Nelson Ogunshakin OBE

6 October 2020





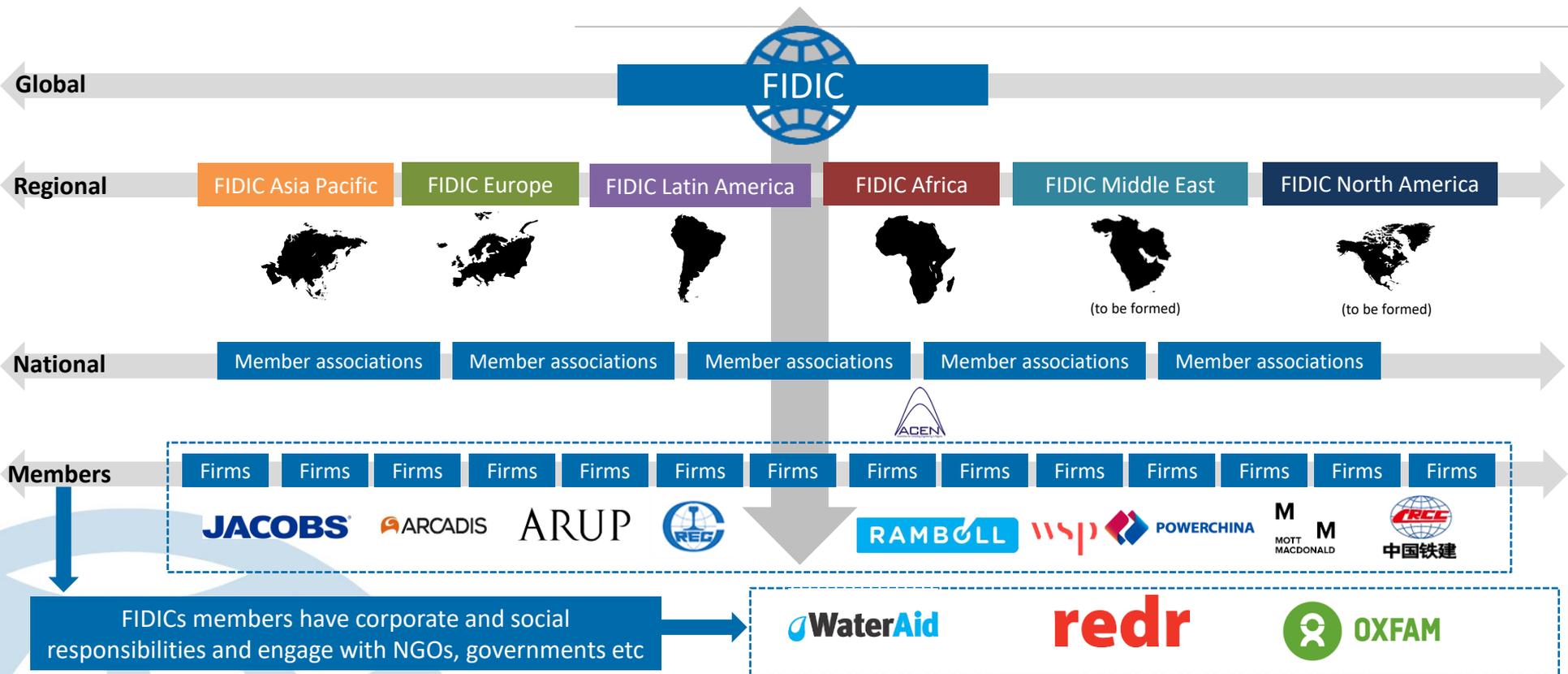
What is affecting dispute levels ...

# FIDIC and the regions

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# FIDIC Global Structure



What is affecting dispute levels ...

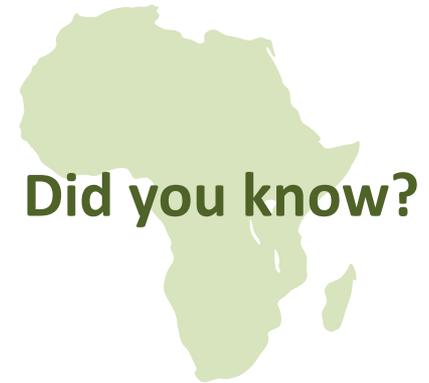
# The world has changed

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# Interesting facts

- Africa is the **second most populous continent** with 1.1bn people (16% of the world's population)
- Over **50% of Africans are under the age of 25**
- Africa **population will more than double to 2.3 billion** people by 2050
- There are **fewer people with internet connections in Africa** than there are in New York City.
- Africa is **the world's second largest continent** covering about over 30 million square kilometres
- **China is Africa's top trade partner** with Sino-African trade volumes now nearing \$200 billion per year.
- Over **1,270 large dams have been built** along the continents rivers
- Africa has approximately **30% of the earth's remaining mineral resources.**



# COVID 19 ... where do we stand

Figure 1: Number of COVID-19 cases reported weekly by WHO Region, and global deaths, 30 December 2019 through 13 September 2020\*\*

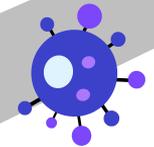
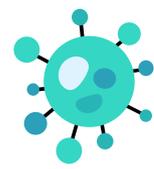
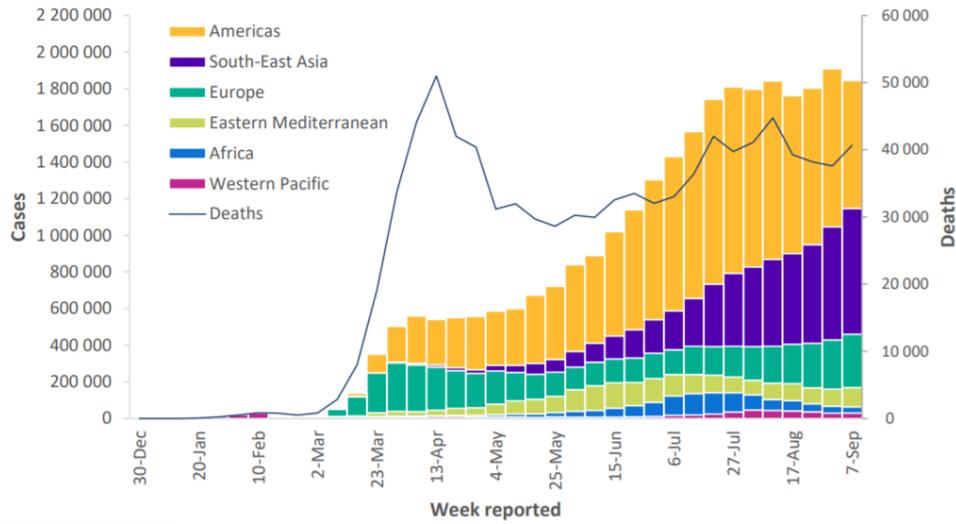


Table 1. Newly reported and cumulative COVID-19 confirmed cases and deaths, by WHO Region, as of 13 September 2020\*\*

WHO Region	New cases in last 7 days (%)	Change in new cases in last 7 days	Cumulative cases (%)	New deaths in last 7 days (%)	Change in new deaths in last 7 days*	Cumulative deaths (%)
Americas	697 780 (38%)	-19%	14 699 174 (51%)	24 626 (61%)	10%	508 705 (55%)
South-East Asia	687 119 (37%)	11%	5 377 062 (19%)	8 991 (22%)	11%	92 391 (10%)
Europe	291 387 (16%)	8%	4 796 426 (17%)	3 050 (8%)	<1%	225 494 (25%)
Eastern Mediterranean	105 430 (6%)	14%	2 101 676 (7%)	2 302 (6%)	3%	55 012 (6%)
Africa	33 169 (2%)	-14%	1 116 321 (4%)	1 007 (2%)	-15%	23 916 (3%)
Western Pacific	30 074 (2%)	4%	546 552 (2%)	680 (2%)	6%	11 886 (1%)
† Other	-	-	741 (<1%)	-	-	13 (<1%)
<b>Global</b>	<b>1 844 959 (100%)</b>	<b>-3%</b>	<b>28 637 952 (100%)</b>	<b>40 656 (100%)</b>	<b>8%</b>	<b>917 417 (100%)</b>

\*Percent change in the number of newly confirmed cases/deaths in past seven days, compared to seven days prior. Regional percentages rounded to the nearest whole number so global totals may not equal 100%.  
 \*\*See data, table and figure notes

Source: WHO; [Weekly Epidemiological Update](#)

# Pre Covid - The African economy

## African Economic Outlook 2020

Developing Africa's Workforce for the Future



- “Africa’s **economic outlook continues to brighten**. Its real GDP growth, estimated at 3.4 percent for 2019, is projected to accelerate to 3.9 percent in 2020 and to 4.1 percent in 2021.”

3.4%  
2019

3.9%  
2020

4.1%  
2021

*The world has changed!!! ... what have we been through and what next?*

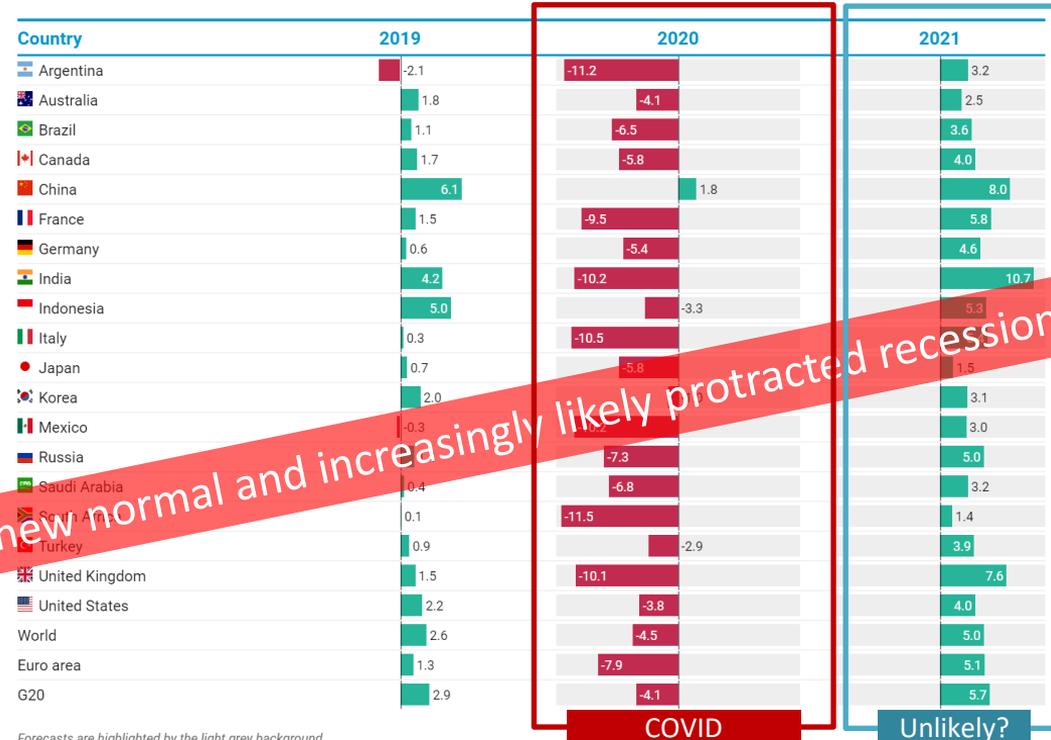
- “Leading the way are six economies among the world’s 10 fastest growers: **Rwanda, Ethiopia, Côte d’Ivoire, Ghana, Tanzania, and Benin.**”
- “Despite Africa’s solid growth performance, **only about a third of countries** achieved **inclusive growth, reducing both poverty and inequality.**”
- “**Investments and exports** are increasingly driving growth”
- “The median ratio of government debt-to-GDP climbing over 56 percent in 2018, up from 38 percent 10 years earlier.”



# The Global Economy

## What a difference 12 months can make ...

- Forecasters initially suggested a V-shape recovery with a quick recession and fast recovery
- This is increasingly becoming unlikely with countries entering second waves
- The unwinding of job support schemes has not occur yet and is artificially supporting even the poor performance of 2020



Forecasts are highlighted by the light grey background

Source: OECD (2020), "OECD Economic Outlook, Interim Report September 2020", OECD Economic Outlook: Statistics and Projections (database). • Created with Datawrapper

The world has changed !! - there will be a new normal and increasingly likely protracted recession

# Covid – Jobs at risk - Construction

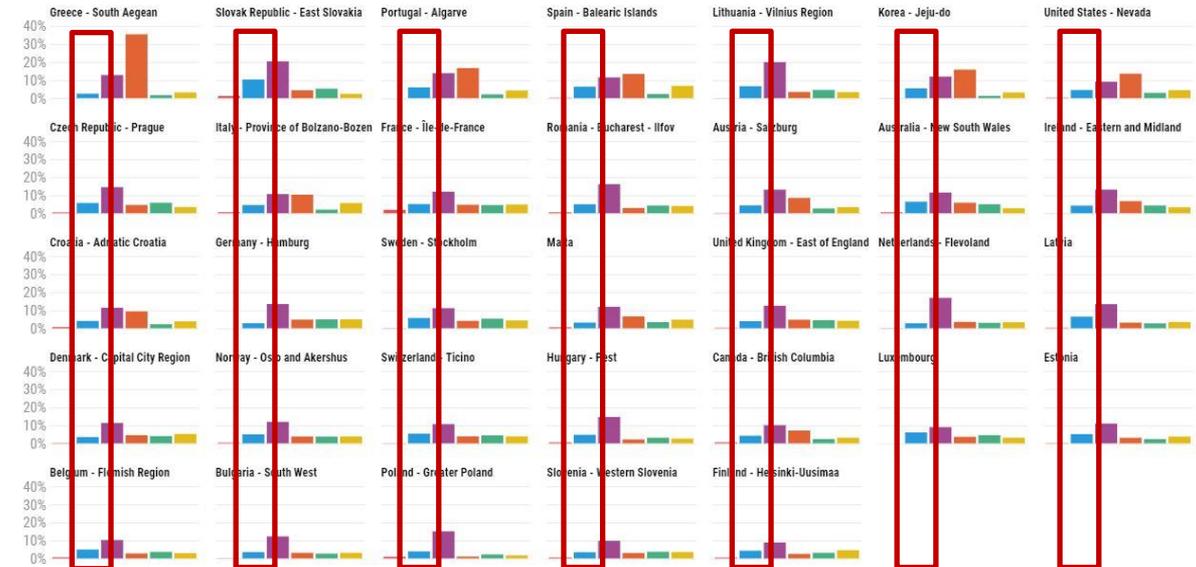
## What a difference 12 months can make ...

- Construction whilst not being the 'most' affected industry will be significantly affected by Covid with a significant number of jobs at risk
- These are skills industry can not afford to lose and may create a skills gap for generations to come

### Regions with the highest share of jobs potentially at risk by country

Sector's shares of jobs potentially at risk over total regional jobs (%)

■ Manufacture of transport equipment; Air transport services 
 ■ Construction ; Real estate services 
 ■ Wholesale and retail trade  
■ Accommodation and food services 
 ■ Professional, scientific and technical activities 
 ■ Art, entertainment and other services

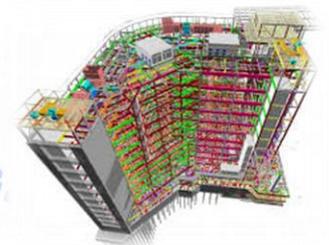


Share of jobs at risk estimated during the containment period. The sectoral composition of the regional economy is based on data from 2017 or latest available year \*

Source : [From pandemic to recovery: Local employment and economic development](#) © 2020 OECD

# Global drivers

## BIG DATA



The world has changed ...

# How FIDIC responded

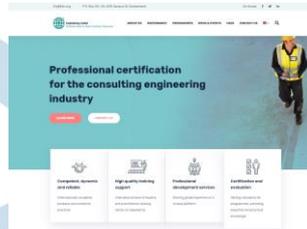
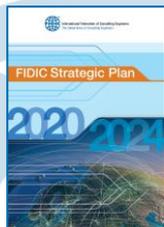
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## FIDIC Operations Update

### Some highlights:

- FIDIC is launching its new Strategic Plan
- FIDIC Continue to build its credentialling and training activity
- COVID webinars 15,000 registrations, 9000 attended, over 150 countries
- Committees have been relaunched/refreshed
- State of the World refresh in place
- Continued working through COVID 19
- Annual Report presented to the GAM
- Delivery of first Annual online conference
- Continue to launch new contracts and guides
- Stabilisation of the FIDIC operation through injection of new and competent staff
- Implement New operating structure
- Establishment of new Board Governors committees
- Held 4 Board meetings (3 extraordinary meetings) and the relaunched committees have all had the first meetings and will meet 3 to 4 times a year
- Significant improvement in our communications with stakeholders
- Major advocacy win with signing Agreements with Six Multilateral Development Banks (MDB)
- Introduction of Contract Users Newsletter & Awards
- Development of New Regional strategy
- Establishment of a new China Office in Beijing.



# FIDICs Covid Webinars

**F** The COVID 19 pandemic has changed everyone's way of life. The industry faced unprecedented challenges and FIDIC stepped up help to lead the global response

18

Webinars have been run over the course of 10 weeks

15,000

Over 15,000 individuals have registered to take part

9,000

Over 9,000 attended by the end of the session

150

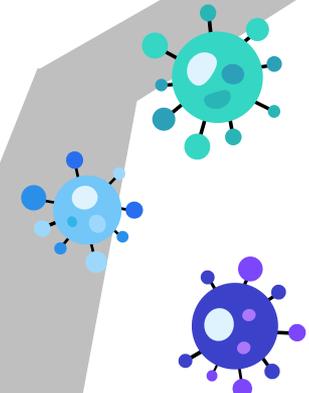
Participants from over 150 countries

79

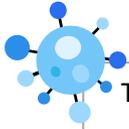
Speakers took part over 10 weeks

10,000

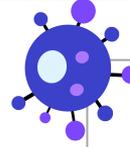
Over 10,000 individuals viewed the You Tube recording



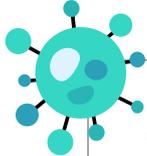
# Some key messages from the industry



There is a new normal and working practices will not go back to the way they were



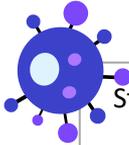
Communication is key both internally and externally



The economic effects of COVID 19 far outweigh the last economic crisis and are estimated to cost between \$1 - \$2 trillion



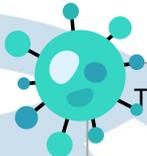
Investment profiles of financiers and governments will change and are likely to shift towards housing, healthcare and the environment



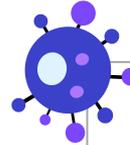
Staff and their wellbeing is key to the survival of the consultancy and engineering sector



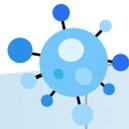
Infrastructure in the short term and even the medium and long term will need to account for the risk of pandemics or adjust to conditions



There will be implications for contracts and projects get delayed / postponed



Collaboration and working together as an industry is more important than ever



No company big or small is immune to the technological change that is now occurring

# FIDIC Covid 19 ACTIVITIES...



## Engineering a post-Covid future: the challenges for global infrastructure

An international online conference brought to you by FIDIC

11 and 14 September 2020



### FIDIC Future Leaders Meeting 2020

An international online conference brought to you by FIDIC

10 September 2020



### FIDIC Presidents Meeting 2020

An international online conference brought to you by FIDIC

9 September 2020



### 2020 FIDIC General Assembly Meeting (GAM)

An international online conference brought to you by FIDIC

15 September 2020



### FIDIC Regional Groups Meeting 2020

An international online conference brought to you by FIDIC

16 September 2020



### FIDIC Executive Committee Meeting 2020

An international online conference brought to you by FIDIC

10 September 2020



### FIDIC Directors & Secretaries (D&S) Meeting 2020

An international online conference brought to you by FIDIC

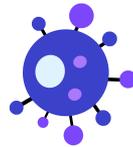
9 September 2020



### Ask the FIDIC Board (Q&A) 2020

An international online conference brought to you by FIDIC

16 September 2020



18 COVID webinars



3 Future leaders webinars



A reminder ...

# FIDIC contracts

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## New professional services contracts



## Works contracts



## Procurement and best practice



## Harmonised Construction Contract



# Stakeholders and contract users

## Private Sector



## Government



## MDBs

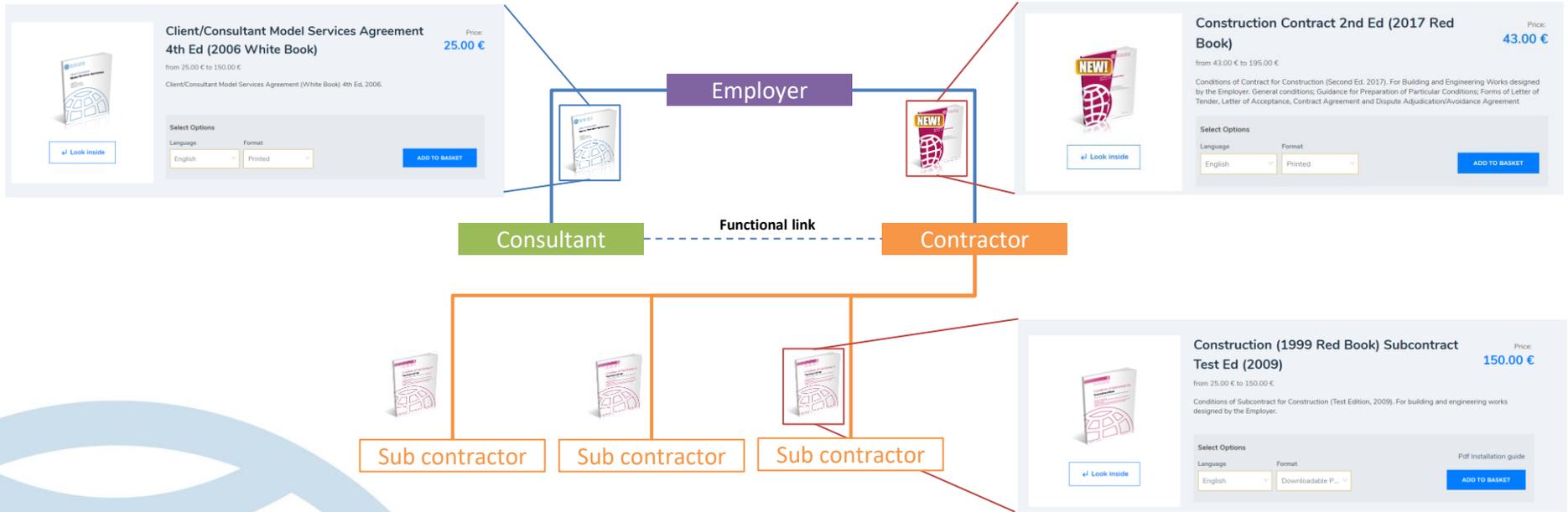


## International organisations



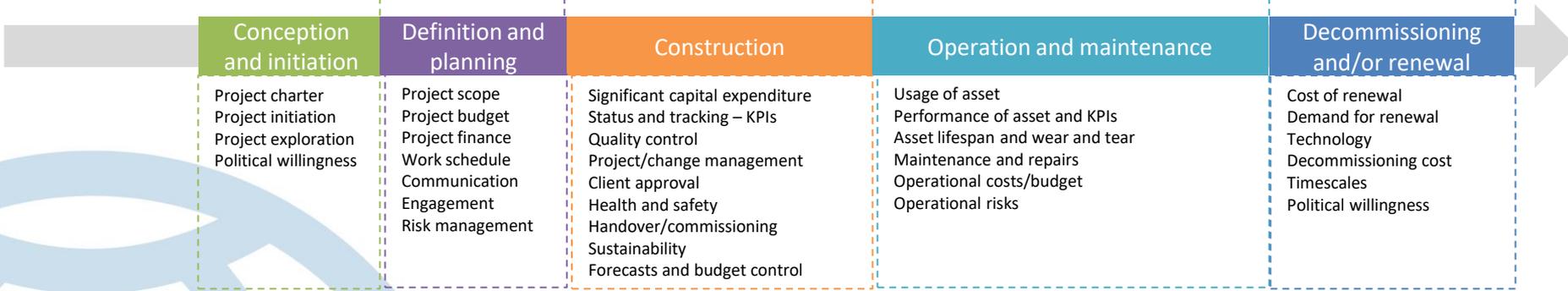
# Contract types – a worked example

Construction contract:



# Project lifecycle

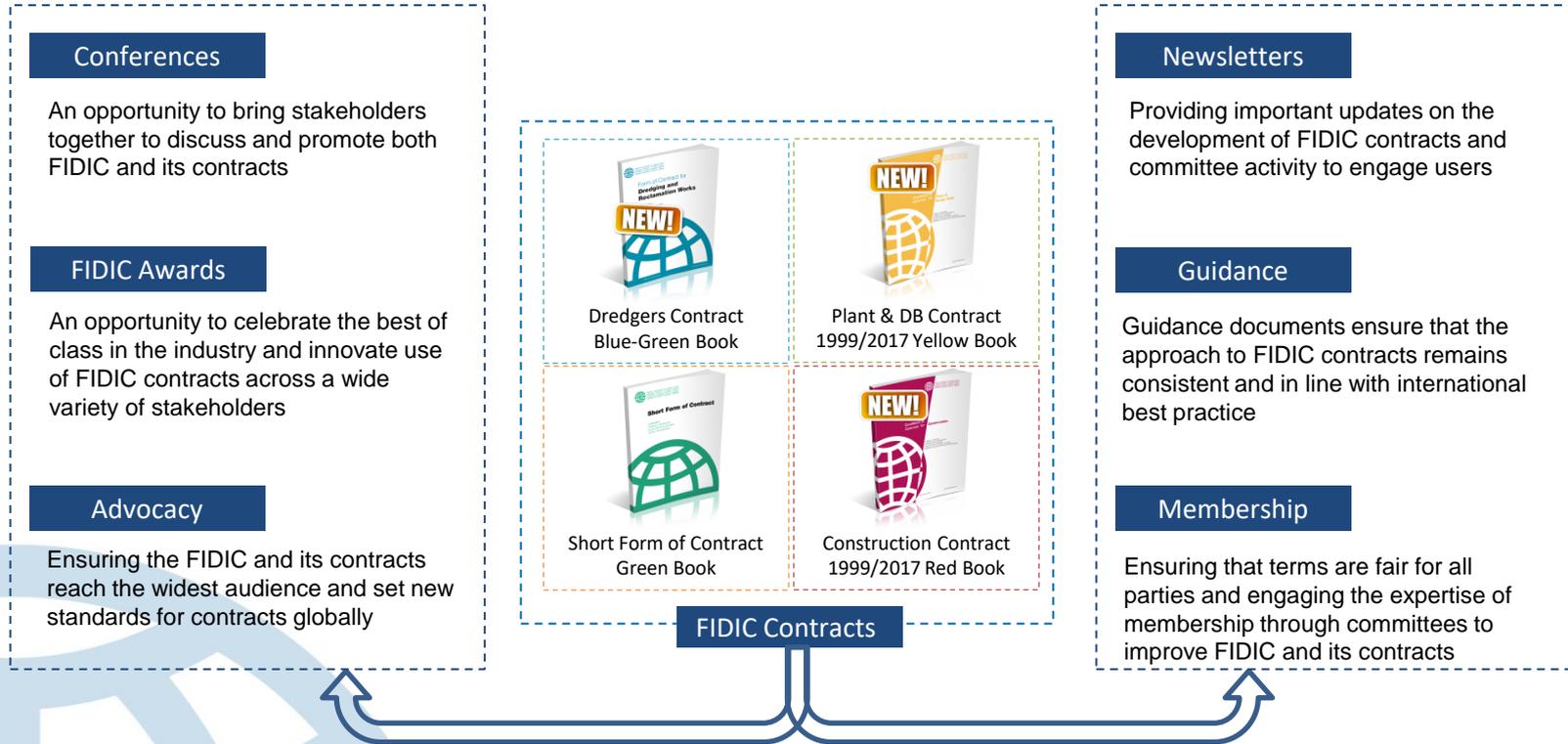
	Current FIDIC contract coverage			
Design	 	   		
Build		    		
Operate/maintain			    	
Design build	  	   	    	
Design build and operate	  	   	     	  
Design build operate and maintain	  	   	     	  



**KEY:**

-  Consultants
-  Equipment/suppliers
-  Legal
-  Banks
-  Government
-  Contractors
-  Asset Owners

# How FIDIC contracts/activity fit together



Managing disputes ...

# Disputes in Africa

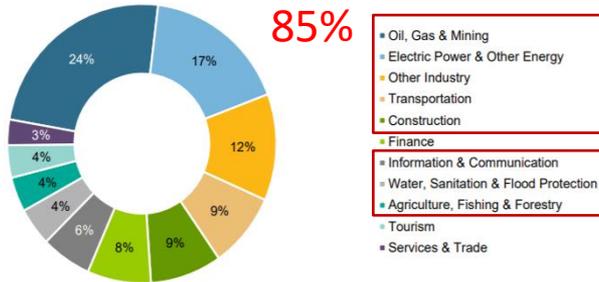
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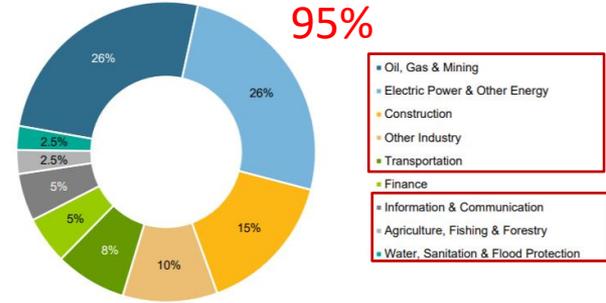
# Investment disputes - items consider



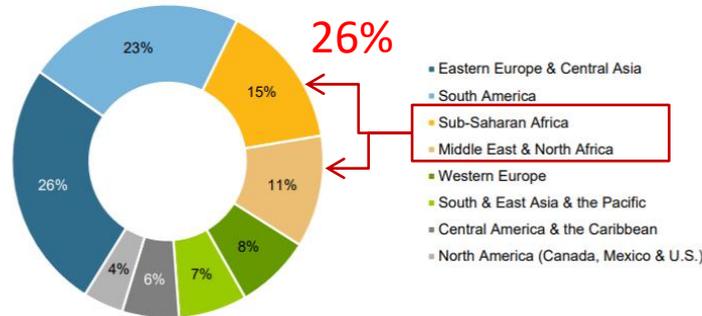
**Chart 8:** Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by Economic Sector



**Chart 6:** Distribution of New Cases Registered in 2019 under the ICSID Convention and Additional Facility Rules, by Economic Sector



**Chart 7:** Geographic Distribution of All Cases Registered under the ICSID Convention and Additional Facility Rules, by State Party Involved



The construction sector and Africa as a region make up are not insignificant in terms of complaints

Managing disputes ...

# Dispute resolution process

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# Dispute Resolution Process

- The use of ADR Process:
  - Negotiation
  - Mediation
  - Adjudication /Dispute Adjudication Board (DAB/DRB/DAAB etc)
  - Arbitration
- Litigation





# FIDIC Dispute Adjudication Boards

## The use of ADR Process:

- FIDIC Conditions of Contracts (Red Book, Yellow Book, Gold Book cl13.5)
- Appointment of Dispute Board members
- Selection and appointment procedures
- Qualifications & Obligations (Impartiality & independence, Good people skills & Relevant experience)
- FIDIC President List



# Impact of Covid-19 on Dispute Resolution

- FIDIC Webinars coverage etc
- FIDIC issues [guidance](#) to the industry on coronavirus
- Force Majeure
- Effective Communication
- DAB / DAAB widely used
- Collaboration in resolution of dispute



Managing disputes ...

# The FIDIC presidents list

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# The Presidents List

## Why

The international need for skilled and highly experienced dispute resolution specialists is met by the FIDIC President's List of Approved Dispute Adjudicators.

## Who

The listed individuals are experienced in all forms of FIDIC Contracts, in dispute resolution, and are skilled in construction contract adjudication and Dispute Boards. They have also been certified by FIDIC to ensure they meet the high professional standards expected of FIDIC contracts.

## Profiles

The adjudicator profiles include:

- Pictures
- Email functionality
- CV download
- Interactive map of country experience
- Regional experience
- Languages spoken
- Services offered
- Technical expertise
- Summary of experience
- Positions and expertise
- Affiliations and membership
- Panel listing and qualifications

The screenshot shows the FIDIC website's interface for the President's List of Approved Dispute Adjudicators. It includes a search bar with various filters and a list of five adjudicator profiles. Each profile card displays a headshot, the name of the adjudicator, their location, and a brief summary of their qualifications and experience. Navigation buttons are provided for each profile.



# The Presidents List

Technical areas



Advanced search

First Name	Last Name	Global regions
<input type="text"/>	<input type="text"/>	- Any -
Languages spoken	Services offered	Construction contract experience
- Any -	- Any -	- Any -
Consultancy contract experience	Specialist contract experience	Technical expertise
- Any -	- Any -	<input type="text"/>
Country	<input type="text"/>	
<input type="text"/>	<input type="text"/>	
<input type="button" value="APPLY"/>		

The screenshot shows the website interface for the President's List of Approved Dispute Adjudicators. It includes a search bar with fields for First Name, Last Name, Languages spoken, Consultancy contract experience, and Country. There are also dropdown menus for Global regions, Services offered, Construction contract experience, and Specialist contract experience. Below the search bar, there is a list of profiles for approved dispute adjudicators, each with a photo, name, and contact information.

Contracts include



**The President of FIDIC is prepared to appoint an adjudicator if by agreement of the Parties this authority is delegated to FIDIC. FIDIC maintains a President's List of Approved Dispute Adjudicators for this purpose and makes appointments from its own list. FIDIC charge the appointment fee for this service.**

A request for the President of FIDIC to appoint a member, or members, of a Dispute Adjudication Board (DAB), a Dispute Board (DB), or a Dispute Avoidance/Adjudication Board (DAAB), as the case may be, under either

- the FIDIC Red, Yellow and Silver Books 1999,
- the FIDIC MDB Harmonised Edition of the Red Book 1999, or
- the FIDIC Red, Yellow and Silver Books 2017; or
- the FIDIC Emerald Book 2019

or for the President of FIDIC to appoint an Adjudicator under either:

- the FIDIC Green Book 1999,
- the FIDIC Dredging and Reclamation contract 2006 or 2016;
- the FIDIC White Book 2017, or
- the FIDIC Sub-consultancy agreement 2017

**Requests for the appointment of an adjudicator are now made online: [fidic.org/node/2552](https://www.fidic.org/node/2552)**



Will tomorrow ever be the same ...

# What next

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# Has the infrastructure question changed?



Will we ever fly as much?  
What happens if Covid continues for 2/3 years?

Will we need more digital networks to work both domestically and internationally?

If there is more remote working do we need less, current or more capacity?

Is the new world actually not blue but 'green'?

Has the world just got smaller or bigger?

How will buildings need to adapt to Covid and or future pandemics?

Will personal forms of transport such as cars become more important and will we need more road capacity if more shopping is purely online?

Will we need more port infrastructure if there is air capacity will shipping go skywards?

# Global drivers – the tip of the iceberg

## Health & Vaccination

Availability of clinical acceptable vaccination. Medical infrastructure, Housing, Laboratories, Food, Water, Waste, Air

## Climate & SDG

Energy, Mobility, Real Estate, Construction Industries

## New Social Contract & behaviours

Shift in Social behaviours - WFH, less traveling, fair of working in the cities with Block-chain, AI, smart contract, collaboration, social infrastructure provision, digital identity etc

## Reformed Spatial Patterns

Mobility, Real Estate, Logistics, Locations & Populations Centres

## Trade & Industry

Ports, Airports, Rail, Logistics etc

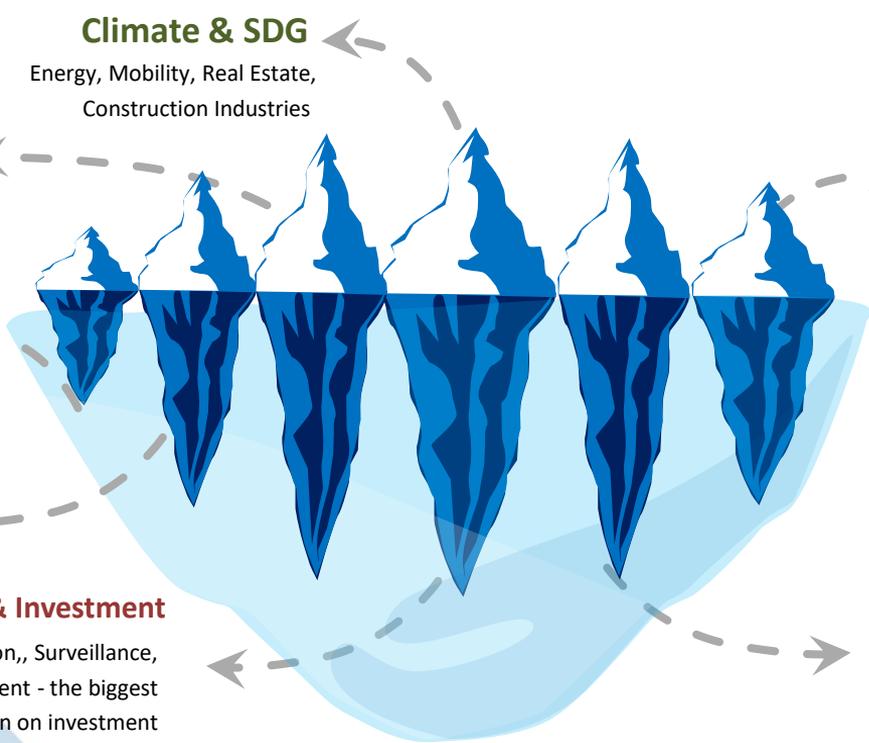
## Digitization & Business models

Digital infrastructure, Logistics, Cyber Security, Real Estate, Services etc

## Democracy, Geo-politics & Investment

Multi-lateralism, competition,, Surveillance, Identity, Control, Government - the biggest client in town on investment  
There will be market winners & losers

New business model - emerging new industry structure & services provision or delivery



# Corporate Prediction 2021 & beyond

1. **Growth** - stagnation with moderate positive move
2. **Profitability** - low, single figure or negative
3. **Employment** - under pressure with productivity & utilisation challenges
4. **Liquidity** - Delay payment challenges, Cashflow management will be critical as cash is king
5. **M&A** - Niche & very selective opportunity but avoid un-warranted management distractions
6. **Finance** - Going concerns will be a challenge to overcome insolvency



# Likely outcomes

## Going digital

Digital transformation has already accelerated this will continue into areas that could not be transformed quickly to date

## Health

Health and wellbeing will go up the agenda. Not only for physical infrastructure but also mental and workplace/home balance

## Going green

Climate change has gone up the agenda, it is increasingly likely that new 'limited' investment will need to focus on green investments

## Transportation

Transportation and systems with significant interactions will need to consider their place and resilience



## Social contact will change

Individuals will be more aware of their environment and distancing and their 'social contract'

## Supply chains

Supply chains may diversify but also undergo re-localisation to improve local and domestic resilience

## Globalisation

There will be increasing questions asked about the 'global' model and its benefits and consequences

## Buildings

The use of buildings will need to change and adapt to increased remote working and possibly reduced urbanization

Will we ever meet again ...

# FIDIC Conference 2021

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# FIDIC 2020 is now 2021



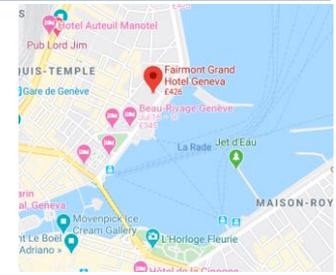
## FIDIC International Infrastructure Conference 2021

### September

S	M	T	W	T	F	S
29	30	31	1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
29	20	21	22	23	24	25
26	27	28	29	30	1	2

### Fairmont Grand Geneva

Quai du Mont-Blanc 19  
Geneva  
1201  
Switzerland

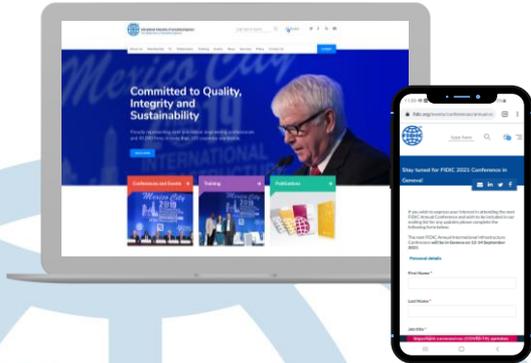


The premier gathering for the global infrastructure community!

Join more than 800 delegates and visitors to discuss:

- How major construction projects are run
- The role of project leadership
- How best to engage with politicians
- International business opportunities

To register your interest in attending go to: [FIDIC.org](https://www.fidic.org)



# Questions



# Engage with FIDIC

## President



**William Howard**  
United States of America

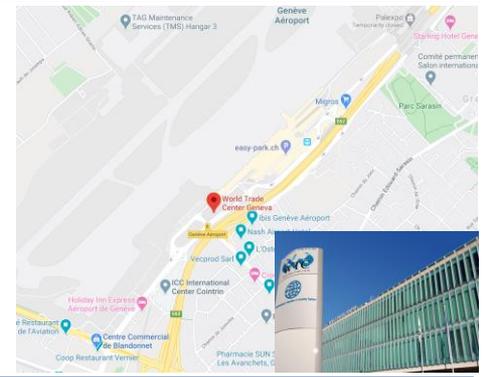
## CEO



**Dr Nelson Ogunshakin** FICE OBE  
United Kingdom

## FIDIC

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## Vice Presidents



**Anthony Barry**  
Australia



**Liu Luobing**  
China

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Federation of Consulting  
Engineers



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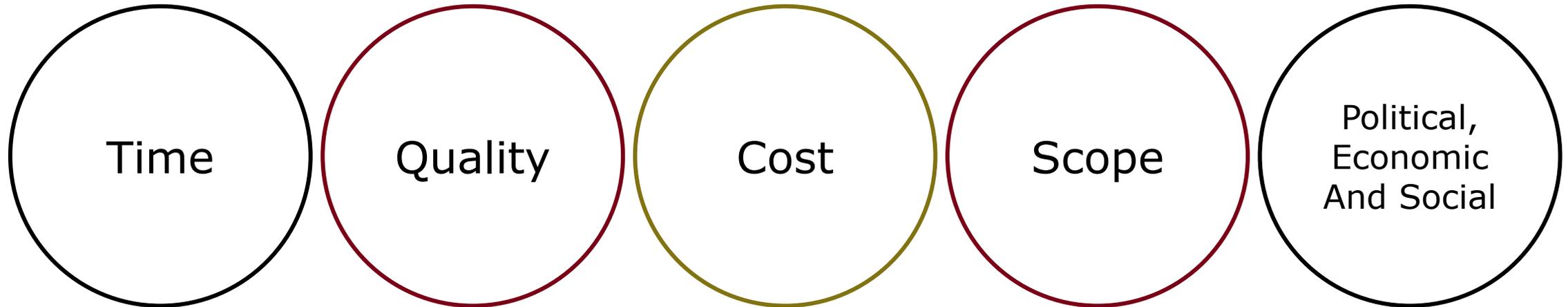
# **RISK MANAGEMENT AND ALLOCATION UNDER CONTRACTS FOR POWER PROJECTS**

Nania Owusu-Ankomah Sackey, FCI Arb

**6 October 2020**

**Examine areas where disputes generally arise in power projects and to explore how to address, manage and allocate these risks through contract drafting to avoid disputes.**

Issues that underline construction disputes in power projects usually relate to:



1

Within the control of  
the Owner/project  
company

2

Within the control of  
the Contractor

3

Outside the control of  
both parties



# **TIME-RELATED RISK**

## What is time-related risk?

The risk of delays in a project's completion.

### **Why is time (i.e. delay) a major risk that requires management and allocation at the contract stage?**

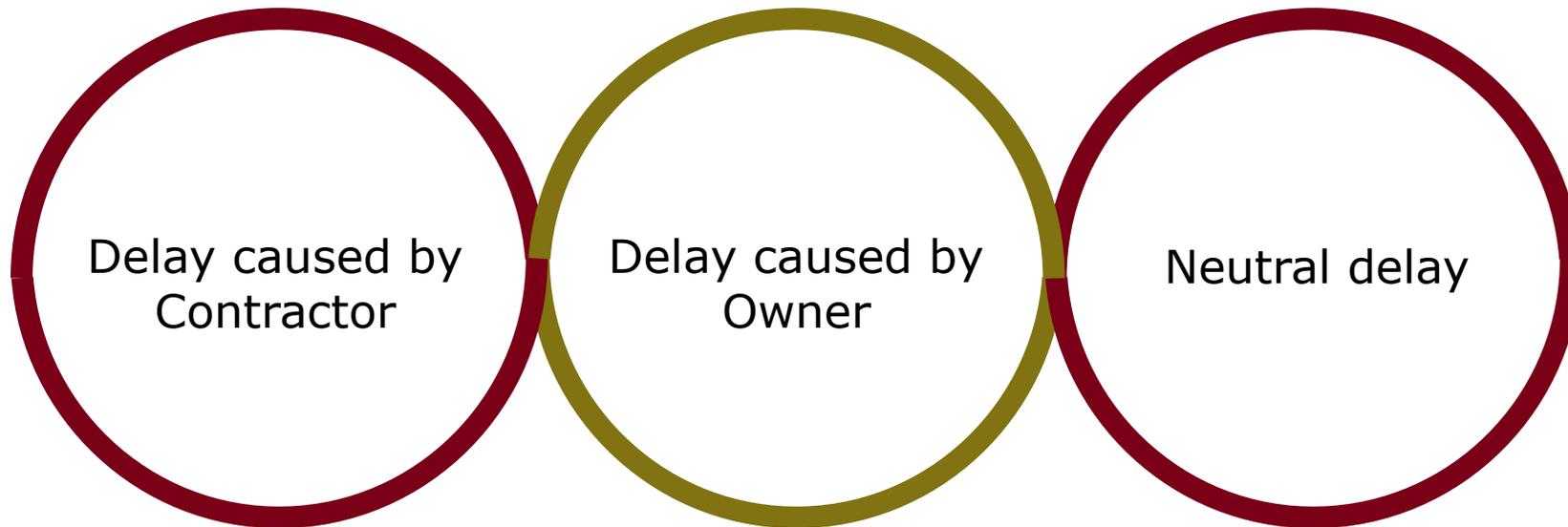
The adverse effects and losses arising if this risk is not managed are significant.

- Increase in costs for contractor
- Lost production and revenue for the owner
- Adverse effects on the payback of loans to financiers
- Cash flow and subsequent solvency issues of the project
- Knock-on delays in multi-phase projects

## Why is time (i.e. delay) a risk that requires management and allocation at the contract stage?

- Breaches of ancillary arrangements to the original contract upon which the project's viability depends (offtake agreements, contracts for input):
  - a. Facility owners would have entered into binding offtake agreements to supply energy at a specified level to an offtake partner from the date of project completion;
  - b. Will become liable to liquidated damages if cannot meet this commitment in a timely manner;
  - c. Resulting liability is often sizeable;

# Addressing Time-Related Risk through drafting





# DELAY CAUSED BY CONTRACTOR

## Delay Caused By Contractor

- Allocated to the Contractor
- Managed through detailed project schedule which establishes the milestones that a Contractor must meet.
- Detailed project schedule encompasses:
  - a. Notice to proceed date
  - b. Phase milestones
  - c. Practical completion date
  - d. Dates and targets for commissioning activities
  - e. Final completion

# Managing Risk through contract drafting

## Liquidated Damages.

Delay Liquidated Damages clause designed to compensate the owner/project company for loss and damage suffered as a result of late completion of the power station by the contractor;

Levies from the contractor an agreed monetary sum that scales per daily/weekly period, subject to an agreed cap fixed at a percentage of the contract price (often 10 to 20%);

The rate per day represents the estimated extra costs incurred (such as extra insurance, supervision fees and financing charges) and losses suffered (revenue forgone) for each day of delay.

Genuine pre-estimate of the losses that an owner will suffer as a result of the delayed completed and compensatory rather than punitive in nature.

# Managing Risk through Contract Drafting

## Liquidated Damages.

Rationale behind liquidated damages clauses is to avoid the complex and costly task of proving losses resulting from delay individually in accordance with general principles of contract recovery.

The categories of losses that may be compensable through a liquidated damages clause (check preceding chapter)

Delay Liquidated Damages and Performance Liquidated Damages

Liquidated damages clause must be carefully drafted so that it is not deemed:

- a. Unenforceable as a penalty
- b. Void for uncertainty
- c. In breach of the prevention principle

# Uncertainty

1

This means that it is not possible to determine how the liquidated damages regime works;

2

If the clause is uncertain, A court will void the liquidated damages provisions. The liquidated damage clause is severed from the contract in its entirety and will not act as A cap on the damages recoverable by the owner from the contractor

# Penalties

1

Liquidated damages clause must be compensatory, not punitive. Under common law, where the liquidated damages clause stipulates an amount wholly disproportionate to the value of the contract so that it takes the form of a payment in terrorem clause, courts will not enforce it.

2

If a liquidated damages clause is invalidated because it is deemed to be a penalty, the liquidated damages or its cap will not act as a cap on damages claim at general law. However, it is rare for a court to find a liquidated damages clause a penalty, especially where it is a contract between two sophisticated and well-advised parties.

# The Prevention Principle

1

An owner will not be entitled to claim liquidated damages against a Contractor for a period of delay infected with delays that are the responsibility of the Owner.

2

For instance, where a project falls 10 days behind schedule, seven of which fall to causes that are the responsibility of the Contractor, and three to causes that are the responsibility of the Owner, the Owner will lose altogether the right to claim liquidated damages in respect of the full 10-day period.

# How To Overcome Prevention Principle

01

Insert a clause in the contract where the Owner grants an 'extension of time' to the Contractor in respect of periods of Owner-caused delay.

02

The clause should require a Contractor to give notice of Owner-caused delays, often within a specified time limit, which is then assessed and granted or declined by the relevant umpire (either the project owner, or a site engineer).

03

Also insert a clause which sets out the consequences when a Contractor fails to comply with notice provisions that are a condition precedent to the Contractor's extension of time claim.

04

Some agreements specify that liquidated damages are an exclusive remedy for delay, which may preclude an Owner from claiming general damages in the alternative where there has also been delay on owner's part.<sup>[1]</sup> This can be overcome by inserting a clause which allows the owner to claim damages at law if the liquidated damages regime fails.

## \*\*When drafting



DLD clause  
must be  
specific, clear  
and certain;

Triggering  
events for  
claiming DLD  
must be  
specified;

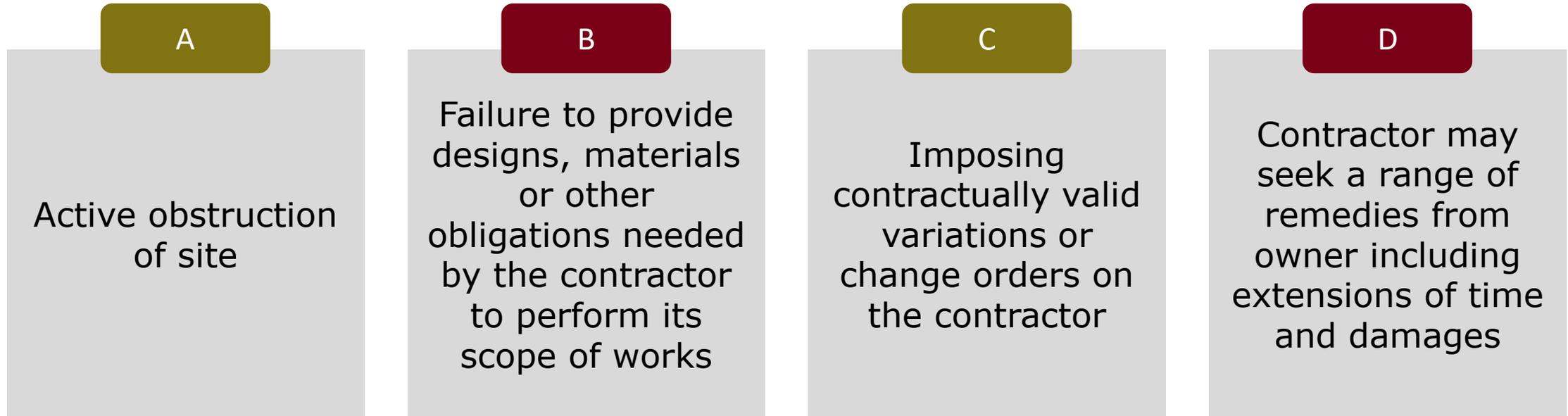
Time limits  
provided;

Caps  
specified;



# **DELAYS CAUSED BY OWNER**

# Owner's acts of prevention



# Remedies

## 1. Liquidated damages:

- Same as described above

## 2. Contractor claims for disruption:

- This is a Contractor's loss of productivity as a result of some form of disturbance by the owner
- Right to claim must be defined by the contract
- Contractor can claim damages only where they demonstrate connection between alleged disruptive event and the increased cost associated with their loss of productivity.
- Comparison between tender schedule and delivery mechanisms and the adapted schedule mechanisms as a result of the disruption.

## 3. Contractor claims for prolongation:

- Claim for costs associated with delay
- Overhead costs, opportunity costs and additional direct costs
- Determined by reference to tender schedule
- Express provisions setting out terms of recovery of prolongation costs

# Remedies

## 4. Suspension of works:

- Non-payment or failure by owner to show evidence of its financial arrangements
- Draft the clause with defined terms on consequences, such as costs to complete.

## 5. Termination of contract by contractor:

- Repudiation, anticipated repudiation, serious breach, frustration, illegality, or where contractually allowed.
- Consequences of termination must be clearly defined under the contract;
- Can recover damages, quantum meruit and debt action for any amounts payable.



# **NEUTRAL DELAYS**

## Neutral Delays



- Not caused by either owner or contractor
- Contractor may seek an extension of time based on Force Majeure

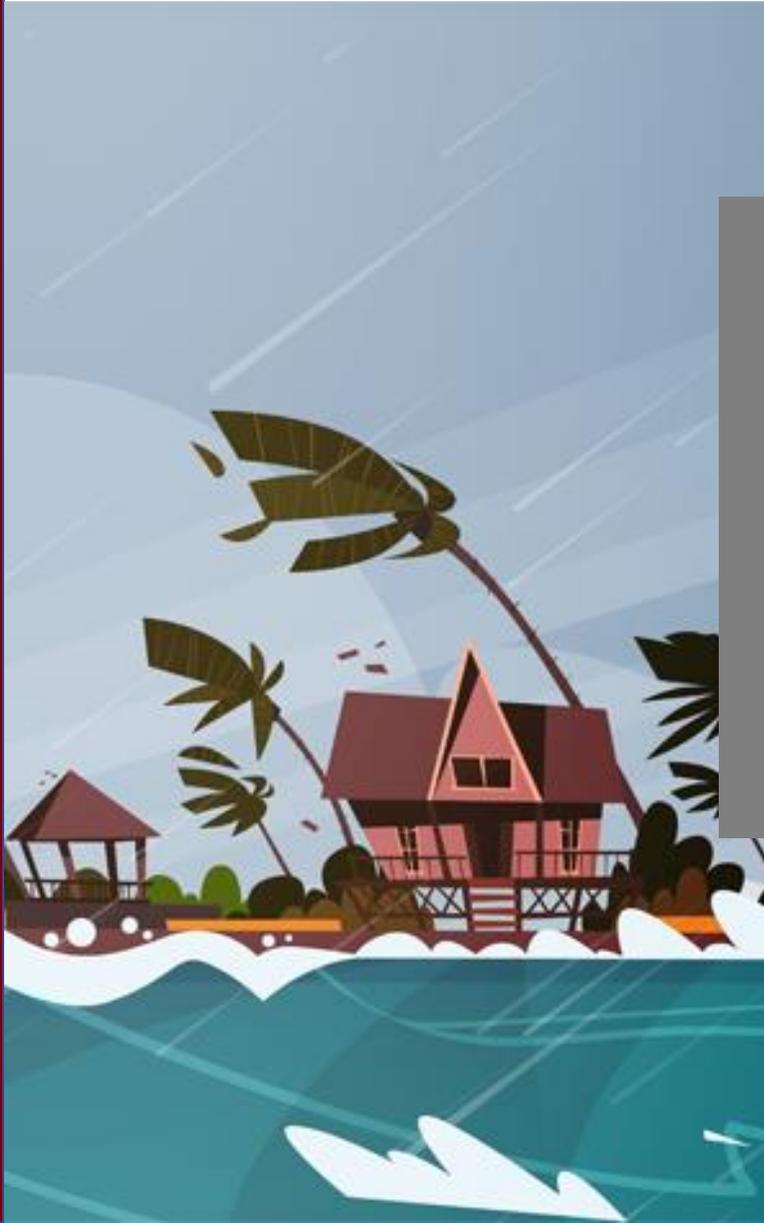
# Force Majeure

Can be allocated through a force majeure clause

Examples of force majeure events that may impact energy disputes:



### 3 Essential Elements Of Force Majeure



*01*

It can occur  
with or without  
human  
intervention

*02*

It cannot have  
reasonably  
been foreseen  
by the parties

*03*

It was  
completely  
beyond the  
parties' control  
and they could  
not have  
prevented its  
consequences.

## \*\*When drafting



Provide the definition of the force majeure event in the contract

It must be clear and best defined as being any of the events in an exhaustive list set out in the contract.

Include an operative clause that sets out the effect on the parties' rights and obligations if a force majeure event occurs.



# QUALITY-RELATED RISK

# What is Quality-Related Risk?

The risk of defects in the contractor's performance or in the ultimate facility under construction.

Risks related to quality fall under two categories:

1

The risk that performance does not comply with the express contractual stipulations for materials and workmanship

2

The risk that the ultimate facility is not fit for purpose.

# Why is Quality a Major Risk That Requires Management and Allocation at The Contract Stage?

Reduced output of the power station resulting in shortfall in production targets

Third-party liability on the part of owner to off-take partner or financier

If a national project, shortfalls in water or power supply may have repercussions for local industries and communities.

This risk is allocated and managed through a well-drafted performance guarantee regime.

# Performance Guarantee Regime

Important to properly draft the performance guarantee regime because the success or failure of the project depends, all other things being equal, on the performance of the power station.

Major elements of the performance regime are



# Performance Testing

Three of the most common performance tests are:

**Functional tests:** tests the functionality of certain parts of the power station, e.g. Pumps, conveyors, pressure vessels.

**Emissions tests:** tests the compliance against environmental requirements

**Guarantee tests:** tests the ability of the power station to meet the performance criteria specified in the contract.

The contract must include guidelines for testing and set out the complete testing procedures. As a minimum, it should set out the details of:

- Testing methodology
- Testing equipment
- Tolerances (what is the margin of error)
- Ambient conditions (atmospheric conditions)

## Performance Guarantees

- The owner's revenue will be earned by operating the power station
- The power station must therefore perform in terms of Output, Efficiency, and Reliability
- Contract must contain performance guarantee backed by performance liquidated damages payable by the contractor if it fails to meet the performance guarantee;
- Include a clause giving the contractor an opportunity to modify the power station if it does not meet the performance guarantees on first attempt. If there is retesting, the contract must deal with who bears the cost of additional fuel and consumables required to undertake the retesting.

## Performance specification

Details the performance criteria that the contractor must meet. However, it does not dictate how they must be met, which is left to the contractor to determine.

Should be drafted so that there is a delicate balance maintained: specification is detailed enough to ensure that the owner/project company knows what it is contracting to receive but not so detailed that if problems arise the contractor can argue that it is not their responsibility.

# Performance security

Provided to protect the project company if the contractor does not carry out its obligations.  
Security can be in a number of forms:

1

Bank guarantee for a percentage, normally between 5-15% of the contract price;

2

Retention i.e. withholding a percentage (usually 5-10%) of each payment. Provision is then made to replace retention monies with a bank guarantee sometimes referred to as a retention guarantee (bond);

3

Advance payment guarantee (if an advance payment is made)

4

A parent company guarantee, i.e. from the ultimate parent (or other suitably related entity) of the contractor which provides that it will perform the contractor's obligations if for some reason, the contractor does not perform.

## Performance Liquidated Damages (PLD)

- Genuine pre-estimate of the loss and damage that the project will suffer over the life of the project if the power station does not achieve the specified performance guarantees.
- The genuine pre-estimate is determined by reference to the time the contract was signed
- PLD usually a net present value (less expenses) calculation of the revenue forgone over the life of the project.

### Example:

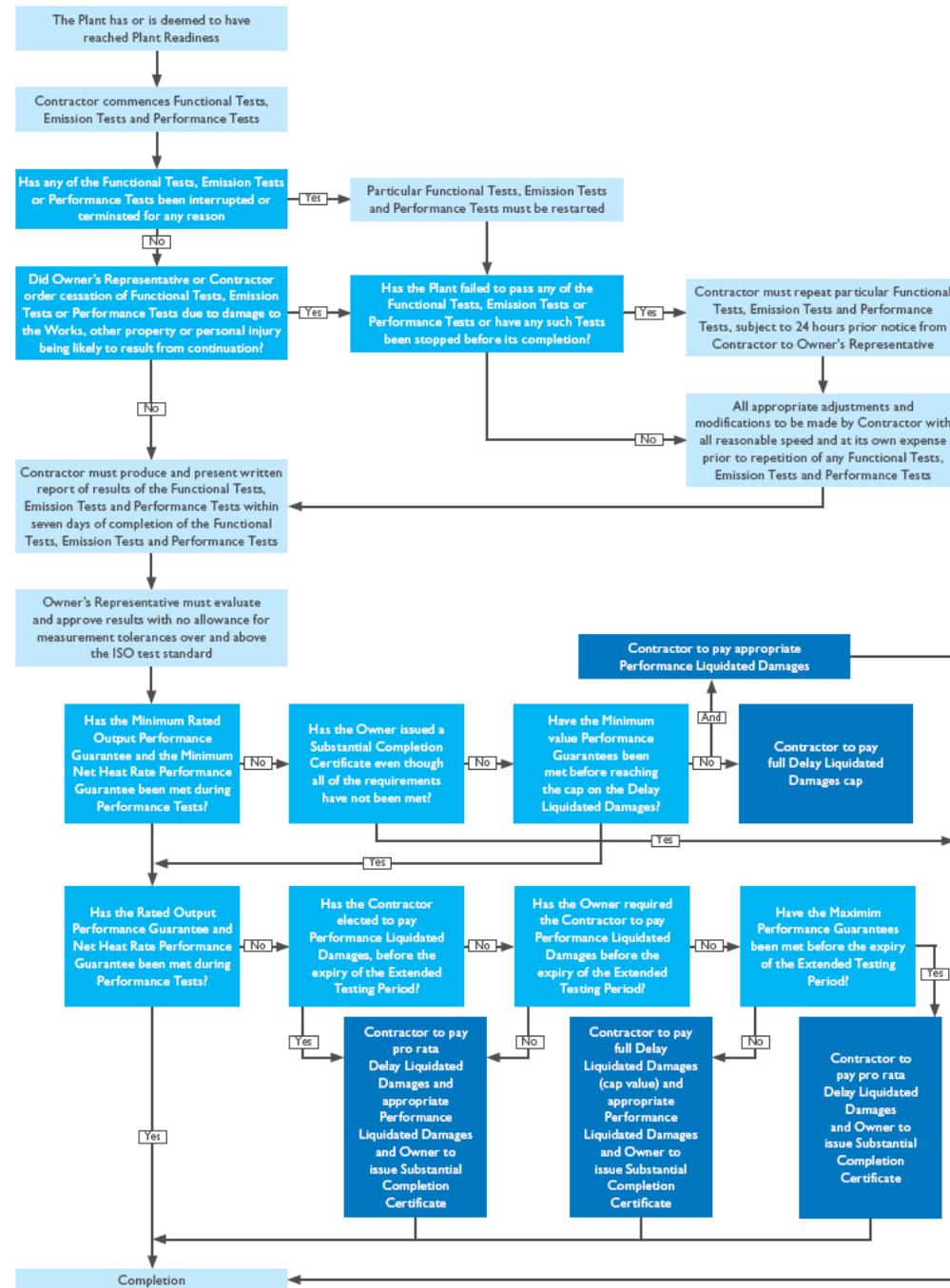
If the output of the plant is five MW less than the specification, the PLDS are designed to compensate the project company for the revenue forgone over the life of the project by being unable to sell that five MW.

Differentiate between different types of PDLS: two types:

- a. Output PLD (how many megawatts the power station produces) and
- b. Efficiency PLD (how much fuel the power station burns to generate the required output of electricity)



# **PERFORMANCE GUARANTEES AND TESTING**





# **COST-RELATED RISK**

## What is cost-related risk?

Cost risk relates to the need to complete work within budget. This is important because projects for the construction of energy facilities generally adopt a lump sum fixed price contract structure.

### **Why is cost a risk that requires management and allocation at the contract stage?**

Cost overruns will greatly affect the contractor's profit margins.

#### **Categories**

- Costs overruns caused by conduct of contractor
- Cost overruns caused by owner's acts of prevention, breach of contract or ordered variations.
- Cost overruns arising from neutral events (factors that were unforeseeable by the parties)

## General Damages

- To restore an aggrieved contractual party to the position they would have been in had the contract been properly performed.
- Direct losses: those rising naturally out of the breach
- Indirect losses: those losses as a result of the breach that are within the contemplation of the parties at the time of the contract's inception.

## Acceleration Damages

- Where contractor has incurred additional cost for expediting construction pursuant to owner's instruction.
- Determined by calculating the total costs of performing the work in the accelerated manner, less the costs of performing the work at the rate specified in the contract.

## **Contractor Claims For Latent Conditions**

- Neutral issues leading to cost overruns;
- Include unforeseen physical ground conditions that are common give the exotic location of such facilities;
- Allocation of risk under several standard forms will be based on an objective test of whether the condition was reasonably foreseeable by an experienced contractor.

## **Limitation and Exclusion of Liability**

- To protect a party from incurring excessive liability for delayed or defective performance;
- Exclusion of liability for indirect or consequential losses- be explicit in the contract in what type of loss is not recoverable, e.g. by listing loss of earnings as an excluded or limited loss.
- Indemnity clauses, e.g. to indemnify owner for claims by third-parties against owner arising out of the contractor's construction of the project.



# **POLITICAL, ECONOMIC AND SOCIAL RISK**

# What Is Political, Economic And Social Risk?



The potential impact of political, economic and social factors on parties to power projects. Political decisions made based on economic and social considerations can lead to legal changes that could potentially affect the power project.

## **Why is political, economic and social a risk that requires management and allocation at the contract stage?**

Major power projects span over many years and there is a substantial risk that adverse political, economic and social changes/ factors may create imbalance in a contract that, when negotiated, achieved a fair outcome for both sides.

- Changes to applicable laws (e.g. changes in subsidies or tax arrangements, local content requirements, local labour laws, tariffs and other terms of trade) can greatly affect the viability and profitability of the project.
- Contractor price risk arising from changes in the market for supplies needed in construction
- Owner price risk arising from changes in the market price of the energy commodity to be produced.

# Allocation Of Political, Economic And Social-Related Risk

- Risk is allocated so that a contractor will benefit from an increase in the contract price to account for additional costs resulting from changes in applicable laws.
- In return, the contractor will account for part of any windfall resulting from beneficial change in law.
- Both parties' interests are therefore protected and the uncertainty associated with change of law is hedged.
- Achieved in two ways: 1. General Provision of risk transfer 2. Risk-specific clause.

## General Provision of Risk Transfer

- Inserting a general provision protecting against an adverse change in applicable law.
- Specific and clear definition of "**applicable law**" so that there are no disputes as to whether it is a change of mere policy, a change in a private agreement between a party and a government agency, or a genuine change in the law.

## Risk-Specific Clause

- Specific provisions in the contract that protect against these risks, e.g. the risk of change in local content requirement may be specifically allocated in the contract
- Schedule of prices may be set out with provision made for adjustments in the contract price for movements in excess of a certain limit.
- Another approach will be to make a more general provision for economic rebalancing of the contract at a later date.

## Dispute Management in Africa Infrastructure Projects (DIMAP)

Effective notices – tips and traps

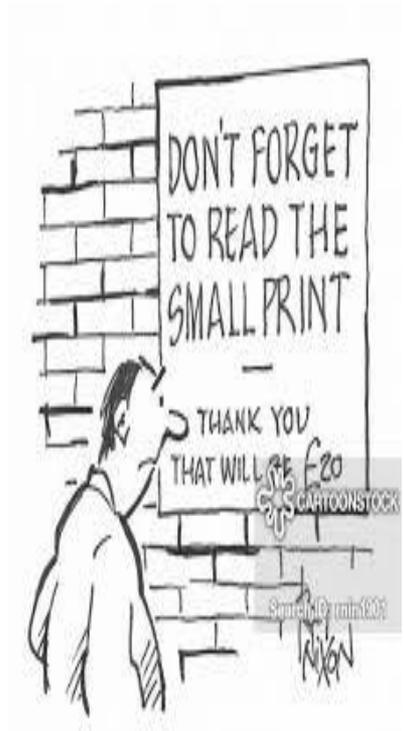
Nathan Searle

6 October 2020

# Importance of a valid notice

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- **Why do we write letters/notices?**
- **What are the key features of a good letter/notice?**
- **What are the implications of an invalid notice?**
- **What are the format requirements of a notice?**



# Key elements of a good letter/notice

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- Comply with notice provisions (who, where and how to send)
- Comply with remedy or response periods set out in contract
- If responding to a letter, say so (and if responding in part – say so)
- Refer to contract provisions where relevant
- Use defined terms from contract where relevant and say that you are doing so
- If it is a settlement offer – state that it is “without prejudice”
- Use headings and sub-headings to show where you are dealing with different points
- For a long letter/notice, consider using numbered paragraphs

# Key elements of a good letter/notice

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- Set out reasons for your position – a helpful formula is “*we consider that [XXX] including because [YYY]*”
- Where there are multiple rights or options – it is beneficial to set out all the options and any choice or priority in which they are being exercised
- Where setting out lists of reasons – consider expressing on a non-exhaustive basis (use words like “including” or “including without limitation”)
- Set a deadline for a response
- Include a summary of “actions required” at the end of the letter
- Include a statement reserving your rights
- Consider involving lawyers to review depending on risk/seriousness

# Issues to think about when receiving a letter/notice

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- Don't be afraid ask for more information from the sender
- Don't be afraid ask for more time to respond if the sender has set an unreasonable deadline (unless the response period is set out in the contract)
- Put in diary reminders: one reminder for a few days before the deadline (to have a draft and send to the legal department) and another for the deadline itself
- Consider what is the level risk/value of the issue
- Gather relevant information
- Consider how this issue is addressed under the contract
- Consider the commercial/technical implications
- If you are going to make a settlement offer state that it is a settlement, is “without prejudice” and that you reserve all your rights
- Based on risk/seriousness consider involving lawyers from an early stage

# Meeting minutes

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- **Why are meeting minutes important?**
- **What are the key features of a good set of meeting minutes?**

# Key elements of a good meeting minutes

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- Date, time and length
- Attendees
- Headings and sub-headings
- Note areas of agreement
- Note areas of disagreement
- Where decision-makers with authority are present note where they accept or reject points
- Consider creating an action list with task, deadlines and party responsible
- Circulate the meeting minutes by email to attendees and invite comments

## Practical considerations when drafting or negotiating a notice clause:

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- Consistency of notice clauses between different documents
- Should the notice clause cover communications other than formal notices?
- Should the notice clause cover service of court proceedings, arbitration or other forms of dispute resolution?
- Should notices be in writing?



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# Dispute Management in Africa Infrastructure Projects (DIMAP)

## Arbitration Agreements in Power Contracts

Dr. Ademola Bamgbose

6 October 2020

## Dr. Ademola Bamgbose

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Hogan Lovells, London

### Profile

- International arbitration lawyer and member of the global Africa practice at Hogan Lovells.
- Qualified to practise in Nigeria, England and Wales.
- 90% of my present practice is in Africa – Nigeria, Ghana, Tanzania, Angola, Cameroon, Uganda, Kenya, Zambia, Seychelles, Namibia etc.
- Honorary (international arbitration) lecturer at University of Ibadan, Nigeria and visiting lecturer at University of Reading, UK.
- Regional Representative (Africa) of the London Court of International Arbitration – Young International Arbitration Group.



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### Practices

International Arbitration and Construction & Engineering

# Overview of today's session



# Today's topics

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## The importance of a dispute resolution clause in a power contract

- Focus of this session will be on arbitration clauses:
  - Choice of seat
  - The law governing the arbitration agreement
  - Administering institution and institutional rules
  - Number and method of selection of arbitrator(s)
  - Language of the arbitration

# The Arbitration Agreement

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- A clause in a contract or a separate agreement
- Treated as separate from principal contract
- Even if the principal contract falls away, the arbitration agreement may remain valid and binding
- Defines scope and conduct of arbitration
- Should specify:
  - Seat/”legal place” of arbitration
  - Governing law of the arbitration agreement
  - Ad hoc/institutional. If institutional, should specify the particular institution.
  - Number and method of selection of arbitrators
  - Language

# 'Seat' of arbitration

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- The 'seat', or legal place, of the arbitration determines which state's law governs the arbitration process.
- The law of the 'seat' will affect various procedural aspects of the arbitration.
- Any challenge to the validity or effect of an award must be addressed to the designated competent court of the seat of the arbitration.
- The '**seat**' of an arbitration is distinct from the **venue** of an arbitration.
- The choice of 'seat' is therefore an important consideration, different from venue of hearings.

# Law governing the agreement to arbitrate

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- Parties should designate the law that will govern their arbitration agreement.
- If no such designation has been made and it becomes necessary to determine the law applicable to the agreement to arbitrate, some of the options open to a tribunal or court **include:**
  - The law governing the contract as a whole
  - The law of the seat of arbitration.
- See *Enka v Chubb (2020)*

# Ad hoc or Institutional arbitration

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- Whether the tribunal will be ad hoc or institutional is one of the most important decisions that has to be taken by parties.
  - Ad hoc arbitration – an arbitration where parties establish their own rules of procedural and without involving an arbitral institution. In practice, when parties opt for ad hoc arbitration, they would usually opt for rules such as the UNCITRAL arbitration rules, which contains a sensible and well thought out framework for parties to use.
  - Institutional arbitration – is one that is administered by a specialist arbitral institution under its own rules of arbitration. The rules usually undergo periodic revision and provide specialist staff to administer the arbitration.

# Ad hoc or Institutional arbitration

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- **Important considerations when choosing institutional rules:**
  - Modern rules of arbitration
  - Reasonable charges – ad valorem v time spent?
  - Specialised staff
  - Permanence

## Getting the right Tribunal

*"An arbitration is only as good as the arbitrator"*

# Strategic approaches to Tribunal selection

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- Selection criteria
- One or three?
- Cost implications
- Time considerations
- Leave it open

Choice of Language: an underestimated  
aspect of the Arbitration?

# Choice of the Language of the Proceedings

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- Promotes efficiency
- Provides certainty
- Cost effective

Any questions?





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