



## Employer's claims under FIDIC contracts

**Drd. Eugen Sârbu, attorney-at-law**

### Abstract

This Sub-Clause entitles the Employer to make formal claims against the Contractor. The Contractor has broadly to follow the same procedure adopted for claims by the Contractor against the Employer.

FIDIC doctrine presents this Sub-Clause as being introduced with the intent to protect the Contractor against abusive actions of the Employer, building a mechanism that implies the decision of a third party (the Engineer), who is supposed to be much more impartial than the Employer, even if it is his representative in the Contract and, one of the most important arguments is that confirms that the Employer no longer has a general right of set-off.



## 1. Procedure and Notice of the Employer's claim

The procedure set out in Sub-Clause 2.5 is less complex than the procedure set out in Clause 20.1.

FIDIC contracts are aimed at the early resolution of any queries at the time when the claim arises, with the likelihood that plant, manpower and witnesses are still on site<sup>1</sup>.

*„Furthermore, such notice sometimes gives the employer the opportunity to withdraw instructions when the financial consequences become apparent”<sup>2</sup>.*

The starting moment of the procedure is given by occurrence of an event or circumstance giving rise to a claim as a result of which the Employer considers himself entitled to any payment under or in connection with the Contract and/or (in all the Books apart from the Gold Book) to any extension of the Defects Notification Period. It then involves the following stages<sup>3</sup>:

- the Employer or Engineer (R/Y/S)/Employer's Representative (G) is required to give notice and particulars to the Contractor. The time within which notice must be given differs as between the Books;
- the contract administrator is then required to proceed in accordance with Sub-Clause 3.5 to agree or determine the Employer's claim.

The notice can be given in a short letter, which should set out the event or circumstance giving rise to the claim as a result of which the Employer considers himself entitled to payment and/or an extension of the Defects Notification Period.

Generally, the notice must comply with the requirements of Sub-Clause 1.3 and must be given in writing. It is not clear if the particulars are to be delivered at the same time with the notice. The clause does not impose this and there is no time limit or frame stated in the clause. So, the contract provides a lot of flexibility when it regulates the procedure of the Employer's claims<sup>4</sup>.

Once received by the Contractor, it should also be listed in the progress reports in accordance with Sub-Clause 4.21 (f).

The Employer must specify the basis of the claim, including reference to the relevant Clause if the claim is under the Contract, and are to include substantiation of the amount to which the Employer considers himself entitled. The time period set out in Sub-Clause 2.5 (20.2 (G)) relates specifically to the giving of the notice. There is, however, no express

---

<sup>1</sup> *Attorney General for the Falkland Islands v. Gordon Forbes Construction (Falklands) Limited*, Falkland Islands Supreme Court 14 March 2003; High Court of Trinidad and Tobago, judgment from 21 October 2009 (Claim No CV2008-04881) in *National Insurance Property Development Co Ltd v. NH International (Caribbean) Ltd*, apud. G.-S. Hök, *FIDIC Claim Management*, 2008, available online at: <https://www.dr-hoek.de/beitrag.asp?t=FIDIC-Claim-Management> [15.06.2016].

<sup>2</sup> *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No. 2)*, [2007] EWHC 447 (TCC), [2007] BLR 195, apud. N. Gould, *UK: Making A Claim Under The FIDIC Form Of Contract. What Is Clause 20 All About?*, 2007, available online at: <http://www.mondaq.com/x/54934/Building+Construction/Making+A+Claim+Under+The+FIDIC+Form+Of+Contract+What+Is+Clause+20+All+About> [15.06.2016].

<sup>3</sup> E. Baker, *op. cit.*, p. 354.

<sup>4</sup> J. Glover, *op. cit.*, p. 53.



time period for service of the particulars, nor any express requirement that the particulars must be given with the notice. Consequently, on a strict reading, there is no time period for service of the particulars. Indeed, the FIDIC Guide<sup>5</sup> states that “*Particulars may be given at any time*” and explains that it was considered unnecessary to impose time constraints on the giving of particulars” because it seemed unlikely that the Contractor would be disadvantaged by belated particulars”. The FIDIC Guide does, however, warn that “*excessive delay in their submission may be construed as an indication that the Employer will not be proceeding with the notified claim*”.

## **2. The period within the notice must be given. Juridical nature of this term**

The period within which notice must be given under Red and Yellow Books is „*as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim*”.

This requires the Employer to have actual knowledge of the event or circumstance before he must give notice, whereas the MDB and the Gold Book are stricter by including the objective standard of when the Employer “*should have become aware*”.

Moreover, no notice is required for payments due under Sub-Clauses 4.19 [Electricity, Water and Gas] or 4.20 [Employer's Equipment and Free-Issue Materials] or “*for other services requested by the Contractor*”<sup>6</sup>.

Relating to the extension of the defects Notification Period, any notice should be given before the expiry of that period. Also, Sub-clause 11.3 restricts the extension to no more than two years<sup>7</sup>.

No sanction is specified if the Employer fails to give notice to the Contractor within the required time.

This brings some scholars to the conclusion that Sub-Clause 2.5 provides a simpler claim mechanism with no time bar<sup>8</sup>.

There is no similar provision to sub-clause 20.1 which says that any claim to time or money will be lost if no notice is given within the specified time limit. As a consequence, it has generally been considered that a failure by the employer to bring a claim “as soon as practicable” would not be treated as a condition precedent. That said, any notice relating to the extension of the Defects Notification Period had of course to be made before the current end of that period<sup>9</sup>.

On the other hand, in our opinion, the Applicable Law might impose some kind of interpretation that will influence the juridical nature of the time limit stated in Sub-

---

<sup>5</sup> FIDIC Guide, p. 80.

<sup>6</sup> E. Baker, *op.cit.*, p. 354.

<sup>7</sup> J. Glover, *op. cit.*, p. 52.

<sup>8</sup> *Ibidem.*, p. 53; W. Godwin, *International construction contracts. A Handbook with commentary on the FIDIC design-build forms*, Wiley-Blackwell Publishing, Oxford, 2013, p. 38.

<sup>9</sup> J. Glover, *Employer claims under the FIDIC form*, 2015, available on line at: <http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/employer-claims-fidic-form> [4.05.2016].



## Clause 2.5.

For example, a lawyer in a dispute, on Romanian Law, will have some arguments to argue that this is a time bar condition.

As there is no sanction, this term cannot be a forfeiture term.

According to art. 2547 of the Romanian Civil Code: *„If from the law or from the parties' convention do not undoubtedly result that a term is a forfeiture one, then are to be applied the rules regulating the time bar (prescription)”*.

This term can not be a forfeiture one because it does not cause losing a right. Then, by applying art. 2547 of the Romanian civil Code, it means that this is a prescription (time bar) term.

A Romanian author stated that: *„However, if a term established by law or by the will of the parties to exercise the right of action (exercising a legal action) or in relation to it, and it was provided that failure do not attract forfeiture of the right, then we have to qualified it as a term of limitation”<sup>10</sup>*.

The Employer cannot successfully exercise an judicial action if he has not respected this contractual procedure. It results that this is a preliminary procedure and as long as it is *in relation to* a legal action, then this can be qualified as a time bar term.

In international contract law is developed the concept of special requirements as mean of limiting the liability. In our opinion, this formal requirement (to act as soon as practicable possible) has the scope of limiting the Contractor's liability and also to encourage the proactivity of the Employer<sup>11</sup>.

Limitations of time period can also be imposed by convention, not only by the law, and in our opinion, the Clause 2.5, interpreted in Romanian law paradigm can be seen as a time limitation clause.

Regarding the fact that the time is not precise, and it uses the expression *„as soon as practicable”*, in Romanian law are a lot of situations when time conditions are expressed in a flexible way, like *„reasonable term”*. For example, art. 1709 or art. 1718 C. civ. uses the term *„reasonable”* as a forfeiture term<sup>12</sup>.

This interpretation is sustained also by a recent decision of the UK Privy Council. The Privy Council agreed with the contractor, noting that it was hard to see how the words of clause 2.5 could be clearer. Lord Neuberger said that the purpose of sub-clause 2.5:

*“is to ensure that claims which an Employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given ‘as soon as practicable’. If the Employer could rely on claims which were first notified well after that, it is hard to see what*

---

<sup>10</sup> G. Boroi, C.A. Anghelescu, *Civil law. General part.*, Hamangiu Publishing House, Bucharest, 2012, p. 362.

<sup>11</sup> M. Fontaine, F. De Ly, *Drafting international contracts. An analysis of contract clauses*, Transnational, Publisher Inc., New York, 2006, p.367-368.

<sup>12</sup> M. Afrasinei, *Comentary of the new Civil Code*, Hamangiu Publishing House, Bucharest, 2012, Comentary of article 2.547



*the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served 'as soon as practicable.'*

Lord Neuberger continued:

*"Perhaps most crucially, it appears to the Board that although the closing part of clause 2.5 limits the right of an Employer in relation to raising a claim by way of set-off against the amount specified in a Payment Certificate, the final words are 'or to otherwise claim against the Contractor, in accordance with this sub-clause'. It is very hard to see a satisfactory answer to the contention that the natural effect of the closing part of clause of 2.5 is that, in order to be valid, any claim by an Employer must comply with the first two parts of the clause, and that this extends to, but, in the light of the word 'otherwise', is not limited to, set-offs and cross-claims"*<sup>13</sup>.

The Privy Council felt that the words "*any payment under any clause of these Conditions or otherwise in connection with the Contract*" were of very wide scope. Sub-clause 2.5 made it clear that if the employer wanted to raise such a claim, it must do so promptly and in a particularised form.

Finally, the Privy Council felt that the purpose of the final part of the clause was to emphasise that, where the employer has failed to raise a claim as required by the earlier part of the clause, the back door of set-off or cross-claims is: "*as firmly shut to it as the front door of an originating claim*"<sup>14</sup>.

The judgment of the Privy Council does suggest that employers too might be subject to a **time bar**, under the FIDIC form at least. Indeed, it might be that depending on the definition of "*as soon as practicable*" that time bar is potentially stricter than the 28-day time bar contractors are subject to<sup>15</sup>.

Further, it is a time bar in two parts. Not only must the employer make a claim "*as soon as practicable*", but the employer must also provide particulars or other substantiation; again, the absence of these could prove fatal to the right to assert a right of set-off. Obviously, employers (and those acting as employers' representatives) should take careful note of this decision, and ensure that any claims are promptly notified to the contractor<sup>16</sup>.

According to Romanian law<sup>17</sup> and in international law<sup>18</sup>, there is a general principle saying that a juridical norm has to be interpreted in a way that it produces juridical effects. So, we can not interpret this time condition as not producing effects, and in my opinion, the

---

<sup>13</sup> J. Glover, *Employer claims under the FIDIC form*, 2015, available on line at: <http://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/employer-claims-fidic-form> [4.05.2016].

<sup>14</sup> P. Van Rensburg, *Employers' claims under FIDIC contracts*, 2016, available online at: <http://www.hoganlovells.com/en/publications/employers-claims-under-fidic-contracts> [14.05.2016].

<sup>15</sup> *Ibidem*.

<sup>16</sup> *Ibidem*.

<sup>17</sup> G. Boroi, C.A. Angheliescu, *Drept civil. Partea generala*, Hamangiu, 2011, p. 47-48; O. Ungureanu, C. Munteanu, *Drept.Civil. Partea Generala*, Universul Juridic, Bucuresti, 2013, p. 85.

<sup>18</sup> S.J. Burton, *Elements of contract interpretation*, Oxford University Press, 2009, p. 69 and 170.



only situation when it can produce effects is by interpreting it as a time bar condition.

### 3. Right to set off, withhold and deduct

This Clause establishes a contractual security of payment regime. When a dispute over a payment obligation arises, the regime facilitates the contractor's cash flow by requiring the employer to pay now, but without disturbing the employer's entitlement (and indeed also the contractor's entitlement) to argue later about the underlying merits of that payment Obligation. This case law asserts the aphorism "*pay now, argue later*"<sup>19</sup>.

The final paragraph of Sub-Clause 2.5 regulates the Employer's contractual entitlement to deduct any amounts agreed or determined under Sub-Clause 3.5 as due to the Employer from Payment Certificates or payments to the Contractor and the Employer's right to set off under the Contract:

*"This amount may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate in accordance with this Sub-Clause".*

This text allows the Engineer to include a deduction in a Payment Certificate of a sum due to the Employer in accordance with Sub-Clause 2.5 from amounts otherwise due to the Contractor.

The provision uses the word „may“, that suggests that the Engineer has no obligation to set off or to deduct a Payment Certificate, this is just an option.

The last sentence of this text is of high importance and have given rise to various debates between the scholars.

It is different of the first sentence which gives the Engineer the right to deduce/set in a Payment Certificate.

This time, the hypothesis is that there has been issued a Payment Certificate and the Employer has a right to the setting-off against or deductions from an amount certified in a Payment Certificate.

In this issue, FIDIC Guide, in its commentary to Sub-Clause 2.5, states:

*"Under Sub-Clause 14.7, the Employer is required to pay the amount certified (namely, incorporating [the Engineer's] deduction), but is not entitled to make any further deduction. If the Employer considers himself to be entitled to any payment under or in connection with the Contract, he is thus required to follow the procedure prescribed in Sub-Clause 2.5, and is not entitled to withhold payment whilst awaiting the outcome of these procedures"*<sup>20</sup>.

So a Payment Certificate is mandatory, and the payment can not be withheld. Then, how the deduction from a certified amount will operate if the payment is mandatory and the Employer can not *withhold payment whilst awaiting the outcome of these procedures*?

---

<sup>19</sup> High Court Singapore (PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation (Indonesia) [2014] SGHC 146.

<sup>20</sup> FIDIC Guide, p. 80.



On the other hand, the same FIDIC Guide says: *“The Employer is... bound by the Certificate, and must make payment in full, irrespective of any entitlement to compensation arising from any claim which the Employer may have against the Contractor. If the Employer considers himself entitled to claim against the Contractor, notice and particulars must first be submitted under Sub-Clause 2.5. The Employer's entitlement is then to be agreed or determined, and incorporated as a deduction in a Payment Certificate”*<sup>21</sup>.

Apparently, there is a closed circle, you have the right to a deduction from a certified sum, but you are also bound to pay that sum.

The solution is found in a corroborated interpretation between the Sub-Clause 3.5 and 2.5. This means that after the Engineer received a Notice under Sub-Clause 2.5 regarding an amount already certificated, he will solve it in accordance with Sub-clause 3.5 and in accordance with the first sentence of the last paragraph of Sub-clause 2.5, the set-off/deduction will be made in the further Payment Certificates<sup>22</sup>.

This result also from the last paragraph of Sub-Clause 14.6: *„The Engineer may in any Payment Certificate make any correction or modification that should properly be made to any previous Payment Certificate.”*

It is also important to point out the provisions of Sub-Clause 14.3 f) according to which a deduction/compensation will be presented in the Statement for Interim Payments<sup>23</sup>.

Also, Sub-Clause 16.2 c) presents an exception according to which the Contractor will not be entitled to termination if Payment Certificate is not honored in due time and the amount that was not paid was deducted according to Sub-Clause 2.5<sup>24</sup>.

---

<sup>21</sup> FIDIC Guide, p. 245.

<sup>22</sup> J. Glover, *op.cit.*, p. 52; A-V. Jaeger, *FIDIC – A Guide for Practitioners*, Springer, Berlin, 2010, p.302.

<sup>23</sup> N. Bunni, *The FIDIC Forms of Contract. Third edition.*, Blackwell Publishing, Oxford, 2005, p. 522.

<sup>24</sup> *Ibidem*.