

FIDIC Middle East Contract Users' Conference

Dubai,
24-27 February 2020



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International Federation of Consulting Engineers
The Global Voice of Consulting Engineers





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Comparative Advantages of the FIDIC Forms of Contracts against other Standard Forms (NEC and ENAA)

The aim of this session is to offer delegates an in-depth understanding of key comparative features between FIDIC and other forms of contract such as ENAA, NEC, JCT et al. Our panel of experts will compare and contrast salient aspects of the different forms of contract and examine which types of projects these may be ideally suited to. Likely areas of coverage include:

Role and authority of the Engineer and its equivalent in other forms

Variations

SH ... Performance management, including incentives and liquidated damages provisions

Liabilities

Relief events and claim management

SH ... Dispute avoidance and resolution





Scope

- This examination is limited to:





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In the English 2010 case of *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd*, Mr Justice Edwards-Stuart had this to say about the NEC3:

“I have to confess that the task of construing the provisions in this form of contract is not made any easier by the widespread use of the present tense in its operative provisions. No doubt this approach to drafting has its adherents within the industry but, speaking for myself and from the point of view of a lawyer, it seems to me to represent a triumph of form over substance.”

In the 2003 case *A.G. Falkland Islands v. Gordon Forbes Construction (Falklands) Ltd (No2)* [2003] F.I.S.Ct. Juge Sanders found about FIDIC 1987

“The whole contractual system is aimed at the early resolution of any queries at the time the claim arises, and with the strong likelihood that plant, manpower, experts and witnesses are still on site. It is designed to avoid prolonged disputes”



I will come back to these observations at the end.





Macro Comparison



- 6 Main Options
- Core Clauses
- 25 Secondary Options
 - twenty-one are labelled 'X' Options,
 - three are labelled 'Y(UK)' Options,
 - one is labelled 'Z' Option
- Three (additional) W Options

- Table of Content
 - **General Conditions**
 - **2 Annexes**
 - **Guidance for the Preparation of Particular Conditions**
 - **Forms**
 - Letter of Tender
 - Letter of Acceptance
 - Contract Agreement
 - Dispute Avoidance/Adjudication Agreement

- Form of Agreement and General Conditions
- Form of Agreement
- General Conditions
- Part I Contract and Interpretation
- Part II Subject Matter of Contract
- Part III Payment
- Part IV Intellectual Property
- Part V Work Execution
- Part VI Guarantees and Liabilities
- Part VII Risk Distribution
- Part VIII Change in Contract Elements
- Guide Notes
- Chapter I. The General Concept of the ENAA Model Form
- Chapter II. Guide Notes for Agreement
- Chapter III. Guide Notes for General Conditions
- Chapter IV Application to the case where No Process License is required from Contractor





Macro Comparison



➤ General Philosophy

- Flexibility
- Clarity & Simplicity
 - However: no references, little amount of definitions, use of plain intelligible English
- Stimulus to good management
 - Does not necessarily involve an Engineer by profession
- Exercise of Financial Control
 - Too much emphasis on it without clear link to the design interface

➤ General Philosophy

- **Use of best practice procedures in daily matters**
- **Intercultural / international approach**
- **Fair risk allocation (in the circumstances)**
- **Clear allocation of responsibilities**

- Little self revelation information available
- In preparing these Model Forms, ENAA extensively referred to, and took into consideration, the comments, recommendations, advice and suggestions of various sources such as the World Bank, and other major financing institutions, potential customers and contractors, and other relevant organizations in the US and Europe.



Proposition

Whichever contract form will be used in the region must be fit for use with Civil Law

Experience

NEC4 has rarely been used in a Civil law context.

FIDIC has been used in various Civil Law countries

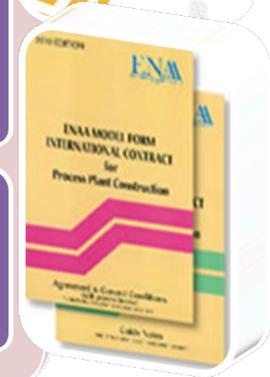
ENAA was used in a Civil Law context

Scope of Application

NEC4 has been designed by English predominantly for use in UK

FIDIC is designed for use in both Civil Law and Common Law countries.

ENAA is designed from the Japanese perspective with emphasis on engineering aspects



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Comparative Advantages of FIDIC Forms of Contract vs. ENAA vs. NEC 3

Content

- **The Engineer's Role and Authority under FIDIC.**
- **The Project Manager under ENAA and NEC 3 ECC.**
- **Variations under FIDIC.**
- **Changes under ENAA and NEC 3 ECC.**





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Question (1)

Which of these Standard Forms you are more familiar with and/or used before?

- 1) FIDIC
- 2) ENAA
- 3) NEC 3 or 4



Mahmoud Abu Hussein

Information Classification: General





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The Engineer's Role & Authority under FIDIC 2017 Edition (R&YBs) - 1/2

➤ The 2017 R&Y Books include elaborate, express provisions on the Engineer's:

❑ Prerequisites and Authority:

Except as otherwise stated in the Contract, the Engineer shall be:

- a third party, appointed by and acting for the Employer.
- a professional engineer, fluent in the ruling language.

And, the Engineer shall have:

- all the necessary authority to administer the Contract.
- **no authority** to amend the Contract or to relieve either Party.

❑ Neutrality between the Parties:

SC 3.2: Employer's consent not required before the Engineer exercises its authority under SC 3.7 [Agreement or Determination]. The Employer shall not impose further constraints on the Engineer's authority.

SC 3.7: When carrying out his/her duties under this Sub-Clause, the Engineer shall act '**neutrally**' between the Parties and **shall not be deemed to act for the Employer.**





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The Engineer's Role & Authority under FIDIC 2017 Edition (R&YBs) - 2/2

❑ Dispute avoidance Role:

- Expanded scope/authority under SC 3.7.
- Reinforced obligation to forge agreements.
- Filtering access to the DAAB.

➤ The 2017 Ed. also included **increased certainly to Contractors:**

SC 3.4: *The Engineer may delegate its duties and authorities **except under SC 3.7** [Agreement or Determination] **and SC15.1** [Notice to Correct].*

SC 3.6: *The Contractor can object to the replacement of the Engineer (**14 d < the Employer's Notice**).*

➤ The 2017 Guidance Notes backed-up the updated express provisions.

➤ Advantages:

- Increased balance, clarity and certainty.
- SC 3.7 provisions (acting 'neutrally' and making 'a fair determination').





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The PM under ENAA Plant EPCT Form of Contract (WB 2017 SBD)

❑ SC 17.1 (Project Manager):

- The Project Manager (PM) is appointed by the Employer and notified to the Contractor.
 - The Employer can replace the PM with a notice to Contractor. **Contractor has no right to object.**
 - The PM **shall represent and act for the Employer at all times**. All notices, instructions, orders, certificates, approvals **shall be given by the PM**, except as otherwise provided.
-
- ❑ The PM can be a third party consulting engineer or an Employer's staff (**Asian DB 2018 User's Guide**).
 - ❑ No express requirements to determine fairly (e.g. determines Contractor's additional cost due to Employer's breach of its obligations under Clause 10 (SC 10.8)).





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The PM under NEC 3 ECC Form of Contract

- ❑ The Employer appoints a Project Manager (PM) and a Supervisor to administer the Contract. **The PM focuses on the contract and risks management** matters and the Supervisor focuses on site activities and defects (issues Defect Certificates).
- ❑ The *Employer*, the *Contractor*, the *Project Manager* and the *Supervisor* shall act as stated in this contract and in a spirit of mutual trust and co-operation.” (SC 10.1) - **changed in NEC 4 (SC 10.1 & 10.2).**

This clause embodies NEC's ethos and is found across the Suite (ref. approval of subcontracts – SC 26).

- ❑ The PM and the Supervisor may delegate their actions after notifying the Contractor (SC 14.2).
- ❑ The Employer may replace the PM or the Supervisor after notifying the Contractor (SC 14.4). **Contractor has NO right to object, unlike FIDIC.**
- ❑ No express requirements for the PM to act or determine fairly (**but implied, when certifying/assessing?**).





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Variations under FIDIC 2017 Edition (R&YBs) – 1/2

❑ Right to Vary (SC 13.1):

- The Engineer may initiate Variations at any time < **issue of the TOC**. Contractor shall execute the Variation **unless it objects**.
- Omission of work to be carried out by the Employer or others can be agreed by the Parties. If so, loss of profit and other damages are permitted (ref. SC 13.3.1 (c)).

❑ Contractor's right to object to Variations/Instructions:

- Under SC 13.1 [*Right to Vary*]: by **prompt Notice**, for specific expanded grounds.
- Under SC 3.5 [*Engineer's Instructions*]: by **immediate Notice < commencing any work**, for specific grounds.

❑ Variation Procedure – (1/2) by Instruction:

SC 13.3.1: Variation instructions Notice issued => **Contractor proceeds** with Variation and submits particulars < **28 days** => Engineer proceeds **under SC 3.7** to agree/determine payment **and EOT**.





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Variations under FIDIC 2017 Edition (R&YBs) – 2/2

❑ Variation Procedure – (2/2) by RFP:

SC 13.3.2: RFP issued by Notice => Contractor submits a proposal **as soon as practicable**. If accepted, Variation instructed under SC 13.3.1. **If not accepted, Contractor can Claim Cost** under SC 20.2.

❑ Valuation:

Improved provisions for the Y&SBs using the Schedule of Rates and Prices (if any) or Cost Plus Profit. **The Engineer shall assess a provisional rate/price in IPCs** until valuation is agreed or determined.

❑ Advantages (to Contractors):

- Increased balance, clarity and certainty.
- EOT associated with Variations does not require resorting to the Claims process.
- Significantly, SC 3.7 applies (i.e. the Engineer acts 'neutrally' and makes 'a fair determination').





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Changes under ENAA Plant EPCT Form of Contract (WB 2017 SBD)

- ❑ **Subject to a limit of +/- 15% of the original Contract Price**, the **Employer can order any 'Changes'**. Change **has to be** a related work, technically practicable and timely suitable (SC 39.1.1). Contractor can object if the limit **is/will** be reached.
- ❑ **Clear, detailed Change procedures** covering Employer **proposed** Changes (SC 39.2) and Contractor proposed Value Engineering (SC 39.3). **No Change by instruction, unlike FIDIC.**
- ❑ **Employer Changes:** PM issues **Request for Change Proposal** => Contractor submits **Estimate** => Estimate accepted => Contractor submits **Change Proposal**. If Estimate not accepted, no Contractor compensation. If Change Proposal not accepted, Contractor compensated ≤ Estimate.
- ❑ **Valuation as far as practicable** is based on the rates/prices in the Contract (SC 39.2.4).
- ❑ **Change Order** issued **< 14 days** of agreeing (\$ & EOT) impacts of a Change Proposal (SC 39.2.6). If no agreement, Employer can issue a '**Pending Agreement Change Order**'. If no agreement in **60 days** => refer to DB (SC 39.2.7). **Changes are separated from the Claims process = FIDIC.**





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Changes under NEC 3 ECC Form of Contract

- ❑ **By Instructions:** Changes could be instructed by the PM (SC 14.3) due to a decision made during a risk reduction meeting (SC 16.4) or due to other reasons (e.g. SC 17.1 & 18.1).
- ❑ **By RFQ:** for a proposed instruction/changed decision (SC 61.2) BUT Contractor does not proceed until the quotation is accepted. No compensation for quotations (changed in NEC 4).
- ❑ Changes are treated as **Compensation Events** i.e. **Claims** under Cl 60. **This contrasts with FIDIC!**
- ❑ NEC advocates would say 'No variations and No claims under NEC', only CE; **BUT:**
- ❑ CE process comprises notifying, quotations, assessing (**incl. by PM**) and implementing. Assessing is **prospective** and uses cost/time **risk allowances** for matters having a **significant chance** of occurring and **assumes** that the Contractor **reacts competently and promptly** (SC 63.6 & 63.7).





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Comparative Advantages of FIDIC vs. ENAA vs. NEC 3 - Summary

Form of Contract	The Engineer/PM	Variations/Changes
FIDIC 2017 R&Y	A professional engineer w/ clear authority limits	Clear procedures by instruction or RFP
	Extensive role in dispute avoidance	Separated from Claims
	Acts neutrally and makes fair determinations	Valued retrospectively
ENAA EPCT	A third party <u>or an Employer's staff</u>	+/- 15% \$ limit and other tech limits
	No dispute avoidance role	Not by instruction (see SC 41.1)
	Acts for the Employer at all times	Separated from Claims (see Cl. 40&45)
NEC 3 ECC	A third party with extensive PM & RM skills	By instruction or RFQ
	No specific professional qualification	Handled as CEs (Claims)
	Acts in a spirit of mutual trust and co-operation	Valued prospectively <u>using assumptions</u>





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Conclusion

- **FIDIC Forms** continue to build on their global dominance and the 2017 Ed., while prescriptive, provides several advantages including, but definitely not limited to, clarity, balance and certainty. It is remarkable, but not surprising, how fast the MDBs signed license agreements with FIDIC to use the 2017 Forms and Model Agreements.
- **ENAA EPC Form** is a solid Form (suitable for multi-prime process/power plant projects) incorporating detailed 'Changes' procedure (and VE sharing mechanism) backed up by elaborate templates and guidance. However, such procedure could be lengthy if not planned in advance.
- **NEC is DIFFERENT** and hence cannot be easily compared in isolation of its main features of collaboration, prospective risk management and timely decision-making. It requires a different mindset, excessive training and resources from all parties/stakeholders. Whether it could compete with FIDIC and gain a sizable foothold in areas like the Middle East is to be time-tested.





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Comparative Advantages of FIDIC Forms of Contract vs. ENAA vs. NEC 3

Thank You!

Mahmoud A. Abu Hussein

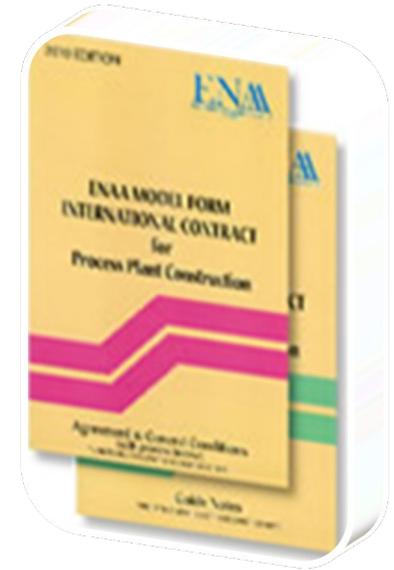
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Micro-Comparison



More or less same generation & procurement approach





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Performance management, including incentives & liquidated damages provisions

NEC



X7,
X17,
X18

FIDIC



S-C
13.2,
8.8

ENAA



Clause
26, 28,
39





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Incentives & Opportunities

NEC



Stimulus to good management –e.g. early warning & programme provisions

Incentivising scope improvements via whole life cost provisions (X21) and the cost incentives of Contractor's proposals provisions (cl 16)

PM required, when replying to a communication, to give reasons "with sufficient detail to enable the Contractor to correct the matter" (cl. 13)

Quality management system (new cl 40)

FIDIC



Stimulus to good management - e.g. advanced warning and programme provisions

Incentivising scope improvements via Value Engineering with due regard to sharing of benefits (S-C 13.2)

Requirement for the Engineer, when making determinations to give reasons "in detail with reasons and detailed supporting particulars (S-C 4.9 Quality management system & Compliance verification

ENAA



39.1.2 Value Engineering but no incentive approach





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Incentives & Opportunities

NEC



Identifying opportunities – Additional procedure for the identification of opportunities by client or contractor. Joint discussion & contractor can share in cost savings of opportunities that it introduces (programme efficiencies, for example).

FIDIC



13.2 Value engineering → contractor may be entitled to a share

ENAA



39.1.2 Value Engineering but no incentive approach





Performance Management (Delay)

NEC



Option X7

Liquidated damages are paid for delays in completing the works however Secondary Option Clause X7 needs to be selected

FIDIC



S-C 8.8

DD are paid until completion up-to the date of termination
Contract Data must be completed

ENAA



S-C 26.1

Completion Time Guarantee
LD until completion





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Performance Management (Performance)

NEC



Defects Correction Period

Option X17 places an obligation on the contractor to pay any **damages** specified in the contract in the event a relevant defect is included in the defects certificate

FIDIC



Clause 11

Defects after Taking-Over

Clause 12

Tests after Completion

S-C 1.1.63

Performance Damages

S-C 1.1.74

Schedule of Performance Guarantees

ENAA



Clause 27

Defect Liability Period

Clause 28

Functional Guarantee

Remedies:

Remedial work at costs of contractor, or

LDs





Micro-Comparison



More or less same generation & procurement approach





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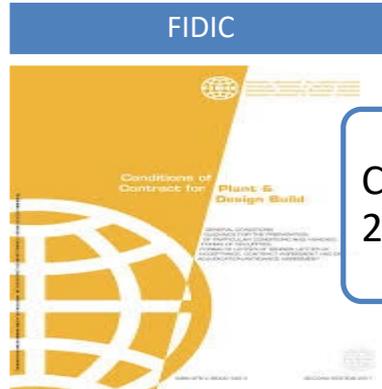
Disputes



Options
W1 &
W2, W3

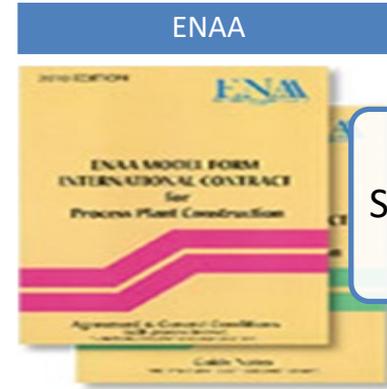
W1_Dispute Adjudication Board

W3_Dispute Avoidance Board



Clause
21

Dispute Avoidance &
Adjudication Board



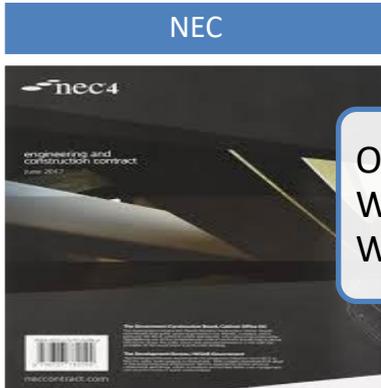
S-C 46

Dispute Board

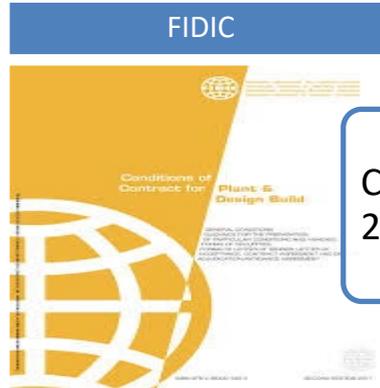




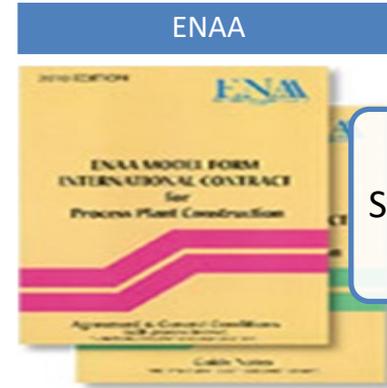
Dispute Avoidance



Options
W1 and
W2, W 3



Clause
21



S-C 46





Dispute Avoidance

NEC4

- NEC4
- Unique approach to claims (compensation events) – complex and difficult to administer
- PM is involved but required to consult with both Parties ...
- Subsequent either DAB or DRB (approach)

FIDIC

- (1) Consult with both Parties
- (2) If required to make a determination Engineer shall proceed to **consult with both Parties in the endeavour to reach a settlement agreement** (see S-C 3.7).
- (3) DAAB

ENAA

- **Agreement to Agree** in S-C 45.1 → PM has no authority to make a determination





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Dispute Avoidance

NEC



“10.1 The Parties, the Project Manager and the Supervisor shall act as stated in this contract.
10.2 The Parties, the Project Manager and the Supervisor shall act in a spirit of mutual trust and co-operation”.

FIDIC



Compliance required
No homologue regarding to act in spirit of mutual cooperation
But Civil Law requires to act in good faith

ENAA



Compliance required
No homologue regarding to act in spirit of mutual cooperation
But Civil Law requires to act in good faith





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Dispute Avoidance

NEC



Early warnings –proactive risk identification and mitigation

Up to date Programme used to manage the works and interfaces, identify issues & manage change

Compensation events –to compensate Contractor, based on Defined Cost plus Fee, entitlement to time and money.

FIDIC



Advanced Warning - proactive risk identification

Up-to date programme is used, backed up with monthly reports

Claims' Events to compensate contractor subject to evidence for Cost & EOT

ENAA



Risk Distribution

Up-to date programme is used
Claim's Events to compensate additional payment & EOT





Dispute Avoidance

NEC



W 1 Involvement of senior representatives before DAB makes a decision

W3 provides standing DAB for recommendations

FIDIC



Express Dispute Avoidance Sub-Clause 21.3

Informal Assistance

ENAA



Amicable Settlement requirement before arbitration





Dispute Avoidance

NEC4

- Option for a four-week period for escalation and negotiation of a potential dispute, which takes place prior to any formal proceedings. Nominated senior representative of each party (named in the Contract Data) shall meet and try to reach a negotiated solution

FIDIC

- (1) If required to make a determination Engineer shall proceed to **consult with both Parties in the endeavour to reach a settlement agreement** (see S-C 3.7).
- (2) DAAB

ENAA

- **Agreement to Agree** in S-C 45.1 → PM has no authority to make a determination





Dispute Resolution

NEC 2 Options

NEC



W3 = standing DAB
(no decision) →
potential dispute
→ DAB provides
recommendation

FIDIC



Claim & other
matter → Engineer's
determination →
NOD →
Dispute → DAAB →
NOD → Arbitration

ENAA



Disagreement →
Dispute Board →
Arbitration





Conclusions

- **General:** Lots of similarities in form & content, though obviously NEC has adopted a more flexible approach while ENAA & FIDIC provide for clear procurement alternatives and less options (less confusing)
- Dispute Avoidance & Dispute Resolution
 - FIDIC & NEC adopt more modern approach emphasizing dispute avoidance
 - FIDIC wording & approach more suitable for international purposes & holding of President's list
- Performance Management
 - FIDIC & NEC adopt more advanced approach
 - FIDIC integrates dispute avoidance in claims' procedure + subsequent Informal Assistance by DAAB (avoiding escalation early)





Conclusions

- NEC, FIDIC and ENAA standards reflect different traditions and probably also different cultural approaches
- FIDIC & ENAA use prescriptive wording, ENAA more descriptive (plain intelligible) English
- What can be good for the English or Japanese market may not always require to be adopted elsewhere or worldwide
- FIDIC & ENAA have a long tradition to reflect MDB needs which is less important for NEC (as it seems to me)
- FIDIC and ENAA are certainly written by Engineers for Engineers while the NEC style is influenced by the „plain and intelligible“ policy.





Conclusions

- What makes FIDIC Contracts **unique** is the combination of
 - Continuous input from more than 100 Member Associations & 1.5 Mio professional engineers
 - FIDIC forms have the widest geographical acceptance
 - because of their strong tradition, support of MDBs, well-known familiar principles and greatest flexibility of use international experience in both civil law and common law environments
 - Use of detailed best practice contract administration & management procedures in clear, comprehensive standard forms which do not need to be assembled
 - Use of detailed & prescriptive wording
 - Modern dispute and dispute avoidance management & holding of FIDIC President's List of approved Adjudicators (as support)





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Conclusions?

NEC



Triumph of form
over substance

FIDIC



Prescriptive
wording aimed
at the early
resolution of any
queries ...

ENAA



Prescriptive
wording with
less emphasis
on contract
management





Thank You

- I kindly thank you for your attention.
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