

FIDIC Middle East Contract Users' Conference

Dubai,
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Risk & Insurance Provisions in the New FIDIC Books

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Risk & Insurance Provisions in the New FIDIC Books

I. Clauses 17 to 19 of the New FIDIC Books

Clause 17: Care of the Works

Clause 18: Exceptional Events

Clause 19: Insurance





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Clause 17: Care of the Works

- 17.1 Responsibility for Care of the Works;
- 17.2 Liability for Care of the Works;
- 17.3 Intellectual and Industrial Property Rights;
- 17.4 Indemnities by the Contractor;
- 17.5 Indemnities by the Employer; &
- 17.6 Shared Indemnities.





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Clause 18: Exceptional Events

- 18.1 Exceptional Events;
- 18.2 Notice of an Exceptional Event;
- 18.3 Duty to Minimise Delay;
- 18.4 Consequences of an Exceptional Event;
- 18.5 Optional Termination; &
- 18.6 Release from Performance under the Law.





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Clause 19: Insurance

19.1 General Requirements;

19.2 Insurances to be provided by the Contractor;

19.2.1 The Works;

19.2.2 Goods;

19.2.3 Liability for breach of professional duty;





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Clause 19: Insurance

19.2.4 Injury to persons and damage to property;

19.2.5 Injury to employees; &

19.2.6 Other insurances required by Laws and by local practice.





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Risk & Insurance Provisions in the New FIDIC Books

Background to the topic of risk

- It is developed since World War II.
- The dictionary meaning is “***danger, harm, or loss***”; “***an undesirable outcome***”.
- British Standard No. 4778 of 1991 defines risk as
‘A combination of the probability, or frequency, of occurrence of a defined hazard and the magnitude of the consequences of the occurrence.’





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Background to the topic of risk

- British Standard No. 4778 of 1991 defines hazard as

‘A situation that could occur during the lifetime of a product, system or plant that has the potential for human injury, damage to property, damage to the environment, or economic loss’.

- These two definitions are confirmed in 2012.





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Background to the topic of risk

However, in Australia/New Zealand Risk Management Standard AS/NZ 3951: 1995, the term “*hazard*” was replaced by “event”, which was considered more appropriate and precise technical meaning of risk, as it includes positive as well as negative consequences.

Thus,





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Background to the topic of risk

RISK was defined as: 'A combination of the probability, or frequency, of occurrence of a defined event and the magnitude of the consequences of the occurrence of that event.'

But, this is changed in 2009.





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Risk & Insurance Provisions in the New FIDIC Books *AS/NZS/ISO 31000:2009 – Definition of Risk*

- Risk is the effect of Uncertainty on Objectives
- NOTE 1: An effect is a deviation from the expected – positive and/or negative.
- NOTE 2: Objectives can have different aspects (such as financial, health and safety, and environmental goals) and can apply at different levels (such as strategic, organization wide, project, product and processes).





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Risk & Insurance Provisions in the New FIDIC Books

AS/NZS/ISO 31000:2009 – Definition of Risk

- NOTE 3: Risk is often characterized by reference to potential events (2.17) and consequences (2.18), or a combination of these.
- NOTE 4: Risk is often expressed in terms of a combination of the consequences of an event (including changes in circumstances) and the associated likelihood (2.19) of occurrence.





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Risk & Insurance Provisions in the New FIDIC Books *AS/NZS/ISO 31000:2009 – Definition of Risk*

- NOTE 5: Uncertainty is the state, even partial, of deficiency of information related to, understanding or knowledge of an event, its consequences, or likelihood.





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Risk & Insurance Provisions in the New FIDIC Books *AS/NZS/ISO 31000:2009 – Definition of Risk*

Risk is the effect, positive and/or negative, of the state, even partial, of deficiency of information related to, understanding or knowledge of a potential event, its consequences, or a combination, or likelihood on objectives.





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Risk & Insurance Provisions in the New FIDIC Books *AS/NZS/ISO 31000:2009 – Definition of Risk*

Objectives can have different aspects (such as financial, health and safety, and environmental goals) and can apply at different levels (such as strategic, organization wide, project, product and processes). Consequences of a potential event include changes in circumstances and the associated likelihood of occurrence, which can escalate through knock-on effect.





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The distinction between Employer's Risks and Contractor's Risks





Risk & Insurance Provisions in the New FIDIC Books

- The effect of this change on Clause 17 is considerable in that it is so elaborate that it does not need any classification within Clause 17, but instead risks are related directly to identification within the various provisions of the Contract.
- Furthermore, the provisions of the Contract should be explicit enough to specify clearly to whom the risks are allocated.



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The Minor Requisite Differences in the Wording between the Three Major Forms

- There are some minor requisite differences in the wording of the Three Major Forms.
- Some examples include:
 - SC 17.2 (c) & SC 17.3 (a): The Yellow Book refers to the “Employer’s Requirements” whereas the Red Book refers to “Specification and Drawings”. The Silver Book refers to the Employer’s Requirements in SC 17.3 (a);





The Minor Requisite Differences in the Wording between the Three Major Forms

- SC 17.4: The last paragraph of the Red Book has the following added text at the beginning of the last paragraph: “To the extent, if any, that the Contractor is responsible for the design of part of the Permanent Works under Sub-Clause 4.1 [*Contractor’s General Obligations*], and/or any other design under the Contract, ...”. However, neither the Silver Book nor the Yellow Book contain this text;



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The Minor Requisite Differences in the Wording between the Three Major Forms

- The last paragraph in SC 17.6 is slightly different in the Yellow and Red Books. The Silver Book reads the same as the Yellow Book; &
- The penultimate paragraph of SC 18.5: The Red Book refers to the “Contractor’s particulars” whereas the Yellow Book only refers to “particulars”. Similarly in this paragraph, the Silver Book refers to the “Employer” and the “Employer’s Representative”, whereas the Yellow and Red Books refer to the “Engineer”.





The Flow from Risk to Insurance

Risks are spread throughout the whole of the Contract

- Duties of the Contracting Parties



- Risks in Performance



- Responsibility towards others & self



- Liability (amount, period & scope)



- Indemnity



- Insurance



Allocation of Risks in Clauses 17 to 19

- Further, and subject to the Applicable Law, a risk will always remain with an employer unless there is an express term within the contract provisions that allows that risk to be transferred or reallocated to either another party to the contract, others involved in the contract or indeed to 3rd parties.
- The flow from liability to insurance occurs when risks eventuate that might lead to liabilities in excess of what the parties can comfortably afford or sustain.



The Allocation of Risks that are not mentioned

- If the Risks are not allocated, then the four Maxims used by a Judge or an Arbitrator, either individually or in combination, consciously or unconsciously, are:
 - Which Party can best control the risk and/or its associated consequences?
 - Which Party can best foresee the risk?
 - Which Party can bear that risk? and
 - Which Party ultimately most benefits or suffers when the risk eventuates?



Risk Allocation and Insurance

- Perhaps the changes concerning the risk and insurance provisions in the New FIDIC Books were most intense & complex, as they not only addressed the new developments relating to the concept of Risk, but they also corrected some of the short-comings of the 1992 & 1999 documents, for example:
- How to identify the risks allocated to the Employer and the Contractor, rather than just the Employer as in the 1992 & the 1999 books, where they only referred to the Employer's Risks?



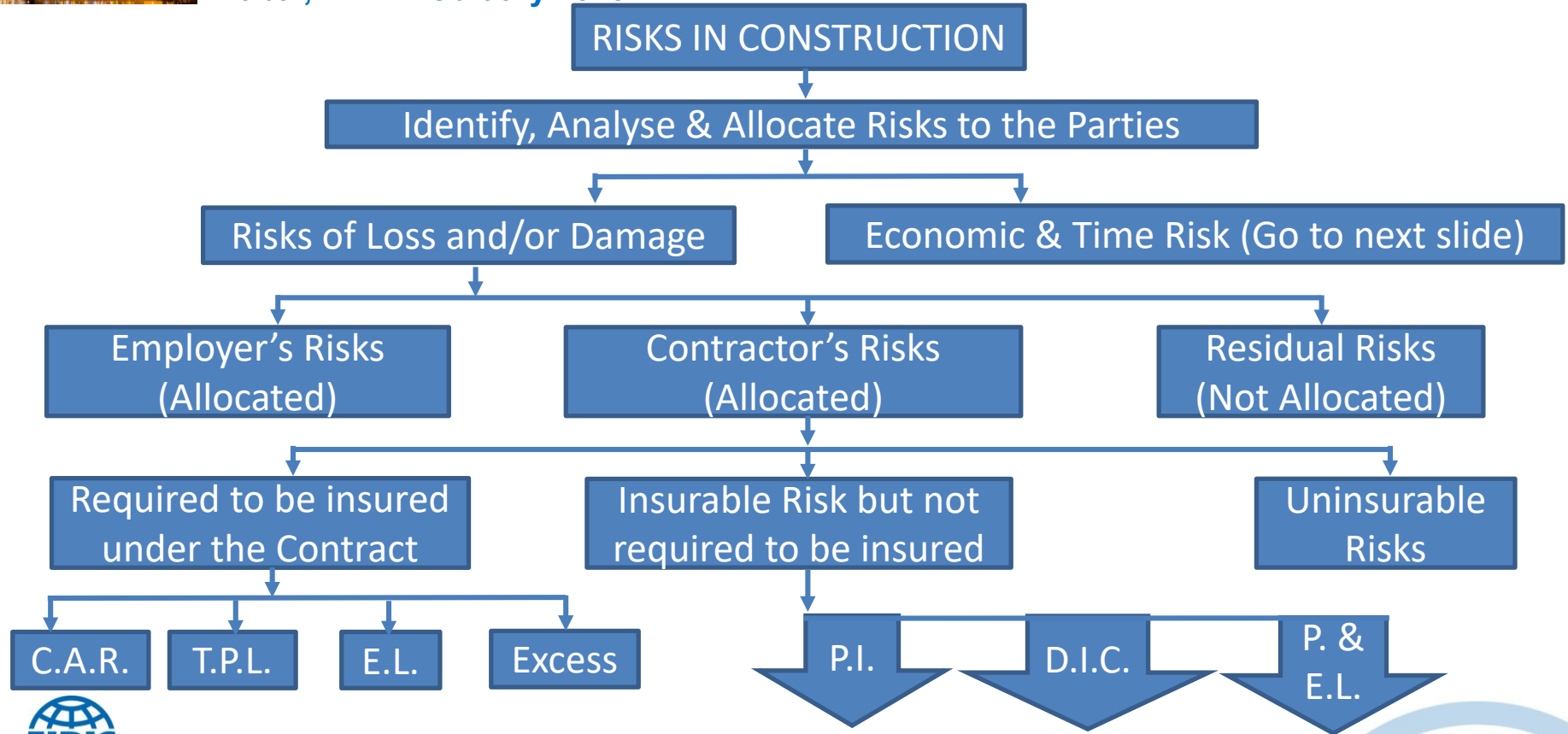
Risk Allocation and Insurance

- Why it is necessary to differentiate between Care of the Risks and the Risks themselves?
- What is generally insurable and what is not?



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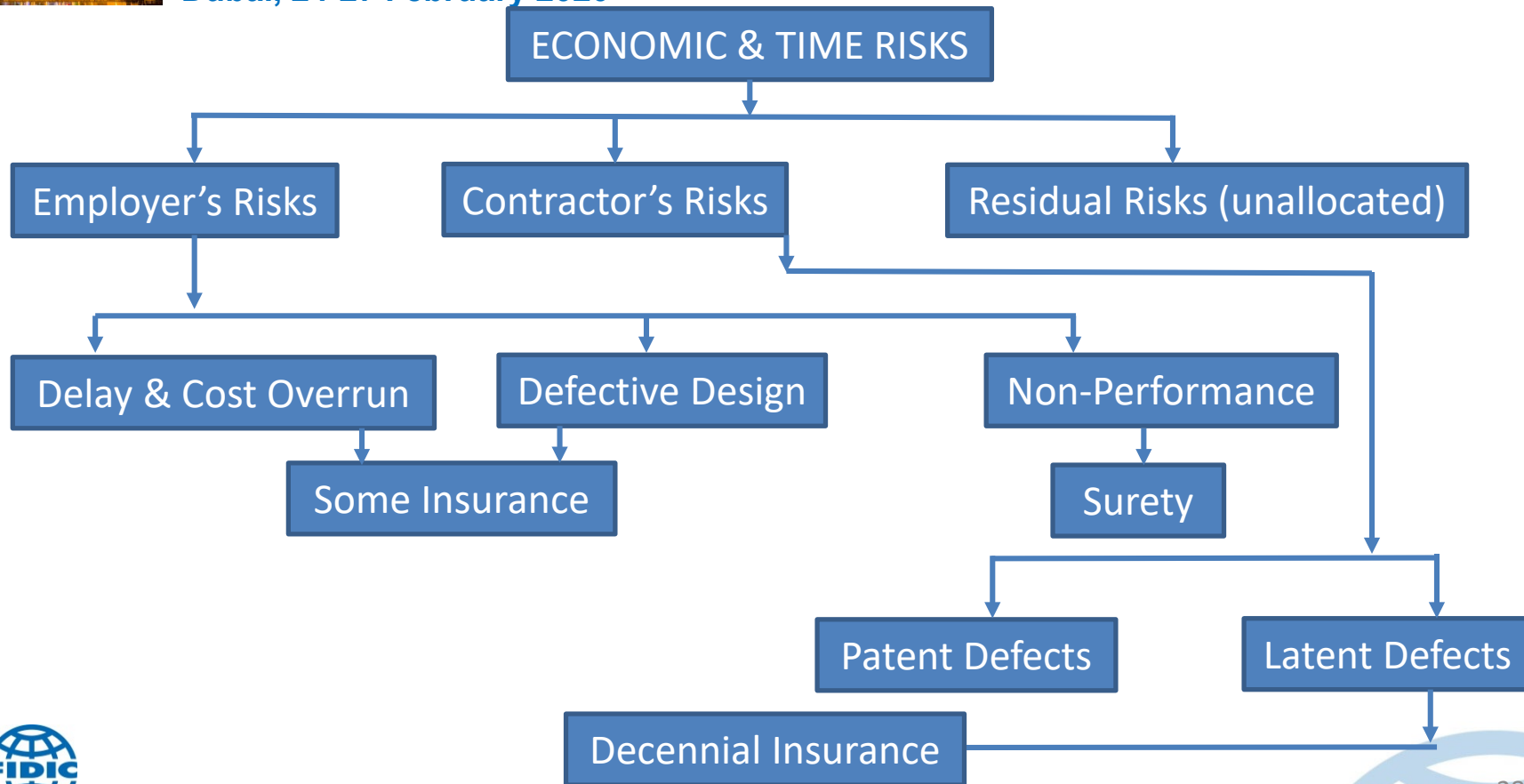
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Clauses 17 to 19 in the New FIDIC Books

- Completely revised and re-structured;
- Drafted using sound foundations, logical reasoning & flow;
- Based on identification & allocation of Risks within the provisions of the Contract & not in Clause 17;
- Residual Risks are to be allocated in accordance with four criteria;
- Substitute the term Force Majeure by the more logical term “***Exceptional Events***”.



Responsibility & Liability to Rectify Loss or Damage

- SC 17.1 – the responsibility for rectifying loss or damage during the execution of the Works is set out in the last paragraph of this Sub-Clause.
- SC 17.2, first paragraph – two possibilities for the liability of the Contractor thereafter:
 1. Loss or damage after the Taking-Over Certificate.
 2. Loss or damage which arose from an event that occurred before the Taking-Over Certificate, for which the Contractor was liable.



Exceptions from Liability of the Contractor

- The second paragraph of Sub-Clause 17.2.
- Some examples include:
 - Interference with any right of way;
 - Use or occupation by the Employer of any part of the Permanent Works, unless specified in the Contract; &
 - Any act or default of the Employer's Personnel or the Employer's other contractors.



Date of Completion -v- Date of Taking-Over Certificate

Date on which responsibility for care of the Works passes from the Contractor to the Employer, under Sub-Clause 17.1, should be the Date of Issue of the Taking-Over-Certificate as in Sub-Clause 17.2 and not the Date of Completion, since the latter varies under Clause 10.



Exceptional Events & Consequences

- 'Exceptional Event' means an event or circumstance which:
 - (i) is beyond a Party's control;
 - (ii) the Party could not reasonably have provided against before entering into the Contract;
 - (iii) having arisen, such Party could not reasonably have avoided or overcome; and
 - (iv) is not substantially attributable to the other Party.



Exceptional Events & Consequences

- An Exceptional Event may comprise but is not limited to any of the following events or circumstances provided that conditions (i) to (iv) in the previous slide are satisfied:
 - (a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies;
 - (b) rebellion, terrorism, revolution, insurrection, military or usurped power or civil war;
 - (c) riot commotion or disorder by persons other than the Contractor's Personnel and other employees of the Contractor and Subcontractors.



Exceptional Events & Consequences

- (d) strike or lockout not solely involving the Contractor's Personnel and other employees of the Contractor and Subcontractors;
- (e) encountering munitions of war, explosive materials, ionising radiation or contamination by radio-activity, except as may be attributable to the Contractor's use of such munitions, explosives, radiation or radio-activity; or



Exceptional Events & Consequences

(f) natural catastrophes such as earthquakes, tsunami, volcanic activity, hurricane or typhoon.

Reference to (f) should be noted in SC 17.2 (e) and is to be distinguished from SC 17.2(d).



The Insurance Requirements – Clause 19

19.1 General Requirements

19.2 Insurances to be provided by the Contractor

- The Works
- Goods
- Liability for breach of professional duty
- Injury to persons and damage to property
- Injury to Employees
- Other insurances required by Laws and by local practice.



Liability for breach of professional duty

To the extent that the Contractor is responsible for design:

- (a) Professional indemnity insurance arising out of any act, error or omission
- (b) If stated in the Contract Data, professional indemnity insurance arising out of any act, error or omission that results in the Works, when completed, not being fit for the purpose(s) for which they are intended under Sub-Clause 4.1.



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Thank you for listening.

