

COMPARISON OF FIDIC CONDITIONS OF CONTRACT (1999) AND UNCITRAL LEGAL  
GUIDE FROM PROSPECTIVE DISPUTES AND CLAIMS PERSPECTIVE

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# **ABSTRACT**

## **COMPARISON OF FIDIC CONDITIONS OF CONTRACT (1999) AND UNCITRAL LEGAL GUIDE FROM PROSPECTIVE DISPUTES AND CLAIMS PERSPECTIVE**

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In today's world where no borders exist and there is a need for a common language, which may be a common law or a basis contract while performing works, that will enable a common ground for different legal traditions, different legal systems, different laws; there lies internationally recognized standard contracts.

These contracts are not limited to documents published by International Federation of Consulting Engineers (FIDIC), Institution of Civil Engineers in the United Kingdom (ICE), The Engineers Joint Contract Documents Committee (EJCDC) or United Nations Commission on International Trade Law (UNCITRAL).

It is the contract; where work is detailed, responsibilities are assigned, the consequences of not fulfilling those responsibilities are defined, the procedure through which the execution of responsibilities to be enforced are construed, the procedure for dispute settlement is specified; the monetary issues find its place. Therefore, contract is the key

document parties should work on carefully before agreeing on. It is also the key document on which, at the first instance, the parties would always refer to during the execution of the works, as well during the guarantee period.

Contract, being the essential factor in execution of Works, should be drafted and followed with care.

Among the standard contracts, one of the documents produced by FIDIC aims to set a common ground for construction contracts where design is done by the Employer. This was mainly known as “Red Book”, which is updated as Conditions Of Contract For Construction For Building And Engineering Works Designed By The Employer, First Edition 1999. From now on, it will be shortly referred as FIDIC Conditions of Contract. It is as well known as one of the most common international document by many Contractors working in Europe or Contractor working for Europe based Employers or with Europe based Consultants.

On the other hand, the Working Group on the New International Economic Order of UNCITRAL, which is composed of 36 members of UNCITRAL, bearing in mind the extensive development in international trade, has worked on principles to guide the contracting parties for construction of industrial works. The outcome, UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, is published in 1988. The document will be shortly referred as UNCITRAL Guide throughout the thesis.

Although latter is aimed for construction of industrial works specifically, studying it by inductive reasoning, the aim is to analyze FIDIC Conditions of Contract under the guidance of UNCITRAL Guide.

The comparative analysis does not cover each and every area pointed out in UNCITRAL Guide, but focuses on the issues which in common, lead to a claim. In the context of the comparison reference to some local practices is drawn highlighting the importance of selection of law for the execution of the contract.

**Keywords:** International Contracts, Claims, FIDIC, UNCITRAL, Law.

# ÖZ

FIDIC SÖZLEŞMESİ (BİRİNCİ BASIM 1999) İLE UNCITRAL HUKUK KILAVUZUNUN  
OLASI UYUŞMAZLIKLAR VE HAK TALEPLERİ AÇISINDAN KARŞILAŞTIRILMASI

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Sınırların olmadığı, işin ifasında farklı hukuk geleneklerini, farklı hukuk sistemlerini, farklı mevzuatları ortak bir noktada buluşturacak, ortak bir dile, diğer bir deyişle ortak bir hukuka veya temel bir sözleşmeye ihtiyaç duyulan günümüz dünyasında, uluslararası geçerliği olan tip sözleşmeler bulunmaktadır.

Söz konusu dokümanlar FIDIC (Uluslararası Müşavir Mühendisler Birliği), ICE (İngiltere İnşaat Mühendisleri Enstitüsü), EJCDC (Birleşik Mühendisler Sözleşme Dokümanları Komitesi) ve UNCITRAL (Birleşmiş Milletler Uluslararası Ticaret Hukuku Komisyonu) tarafından oluşturulanlarla sınırlı değildir.

İşin detaylandırıldığı, tarafların karşılıklı sorumluluklarının tanımlandığı, sorumlulukların yerine getirilmemesinin sonuçlarını içeren, sorumlulukların ifasının temini için cebri yolların yer aldığı, anlaşmazlıkların çözümü ve parasal konuların tanımlandığı doküman olan sözleşme, bu anlamda, tarafların üzerinde anlaşmadan önce üzerinde özenle

alıřmaları gereken, iřin ifası sırasında ve sonrasındaki garanti srecinde ncelikle bařvurmaları icap eden ana kaynaktır.

İřin ifasında temel faktr olan szleşme, bu ynyle, dikkatle oluřturulmalı ve izlenmelidir.

FIDIC tarafından yayımlanan dkmanlardan biri, tasarımı iřveren tarafından yapılan inřaat iřleri szleşmeleri iin ortak zemin oluřturmayı amalar. “Kırmızı Kitap” olarak bilinen sz konusu dkman, Tasarımı İřveren Tarafından Gerekleřtirilen Yapım ve Mhendislik İřleri Szleşmesi řartnamesi, Birinci Basım 1999 olarak gncellenmiřtir. Kısaca FIDIC řartnamesi olarak anılan olan řartname, Avrupa’da veya Avrupa bazlı iřverenler iin veya Avrupa bazlı mřavir firmalarla iř yapan Trk mteahhitleri tarafından en iyi bilinen szleşmelerdendir.

Diğerk taraftan, UNCITRAL’in 36 yeli Uluslararası Yeni Ekonomik Dzen alıřma Grubu, uluslararası ticaretteki geliřmeleri dikkate alarak, endstriyel yapıların inřaatına iliřkin, taraflara ıřık tutabilecek szleşme prensipleri zerinde alıřmıřtır. Tez ierisinde kısaca UNCITRAL Rehberi olarak anılan alıřmanın sonucu, Endstriyel Tesis inřaatı Uluslararası Mukavelelerinin Dzenlenmesi hakkında UNCITRAL Hukuk Rehberi bařlığıyla 1988 yılında yayınlanmıřtır.

UNCITRAL Rehberi, endstriyel yapıların inřaatı iin kaleme alınmıř olsa da, tmevarım prensibinden yararlanılarak FIDIC řartnamesi’nin incelenmesinde referans alınmıřtır.

Karřılařtırmalı analiz, UNCITRAL Rehberi’nin tm bařlıklarını kapsamamakta, daha sıklıkla uyuřmazlığık neden olduėu bilinen konuları ele almaktadır. Karřılařtırma kapsamında yerel uygulamalara da deėinilmekte, bu minvalde hukuk seiminin szleşmenin uygulanması aısından nemine deėinilmektedir.

**Anahtar Szckler:** Uluslararası Szleşmeler, Hak Talepleri, FIDIC, UNCITRAL, Hukuk.

Babişime,



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Two majors, namely civil engineering and degree of law; which I studied were due to some people other than me. First, it was my father who desired me to study civil engineering, and then the idea of law presented by Bülent Erdoğan was also highly appreciated with my mother and father. My name-mother Pelin Korkmaz, and her husband Abidin Korkmaz, whose role in my life cannot be argued, coming into the scene as usual, made it impossible for me not to study law.

Being used to beloved ones orienting, surprisingly this graduate study in civil engineering, is the first time in my life, unfortunately at the age of 28, that I have made a choice on my own.

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## LIST OF ABBREVIATIONS

AALCC	Asian-African Legal Consultative Committee
ACE	Association of Consulting Engineers in the United Kingdom
AIA	Amerian Institute of Architects
BGB	Bürgerliches Gesetzbuch (German Civil Law)
CECC	Civil Engineering Contracts Committee
CICA	Confederation of International Contractors' Associations
EIC	European International Contractors
EJCDC	The Engineers Joint Contract Documents Committee
FAR	Federal Acquisition Regulation (United States of America)
FIDIC	Federation Internationale Des Ingenieurs Conseils (International Federation of Consulting Engineers)
FIEC	Federation Internationale du Batiment et des Travaux Public (now known as the International European Construction Federation)
ICC	International Chamber of Commerce
ICE	Institution of Civil Engineers in the United Kingdom
INCOTERMS	International Rules for the Interpretation of Trade Terms
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Guide	UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works
US Army COE	United States Army Corps of Engineers
MTK	Milletlerarası Tahkim Kanunu (International Arbitration Law, Turkey), Law No: 4686
MÖHUK	Milletlerarası Özel Hukuk ve Usul Hukuku Kanunu (Law on Private International Law and International Civil Procedure, Turkey), Law No: 5718

# CHAPTER 1

## INTRODUCTION

### 1.1. GENERAL REMARKS

In today's world, there exist no borders. It is such that, a contractor of "origin X" may perform a work for a client of "origin Y" in a "country Z", where they may agree such that in case of a conflict an international body or courts of "origin Q" will be involved, where laws of "country W" would govern. When there is also a second contract between the client and the engineer / consultant the case becomes more complex. As well, the designer would have intellectual property rights, when there occurs variation in design during construction. In respect to multi-body contractors, such as a joint venture or a consortium, or inevitably more common, the subcontractors of different origins, each party would like to prevent a dispute.

Where parties subject to different legal systems come into a pot, even if arbitration is perceived to be economical and faster compared to bringing a case before a court, it should be noted that, it is only relatively economical and faster. On the other hand, taking into consideration the execution of the arbitration decision in a country's legal system, which is again to deal with foreign objects, arbitration may turn out to be a non-solution.

Therefore the key point is, to avoid disputes; which unfortunately is merely impossible in the construction industry. So it is the contract to have a role in minimizing the disputes. In fact, a contract is the basic document where all responsibilities, duties and solution methods to problems, claims, changes, variations, extensions, and disputes are covered.

Even the case is such; parties usually do not pay adequate attention to the contract. The reason for the client being often to think, it is he who drafted the contract, therefore nothing negative can happen. On the other hand, the reason for the contractor not paying enough attention to contract drafting, often being economic reasons, being in need of a new project to work on, and the risk of losing the bid if he is to complain about the contract.

However it is not always bargaining on the contract, it is merely knowing the rights, what can the contract bring, what can be the consequences, what is the possible outcome in case of a change, what is the process for a time extension and etc. This would then enable the contractor to evaluate his risks and price accordingly. On the other hand, if change procedure is not so easy, claims are not welcome by the contract, if there exist additional responsibilities per local law it may be better for the client to notice the prospective contractor -especially if his price seems lower than expected- before signing the contract, thus the contractor may revise his price and the client therefore reduce his risk that the contractor will not be incapable to complete the work, or drop out in the midway.

When it comes to contract drafting there will certainly be different concerns as there are different legal traditions, as Anglo Saxon, European (Roman), Islamic or Socialist. In addition to this, considering the legal systems even in the same legal tradition, one may still have to deal with different implementations.

In Anglo-Saxon tradition, the emphasis is on case law, detailed regulations are not common. This would have its reflections in private contracts as well. A legal person familiar with the case-law tradition may prefer to skip some issues, while a legal or paralegal from Continental Europe tradition would prefer more issues to be recorded from the beginning.

On the other hand, when the parties refer to an international body in case of disputes, there rises the problem of enforceability of the outcome. Therefore, the emphasis should be on prevention of conflicts and as well drafting a contract, which is to cover as much points as it can.

However, while drafting a contract with an idea to cover each and every point, one shall be careful not to become entrapped in the contract. Prussian Civil Code of 17,000 paragraphs is a good example regards the fact that when one tries to detail each and every point, the applicability will fail, and still there would be points not covered.

In this aspect, and keeping in mind FIDIC is more a private organization compared to UNCITRAL's character of Governmental constitution, the FIDIC Conditions of Contract (which refers to "Conditions Of Contract For Construction For Building And Engineering Works Designed By The Employer, First Edition 1999" throughout this Thesis) and UNCITRAL Guide (which refers to "UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works" throughout this Thesis) is analyzed with an aim to understand similarities and differences in their approaches. During the study, the nature of the UNCITRAL Guide, which it is not basically dealing with construction but with construction of industrial facilities such as petrochemical plants,

fertilizer plants and hydroelectric plants; however aimed to assist persons involved in the negotiation and drafting of contracts of other types- is respected.

In certain parts of the Thesis, there are references to local laws of some countries, especially Turkish Code of Obligations, which is as well a part of Turkish Civil Law. The reason why the specific laws such as Public Works Regulations are not taken as a reference for comparison is, it is the Civil Law and thus Code of Obligations being the basis norm setting up the periphery, and all the other norms shall be in conformity with it.

The study, namely, comparison of FIDIC Conditions of Contract and UNCITRAL Guide is based on literature review; whereas talks with experts in construction industry and in legal arena are taken advantage of.

Chapter 2 of the thesis is an introduction to the standard documents, reviewing shortly the history and background how and on which basis FIDIC Conditions of Contract was created, and the motto behind UNCITRAL Guide.

Chapter 3, analyzes FIDIC Conditions of Contract under the principles set out in UNCITRAL Guide. Special attention is drawn on critical points such as applicable law, language, hierarchy between documents, price and payment conditions, consulting engineer, changes, variations, claims, time extension, additional payments and dispute resolution. In each sub-section, first the view of the two documents is presented. Then there stands a sub-heading, which comparatively views the two documents while paying attention to the legal consequences.

Chapter 4 of the thesis concludes the study with summary and discussion of results.

## **1.2. LITERATURE REVIEW**

In lieu of the study, below is the list of documents reviewed:

### **- Books**

FIDIC Conditions of Contract for Construction For Building and Engineering Works Designed by the Employer, General Conditions, Guidance for the Preparation of Particular Conditions, Forms of Letter of Tender, Contract Agreement and Dispute Adjudication Agreement, General Conditions and Particular Conditions, 1999, First Edition, ISBN 2-88432-022-9

UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, Prepared by UNCITRAL, United Nations, New York, 1988, ISBN 92-1-133300-8

The FIDIC Forms of Contract, Nael G. Bunni, Blackwell Publishing, 2005, Third Edition, ISBN 13: 978-14051-2031-9

FIDIC, An Analysis of International Construction Contracts, Edited by: Robert Krutson, Kluwer Law International and International Bar Association, 2005, ISBN 90-411-2323-7

The UNIDROIT Principles of International Commercial Contracts: A Governing Law?, David Oser, Martinus Nijhoff Publishers, 2008, ISBN 978-90-04-16789-6

Keating On Building Contracts, Donald Keating, Hon. Sir Anthony May, Adrian Williamson, John Uff, London Sweet & Maxwell, 1991, Fifth Edition, ISBN 0421 3273 08

Legal Aspects of Architecture, Engineering and the Construction Process, Justin Sweet, West Publishing Company, 1994, Fifth Edition, ISBN 0-314-02706-8

How to Achieve Perfection with International Construction and Engineering Claims, James R Knowles, JKR Roadshow, November 2000

Construction Contracts and Claims, Michael S. Simon, McGraw-Hill Book Company, 1979, ISBN 0-07-057433-2

Borçlar Hukuku Özel Borç İlişkileri, Prof. Dr. Fahrettin Aral, Yetkin Yayınları, Fifth Edition, Ankara 2003

Borçlar Hukuku Genel Hükümler, Prof. Dr. Ahmet M. Kılıçoğlu, Turhan Kitabevi, Fourth Edition, Ankara 2004

Borçlar Hukuku Dersleri Özel Hükümler, Prof.Dr. Cevdet Yavuz, Beta Basım Yayım, Fourth Edition, 2006 İstanbul

Comparative Legal Traditions – Historical Survey of the European Civil Law Tradition, the English Common Law Tradition and the Chinese Legal Tradition, Compiled by J.W. Head for the Istanbul Study Program – Summer 2006

- *Articles*

<http://www.scribd.com/doc/22225659/Claims-Under-New-Fidic-John-Papworth>, Claims Under The New FIDIC Conditions Of Contract, John Papworth Frics, FCI Arb, MInstCES, MACostE Managing Director, John Papworth Limited, UK, last accessed on 26 Jan 2012

<http://www.fenwickelliott.co.uk/files/Arbitration%20-%20FIDIC%20an%20overview.pdf>, FIDIC: An Overview The Latest Developments, Comparisons, Claims And Force Majeure, Jeremy Glover, 11 September 2007, Construction Law Summer School 2007, Queen's College Cambridge, last accessed on 26 Jan 2012

FIDIC's Clause 20.1 – A Civil Law Review, Mauro Rubino-Sammartano, Bianchi Rubino-Sammartano e Associati, Milan, Construction Law International, Volume 4 No 1 March 2009

New Trends and Bad Results in Construction Contracts, Ron Shumway, Alan Richard, Jush Ritti, Leadership and Management in Engineering, July 2004, page 93-104

Global Legal Issues for Engineers and Constructors, J.K. Yates and Joseph A. Smith, Journal of Professional Issues in Engineering Education and Practice, ASCE, July 2007, pages 199-209

Lawyerization of the Engineering and Construction Industry, Roger Owers, Samuel T. Ariaratnam, Daniel Armstrong, Journal of Professional Issues in Engineering Education and Practice, ASCE, April 2007, pages 134-142

A Guide to Standard Forms of Construction Contract, Produced for SCALA and the Local Government Task Force by Rob Tate, February 2003

Yargıtay Kararlarına Göre Müteahhidin Teslimden. Sonra İnşaattaki Noksan Ve Bozukluklardan Doğan. Mesuliyeti. Yrd. Doç. Dr. Asuman Turanboy, <http://dergiler.ankara.edu.tr/dergiler/38/301/2826.pdf>, last accessed on 27 Jan 2012

Milletlerarası Tahkim Kanununun Uygulama Alanı Ve Hakem Kararlarının İptal Sebepleri, Veli Atılğan, [http://www.turkhukuksitesi.com/makale\\_119.htm](http://www.turkhukuksitesi.com/makale_119.htm), last accessed on 8 February 2012

Türkiye'de Uluslararası Tahkim Kararlarının İcrası, Öngören Hukuk Bürosu, Kütüphane, [http://www.ongoren.av.tr/library/tr/tr\\_library.php?incname=08-10](http://www.ongoren.av.tr/library/tr/tr_library.php?incname=08-10), last accessed on 8 February 2012

Milletlerarası Hakem Kararlarının Tenfizi, Av. Ömer Elmas, İstanbul Barosu, [http://www.hukukcu.com/bilimsel/kitaplar/hakem\\_tenfiz.htm](http://www.hukukcu.com/bilimsel/kitaplar/hakem_tenfiz.htm), last accessed on 8 February 2012

- *Theses*

An Investigation On The Application Of Standard Contracts In The Turkish Construction Industry, A Thesis Submitted To The Graduate School Of Natural And Applied Sciences Of Middle East Technical University By Begüm Sertyeşilışık, In Partial Fulfillment Of The Requirements For The Degree Of Doctor Of Philosophy In Building Science In Architecture, January 2007

A Conscientious Approach To Claims Management Strategies In International Projects Using FIDIC Based Contract, By Özlem Sevin, B.S. in C.E. Boğaziçi University 2003,

Submitted to the Institute for Graduate Studies in Science and Engineering in Partial Fulfillment Of The Requirements For The Degree Of Master Of Science Graduate Program In Civil Engineering, Boğaziçi University, 2007

Contract Management Behavior Of Turkish Construction Companies In International Contracts A Thesis Submitted To The Graduate School Of Natural And Applied Sciences Of Middle East Technical University, By Muhammet Alper Yiğit, In Partial Fulfillment Of The Requirements For The Degree Of Master Of Science In Civil Engineering, February 2009

FIDIC Kapsamında Uyuşmazlıkların Çözümü, Yüksek Lisans Tezi, Gazi Üniversitesi, Sosyal Bilimler Enstitüsü Özel Hukuk Anabilim Dalı, Devletler Özel Hukuku Bilim Dalı, Hazırlayan: Buket Koldaş, Tez Danışmanı: Doç. Dr. F. Bilge Tanrıbilir, Ankara, 2008

Uluslararası İhalelerde Örnek Alınan FIDIC Şartnamelerinin Ve Türkiye Uygulamasının İncelenmesi, Master Tezi, Gazi Üniversitesi, Sosyal Bilimler Enstitüsü, Kamu Hukuku Anabilim Dalı, İdare Hukuku Bilim Dalı, Hazırlayan: Celalettin Güvenç, Tez Danışmanı: Doç. Dr. E. Ethem Atay, Ankara, 2006

FIDIC Standart Kurallarına Göre Hazırlanan Milletlerarası İnşaat Sözleşmelerinden Doğan Uyuşmazlıklarda Tahkim, Yüksek Lisans Tezi, Başkent Üniversitesi, Özel Hukuk Anabilim Dalı, Hazırlayan: Mehmet Kodakoğlu, Tez Danışmanı: Yrd. Doç. Dr. Mustafa Özbek, Ankara, 2007

Milletlerarası Tahkimde Yabancı Hakem Kararlarının Kesinleşmesi İle Tanıma Ve Tenfizi, Yüksek Lisans Tezi, Gazi Üniversitesi Sosyal Bilimler Enstitüsü, Özel Hukuk Anabilim Dalı, Devletler Özel Hukuku Bilim Dalı, Hazırlayan: Hacer Onur Eray, Tez Danışmanı: Doç. Dr. Feriha Bilge Tanrıbilir, Ankara, 2010

- *Laws*

Turkish Code of Obligations, Law No: 6098, Accepted On: 11 January 2011 (as of 1.1.2012)

German Civil Code - Bürgerliches Gesetzbuch (BGB), Civil Code in the version promulgated on 2 January 2002 (Federal Law Gazette [Bundesgesetzblatt]), last amended by statute of 28 September 2009, [http://www.gesetze-im-internet.de/englisch\\_bgb/englisch\\_bgb.html#p0845](http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0845), last accessed on 26 January 2012

International Arbitration Law (Turkey), Milletlerarası Tahkim Kanunu, Law No: 4686, Accepted On: 21/06/2001 (as of 1.1.2012)

General Specifications for Public Works (Turkey), Bayındırlık İşleri Genel Şartnamesi, Official Gazette no: 18540, dated 9.10.1984 (as of 1.1.2012)

General Conditions of Construction Works (Turkey), Yapım İşleri Genel Şartnamesi (For contracts agreed upon Public Works Contract Law, Law No: 4735) (as of 1.1.2012)

International Private Law and Procedura Law (Turkey), Milletlerarası Özel Hukuk Ve Usul Hukuku Hakkında Kanun, Law No: 5718, Accepted On: 27/11/2007 (as of 1.1.2012)

Regulation (EC) No 864/2007 Of The European Parliament And Of The Council Of 11 July 2007 On The Law Applicable To Non-Contractual Obligations (Rome II)

Regulation (EC) No 593/2008 Of The European Parliament And Of The Council Of 17 June 2008 On The Law Applicable To Contractual Obligations (Rome I)



## **CHAPTER 2**

# **BACKGROUND OF THE TWO FORMS OF DOCUMENTS**

### **2.1. UNCITRAL AND THE UNCITRAL GUIDE**

Drafted within the Working Group on the New International Economic Order of the United Nations Commission on International Trade Law (UNCITRAL), which is composed of all 36 member States of UNCITRAL, the document is adopted by UNCITRAL at its twentieth session in August 1987 by the following resolution:

"The United Nations Commission on International Trade Law,  
Recalling its mandate under General Assembly resolution 2205 (XXI) of 17 December 1966 to further the progressive harmonization and unification of the law of international trade, and in that respect to bear in mind the interests of all peoples, and in particular those of developing countries, in the extensive development of international trade,  
Taking into consideration the resolutions adopted by the General Assembly on economic development and the establishment of the new international economic order,  
Considering that legally sound, balanced and equitable international contracts for the construction of industrial works are important for all countries, and in particular for developing countries,  
Being of the opinion that a legal guide on drawing up international contracts for the construction of industrial works, identifying the legal issues to be dealt with in such contracts and suggesting solutions of those issues, will be helpful to all parties, in particular those from developing countries, in concluding such contracts,  
1. Adopts the UNCITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works;

2. Invites the General Assembly to recommend the use of the Legal Guide by persons involved in drawing up international contracts for, the construction of industrial works;
3. Requests the Secretary-General to take effective measures for the widespread distribution and promotion of the use of the Legal Guide" (UNCITRAL Guide, Foreword, Introduction).

Reviewing the resolution text, one would be reminded of construction works taking place in Iraq, Afghanistan, former Soviet Countries after the pro-1989 political structure; and also the facilities constructed for energy, such as pipelines and the petroleum dwelling facilities. Then the importance of the UNCITRAL Guide becomes more apparent.

It is as well summarized in the Introduction of the UNCITRAL Guide that; after 1974 and 1975 when the United Nations General Assembly adopted a number of resolutions dealing with economic development and the establishment of a new international economic order, UNCITRAL was called upon to take account of the relevant provisions of those resolutions. UNCITRAL, also taking into account a recommendation of the Asian-African Legal Consultative Committee (AALCC), in 1978 the established a Working Group on the New International Economic Order and charged it with the task of making recommendations as to specific topics. The Working Group reported to the Commission its conclusion that a study of contractual provisions commonly occurring in international industrial development contracts would be of special importance to developing countries, in view of the role of industrialization in the process of economic development. Thus, in 1981 the Commission instructed the Working Group to prepare a Legal Guide on Drawing up International Contracts for the Construction of Industrial Works (UNCITRAL Guide, Introduction).

In the Foreword of the UNCITRAL Guide, it is noted that representatives of many other States and international organizations attended sessions of the Working Group as observers and participated actively in the work on the Guide, that the Secretariat consulted with practitioners and other experts in the field of international works contracts, it consulted numerous sources, including publications, articles and other textual materials, as well as model forms of contract, general conditions of contract and actual contracts between parties (UNCITRAL Guide, Foreword).

The preparation of the Guide was largely motivated by an awareness that the complexities and technical nature of the field often make it difficult for purchasers of industrial works, particularly those from developing countries, to acquire the necessary information and expertise required to draw up appropriate contracts. The Guide has therefore been designed to be of particular benefit to those purchasers, while seeking at

the same time to take account of the legitimate interests of contractors. The Guide seeks to assist parties in negotiating and drawing up contracts by identifying the legal issues involved in contracts, discussing possible approaches to the solution of the issues, and, where appropriate, suggesting solutions which the parties may wish to incorporate in their contract, in the light of the differences between the various legal systems in the world (UNCITRAL Guide, Introduction).

In regards the UNCITRAL Guide, an industrial works is an installation, which incorporates one or more major pieces of equipment and a technological process to produce an output, examples of which include petrochemical plants, fertilizer plants and hydroelectric plants (UNCITRAL Guide, Introduction).

The UNCITRAL Guide has been designed to be of use to persons involved at various levels in negotiating and drawing up works contracts; such as lawyers representing the parties, as well as non-legal staff of and advisers to the parties (e.g., engineers) who participate in the negotiation and drawing up of the contracts. The UNCITRAL Guide is also intended to be of assistance to persons who have overall managerial responsibility for the conclusion of contracts, and who require a broad awareness of the structure of those contracts and the principal legal issues to be covered by them. Such persons may include, for example, high-level officials of a Government ministry under the auspices of which the works is being constructed. The UNCITRAL Guide not having an independent juridical status; is intended merely to assist parties in negotiating and drafting their contract; also it is not intended to be used for interpreting contracts entered into before or after its publication (UNCITRAL Guide, Introduction).

## **2.2. FIDIC CONDITIONS OF CONTRACT**

In need of a standard form in construction contracts, various forms, which were used prior to Second World War, were combined in to an agreed standard document, by Institution of Civil Engineers and the Federation of Civil Engineering Contractors in the United Kingdom. This, published in 1945, is the document shortly known as ICE Form. However, ICE Form was mainly for the domestic scene in United Kingdom. An international document Overseas (Civil) Conditions of Contract (the ACE Form) is therefore published 11 years after the ICE, in 1956, jointly by Association of Consulting Engineers in the United Kingdom, Export Group for the Construction Industries in the United Kingdom, and Institution of Civil Engineers. However, the ACE Form remained faithful to the original domestic form (Bunni, p.3-16).

In 1957, Conditions of Contract (International) for Works of Civil Engineering Construction was published. This was based on the ACE Form, prepared by FIDIC and FIEC. Due to its long name, on the other hand the cover printed in red, it became popularly known as the “Red Book” (Bunni, p.3-16).

The Second Edition of the Red Book was published in 1969, when it was approved and ratified by the International Federation of Asian and Western Pacific Contractors’ Associations. A reprint in 1973 added the approval and ratification by the Associated General Contractors of America and the Inter-American Federation of the Construction Industry (Bunni, p.3-16).

Following the Fifth Edition of the ICE Form, in 1977 the Third Edition of the Red Book was published. With this Third Edition, the importance of law governing a specific contract, the applicable law of the contract was recognized in the Red Book, but no attempt was made to depart from the principles of common law under which the ICE and ACE Forms were drafted. There was also no attempt to recognize that there could be a conflict of laws between the common law system and any other system of law to which the applicable law of contract belonged (Bunni, p.3-16).

Criticism came to after 1980s when the number of disputes ending in arbitration increased and every clause and term in the Red Book came under the scrutiny of lawyers experienced discovering different interpretations (Bunni, p.3-16).

In 1987 when the Forth Edition is published, the word “international” was no more in the title of the document, inviting parties from all over the world to use the Red Book also in domestic contracts (Bunni, p.3-16).

In 1996, FIDIC published the document “Supplement to Fourth Edition 1987”, intended to provide alternative arrangements in three controversial areas of the Red Book. These were:

- Settlement of disputes: “Dispute Adjudication Board”. This is modeled in response to the criticism of the role of the engineer as an adjudicator or quasi-arbitrator in the resolution of disputes. Dispute Adjudication Board, formed of one or three experts to render a decision in respect of a dispute without having to resort to the engineer for a final determination is new.
- Payment: “Payment on Lump Sum Basis”. This section provides the tools to payment in lump sum basis instead of using bill of quantities.
- Preventing Delay in Certification: “Late Certification”. This section provides alternative wording to safeguard the interests of the contractor where the engineer is late in certifying interim payments.

In 1999, FIDIC produced a totally new set of documents, one of which is the Construction Contract, sometimes referred as 1999 Red Book (Bunni, p.3-16).

Revised certain times due to criticisms and changing conditions, FIDIC Conditions of Contract is being classified as a standard document with ability to be applied to projects covering a wide range of complexity, enabling low to medium level of Employer involvement in the management of the project, where high cost certainty can be achieved high, on the other hand enabling a high capacity for managing variations, however low to medium speed of implementation (Tate, 2003).

The 1999 “Red Book” is the subject of study of this Thesis.

## **CHAPTER 3**

# **ANALYSIS OF FIDIC CONDITIONS OF CONTRACT UNDER THE PRINCIPLES OF UNCITRAL GUIDE**

### **3.1. METHODOLOGY**

The aim the thesis is to review FIDIC Conditions of Contract in respect to claim issues. A literature survey is performed to understand contracts law, essence of FIDIC Conditions of Contract, and determine which issues mostly lead to a considerable claim.

The below documents are reviewed for this purpose:

- An Investigation on the Application of Standard Contracts in the Turkish Construction Industry, A Thesis Submitted to the Graduate School of Natural and Applied Sciences of Middle East Technical University by Begüm Sertyeşilışık, In Partial Fulfillment of the Requirements for the Degree of Doctor of Philosophy in Building Science In Architecture, January 2007
- A Conscientious Approach to Claims Management Strategies in International Projects Using FIDIC Based Contract, by Özlem Sevin, B.S. in C.E. Boğaziçi University 2003, Submitted to the Institute for Graduate Studies in Science and Engineering in Partial Fulfillment of the Requirements for the Degree of Master of Science Graduate Program In Civil Engineering, Boğaziçi University, 2007
- Contract Management Behavior of Turkish Construction Companies in International Contracts, A Thesis Submitted to the Graduate School of Natural and Applied Sciences of Middle East Technical University, by Muhammet Alper Yiğit, In Partial Fulfillment of the Requirements for the Degree of Master of Science in Civil Engineering, February 2009

- <http://www.scribd.com/doc/22225659/Claims-Under-New-Fidic-John-Papworth>, Claims Under The New FIDIC Conditions Of Contract, John Papworth Frics, FCI Arb, MInstCES, MACostEManaging Director, John Papworth Limited, UK, last accessed on 26 Jan 2012
- <http://www.fenwickelliott.co.uk/files/Arbitration%20%20-%20FIDIC%20an%20overview.pdf>, FIDIC: An Overview The Latest Developments, Comparisons, Claims and Force Majeure, Jeremy Glover, 11 September 2007, Construction Law Summer School 2007, Queen's College Cambridge, last accessed on 26 Jan 2012
- FIDIC, An Analysis of International Construction Contracts, Edited by: Robert Krutson, Kluwer Law International and International Bar Association, 2005, ISBN 90-411-2323-7
- The FIDIC Forms of Contract, Neal G. Bunni, Blackwell Publishing, 2005, Third Edition, ISBN 13: 978-14051-2031-9
- Exploring the Influence of Contract Governance on Construction Dispute Negotiation, Sai On Cheung, Wei Kei Wong, Tak Wing Yiu, Tim Wai Kwok, Journal of Professional Issues in Engineering Education and Practice, ASCE, October 2008, pages 391-398

Consequently it is observed that; compliance with standards as to pass the tests and taking over of works, delays and defects and remedying of such, extension of defects notification period, extent of Engineer's authority especially in a view to giving instructions, determinations and evaluation, payment issues and price adjustments, Contractor's access to site and completeness or on the contrary delay of data or drawings or instructions are of the most problematic areas leading to claims.

Settlement of Disputes and Termination of Contract is without any doubt, is regarded as problematic area for claims. However, reserving a section for them would be contrary to the essence of the Thesis, in view to the statements in Chapter 1 – Introduction (page 1). The aim should be drafting a contract that will minimize the disputes, such that contract is the basis document where all responsibilities, duties and solution methods to problems, claims, changes, variations, extensions, and disputes are covered. Thus, it is desired that parties -employer, engineer and contractor- reach to a compromise without referring the issues to Dispute Adjudication Board or to arbitration. Similarly, it is desired that works be completed as stated in the contract unless termination has to take place due to case of absolute necessity such as force majeure.

In respect to comparison, one would note that, the structure of UNCITRAL Guide and FIDIC Conditions of Contract are far away from being similar. When analyzing if FIDIC Conditions of Contract is falling in line with UNCITRAL Guide, as a matter of methodology, UNCITRAL Guide is taken as the basis, thus the order of sections of UNCITRAL Guide is followed.

Considering the above stated areas leading to claims, as to the limits of the Thesis, special attention had to be drawn to certain section of UNCITRAL Guide while omitting the others.

Below are the sections of UNCITRAL Guide whose content is summarized as they appear in UNCITRAL Guide, which are not considered within the abovementioned criteria.

- *Transfer of technology*

The purchaser will require knowledge of the technological processes necessary for production by the works, and require the technical information and skills necessary for its operation and maintenance. The communication to the purchaser of this knowledge, information and skills is often referred to as the transfer of technology. Differing contractual arrangements can be adopted for the transfer of technology and the performance of the other obligations necessary to construct the works. The transfer of technology itself may occur in different ways, for example, through the licensing of industrial property, through the creation of a joint venture between the parties or the supply of confidential know-how (UNCITRAL Guide, p. 64-75).

- *Supply of equipment and materials*

In structuring provisions in their contract concerning the supply of equipment and materials, the parties might bear in mind that supply of equipment and materials by the contractor under a works contract has features, which may differ from those in respect of delivery of goods under a sales contract. The parties may wish to consider whether certain issues connected with the supply of equipment and materials should be settled in their Works contract in accordance with a particular trade term as interpreted in the International Rules for the Interpretation of Trade Terms (INCOTERMS). The necessity for and nature of the description in the contract of equipment and materials to be supplied by the contractor may depend upon the contracting approach chosen by the purchaser as well as the extent of the contractor's obligations. It is advisable to specify in the contract the time when and the place where equipment and materials are to be supplied (UNCITRAL Guide, p. 99-108).



- *Construction on site*

Construction on site covers civil engineering, building and the installation of equipment. It also covers the supply by the contractor of certain construction services relating to installation to be effected by the purchaser or an enterprise engaged by the purchaser (UNCITRAL Guide, p. 109-118).

- *Subcontracting*

The term "subcontracting" as used in UNCITRAL Guide refers to the engagement by the contractor of a third person to perform certain of the contractor's obligations under the works contract. It is desirable for the contract to contain provisions dealing with the permissible scope of subcontracting, the selection of subcontractors and other aspects of subcontracting (UNCITRAL Guide, p. 128-139).

- *Completion, take-over and acceptance*

The contractor may be obligated to prove completion of construction through the conduct of successful completion tests. The contract may describe the tests that are required. The contract may require the conduct of the tests within a specified period after notification of completion to the purchaser. If the tests are unsuccessful, the contractor may be obligated to repeat them. The contract may determine the date when construction is considered complete if completion tests are successful. The contract should specify when the purchaser is obligated to take over the works. It is advisable for the contract to determine the legal consequences of take-over. The contract may obligate the purchaser to accept the works within a specified period after the conduct of successful performance tests, and obligate the parties to prepare an acceptance statement, to be signed by both parties. The statement may list the defects in the works discovered during the performance tests, and set forth a time-schedule for their cure. It is advisable for the contract to determine the legal consequences of acceptance, in particular if the contract provides for provisional acceptance (UNCITRAL Guide, p. 147-157).

Some of the sub-heading under this head are considered in sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53).

- *Passing of risk*

Loss or damage may be caused to equipment and materials to be incorporated in the works and to the works before or after completion, as well as to tools and construction machinery to be used by the contractor for effecting the construction. Under this head, UNCITRAL Guide deals with loss or damage, which may be caused by accidental events

or by the acts of third persons for whom neither party is responsible, and the issue of allocating the risk of such loss or damage between the parties (UNCITRAL Guide, p. 158-166).

- *Transfer of ownership of property*

The issue of whether various types of property involved in the construction of works are owned by the contractor or the purchaser may be important in connection with questions of insurance, taxation, and liability to third persons arising from the property or its use. The issue is also important because the property may be seized by creditors of its owner and is subject to bankruptcy proceedings against him. The UNCITRAL Guide deals with the transfer of the ownership of property as an issue distinct from the passing of risk of loss of or damage to that property (UNCITRAL Guide, p. 167-169).

- *Insurance*

It is advisable for the contract to require property insurance and liability insurance, and to specify the risks which are to be insured against, the party who is obligated to obtain the insurance, the parties and other entities who are to be named as insured parties, the minimum amount of insurance, the applicable deductible or excess, and the period of time to be covered by the insurance (UNCITRAL Guide, p. 170-181).

- *Security for performance*

Each party to a works contract may seek security against failure of performance by the other. A security in favor of the purchaser may be in the form of a guarantee, while that in favor of the contractor may be in the form of a guarantee or an irrevocable letter of credit in his favor. Security interests in property are not a significant form of security for performance under works contracts. It is advisable for the works contract to set forth the forms of security to be furnished by each party, and the consequences of a failure to do so (UNCITRAL Guide, p. 182-195).

- *Liquidated damages and penalty clauses*

Liquidated damages clauses and penalty clauses provide that, upon a failure of performance by one party, the aggrieved party be entitled to an agreed sum of money from the party failing to perform. In works contracts, these clauses are usually included in respect of failures of performance by the contractor. The clauses have certain advantages. Since the agreed sum is recoverable without the need to prove that losses have been suffered, the expenses and uncertainty associated with the proof of losses are

removed. The sum may also serve as the limit to the liability of the contractor, who will be assisted by knowing the maximum liability to which he is likely to be exposed. The parties may wish to provide that if the failure to perform is caused by an exempting impediment, the agreed sum is not due. The law applicable to the contract often regulates the relationship between recovery of the agreed sum and enforcement of the performance of obligations. That law also often regulates the relationship between the recovery of the agreed sum and the recovery of damages (UNCITRAL Guide, p. 218-225).

- *Damages*

The law applicable to the contract will determine the conditions under which, and the extent to which, a party who fails to perform a contractual obligation is liable to pay damages. The legal rules on some issues relating to liability may be mandatory, while on other issues the legal rules may be capable of modification by the parties. Most legal systems, however, permit the parties to settle through contract provisions issues relating to the extent to which damages may be recoverable. In the contract, the parties may wish to determine the extent to which the party who is aggrieved by the failure to perform is to be compensated. Damages may be distinguished in certain respects from payment of an agreed sum and from interest (UNCITRAL Guide, p. 226-232).

Although the heading is not studied separately within the context of the Thesis, there exist references in sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53) and sub-section 3.11.3. Choice of Law - Notes on Sub-Section (see page 102).

- *Exemption clauses*

During the course of construction, events may occur which impede the performance by a party of his contractual obligations. The exemption clauses deals with the case that under which a party who fails to perform a contractual obligation due to an impediment is exempted from certain legal consequences of the failure. It would be in the interest of the purchaser if the scope of the exemption clause were limited, both as to the events which constitute exempting impediments and the legal consequences of exempting impediments. The parties may wish to enable both parties to invoke an exemption clause (UNCITRAL Guide, p. 233-240).

- *Hardship clauses*

Hardship is a term that is used in the UNCITRAL Guide to describe a change in economic, financial, legal, or technological factors, which causes serious adverse economic consequences to a contracting party, thereby rendering more difficult the

performance of his contractual obligations. A hardship clause usually defines hardship, and provides for renegotiation to adapt the contract to the new situation created by the hardship. Hardship clauses are to be distinguished from exemption clauses. A hardship clause has, however, several disadvantages. The possibility of renegotiation makes the contract to some degree unstable, the definition of hardship tends to be imprecise and vague, and the inclusion of the clause may induce the advancement of spurious claims that hardship exists to avoid the performance of obligations. Furthermore, the purchaser may in particular be disadvantaged because the contractor will potentially have more opportunities to invoke the clause than the purchaser will (UNCITRAL Guide, p. 241-247).

Although the heading is not studied separately within the context of the Thesis, there exist references in sub-section 3.6.3.1. *Pacta Sunt Servanda, Clausula Rebus Sic Stantibus*, Alteration of Contracts (see page 40).

- *Suspension of construction*

As no developed doctrine of suspension exists in most legal systems, the parties may wish to consider the inclusion of a clause in the contract permitting suspension of construction, defining the circumstances in which suspension may be invoked and describing its legal effects. The parties may agree to permit the purchaser to order the suspension of construction only upon grounds specified in the contract or for his convenience. The contract may give the contractor the right to suspend construction in two specific circumstances. The contractor may be entitled to suspend construction firstly as an alternative to the more drastic remedy of termination in cases where the failure to perform an obligation by the purchaser is serious enough to justify such termination, and secondly when a failure of performance on the part of the purchaser makes it unreasonably difficult for the contractor to proceed with the construction (UNCITRAL Guide, p. 260-265).

- *Termination of Contract*

It is desirable for the contract to include a termination clause in order to provide for an orderly and equitable procedure in the event of circumstances, which make it prudent or necessary to terminate the contract. Before the contract is terminated, it would be in the interests of both parties to resort to other measures or remedies provided by the contract in order to deal with the circumstances. In drafting a termination clause, the parties should take account of any mandatory legal rules on the subject of the law applicable to the contract, and should be aware of any non-mandatory rules. The contract might entitle the purchaser to terminate in certain situations involving a failure of the contractor to perform, a violation by the contractor of restrictions on the transfer of the contract and,

possibly, a violation of restrictions on subcontracting. It may be advisable for the contract to entitle the purchaser to terminate the contract in the event that the contractor is adjudicated bankrupt. The parties may wish to consider whether the institution of bankruptcy proceedings in respect of the contractor should entitle the purchaser to terminate the contract. The parties may also wish to consider whether the purchaser should be entitled to terminate the contract in the event of proceedings similar or related to bankruptcy proceedings in respect of the contractor, or in the event of bankruptcy or similar or related proceedings in respect of a guarantor. The parties may wish to consider whether the purchaser should be entitled to terminate the contract for his convenience. The contract might entitle the contractor to terminate in certain situations similar to those in respect of the purchaser. The contract may specify the rights and obligations of the parties upon termination. The contract may specify those provisions, which are to survive the termination, and continue to bind the parties (UNCITRAL Guide, p. 266-278).

Although the heading is not studied separately within the context of the Thesis, there exist references in sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53).

- *Supplies of spare parts and services after construction*

After construction is completed and the works has been taken over by the purchaser, the purchaser will have to obtain spare parts to replace those that are worn out or damaged, and to maintain, repair, and operate the works. He may wish to obtain from the contractor the spare parts and the repair, maintenance and operation services, which he may need (UNCITRAL Guide, p. 279-293).

- *Transfer of contractual rights and obligations*

The transfer of contractual rights and obligations as considered in this chapter of UNCITRAL Guide includes, the transfer of the contract in its entirety, whereby a new party is substituted for one of the original parties to the contract, as well as the transfer of certain specific rights and obligations under the contract (UNCITRAL Guide, p. 294-298).

- *Settlement of Disputes*

The mechanisms provided in the contract for the settlement of disputes might include negotiation, conciliation, arbitration or judicial proceedings. A referee may also be authorized to settle disputes. The most satisfactory method of settling disputes is usually by negotiation between the parties. If the parties fail to settle their dispute through negotiation, they may wish to attempt to do so through conciliation before resorting to

arbitral or judicial proceedings. The parties may wish to provide for conciliation under the UNCITRAL Conciliation Rules. Disputes arising from works contracts are frequently settled through arbitration. Arbitration may be conducted only based on an agreement by the parties to arbitrate. Such an agreement may take the form of an arbitration clause included in the contract. It would be advisable for the contract to indicate what disputes are to be settled by arbitration. The parties may select the type of arbitration that best suits their needs. They may establish by agreement the procedural rules to govern their arbitral proceedings, such as the UNCITRAL Arbitration Rules. In addition, they may wish to settle various practical matters relating to the arbitral proceedings, including the number and appointment of arbitrators, the place of arbitration and the language of the proceedings. Where the parties wish their disputes to be settled in judicial proceedings, it may be advisable for the contract to contain an exclusive jurisdiction clause to reduce the uncertainties connected with judicial settlement. The validity and effect of the exclusive jurisdiction clause should be considered in the light of the law of the country of the selected court, as well as the law of the countries of the two parties (UNCITRAL Guide, p. 306-320).

Although not handled separately in the context of the Thesis, in respect to the vagueness of the subject, a sub-section is reserved to discuss how claims are handled in FIDIC Conditions of Contract (see sub-section 3.11.3.1. Notes on FIDIC Conditions of Contract Sub-Clause 20.1 [Contractor's Claims], page 104).

## **3.2. TERMINOLOGY**

In UNCITRAL Guide the terms used as purchaser, contractor, consulting engineer consecutively corresponds to employer, contractor and engineer in FIDIC Conditions of Contract. Throughout the Thesis the terms purchaser and employer, consulting engineer and engineer would have the same meaning as the other would have.

## **3.3. ENTERING INTO CONTRACT**

UNCITRAL Guide Part 1 starts drawing attention to pre-contract studies, choice of contracting approach, where approaches for single contract or for several contracts and for joint ventures are studied. In continuation, tendering and negotiation is discussed. These sections would not be referred here, but "Entering into Contract" where form of contract and validity and entry into force of contract is reviewed will be discussed below. Emphasis is drawn to validity and entry into force of contract because that the rest of the

discussions will have a meaning only if the contract is valid and only if the responsibilities or obligations arising from the contract fall into the time wise validity and applicability of the contract.

### **3.3.1. UNCITRAL GUIDE**

UNCITRAL Guide draws attention to the fact that the date of signing of a contract, that is entering into a contract and the date on which contractual obligations start may differ. Such that, the parties may agree that the contractual obligations are to arise only from the date when a specified pre-condition is fulfilled. An example for a pre-condition may be the date on which a required license is obtained (UNCITRAL Guide, p. 39).

### **3.3.2. FIDIC CONDITIONS OF CONTRACT**

As regards FIDIC Conditions of Contract, there is no differentiation between entering into contract and start of contractual obligations.

### **3.3.3. NOTES ON SUB-SECTION**

One may question the use of different dates that UNCITRAL Guide suggests. In FIDIC Conditions of Contract, per Sub-Clause 8.1 [Commencement of Work], unless otherwise agreed the Contractor shall commence the work. As a result, Contractor shall furnish a performance security not later than 28 days after Letter of Acceptance (FIDIC Conditions of Contract, Sub-Clause 4.2 [Performance Security]).

On the other hand, if no date is specified for Sub-Clause 2.1 [Right of Access to the Site] in the Appendix for Tender, Contractor submitting a program (Sub-Clause 8.3 [Programme]) and Employer providing access to the site (Sub-Clause 2.1) will also occur consecutively.

It may be argued that these dates in FIDIC Conditions of Contract may be overcome by specifying a delaying clause. However, there are other consequences of entering into a contract, which are in some legal systems, not possible to look the other way.

For example, in legal systems having their roots in Roman law, after entering into a contract one may not revert from the contract but may only terminate it. The capacity of the parties as well, is determined by as of the time of entering into contract. Changes occurring later than that, but before the obligations are due would not have an effect on the contract. By signing the contract, there are also secondary responsibilities such as not to act in a way that may endanger the subject of contract or contrary to other party's

benefits. As a result of this, the purchaser would be retained to destroy, sell, or restrict the rights associated with the construction area, plants or materials that will be provided by the employer. Similar holds true for the contractor.

In this case, entering of the contract would have its importance concerning the fact that, the offer of the contractor may be valid only for a limited time.

### **3.4. GENERAL REMARKS ON DRAFTING**

In Part 2 of UNCITRAL Guide, first there is a reference to General Remarks on Drafting where language of contract; parties to and execution of contract; contract documents, hierarchy and interpretation; notifications and lastly definitions are discussed. Hereby, only the discussion for language of the contract and the contract documents are reviewed.

Parties to the contract and execution of the contract are studied within discussion of other factors. As well, the issue of notifications is referred to under relevant sections when there is a reference to a notification. Definitions, which are advised to be included in the contract, are already present in FIDIC Conditions of Contract and reference is drawn to those definitions when required.

#### **3.4.1. LANGUAGE OF CONTRACT**

##### **3.4.1.1. UNCITRAL GUIDE**

UNCITRAL Guide highlights that drawing up the contract only in a single language version would reduce conflicts of interpretation in regards to contractual provisions. On the other hand, UNCITRAL Guide draws attention to the criteria for selection of language where attention the following is recommended: to be understood by senior personnel of each party who will be implementing the contract, reflect agreement of parties on technical issues, language commonly used in international commerce, ease for dispute settlement and language of the country whose law is applicable (UNCITRAL Guide, p.46).



#### **3.4.1.2. FIDIC CONDITIONS OF CONTRACT**

FIDIC Conditions of Contract Sub-Clause 1.4 [Law and Language] states that: "If there are versions of any part of the Contract which are written in more than one language, the version which is in the ruling language stated in the Appendix to Tender shall prevail".

In the Appendix to Tender (FIDIC Conditions of Contract), two languages are defined, which are: "Ruling Language" and "Language for Communications".

#### **3.4.1.3. NOTES ON SUB-SECTION**

The approach of FIDIC Conditions of Contract for two languages, one as the ruling language and the other for communications may lead to disputes. In a contract with ruling language "X", and language of communication as "Y"; where directions or instructions are issued by the Engineer introduces a variation, however communicated on in the language specified as "Language for communications" -in this case "Y"- may lead to a question of interpretation. Language "Y" is only for communication, on the other hand it is "X" being the ruling language of the contract. Bearing in mind that Specifications and Drawings forming part of the Contract; then any change or modification to these may be claimed to be void when the direction or the instruction is only in language "Y".

### **3.4.2. CONTRACT DOCUMENTS, HIERARCHY AND INTERPRETATION**

#### **3.4.2.1. UNCITRAL GUIDE**

While UNCITRAL Guide stresses that the principal document should always prevail, it does not give further specific formula but draws attention to certain facts (UNCITRAL Guide, p.48).

First concern is any modification to contract to be in effect, is advised to be done in writing. Then, UNCITRAL Guide draws the attention to the relationship of contract documents with oral exchanges, correspondences and draft documents, which were during the negotiation stage of the contract. It reminds that, the parties may agree that; those should not be part of contract document, and even further, those cannot be used to interpret the contract (UNCITRAL Guide p.48-49). From here it follows that, unless parties disagree so, those can also be used to interpret the contract or can be as well the part of the contract.

If headings and side notes, that mainly facilitate the easy reading of the contract, are part of the contract text, is also another point, which can be noted in the contract document (UNCITRAL Guide p.48-49).

### **3.4.2.2. FIDIC CONDITIONS OF CONTRACT**

FIDIC Conditions of Contract defines the hierarchy between contract documents in Sub-Clause 1.5 [Priority of Documents]:

“The documents forming the Contract are to be taken as mutually explanatory of one another. For the purpose of interpretation, the priority of the documents shall be in accordance with the following sequence:

- A. The Contract Agreement (if any)
- B. The Letter of Acceptance
- C. The Letter of Tender
- D. The Particular Conditions
- E. These General Conditions
- F. The Specification
- G. The Drawings, and
- H. The Schedules and any other documents forming part of the Contract.

If an ambiguity or discrepancy is found in the documents, the Engineer shall issue any necessary clarification or instruction”.

In the “Guidance for the Preparation of Particular Conditions”, FIDIC Conditions of Contract suggests a variation as below:

“The Documents forming the Contract are to be taken as mutually explanatory of one another. If an ambiguity or discrepancy is found, the priority shall be such as may be accorded by the governing law. The Engineer has authority to issue any instruction which he considers necessary to resolve an ambiguity or discrepancy”.

On the other hand, for interpretation purposes, FIDIC Conditions of Contract Sub-Clause 1.2 [Interpretation] states that words indicating one gender includes both genders, words indicating singular also includes plural and vice versa, provisions including the words “agree”, “agreed” or “agreement” require the agreement to be recorded in writing, “written” or “in writing” means hand-written, type-written, printed or electronically made,

resulting in a permanent record. It is followed that, the marginal words and other headings shall not be taken into consideration of the Conditions of Contract.

The latter statement is of crucial importance when interpreting the contract. For example, when one reads Sub-Clause 15.1 [Notice to Correct] "If the Contractor fails to carry out any obligation under the Contract, the Engineer may by notice require the Contractor to make good the failure and to remedy it within a specified reasonable time." as it is, he may think that if Contractor does not act per Employer's request, there may be several outcomes, such as cost reduction per Employer's claim, suspension, introducing another Contractor to act side by with the existing one, remedy of the failure by the Employer, and etc. However, when it is interpreted together with the heading, which is namely "Termination by Employer", then one may interpret such that, since it is under that heading, when Contractor fails to remedy any failure or make it good, then it is Employer's Termination to follow, and no other way.

#### **3.4.2.3. NOTES ON SUB-SECTION**

Although the talks during negotiation stage may be of crucial importance when interpreting the Contract, there is no direct reference to those in FIDIC Conditions of Contract. From there, it follows that, during execution of the Contract or interpreting any Clause later, if there were a discussion in respect to common understanding of any clause or technical issue, Contractor and / or the Employer shall be careful to note these in Particular Conditions of Contract, or make necessary clarifications in the associated documents or make notes of the Negotiation stage talks can be a part of the Contract in reference to Sub-Clause 1.5(h). However, to assure this; attention should be drawn that, per FIDIC Conditions of Contract Sub-Clause 1.2 [Interpretation], to have an effect, any agreement must be in writing. As well, in respect of Sub-Clause 1.5 [Priority of Documents], a reference may also be drawn to the correspondences during the Tendering stage to be part of contract documents.

In respect to the negotiation talks, especially in countries Romano-Germanic law tradition, in case of a dispute, the judge would have to give a meaning to those, or interpret the contract in the light of those negotiation talks which reflect the intentions of the parties.

## **3.5. DESCRIPTION OF WORKS AND QUALITY GUARANTEE**

For one, who is familiar with FIDIC Conditions of Contract, the heading reminds simply of the scope of the works to be executed under the Contract, and the issue of quality assurance. However, under this heading UNCITRAL Guide covers issues such as:

- Scope and technical characteristics of works to be defined in contract documents
- Liability for inaccuracy, insufficiency or inconsistency in the drawings to be supplied by the purchaser and the contractor, and the consequences
- Confidentiality of contract documents, especially the drawings
- Liability for defects in works, length of guarantee period, commencement of guarantee period, extension of guarantee period

These most probably extends beyond the expectation of a FIDIC-familiar person, where the above sub-headings are covered in diverse Sub-Clauses of FIDIC Conditions of Contract.

In any case, this sub-section should better be reviewed together with sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53) where the consequences of inaccurate, insufficient or inconsistent drawings and also liability for defects are of concern.

### **3.5.1. UNCITRAL GUIDE**

Under this heading, UNCITRAL Guide (UNCITRAL Guide p. 53-62) draws attention to that, the main conditions of contract usually cannot cover all the issues related with the Works. Therefore usually, the general conditions of the contract outlines what is to be constructed and it is accompanied by drawings, specifications, reference to standards and other technical documents. On the other hand, it advises the contract to refer to codes, regulations and any other issue to which contractor must pay attention according to local legal rules.

UNCITRAL Guide considers that the technical documents, namely, the specifications and drawings may not be complete to execute the works and some additional documents may need to be produced during the execution stage. When these are produced by the purchaser they should be consistent with the previous documents, or else they would indicate a variation which would be later discussed in upcoming sub-sections, especially under sub-section 3.10. Variation Clauses (see page 93). When Contractor is to produce

additional drawings required for execution of the works, such as detailed drawings or shop drawings, they should also not introduce a change to the basic drawings. UNCITRAL Guide advises the contract to determine whether detailed drawings submitted by the contractor require the approval of the purchaser before they can be acted upon by the contractor. On the other hand, where the purchaser is not even required to approve drawings, as regards UNCITRAL Guide, the contract may provide that the absence of objection by the purchaser to detailed drawings is not to be deemed as consent by the purchaser to deviations in those drawings from the basic drawings.

In cases where specifications and drawings are to be supplied by the purchaser, the contractor may be obligated to review them if there is any inaccuracy, insufficiency, or inconsistency. UNCITRAL Guide states that, the contract may provide the contractor be liable for damages if, within a specified or reasonable period of time after he has discovered or could reasonably have been expected to discover any inaccuracies, insufficiencies or inconsistencies in the specifications and drawings, he fails to notify the purchaser of them.

Else, if the inaccuracy, insufficiency or inconsistency is not expected to be discovered in such a way, or the notice by the contractor to the purchaser requires changes in the documents, then the contractor should be compensated due to the occurring results, such as time and cost where due to which suspension of the works may even take place.

On the other hand, the contractor should bear the costs occasioned by all corrections and changes necessitated by inaccuracies, insufficiencies or inconsistencies in the documents provided by him. Moreover, if there is a resulting delay, he may also be liable to the purchaser for that delay. In sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53), there exists reference to purchaser's remedies for similar cases.

Regards the confidentiality of documents, UNCITRAL Guide questions if there exists any mandatory local regulation in regards to obligations as to confidentiality may be imposed on a party. Where certain documents are to be kept confidential, it is advised that the contract clearly identify these documents, and to specify the extent and duration of the confidentiality and the extent of permissible disclosure. It is noted that the parties may wish to agree the confidentiality be in force for a certain duration even if the contract is terminated. The issue being a subject of intellectual rights, it would not be analyzed within here in detail.

The last point covered under this topic in UNCITRAL Guide is the quality guarantee and more specifically the guarantee period. It is advised that contractor be liable for defects in the works, and for inaccuracies or insufficiencies in technical documents supplied with the works or those failures discovered and notified to him before the expiry of a guarantee

period specified in the contract. What constitutes a defect in the works and the remedies, which the purchaser may have when the contractor is liable under the guarantee, and the question whether there exists any liability after the expiry of the guarantee period, are discussed in sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53).

For guarantee purposes, UNCITRAL Guide puts forward that there should be limitation in scope of guarantee and the period of guarantee to be specified.

In this respect, UNCITRAL Guide has drafted the following illustrative provisions (UNCITRAL Guide, p. 62-63 endnote):

- (1) "The Contractor guarantees that, during the guarantee period, the Works will be capable of operation in accordance with the contract, that all the equipment, materials and other supplies annexed to or forming part of the works will conform with drawings, specifications and other contractual terms relating to the equipment, materials or other supplies, and that all technical documents supplied by him are correct and complete.
- (2) The contractor is liable only in respect of defects in the works, equipment, materials or other supplies, or inaccuracies and insufficiencies in technical documents, which are notified to him by the purchaser before the expiry of the guarantee period.
- (3) The contractor is not liable under paragraphs (1) and (2) of this article if the work fail to operate in accordance with the contract during the guarantee period as a result of:
  - Normal wear and tear;
  - Faulty operation or maintenance carried out by the purchaser or persons engaged by him, unless the faulty operation or maintenance is a result of incorrect instructions on operation or maintenance given by the contractor;
  - Defective design, equipment or materials supplied or incorrect instructions given by the purchaser;
  - Improper repair or alteration of the works effected by the purchaser or persons engaged by him, unless the repair or alteration was effected with the written consent of the contractor;
  - Any event, which causes loss or damage to the works where the risk of such loss or damage is borne by the purchaser.

- (4) The guarantee period commences to run from the date of [acceptance] [take-over] of the works, and continue for ..... (indicate a period of time).
- (5) The guarantee period ceases to run during any period of time during which the works is not capable of being operated due to a defect covered by this guarantee. If only a portion of the works is not capable of being operated, the guarantee period ceases to run in respect of that portion.
- (6) When the works cannot be operated as a result of defective equipment or materials, and the defective equipment or materials are repaired or replaced, a new guarantee period commences to run in respect of the repaired or replaced equipment or materials from the date the works can be operated after the repair or replacement. Where the works can be operated despite the defective equipment or materials, a new guarantee period commences to run in respect of the repaired or replaced equipment or materials from the date of the repair or replacement.

In lieu of the above illustrative provisions, UNCITRAL Guide notes that the length of the guarantee period may depend on, the nature of the works also taking into consideration the level of sophistication of the equipment installed in the works; and the difficulty of discovering defects. It follows that for certain types of works, it may be reasonable to specify guarantee periods of different lengths in respect of different portions of the works.

If equipment to be installed in the works is not manufactured by the contractor but by third persons, those manufacturers may provide to the contractor a guarantee in respect of that equipment with a guarantee period longer than that by the contractor to the purchaser in respect of the construction to be effected by the contractor. The contractor may be obligated to inform the purchaser of the content and length of such guarantees provided by manufacturers, and to transfer to the purchaser all the contractor's rights arising from such guarantees. If a transfer is not permitted under the applicable law, the parties may wish to agree that the guarantee provided by the contractor to the purchaser is not to expire in respect of the equipment covered by the manufacturer's guarantee before the expiration of that guarantee.

### **3.5.2. FIDIC CONDITIONS OF CONTRACT**

In FIDIC Conditions of Contract set of documents, the contract documents; are listed in the Contract Agreement.

In FIDIC Conditions of Contract, which is drawn up for building and engineering works designed by the Employer, Sub-Clause 1.1.6.1 [Definitions] defines what is meant by Contractor's Documents that are to be supplied by the Contractor.

In this respect, Sub-Clause 4.1 [Contractor's General Obligations] puts forward the Contractor's obligations:

- Be responsible for all of the Contractor's Documents (calculations, computer programs and other software, drawings, manuals, models and other documents of a technical nature supplied by the Contractor)
- Design any part of the Permanent Works when it is required by the Contract, to be fit such purposes for which the part is intended as are specified in the Contract

Sub-Clause 1.13 [Compliance with Laws] states that Contractor shall comply with the applicable Laws when performing the Contract. Similarly, Sub-Clause 7.1 [Manner of Execution] sets out that Contractor shall carry out the Works as specified in the Contract and in accordance with recognized good practice.

Sub-Clause 4.9 [Quality Assurance] states that Contractor shall institute a quality assurance system, details of all procedures and compliance documents shall be submitted to the Engineer for information before each design and execution stage is commenced, on the other hand compliance with the quality assurance system shall not relieve the Contractor of any of his duties, obligations or responsibilities under the Contract.

Regarding Sub-Clause 3.1(c), any approval, check, certificate, consent, examination, inspection, test or similar act by the Engineer does not relieve the Contractor from any responsibility. In parallel, per Sub-Clause 3.2 [Delegation by the Engineer]; when Engineer delegates his duties or authorities to assistants, any examination, inspection, test or similar act would have the same effect as the act of the Engineer. However, any failure to disapprove any Work, Plant or Materials shall not constitute approval, and thus Engineer has a right to reject them later.

Sub-Clause 1.8 [Care and Supply of Documents] specifies under whose custody the documents (Employer's Documents and Contractor's Documents) are. Moreover, it states that, whenever a Party becomes aware of an error or defect of a technical nature in a document, which is for the execution of the Works, the party shall promptly notice the other party.

Sub-Clause 1.9 [Delayed Drawings and Instructions] states that when works are likely to be delayed or disrupted due a missing drawing or instruction not issued to the Contractor, the Contractor is entitled to a claim for extension and cost.



Sub-Clause 3.3 [Instructions of the Engineer] refers to the fact that the Engineer may at any time issue additional instruction and additional or modified drawings, whereas if an instruction constitutes a variation, the associated Clause 13, [Variations and Adjustments] shall apply.

Sub-Clause 1.10 [Employer's Use of Contractor's Documents] frames up the intellectual rights arising from the Contractor's Documents while Sub-Clause 1.11 [Contractor's Use of Employer's Documents] does it for those rights arising from the Employer's Documents. Sub-Clause 17.5 [Intellectual and Industrial Property Rights] also deals with Intellectual and Industrial Property Rights, however intellectual rights would not be dealt in detail hereby. On the other hand, Sub-Clause 1.12 [Confidential Details] entitles the Contractor to disclose all such confidential information as the Engineer may reasonably require in order to verify the Contractor's compliance with the Contract.

Regarding guarantee purposes, Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects] puts forward that Contractor is to complete any work which is outstanding as stated in Taking-Over Certificate, and execute all work required to remedy defects or damage which should be notified to him before the Defects Notification Period stated in the Contract. Sub-Clause 11.3 [Extension of Defects Notification Period] further states that; if the defect or damage hinders the Employer to benefit from the Work, Section or a major item of Plant for which it was intended, then the Employer may benefit from the remedy of Extension of Defects Notification Period subject to Sub-Clause 2.5 [Employers Claims]. The maximum period it can be extended is limited to two years. Similarly, in case of suspension, Contractor's obligations in regards the Plant and / or Materials, whose delivery or erection was suspended, would not extend more than 2 years after the Defects Notification Period had otherwise have expired.

Sub-Clause 11.4 [Failure to Remedy Defects] states down the Employer's remedies for defects and damages.

### **3.5.3. NOTES ON SUB-SECTION**

When reviewed together, both UNCITRAL Guide and FIDIC Conditions of Contract draw attention to not a single document but a list of documents where works are defined. Similarly, both of them mention that the Contractor shall perform in accordance to the laws in force.

On the other hand, similar to the responsibility defined in UNCITRAL Guide which mentions that it is the Contractor's responsibility to review the documents for inaccuracy or insufficiency in the information contained therein, or the inconsistencies between them,

and thus inform the Employer within a specified or reasonable period of time; FIDIC Conditions of Contract envisages each Party to promptly notice the other whenever he becomes aware of an error or defect of a technical nature. One may argue if inaccuracy, insufficiency or inconsistency is equivalent to error or defect of a technical nature or vice versa. Bearing in mind, although there may not be an error or a defect, but only an information of any kind is required for execution of works, FIDIC Conditions of Contract Sub-Clause 1.9 [Delayed Drawings and Instructions] fills in this gap. According to the mentioned Sub-Clause Contractor is to give notice to the Employer when a drawing or instruction is to be issued in a particular time for the timely execution of the works.

Both UNCITRAL Guide and FIDIC Conditions of Contract foresee that, although the drawings and specifications are already part of the contract documents, during the execution, there may be a need for some additional documents. While producing these, both the contractor and the employer should devote to the original documents. Otherwise, when purchaser deviates from the original documents, it would constitute a variation. Since it is contractor's duty to perform according to the contract, he shall not deviate from the original documents. In addition, where UNCITRAL Guide foresees a review mechanism by purchaser over the documents produced by Contractor, it further advises that even if an approval mechanism is set, absence to objection should not be deemed as consent to a deviation. Similarly, FIDIC Conditions of Contract puts forward that although the employer or the engineer reviews the documents and does not reject them or fails to disapprove a work, Contractor is still bound to execute according to the contract. Therefore, he is not free of his obligations or responsibilities. Especially Sub-Clause 7.1 [Manner of Execution] of FIDIC Conditions of Contract refers both to Contract and to the recognized good practice. Moreover, both of the compared documents agree that the contractor is responsible from the documents he produces including related additional costs and possible delays that may occur.

Similarly, the Law of Obligations of Turkey dated 1926, which was adopted from German Code, as well as the updated version which is now in force by 2011, in the section relating to specific contracts, namely the Independent Contractor Agreement (*Eser Sözleşmesi, Istisna Akti*), the contractor is responsible to perform the works while observing the benefits of the owner with duty of loyalty (*sadakat borcu*) and duty of care (*özen borcu*). When determining duty of care of the contractor, the act of a prudent contractor will be referred in view to professional and technical conduct (Turkish Law of Obligations, 2011, Article 471).

In regard to manner of execution, due to the organization of French construction industry, such that employers were more individuals or businesses and contractors more gangs of professionals which were more difficult to control, the courts extended the duty of the

contractors as far as to advise the employers, even when the design and engineering had been done by others. To the principle of good faith, which stands in continental Europe legal tradition, the courts have given very extensive role, which in fact depends on the strength and professional knowledge of each of the parties to the contract (Knutson, 2005, article by Marc Frilet, page 80-81).

Although it will be discussed in sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53) in more detail; comparing the approach of two documents on guarantee matters as covered hereby; one of two main issues is Extension of Defects Notification Period or to say extension of guarantee period. The other is the extent of guarantee.

Regarding extent of guarantee; although FIDIC Conditions of Contract states that Contractor is to execute all work required to remedy defects or damage which should be notified to him before the Defects Notification Period, UNCITRAL Guide draws the attention that the extent of guarantee should be limited not to include normal wear and tear; faulty operation or maintenance or improper repair or alteration carried out by the purchaser; defective design, equipment or materials supplied or incorrect instructions given by the purchaser. Therefore, UNCITRAL Guide, excludes the cases where there is remoteness of damages (*illiyet bağı bulunmaması*).

On the other hand, the UNCITRAL Guide advises the length of the guarantee period to depend on the nature of the works and the difficulty of discovering defects. This brings in the issue of latent defect – apparent defect classification; whereas the case of latent defect is of special concern in law.

The extension of defects notification period when the work cannot be benefitted from is handled similarly in UNCITRAL Guide and FIDIC Conditions of Contract. In cases where defect is cured either by replacement or by repair, the question of guarantee period is also covered in UNCITRAL Guide. In this respect, FIDIC Conditions of Contract foresees maximum extension of 2 years. In the doctrine, the question, which usually arises, is, if for the repaired item, a new guarantee period would start, or the guarantee period would cease to continue. In other words, if an item is repaired or replaced, would the total guarantee period remain unchanged, or replacement or repair will be recognized as time=0 for the new guarantee period, if such item is repaired or replaced for more than two times, would the purchaser have a right to claim price reduction or other damages or other remedies.

The option of different guarantee periods for different parts of work, or right to benefit from a longer guarantee period for parts manufactured by 3<sup>rd</sup> parties for which a longer guarantee period is foreseen by the manufacturer are not specifically covered in FIDIC

Conditions of Contract. This is mainly due to the compactness of the contract, but there is no clause that hinders the opportunity.

The remedies foreseen in Sub-Clause 11.4 [Failure to Remedy Defect] in case of defects are discussed in more detail in sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53).

## **3.6. PRICE AND PAYMENT CONDITIONS**

### **3.6.1. UNCITRAL GUIDE**

Under this heading (UNCITRAL Guide, p. 76-98), after introducing the three main contracting approaches as lump-sum, cost-reimbursable and unit-price methods; their advantages, disadvantages, usage and modalities for contractor and for the purchaser, UNCITRAL Guide states that regarding the length of the time frame starting from contract agreement till completion of the construction; adjustment or revision of price is possible.

For early completion of Works, an option of bonus payment is also welcome in UNCITRAL Guide.

UNCITRAL Guide defines adjustment as; construction costs becoming higher or lower after entering into the contract due to a change in the construction required under the contract. This change may be due to a variation in the works to be constructed, a change in the method of construction from that anticipated at the time of entering into the contract, incorrect data supplied by the purchaser which could not reasonably have been discovered at the time of entering into the contract, unforeseeable natural obstacles or changes in local regulations and conditions.

Revision of price refers to situations where the construction required under the contract remains the same, but certain economic factors have changed in such a way that the cost of the construction and the price to be paid for it has become substantially unbalanced.

In regards to adjustment and revision, there are several possibilities and methods foreseen in UNCITRAL Guide. Within the context of examining FIDIC Conditions of Contract under UNCITRAL Guide's light, it is settled on only mention that UNCITRAL Guide foresees price adjustment in certain cases.

UNCITRAL Guide advises to limit adjustment and revision of the price to situations clearly determined in the contract or provided for by the law applicable to the contract. It further advises the contract not obligate the parties to agree upon an adjustment or revision when stipulated circumstances arise, but the price revision takes place automatically

when the stipulated circumstances take place. Else, if the parties fail to agree, difficulties may arise in settling the question in arbitral or judicial proceedings. Further, it is advised that, in case the dispute is referred to be settled in arbitral or judicial proceedings, a clause such as the construction not to be interrupted during the proceedings, revision, or otherwise may also be added.

UNCITRAL Guide mentions that the revision of price may be due change in costs of construction, in which case index clause or documentary proof method (on the basis of costs actually incurred) may be used. For index clause, UNCITRAL Guide suggests several alternatives for establishment of base date. However, it is also noted that the contract might similarly provide that if the contractor is in delay in completing the construction, the index levels existing a specified number of days prior to the agreed date for performance are to be used if those levels are more favorable for the purchaser

When revision is due to change in exchange rate of price currency in relation to other currencies; a currency clause is advised; adding the fact that contractual provisions concerning price revision due to a change in the value of the price currency are mandatorily regulated under some legal systems.

For revision of price, UNCITRAL Guide suggests the contract might provide the price revision clause to apply only in cases where its application would result in a revision exceeding a certain percentage of the price or that price revision clauses not used for short contract durations.

In this regard, the illustrative provision for index clause reads:

- (1) The agreed price is to be revised if there is an increase or decrease in the costs of ... [list materials or services to be covered by this clause]. The revision is to be made by the application of the formula contained in the annex to this contract." [see appendix to the present chapter].
- (2) The base levels of the indices are to be those existing [at the time of the entering into the contract] [... days prior to the actual submission of the bid] [... days prior to the closing date for the submission of bids]. These levels are to be compared with the levels of the indices for the same materials or wages existing [... days prior to the last day of the period of construction in respect of which payment is to be made] [... days prior to the date on which the payment claimed is due]. However, if the contractor is in delay in construction, the base levels are, at the purchaser's option, to be compared with the levels existing ... days prior to the agreed date for performance [unless the delay was due to an exempting impediment].

- (3) The price subject to revision is to be ... per cent of the price for the construction of ... (indicate items to be covered by this clause) effected during the construction period in respect of which the interim payment is to be made.
- (4) If a dispute arises between the parties with regard to the weightings in the formula, the weightings are to be adjusted by [the arbitrators] [the court] if they have been rendered unreasonable or inapplicable as a result of changes in the nature or extent of construction or major changes in the cost relationship of the factors weighted.  
(This paragraph may be included in the index clause if the laws applicable to the contract and the law applicable to arbitral or judicial proceedings permit an arbitral tribunal or a court to exercise the authority specified in this paragraph).
- (5) For the purposes of this provision the indices published by ... in ... [indicate the country] are to be used. If these indices cease to be available, other indices are to be used if they can reasonably be expected to reflect price changes in respect of the construction costs covered by this clause.
- (6) This clause applies only in cases where its application results in a revision of the price exceeding ... per cent of the price agreed in the contract.

In this regard, the illustrative provision for currency clause reads:

The price is agreed upon subject to the condition that ... [indicate a unit of price currency] is equal to ... [indicate unit or units of a unit of account]. Should this relationship have changed at the time of the actual payment of the price by more than ... per cent, the price to be paid is to be increased or decreased so as to reflect the new relationship between the unit of account and the unit of the price currency.

For payment conditions, UNCITRAL Guide mentions that payment can be done in accordance with an agreed time-schedule by providing for a substantial portion of the price to be paid to the contractor as various steps in the construction are completed. Continuing that; if the lump-sum pricing method is used, the lump-sum price might be broken down and allocated against major aspects of the construction to be effected by the contractor. A second method of payment due progress payments in certain time intervals is also advised.

Also for payment of the fee, it is foreseen that a certain portion of the fee may be payable as portions of the construction are completed, a certain portion after acceptance and the rest after the expiry of the guarantee period. In case of advance payment, a guarantee is advised.

To determine on which basis the payment will be made, that is the completion status of Works, the purchaser may authorize the consulting engineer to measure, or the contract might require the contractor to submit to the consulting engineer certain documents and a detailed report for the construction completed in the relevant payment period. If the cost-reimbursable pricing method is used, special contractual provisions may be needed for the verification of costs incurred by the contractor. Any case, the contract to specify a period of time within which an interim certificate for payment must be issued by the consulting engineer or the purchaser, and a period of time after issuance of this certificate within which payment must be effected by the purchaser are advised by the Guide. In case of a failure to issue the certificate or to pay the amount due under the certificate, the contractor might be entitled to claim payment in dispute settlement proceedings. (see sub-section 3.9.1.2.1. Delay in Payment of Price or in Providing Security for Payment of Price, page 65).

As mentioned above, UNCITRAL Guide advises that a certain portion of the price to be paid after completion of construction and some of it after the guarantee period. This is to protect the purchaser against the consequences of defective construction. In this case, when defects are discovered and notified within the guarantee period, the purchaser is entitled to retain from the portion of the price then outstanding an amount, which is needed to compensate him for the defects. The retention might last until the contractor cures the defects and pays any damages to which the purchaser may be entitled.

### **3.6.2. FIDIC CONDITIONS OF CONTRACT**

Sub-Clause 4.11 [Sufficiency of the Accepted Contract Amount] of FIDIC Conditions of Contract emphasizes unless otherwise stated the contract price is to cover all the Contractor's obligations under the Contract.

It is Clause 13 [Variations and Adjustments], which mainly deals with adjustments and variations.

Sub-Clause 13.4 [Payment in Applicable Currencies] anticipates the Contract Price to be paid in different currencies, and when an adjustment is made, the adjustment is effective and payable in each of applicable currencies.

Further, Sub-Clause 13.7 [Adjustments for Changes in Legislation] states that the Contract price shall be adjusted to take into account of any increase or decrease in Cost resulting from a change in legislation, made after the Base Date, which affect the Contractor cost wise or time wise in the performance of the obligations under the Contract.

Sub-Clause 13.8 [Adjustments for Changes in Costs] corresponds to UNCITRAL Guide's terminology and formulation for revision in costs. The Sub-Clause shall apply if the table of adjustment data in the Appendix to Tender is filled out. It is stated that unless this Sub-clause applied, or unless there is a compensation foreseen for rises and falls through this or another clause, the Accepted Contract Amount is deemed to include any contingency. The formula for adjustment is stated not to be applied to cost based prices or current prices. For application of adjustment clause, there exists a table in the Appendix to Tender and the reference dates for reference values is input there. The procedure for conversion is also specified in the Sub-Clause in case the payment currency and the currency of index stated in the table are not relevant. FIDIC Conditions of Contract suggest that when Contractor fails to complete the Works in time, the current index or the index 49 days prior to expiry of Time of Completion should be used, whichever is more favorable to the Employer. The weightings of index clause, which are representing the estimated proportion of each cost element related to the execution of Works, is only to be adjusted if they are rendered unreasonable, unbalanced or inapplicable, as a result of Variations.

In regards to advance payment, Sub-Clause 14.2 [Advance Payment] states that, when secured with a guarantee, an interest-free loan for mobilization can be paid to the Contractor as advance payment, where the timing and number of installments are left to the Parties. In the Sub-Clause, it is stated that the amount of guarantee may be reduced by the amount repaid by the Contractor. The advance payment is foreseen to be deducted from Payment Certificates. If advance payment has not been repaid prior to Taking-Over Certificate or Termination or Force Majeure, the outstanding balance will immediately become due.

Sub-Clause 14.3 [Application for Interim Payment Certificates], 14.4 [Schedule of Payments], 14.5 [Plants and Materials Intended for Works], 14.6 [Issue of Interim Payment Certificate] and 14.7 [Payment] codifies the process regarding interim payments, comprising issues such as how the Contractor applies for it, how it is evaluated, issuing of Payment Certificates and how payment is realized; and the associated time limits for these.

### **3.6.3. NOTES ON SUB-SECTION**

Examining FIDIC Conditions of Contract from the viewpoint of UNCITRAL Guide, although it is not interdicted, different from UNCITRAL Guide there is no bonus payment.

Regarding revision and adjustment of price, both FIDIC Conditions of Contract and UNCITRAL Guide are parallel. UNCITRAL Guide recommends the circumstances leading



adjustment or revision is limited, likewise FIDIC Conditions of Contract also specifies what employs the right to an adjustment. Furthermore, in case of revision, FIDIC adopts the index principle, where in parallel to UNCITRAL Guide, when Contractor is in delay to complete the construction, there may be alternatives for determining the base date in favor of the Employer.

In case of adjustment, UNCITRAL Guide's advice that contractor not to delay work awaiting response, is missing in FIDIC Conditions of Contract. Sub-Clause 13.3 [Variation Procedure] foresees that Contractor shall not delay work in case of variation. However, Sub-Clause 13.7 [Adjustments for Changes in Legislation] does not include such a wording for adjustments.

On the other hand, for revision of the price, the index clause stipulated in FIDIC Conditions of Contract is identical with UNCITRAL Guide's suggestion.

Contrary to adjustment of price, in cases where there is an index clause, the revision of price takes place automatically through each interim payment. This is what is advised in UNCITRAL Guide, that parties should not be left for agreement in each case as it can lead to delay or dispute. This is formulated similarly in FIDIC Conditions of Contract Sub-Clause 13.8 [Adjustments for Changes in Cost]. However, it may be said that UNCITRAL Guide is more strict in revision of price, while it advises that the revision shall occur only if the price subject to revision is a minimum percent of the construction price. On the other hand, FIDIC Conditions of Contract Sub-Clause 13.8 does not put such a limit for revision. However, if it was a variation, and there was an increase or decrease in the quantity of work, then Sub-Clause 12.3 [Evaluation] enables re-determination of price only if this change in quantity has a minimum percent effect on the work and price.

Adjustment of adjustment data, namely the index clause coefficients is both expected in UNCITRAL Guide and FIDIC Conditions of Contract under certain conditions. (see sub-section 3.6.3.1. Pacta Sunt Servanda, Clausula Rebus Sic Stantibus, Alteration of Contracts, page 40)

The process of payment, the interim payments, retention money, amount of money to be kept or paid during taking-over and at the end of guarantee period are handled similar in both documents.

### **3.6.3.1. PACTA SUNT SERVANDA, CLAUSULA REBUS SIC STANTIBUS, ALTERATION OF CONTRACTS**

The general principle in contracts law is pacta sunt servanda (promises must kept); which follows that the parties shall conform to the provisions of the contract. The exception to

this major principle is changing conditions that occur after entering into contract, and could not be foreseen prior to contracting. Clausula rebus sic stantibus, meaning things thus standing, enables the parties to adapt the contract to changing conditions.

German Civil Law - Bürgerliches Gesetzbuch (BGB), Articles 313 and 314 are for adaptation and ending of contracts:

Section 313 - Interference with the basis of the transaction

- (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.
- (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
- (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

Section 314 - Termination, for a compelling reason, of contracts for the performance of a continuing obligation

- (1) Each party may terminate a contract for the performance of a continuing obligation for a compelling reason without a notice period. There is a compelling reason if the terminating party, taking into account all the circumstances of the specific case and weighing the interests of both parties, cannot reasonably be expected to continue the contractual relationship until the agreed end or until the expiry of a notice period.

Similarly in Turkish Code of Obligations, 2011, Articles 138 under the section drawing up general conditions to end contracts, and Article 480 under the section for independent contractor agreement, lump-sum agreements; draw up the conditions for adaptation of contracts.

On the other hand, Turkish Commercial Code Article 18 requires that, each merchant should act prudent (*basiretli*). The Turkish Court of Cassation has accordingly rendered several decisions where adaptation is not possible, where the cases even include unforeseeable changes occurred in exchange rates, which is certainly objective and true all over the world economy, and not restricted to a certain area of business.

One should bear in mind that due to European Directives the right to amend the contract may be limited. For example, French law will limit the employer or his agent to order variations or to conclude an amendment to the contract. Marc Frilet (Knutson, 2005, page 83-84) holds that; the general theory is that above certain threshold of variation or amendment to the contractual conditions leading often to a change of the original price another potential bidder could have proposed a lower bid based on the changed conditions and that as a result a fraud on the bidding procedures has taken place. Thus, parties must be careful not to go beyond this threshold. On the other hand, General Specifications for Public Works, Turkey (*Bayındırlık İşleri Genel Şartnamesi*), which is mainly applied for Turkish Governmental Contracts outside Turkey, Article 38 does not permit an increase more than 30% in the contract price. Similarly General Conditions of Construction Works, Turkey (*Yapım İşleri Genel Şartnamesi*), which is mainly applied for Turkish Governmental Contracts, Article 48 foresees that, if due to unforeseeable reasons the contract will be completed at a value higher than the initial value, the contract is to be liquidated (*tasfiye etme*).

### **3.7. CONSULTING ENGINEER**

For FIDIC Conditions of Contract, Engineer is a key concept, and his responsibilities and functions are always of debate. In UNCITRAL Guide, the corresponding party is defined as Consulting Engineer.

#### **3.7.1. UNCITRAL GUIDE**

In UNCITRAL Guide (UNCITRAL Guide, p. 119-127), the authority and functions of the Consulting Engineer are foreseen to be established by a contract between him and the purchaser, rather than in the works contract, to which the consulting engineer is not normally a party. However, it is advised that his duties and authorities would as well be defined in the works contract, especially any authority of the consulting engineer to act on behalf of the purchaser, including the limitations on such authority. In the UNCITRAL Guide, the functions of consulting engineer are classified as below:

##### **1. Rendering services to purchaser**

###### **(a) Rendering advice and technical expertise to purchaser**

If the consulting engineer's duty is limited only to render advice and not to act on behalf of the purchaser, there is no need for the works contract to mention the duties of him. On

the other hand, to facilitate him to have access to the site and to monitor progress of work, it may be desirable for the works contract to contain provisions accordingly.

(b) Acting on behalf of purchaser

Besides his technical expertise, when the consulting engineer acts on behalf of the purchaser, his acts may directly affect the contractor's contractual rights and obligations. Thus, it is advised that the Works contract to set forth his authority in this regard, including any limitations upon that authority.

## 2. Independent functions

The parties may wish to consider whether a consulting engineer should exercise certain functions independently, rather than for or on behalf of the purchaser. However, there may be certain disadvantages of this. That is; when he is chosen and employed or paid by the purchaser, the contractor may question his impartiality. UNCITRAL Guide states that the parties may have more confidence in his independency and impartiality to the extent they had jointly participated in the selection of him. On the other hand, UNCITRAL Guide claims that, even in the case where the consulting engineer is selected by the purchaser alone, the selection of an engineer who has a high international reputation for competence and fairness could increase the acceptability of a broader independent role of the consulting engineer, by the potential contractors.

UNCITRAL Guide further advises the parties to consider whether the consulting engineer should be authorized to decide disputes between the parties.

Therefore, if the consulting engineer is to be authorized to exercise independent functions, the contract should provide that those functions are to be exercised impartially. Moreover, it is desirable to establish the extent to which an act of the consulting engineer pursuant to an independent function is to be considered binding on the parties and non-reviewable or can be referred by either party for review in dispute settlement proceedings provided for in the contract. Alternatively, UNCITRAL Guide suggests that, the contract might also provide that any matter upon which the consulting engineer has failed to act within a specified period of time after having been requested by a party to do so may be referred to dispute settlement proceedings, unless the contract provides other means of dealing with the matter.

As to the status of the consulting engineer's act in question, during the pendency of dispute settlement proceedings, according to UNCITRAL Guide, the contract might provide that the act must be conformed to or complied with until it is modified or reversed in such proceedings, or unless the tribunal -conducting the proceedings- otherwise decides an interim measure. Such an approach would avoid lengthy and costly

interruptions in the construction. If that approach is adopted, however, the contract might entitle either party to be compensated by the other party for any costs incurred, not otherwise compensated under the contract, as a result of conforming to or complying with an act of the consulting engineer which is subsequently modified or reversed in dispute settlement proceedings.

In UNCITRAL Guide's view, regarding the selection of consulting engineer, the more the consulting engineer is to act impartially, the more the contractor is expected to participate in the selection. Among the alternatives stated in UNCITRAL Guide, if the contractor is to participate in the selection of a consulting engineer after the contract has been entered into and the consulting engineer is to exercise independent functions, it would be desirable for the contract to provide a mechanism for the selection. The contract might require the purchaser to notify the contractor in writing of the name and address of the proposed consulting engineer and seek the contractor's consent to his appointment. It might permit the purchaser to engage the proposed consulting engineer immediately, but provide that the consulting engineer is not to exercise any independent functions until the contractor consents in writing to the appointment of the consulting engineer. The contract might further provide that the consulting engineer may exercise the independent functions provided for in the contract if the purchaser does not receive, within a specified period of time after the dispatch of his notice to the contractor, his written objection to the appointment specifying his grounds for the objection.

In regards to delegation of authority by the consulting engineer, UNCITRAL Guide states that this will often be regulated by rules of the applicable law; however, parties may also define it in the contract. According to UNCITRAL Guide, the contract might provide that any act taken by the person to whom authority has properly been delegated, shall have the same effect as if the acts had been taken by the consulting engineer himself. Similarly, the contract might also provide that the consulting engineer may take any act, which the delegated person is authorized to take but has not taken.

In order to enable the consulting engineer to exercise his functions effectively, he would need to have various types of information, have access to the site, to places of manufacture of equipment, materials and supplies to be incorporated in the works, and to the works. In this manner, UNCITRAL Guide advises the contract to obligate the contractor to provide such information or grant such access to the same extent that he must provide it to the purchaser under the works contract.

### **3.7.2. FIDIC CONDITIONS OF CONTRACT**

A trusted, independent engineer who is central to the contract (Bunni, p.73, 112) is what FIDIC Conditions of Contract describes. The services provided by the Engineer may be one or a combination of any of the following: counseling, pre-investment studies, design and preparation of documents, supervision, employer's agent, certifier, specialized design and development services and project management (Bunni, p. 79, 155-183).

In the previous editions the Engineer was required to exercise his functions impartially, however in 1999 edition of FIDIC Conditions of Contract, the engineer is deemed to act for the employer unless expressly stated to the contrary but, if required to agree or determine any matter, he is obliged to consult with the parties in an attempt to reach agreement and to make a fair determination (Bunni, p.490-491).

According to FIDIC Conditions of Contract Article 3.1 [Engineer's Duties and Authority], the Engineer is appointed by the Employer, carrying out the duties specified in or necessarily to be implied from the Contract. He has no authority to amend the Contract. He is required to obtain the approval of the Employer before exercising a specified authority, the requirements of which are to be stated in the Particular Conditions. On the other hand, whenever he exercises a specified authority for which the Employer's approval is required, then (for the purposes of the Contract) the Employer is deemed to have given the approval. Moreover, the Employer is in a position not to impose further constraints on Engineer's authority, except as stated in the Contract. Engineer when carrying out duties or exercising authority is deemed to act for the Employer, while he has no authority to relieve either party of any duties, obligations or responsibilities under the Contract and any approval, check, certificate, consent, examination, inspection, instruction, notice, proposal, request, test or similar act by him does not relieve the Contractor from any responsibility, including the responsibility for errors, omissions, discrepancy and non-compliances.

Per Sub-Clause 3.2 [Delegation by the Engineer], he can delegate authority to assistants in writing, other than the authority of Determinations specified in Sub-Clause 3.5 [Determinations] of FIDIC Conditions of Contract unless agreed by both Parties. The assistant's approval would have the same effect as the Engineer's, however any failure to disapprove would not constitute an approval and thus the Engineer has then the right to reject the work, plant or materials. As well, if the Contractor questions any determination or instruction of the Engineer's assistant, the Contractor may refer it to the Engineer.

According to Sub-Clause 3.3 [Instructions of the Engineer], the Contractor may only take instructions from the Engineer or his assistants to whom appropriate authority is delegated. If the instruction constitutes a variation then Clause 13 [Variations and

Adjustments] of FIDIC Conditions of Contract is referred. Whenever practicable, the instruction of the Engineer or his delegated assistant should be in writing. If there is an oral instruction and the Contractor confirms the instruction within two working days after the instruction and the Engineer or the delegated assistant does not reply to the latter by issuing a written rejection and / or instruction within two days after receiving the confirmation, then this instruction shall constitute the written instruction of the Engineer or the delegated assistant.

Sub-Clause 3.4 [Replacement of the Engineer] when assessed together with Sub-Clause 1.1.2.4 [Definitions] requires the Employer to give notice to the Contractor before replacement. In this case, Employer shall not replace the Engineer with a new, against whom the Contractor raises reasonable objection by notice to the Employer, with supporting particulars.

Engineer, when he is to agree or determine any matter as foreseen by Sub-Clause 3.5 [Determinations] of FIDIC Conditions of Contract, he is to consult with each party to reach an agreement. When agreement is not achieved, he is to make a fair determination. Each party should give effect to the agreements and determinations by the Engineer, unless and until it is revised under Clause 20 [Claims, Disputes and Arbitration].

### **3.7.3. NOTES ON SUB-SECTION**

Before discussing the differences how UNCITRAL Guide and FIDIC Conditions of Contract handle the Engineer, it is worth to note two points.

First; most of the time, it is only the parties to a contract who may be bound by the terms of the contract and the contract would not extend to third persons. It follows that the contract between the Employer and the Engineer will not extend to the Contractor; and the contract between the Employer and the Contractor will not extend to the Engineer. However, the terms of these two contracts will surely be of concern for both parties.

Secondly, in Continental Europe system, it would be hard to find an institution similar to that of an Engineer, as it is discussed in FIDIC Conditions of Contract. In FIDIC Conditions of Contract, the administration of contract is mainly being the Engineer's duty, depending on his decisions, instructions, approvals and other determinations.

For example in both Turkish Law and German Law, there is no equivalent to Engineer. The contract administration would be the right and obligation of the parties directly. There may be a counselor or an architect but then, as his function is to advise or provide technical expertise, he would not be independent such as the Engineer to give instructions or decide for claims himself or order for variations including omission. He may

only act as Employer's agent. On the other hand, taking over of works, amendment of contract, approval of payment certificates, ordering variations would fall far beyond his duties. In this context, Article 15 and 16 of the General Conditions of Construction Works, Turkey (*Yapım İşleri Genel Şartnamesi*) point out the functions, responsibilities and authority of such supervisor. Especially Article 16 sets that, the Contractor shall act according to the Supervisor's (*Yapı Denetim Görevlisi*) direction guaranteed that it is not contradictory to the contract documents. Thus, the Supervisor is not in any position to order changes or variations that would amend the contract. Similarly, the extension of time is decided by the Administration per Article 30 of General Conditions of Construction Works, Turkey (*Yapım İşleri Genel Şartnamesi*), not by the Supervisor. However, the freedom of contract does not limit parties to agree on the Employer-Engineer-Contractor frame outlined by FIDIC Conditions of Contract.

Based on case law, Federal Acquisition Regulation (FAR), used in United States Government contracting context, the Contracting Officer who has similar functions to Engineer, has the authority to issue change order, decide for extension time, make equitable adjustment and modify the contract as required by the change order.

Having made this note; UNCITRAL Guide mentions several alternatives for Engineer's duties ranging from basically providing technical expertise extending to acting on behalf of purchaser or acting impartially and at some cases decisions being non-reviewable, so that cannot be referred for review in dispute settlement proceedings. UNCITRAL Guide emphasizes that when the Engineer is to act on behalf of the Employer or especially when he is to decide dispute between parties, it is recommended that contractor is also involved in selection of the Engineer.

FIDIC Conditions of Contract, although lets the Engineer to make determinations, it does not involve the Contractor in the selection procedure of the Engineer. Contractor is only involved when the Engineer would be changed by the Employer. Even if, in this case when Contractor puts forward his rejection based on reasonable objection, the extend to determine the reasonableness of rejection is not clear. It is usually the Engineer to make determinations, however in case of the issue of replacement of the Engineer, in case the Employer does not recognize Contractor's objection be reasonable, then the issue should be resolved through the dispute resolution procedure.

The question would arise when the Employer would like to replace the Engineer, and inform the Contractor for so at least 42 days in advance (Sub-Clause 3.4 [Replacement of the Engineer]). Then the Contractor would submit his rejection whereas no time limit is defined in FIDIC Conditions of Contract. The Employer may not find this rejection reasonable. In this case, will the new Engineer start his duty, if yes, should the Contractor



be bound with his instructions. Meanwhile if the Contractor carries his rejection to the dispute resolution procedure and his rejection is found out to be reasonable, will the orders given by the Engineer deemed null or still have affect. Assuming that Engineer is acting on behalf of the Employer, and if there was no Engineer present, the Employer would as well give the same directions, the directions may deemed to be valid. On the other hand, under Sub-Clause 3.5 [Determinations] the Engineer is responsible to make determination on several issues. In case of rejection pending before the dispute resolution procedure, what would be the validity of the determinations made by the Engineer in question, or if there arises issues to be determined in this time frame, who would be in charge to make any determination?

Likewise, is it not fair to claim that the Contractor had no intermeddling position in determining the Engineer at the beginning of the works, while he would have a stronger position in case of Employer changing the Engineer.

Another issue is the independency of the Engineer. He is acting on behalf of the purchaser, but different from the previous edition of FIDIC Condition of Contract, he is not to act independent, but he shall make a fair determination. Regarding the independency, impartiality and fair determination, in addition to the comment by Jensinko (Philip Jenkinso, [http://www.unep.fr/energy/activities/eca/pdf/ws3/philipjenkinson\\_fidic.pdf](http://www.unep.fr/energy/activities/eca/pdf/ws3/philipjenkinson_fidic.pdf), Overview of the FIDIC Forms of Contract, last accessed on 7.12.2011) in "Traditional role of 'the Engineer' to make impartial determinations modified to reflect current practice"; below issues are also worth to note:

"A source of continuing criticism of its Red Book concerns the duality in the traditional role of the engineer as the employer's agent and as an independent third party holding the balance fairly between the employer and the contractor. In response to this and other criticisms, FIDIC Conditions of Contract produced a replacement for it in 1999." (Ndekugri, I., Smith, N. and Hughes, W.P. (2007). The engineer under FIDIC's conditions of contract for construction. Construction Management and Economics (Special Issue, Guest-edited by Edwin Chan and John Uff). 25(7), 791-799,

[http://reading.academia.edu/WillHughes/Papers/81922/The\\_engineer\\_under\\_FIDICs\\_conditions\\_of\\_contract\\_for\\_construction](http://reading.academia.edu/WillHughes/Papers/81922/The_engineer_under_FIDICs_conditions_of_contract_for_construction), last accessed on 7.12.2011)

"Just as one begins to miss the impartial engineer, any typical professional service agreement states that the engineer is under a contractual duty to exercise a 'fair determination'. ... However, the term 'fair determination' is always debatable, probably because the engineer moves from being an employer's agent to being an independent consultant, in the same project. ... An argument is that the engineer must not be too remote and both parties are entitled to the expertise of the engineer

on all matters. The engineer is therefore required to act fairly between and independently of the parties. However, the true employer's agent has no independent function. The employer's agent is the employer's representative and their relationship is normally governed by the law of agency where the agent has no discretion. ... On the one hand, contractors have been suspicious of such impartiality bearing in mind that the engineer is remunerated by the employer and acts under a separate agreement with the employer to which the contractor is not party. In addition, the engineer may have a long-term interest in securing further appointments from the employer that could lead to bias towards the employer. Also, the engineer in making decisions on disputes may have to rule on matters involving his own shortcomings, for example the late issue of drawings. Employers may also either rightly or wrongly, be in the impression that the engineer has acted over generously in the administration of the contract in areas such as determining extensions of time and settling claims. ... However, the sub-clause 3.5 [Determinations] of the New Red Book keeps the Engineer under a contractual duty to act fairly in all circumstances unless otherwise specified. It is important to understand that the engineer cannot act on his own opinion on matters such as valuations, defects, entitlements and particularly in deciding disputes referred to him. In this function, the principle that applies is that the Engineer is required to reach his decisions fairly, yet within the contract, which is sometimes known as the Sutcliffe Principle. ... It could be argued that these concerns about the role of the engineer have been recognized by FIDIC Conditions of Contract and the introduction of dispute adjudication boards and replacement of traditional engineer's decisions in the standard forms are evidence of that change of mindset. However, as long as employers continue to fetter the engineer's discretion by insisting on a variety of scenarios in which he cannot act without express approval, the engineer will continue to be viewed in certain quarters as nothing more than an engineer's representative" (Dr. Chandana Jayalath, Demystifying the Role of Engineer under FIDIC Forms, Posted: July 06, 2009, <http://www.articlesbase.com/construction-articles/demystifying-the-role-of-engineer-under-fidic-forms-1016078.html>, last accessed on 7.12.2011).

Thus, FIDIC Conditions of Contract has introduced a change in Engineer's way of determination and made a shift from impartiality to fairness, and highlighted the concept of Dispute Adjudication Board. When viewed in the light of UNCITRAL Guide, it is obvious that the debate would continue for the determinations. It is therefore advised that, not only the replacement of Engineer but selection procedure to include Contractor's involvement.

On the other hand, it would not be realistic to claim that the mechanism of contractor's consent in selection of Engineer under UNCITRAL Guide is problem loss. As mentioned above, while awaiting contractor's consent, the purchaser may engage the proposed consulting engineer immediately, but the consulting engineer is not to exercise any independent functions until the contractor's consent. In this case, if the Contractor has not yet declared his consent, however there had arisen a technical issue requiring Engineer's determination, the question is: who would be responsible for late determination and a possible delay. Is it the purchaser, who suggested a questionable Engineer; or is it the contractor, who did not yet conclude with the analysis of Engineer's capabilities? It may be claimed that the Engineer is not in a position to make a determination because the Contractor has still the time to examine and forward his disagreement. On the contrary, what happens if Engineer delivers his determination but the Contractor later forwards his disagreement on the appointment of Engineer. Alternatively, it may be the case that, the Contractor had already presented his disagreement, and the purchaser did not yet suggest a new candidate for Engineer position. Similar dilemma may occur in case the Engineer is to be replaced by the Employer, thus the Contractor's consent is not clear or that the Contractor had already raised his objection and this objection is now being reviewed or they are in the period for the Employer to suggest an alternative Engineer.

Another issue is the binding capacity of the Engineer's decisions. Despite the suggestion of UNCITRAL Guide, which recommends that certain decisions, or determinations of the Engineer being un-reviewable to avoid time-loss and some probable costs; Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] of FIDIC Conditions of Contract does not foresee any limit to obtain Dispute Adjudication Board's decision on Engineer's determinations. This may seem a guarantee in favor of the Contractor to assure the Engineer act fair, however concerning the time and financial impact, the Contractor may still choose to act in the direction of Engineer's determination but not refer it to the Dispute Adjudication Board.

### **3.8. INSPECTIONS AND TESTS DURING MANUFACTURE AND CONSTRUCTION**

Inspection and testing is one of the key elements to assure the quality of the work conforms to the contract, to the specifications, to the technical requirements as well as to the local regulations. On the other hand, tests for major items are usually indicated on the work schedule. Thus through the timing of the test and inspections, the progress per schedule is also controlled.

### **3.8.1. UNCITRAL GUIDE**

UNCITRAL Guide due to the aim it is designed; which is the construction of industrial facilities, it focuses both on tests on manufacture and tests during construction. Here attention would be drawn mainly on tests during construction, rather than inspections and tests during manufacture and inspection upon shipment or arrival on site.

UNCITRAL Guide (UNCITRAL Guide p. 140-146), emphasizes that, it is advisable to provide that a failure of the purchaser to detect and notify a defect during manufacture and construction does not deprive him from later claiming a remedy for that defect; or similarly does not release the contractor from the responsibility to demonstrate by appropriate tests after completion that the works is free of defects.

Reference to local legal requirements and to contractor's quality control system is made in UNCITRAL Guide. It is advised that when local legal regulations foresee some tests for inspection to be made, it might be cost saving if these tests replace the tests foreseen in the contract, which have the same scope and meet the purchaser's requirements. Similarly, the purchaser may satisfy himself with tests performed as a part of Contractor's quality control system. Yet inspections and tests may also be conducted by an independent institution, UNCITRAL Guide advises to describe the character of the inspections and tests to be conducted.

UNCITRAL Guide further asserts that in order to enable the purchaser or his representative to exercise the right to attend tests, the contractor might be obligated to notify in advance, of the time when the tests will be conducted. The contract may require a specified period of notice to be given to the purchaser.

According to UNCITRAL Guide, in case of specified important items of equipment, the contract may allow the contractor to proceed with further manufacture and construction only after those items have been successfully tested in the presence of the purchaser.

In respect to the failure to attend the tests, UNCITRAL Guide puts forward that, if the purchaser fails to attend the tests due to causes for which the contractor is not responsible, the contract might entitle the contractor to conduct the tests in the absence of the purchaser.

It is expressed that, the contractor may be entitled to be compensated for reasonable costs incurred by conducting additional or modified tests not foreseen within the contract, and to a reasonable extension duly. If such tests are not required by legal rules, but the purchaser wishes to have them conducted, the tests may be conducted with the consent of the contractor.

If the tests are unsuccessful, it is stipulated that the contract might require them to be repeated. However, in this case, the contractor might not be granted additional time or compensated for additional cost for performance if unsuccessful tests have to be repeated for reasons for which the contractor is responsible.

The purchaser's remedies in cases of defects discovered are discussed more in sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53).

### **3.8.2. FIDIC CONDITIONS OF CONTRACT**

Inspection and testing during the execution of works are handled in FIDIC Conditions of Contract Sub-Clause 3.1(c) and then in Sub-Clause 7.3 [Inspection] giving full opportunity to the Employer and to the Engineer to inspect and test occasionally, as well the responsibility of the Contractor to inform the Engineer for inspection and testing. Further, Sub-Clause 7.4 [Testing] puts forward the general methodology of testing.

Regarding Sub-Clause 3.1(c), any approval, check, certificate, consent, examination, inspection, test or similar act by the Engineer does not relieve the Contractor from any responsibility.

On the other hand, Sub-Clause 7.3 [Inspection] requires the Contractor to inform the Engineer whenever any work is ready and before it is covered up, put out of sight, or packaged for storage or transport. Then The Engineer shall carry the inspection or testing without delay or promptly inform the Contractor that he does not require doing so. If Contractor fails to inform the Engineer, then whenever the Engineer requires, the Contractor should uncover it at his own cost.

Sub-Clause 7.4 [Testing] confirms that it is Contractor's responsibility and cost to provide for the tests. Sub-Clause 7.4 further reads that, if additional tests are required than it would be dealt under Clause 13 [Variations and Adjustments]. However, even if this is a varied or additional test, if the outcome shows that plant, material or workmanship is not in accordance with the Contract, the cost of this variation would be borne by the Contractor.

### **3.8.3. NOTES ON SUB-SECTION**

Both the documents emphasize that purchaser's or Engineer's failure to detect and notify for a defect does not deprive the contractor from his responsibilities.

The reference, which is made in UNCITRAL Guide regarding local requirements for testing, is not made directly in FIDIC Conditions Contract. However, this could be

explained through the reference in Sub-Clause 1.13 [Compliance with Laws] requiring the Contractor to comply with the local laws, rules and regulations. Another reason may be that, the tests and associated details are usually mentioned not in the main Contract, but in the documents accompanying the main Contract, such as the technical specifications.

For the unsuccessful tests and their consequences, sub-section 3.9. Delay, Defects and Other Failures to Perform (see page 53).

## **3.9. DELAY, DEFECTS AND OTHER FAILURES TO PERFORM**

### **3.9.1. UNCITRAL GUIDE**

According to UNCITRAL Guide's definitions, delay in performance occurs when a party performs his contractual obligations later than the time stipulated in the contract, or does not perform them at all. Whereas, defective performance occurs when a party fails to comply with those contract terms that describe the technical characteristics of the construction to be effected.

UNCITRAL Guide, in case of defects and delays, foresees two remedies in principle: the initial remedy usually given to the purchaser is to require the completion or cure by the contractor of performance, which is delayed or defective; and the remedy of termination is given as one of last resort. Anyhow, recovery of damages or payment of an agreed sum is additional remedies that can take place.

#### **3.9.1.1. PURCHASER'S REMEDIES**

##### **3.9.1.1.1. DELAY IN CONSTRUCTION BY CONTRACTOR**

Below, Figure 1 schematizes the remedies of the purchaser according to the UNCITRAL Guide.

UNCITRAL Guide states that, if the contractor fails to commence construction at the time stipulated in the contract, or if the contractor fails to complete a portion of the construction by an obligatory milestone date set out in the construction time-schedule or if the contractor fails to complete the entire construction on the date for completion specified in the contract, the contract may entitle the purchaser by written notice to require the contractor to commence construction or to require the contractor to complete that portion

or require the contractor to complete the entire construction within an additional period of a specified or reasonable length commencing to run from the date of the delivery of the notice. If the contractor does not act so within the additional period, the contract may entitle the purchaser to terminate the contract.

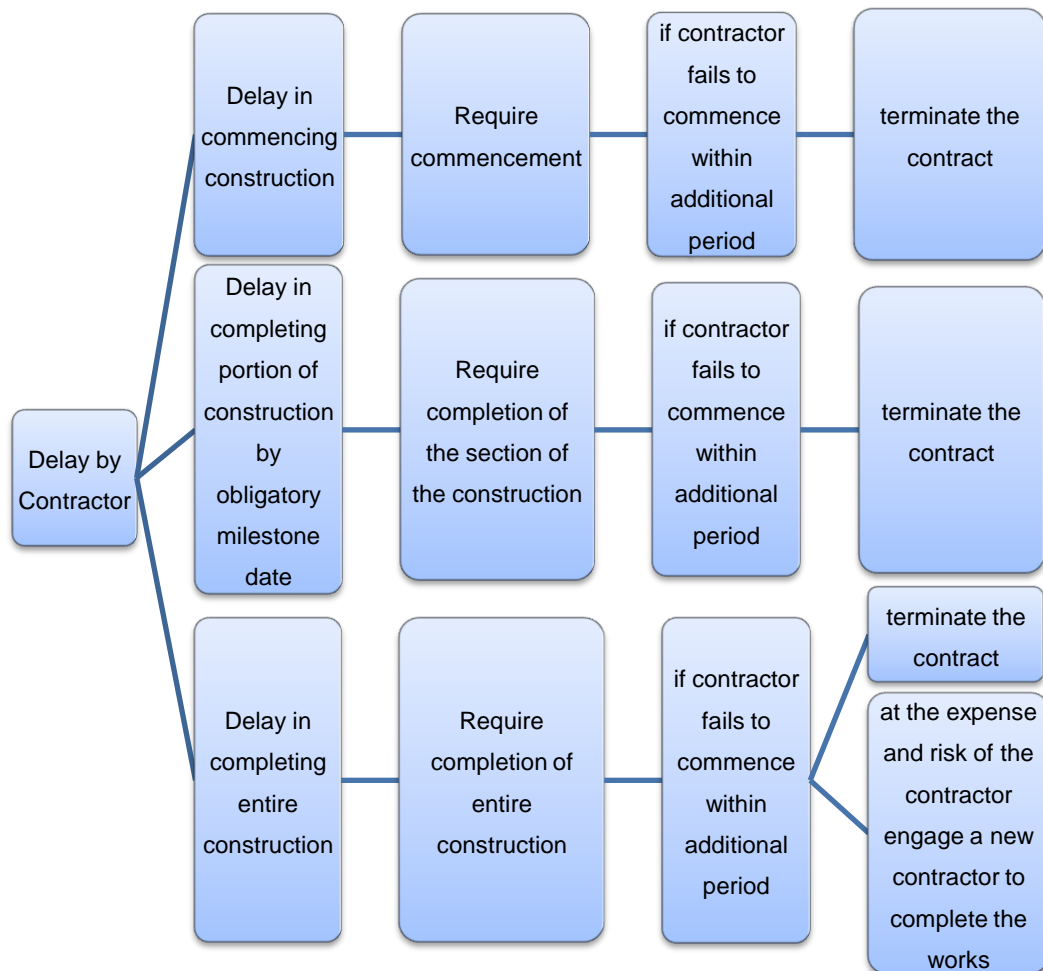


Figure 1: Remedies provided to purchaser for delays

In case of delay in commencing construction, if the contractor states that he will not commence construction, the contract may entitle the purchaser to immediate termination of the contract.

In case of delay in completing portion of construction by obligatory milestone date, UNCITRAL Guide states that termination may be considered only in respect of the portion in delay, or, in certain situations, in respect of the entirety of the uncompleted construction. In this case, the parties may consider whether the purchaser is to be entitled to terminate the contract only if certain additional conditions are satisfied, e.g., only if a specified limit of an agreed sum [Liquidated damages and penalty clauses] has

become due in respect of all delays in construction by the contractor. In UNCITRAL Guide's view, such a limitation may prevent termination in cases where only a small portion of the construction has not been completed.

In case of delay in completing entire construction, instead of termination; to complete the construction by engaging a new contractor at the expense and risk of the contractor is another remedy foreseen by UNCITRAL Guide. However, it is noted that under some performance bonds, the consent of the guarantor may be required for the engagement of this new contractor.

In all the three cases, in addition to the above stated remedies, UNCITRAL Guide states that the purchaser may be entitled to remedies foreseen under section, "Liquidated damages and penalty clauses", and as well the remedies under "Damages" of the UNCITRAL Guide.

In case of delay in the entire construction, if the contract is not terminated and a new contractor is engaged at the risk and expense of the existing contractor, UNCITRAL Guide advises that the contract may provide that, the choice of the new contractor and the terms agreed with him must be reasonable. The contract may obligate the purchaser, prior to engaging a new contractor, to notify the contractor of the new contractor and the terms of the new contract. Following this, the contractor may be entitled to object to the intended new contractor, or to the contractual terms, on the grounds that the new contractor is not a reasonable choice as a contractor (e.g. he lacks the necessary experience), or that the intended terms with the new contractor are not reasonable. The contract may nevertheless entitle the purchaser to engage the new contractor even though the contractor has objected to the new contractor or to the intended contractual terms. However, for this case, UNCITRAL Guide then puts forward the below potential risks to the purchaser:

- The contract may provide that the contractor is obligated to be pay to the purchaser the price that the purchaser must pay to the new contractor, which the purchaser may be entitled to deduct from the price to which the contractor may be entitled under the contract. In addition, the contractor may be obligated to pay to the purchaser other reasonable costs incurred by him in connection with this new engagement. However, when the purchaser has engaged the new contractor without notifying the contractor, or despite valid objections by the contractor, the contract may entitle the purchaser only to the price and other costs that would have been incurred by him in connection with the engagement of the new contractor as if the choice of the new contractor and the terms agreed with him had been reasonable.



- The contract may provide that the contractor is liable for a failure by the new contractor to complete the construction to the same extent as if the new contractor were a subcontractor engaged by him. Alternatively, the contract may provide that the contractor is liable for any defect discovered in the completed works, but that he is entitled to exclude this liability by proving that the defect was caused by the new contractor (remoteness of damages). However, if the purchaser has engaged the new contractor without notifying the contractor or despite valid objections by the contractor, the risk connected with the engagement of the new contractor may be borne under the contract by the purchaser. The contract may also provide that, where the contractor is held liable for a failure of the new contractor to perform, the purchaser must transfer to the contractor any rights, which the purchaser may have against the new contractor arising from that failure, if such a transfer is permitted by the applicable law.

UNCITRAL Guide advises that, it may be desirable to provide that, if the purchaser chooses the remedy of engaging a new contractor to complete the construction, the contractor must cease construction and leave the site so that it can be occupied by the new contractor. The contract may prohibit the contractor from removing from the site without the consent of the purchaser any of his construction machinery and tools, or equipment and materials to be incorporated in the works, since those items may be needed by the new contractor to complete the construction. Where the purchaser chooses this remedy, it is advisable for him not to terminate the works contract with the contractor, since it is desirable that the liability of the contractor for the construction to be effected by the new contractor not be eliminated by the termination of that works contract. However says the UNCITRAL Guide, the works contract with the contractor may provide that the purchaser is entitled to terminate it and to claim any remedies available upon termination if and when the works contract with the new contractor is terminated. The purchaser will also be entitled to remedies against the new contractor under the works contract between him and the purchaser if the new contractor fails to perform.

#### **3.9.1.1.2. DEFECTIVE CONSTRUCTION BY CONTRACTOR**

UNCITRAL Guide states that the remedies available to the purchaser where the construction is defective may depend on whether the defects are serious or not. In this case, it advises that the contract define what defects are serious, taking into consideration the nature of the works to be constructed and the expected performance parameters of the works specified in the contract. Serious defects may be defined as those that prevent the works from operating within certain parameters specified in the contract.

Figure 2 summarizes the remedies available to the purchaser according to the time and type of defects discovered; while the issues related with defects and materials and equipment are not discussed herein in regards of the context of comparison of the two main documents.

From the figure, it follows that, requiring cure of defects, if this is not possible claiming price reduction or terminating the contract are the remedies provided to the purchaser.

In any case, that is, either the defects are discovered during construction, or during performance tests, or after performance tests are concluded but within the guarantee period, in addition to the remedies discussed, the purchaser may also be entitled to remedies discussed in "Liquidated damages and penalty clauses" and "Damages" of UNCITRAL Guide.

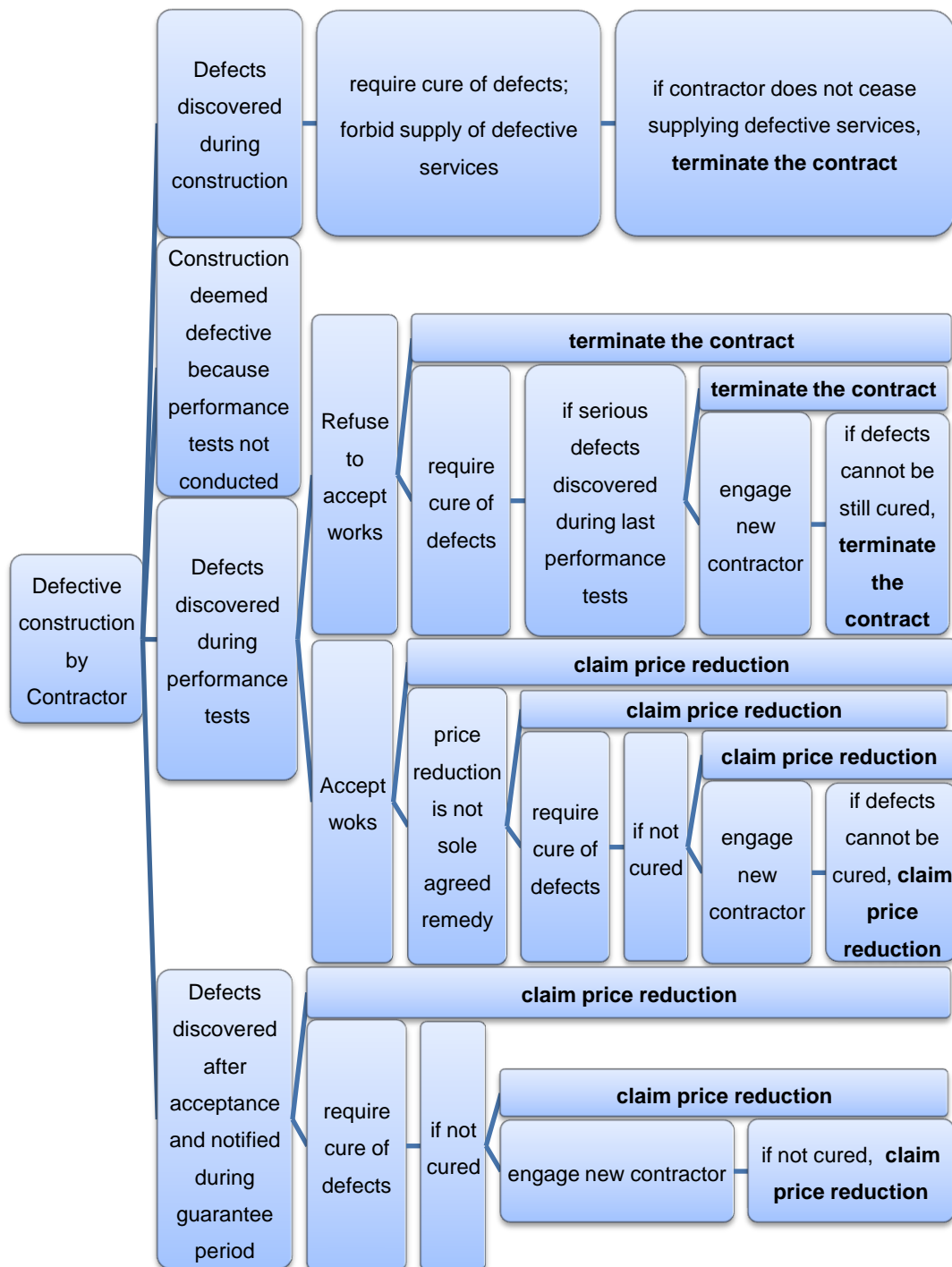


Figure 2: Remedies provided to purchaser for defects

If one would analyze in detail the above-schematized remedies provided for the Purchaser:

#### 3.9.1.1.2.1. Defects Discovered During Construction

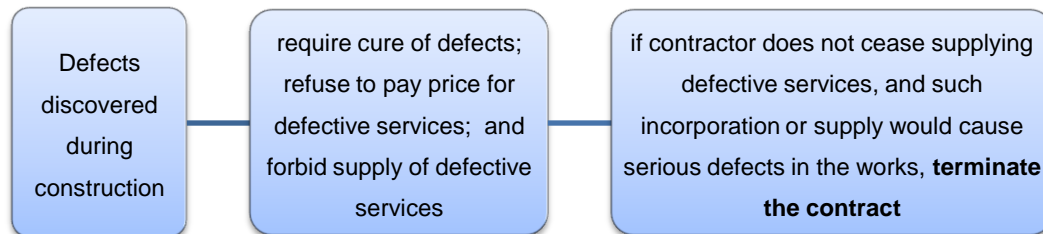


Figure 3: Remedies provided to purchaser when defects are discovered during construction

If disputes arise between the parties as to the validity of claims made by the purchaser that services being supplied are defective, UNCITRAL Guide states that, the contract may obligate the contractor to comply with the directions of the purchaser even if the he himself considers that the services are not defective.

If the contractor is forbidden to supply services for the purposes of the construction and it is later determined in dispute settlement proceedings that the services were not defective, the contractor may be given the same rights against the purchaser as in cases where the purchaser suspends the construction for his convenience.

If the contractor is, in addition, required to supply different equipment, materials or services, the contractor may be given the same rights against the purchaser as if the construction had been varied under a variation order.

If the contractor fails within a reasonable or specified period after the delivery of the notice to stop the supply of defective construction services, or if he refuses to stop the incorporation or supply, and if the use of the equipment, materials or construction services would result in serious defects in the works, the contract may entitle the purchaser to terminate the contract.

UNCITRAL Guide continues that, the contract may provide that defective equipment or materials for which the purchaser has paid at least in part cannot be removed from the site without the purchaser's approval, or without being replaced by equivalent new equipment or materials. However, if, due to the nature of the defects, the contractor must take the defective equipment or materials from the site to be repaired, the contract might permit the contractor to do so provided that, if no other guarantee is applicable, the contractor arranges for a suitable third party to guarantee that in the event the equipment

and materials are not returned, the guarantor will reimburse the purchaser for the price already paid by him for the equipment and materials.

#### 3.9.1.1.2.2. Construction Deemed Defective Because Performance Tests Not Conducted

If this non-conduct of tests is not due to causes for which the contractor was not responsible, UNCITRAL Guide states that, the contract may provide that the performance tests are to be deemed unsuccessful, and the works deemed to have serious defects. Accordingly, the purchaser would be entitled to the same remedies to which he is entitled when he refuses to accept the works due to the discovery of serious defects during the conduct of performance tests.

#### 3.9.1.1.2.3. Defects Discovered During Performance Tests

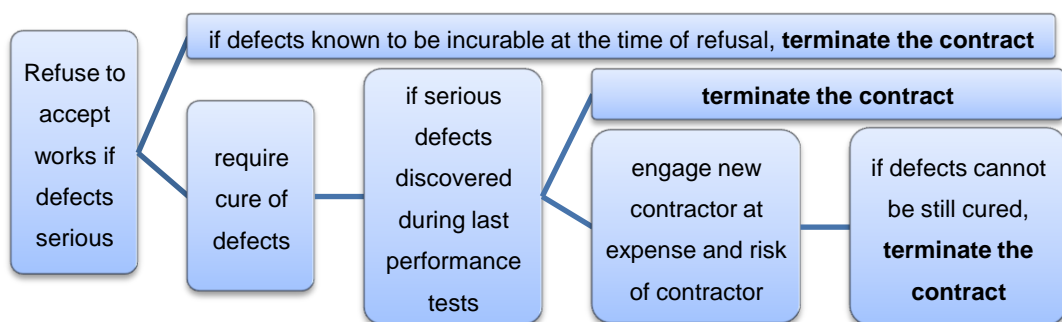


Figure 4: Remedy of refuse to accept works, when defects are discovered during performance tests.

If the performance tests are being carried by the Contractor, however serious defects are observed, then UNCITRAL Guide states that, the contract may entitle the purchaser to refuse to accept the works. If serious defects still exist after the conduct of the last performance tests envisaged in the contract, the purchaser may request cure of the works, or engage a new contractor to cure the defects at the expense and risk of the contractor; or if it is known that defects are incurable, then he may terminate the contract.

If another contractor is engaged to cure the defects, then the legal position of the parties may be analogous to that where the purchaser chooses to engage a new contractor to complete the construction at the expense and risk of the contractor where there is a delay.

The illustrative provisions as they exist in the UNCITRAL Guide are as below:

- (1) If serious defects in the works are discovered during performance tests conducted under article ..., the purchaser is entitled either to refuse to accept the works, or to accept the works.
- (2) If the purchaser exercises his right to refuse to accept the works, and the defects are not known to be incurable at the time of refusal, the contractor must cure the defects and prove that the works is free of serious defects through a repetition of the performance tests within ... (indicate a period of time) after the conduct of the previous unsuccessful tests. If the contractor fails to repeat the tests within this period, the performance tests are deemed to be unsuccessful.
- (3) If the tests are repeated, but the last performance tests envisaged under article ... are unsuccessful, the purchaser is entitled either to terminate the contract or to engage a new contractor to cure the defects at the expense and risk of the contractor.
- (4) If the defects are known to be incurable at the time of the refusal to accept, the purchaser is entitled to terminate the contract.

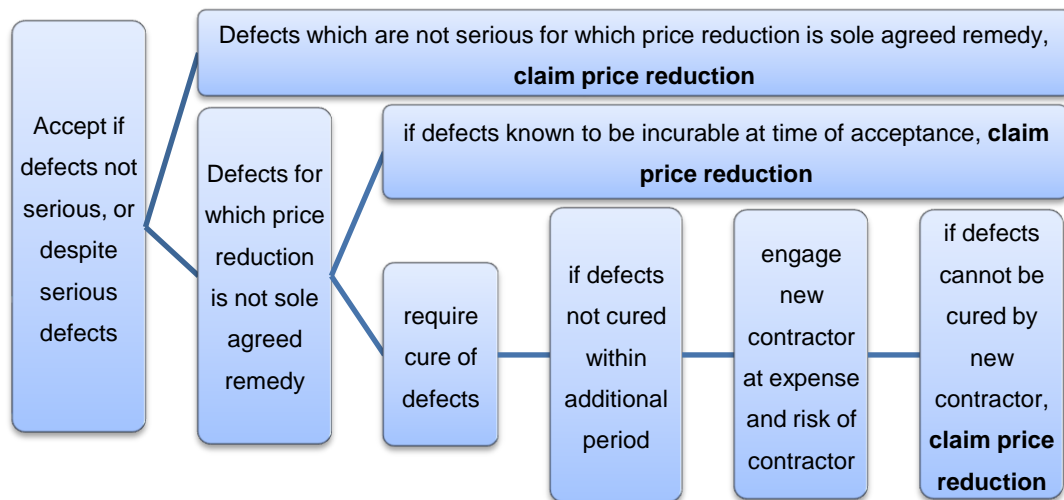


Figure 5: When purchaser prefers to accept the works although defects are discovered during performance tests.

In case the defects in the works discovered during the performance tests are not serious, UNCITRAL Guide states that, the contract may provide that the purchaser is to accept the works. It may also entitle him to accept the works even if the defects discovered are serious. UNCITRAL Guide follows that, when the purchaser chooses to accept the work, although it is defective, then where it is precisely defined in the contract that price reduction is the sole remedy or when parties agree so, the purchaser may request that

price reduction. Otherwise, the purchaser may request cure of defects, if they are not cured, then he may also claim for price reduction or engage a new contractor at the expense and risk of the contractor. According to UNCITRAL Guide, if the purchaser chooses price reduction, the contract may provide that the amount of the reduction is to be the reasonable costs, which would be incurred in curing the defects. If the purchaser chooses the remedy of engaging a new contractor, the legal position of the parties would be analogous to that where the purchaser chooses to engage a new contractor to complete the construction at the expense and risk of the contractor.

If it is known at the time of acceptance that the defects are incurable, the purchaser may be entitled logically only to a price reduction. UNCITRAL Guide states that, the contract may provide in these cases that the amount of the reduction is to be the difference between a reasonable price, which would have been paid for the works without the defects, and a reasonable price, which would have been paid for the works with the defects at the time the defects are discovered.

Illustrative provisions in this case, as provided in UNCITRAL Guide, are below:

- (1) Where the purchaser accepts the works, he is entitled to the following remedies in respect of defects discovered during performance tests.
- (2) In respect of the defects described in this paragraph, the purchaser is only entitled to the price reduction indicated below:

$$\frac{\text{Reduced production capacity of the works}}{1 \text{ per cent}} = \frac{\text{Price reduction}}{\text{Per cent of the price}}$$

(other defects and the consequent price reductions may be included).

- (3) If defects other than those noted in paragraph (2) of this article are not known to be incurable at the time of acceptance, the purchaser may deliver to the contractor a written notice requiring him to cure the defects within an additional [... days (period of time to be specified in contract) [period of time of reasonable length to be specified in notice], and indicating that, if the contractor fails to cure the defects within the additional period, the purchaser intends either to claim a price reduction or to engage a new contractor to cure the defects at the expense and risk of the contractor.
- (4) If the contractor fails to cure the defects within the additional period indicated in paragraph (3) of this article, the purchaser is entitled in accordance with the notice given under that paragraph either to claim a price reduction or to engage a new contractor to cure the defects at the expense and risk of the contractor.

- (5) If the purchaser claims a price reduction, he is entitled to a reduction in an amount equivalent to the reasonable costs, which would be incurred in curing the defects.
- (6) If defects other than those noted in paragraph (2) of this article are known to be incurable at the time of acceptance, the purchaser is only entitled to claim a price reduction. The purchaser is entitled to a price reduction in an amount equal to the difference between a reasonable price, which would have been paid for the works without the defects, and with the defects at the time the defects are discovered.

#### 3.9.1.1.2.4. Defects Discovered After Acceptance and Notified During Guarantee Period

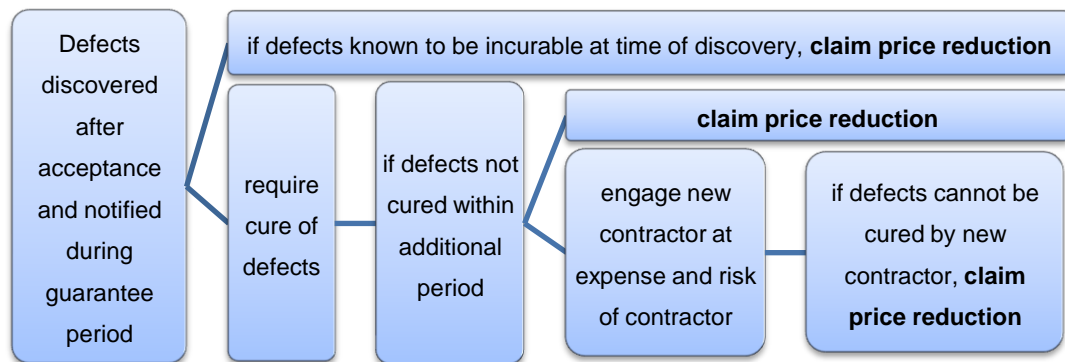


Figure 6: Remedy provided to when defects are discovered within the guarantee period

If defects are discovered after acceptance and notified during guarantee period, UNCITRAL Guide states that, in case if the purchaser fails to notify the contractor of such a defect as soon as possible, but nevertheless notifies the contractor of the defect before the expiry of the guarantee period, purchaser retains all his contractual rights and remedies in respect of the defect, but is liable to pay damages to the contractor for any loss suffered by the latter as a result of the failure to give timely notice of the defect.

UNCITRAL Guides continues that, the contract may provide that the contractor is not liable for defects notified to him after the expiration of the guarantee period. However, the parties may wish to note that exceptions to this principle may exist under mandatory provisions of the law applicable to the contract (for example, the contractor may be liable for defects discovered and notified by the purchaser after the expiration of the guarantee period if the contractor had known of the defects at the time of acceptance and had fraudulently concealed them).

If the contractor denies his liability but the purchaser continues to assert it, UNCITRAL Guide states that, the contract may require the contractor to cure the defects with all



possible speed. If it is later determined in dispute settlement proceedings that the contractor is not liable for the defects, he may be entitled to a reasonable price for curing the defects.

For these defects, according to UNCITRAL Guide, the purchaser may be entitled to require the contractor, to cure the defects within an additional period of time of a specified or reasonable length commencing to run from the date of the delivery of the notice. If the defects are not cured within the additional period of time, the purchaser may be entitled either to a price reduction or to engage a new contractor to cure the defects at the expense and risk of the contractor. However, UNCITRAL Guide notes that, under some performance bonds the consent of the surety may be required for the engagement of a new contractor at the expense and risk of the contractor.

UNCITRAL Guide states that, the contract may provide that the amount of the reduction is to be equal to the reasonable costs that would be incurred in curing the defects. If the purchaser chooses the latter remedy, and the contract with the new contractor is terminated because the defects are incurable, the purchaser may be entitled to a price reduction. The contract may provide that the amount of the price reduction is to be the difference between a reasonable price that would have been paid for the works without the defects and a reasonable price that would have been paid for the works with the defects at the time when the new contractor fails to cure the defects.

In respect to UNCITRAL Guide, if defects are known to be incurable at the time of their discovery, the purchaser may be entitled to a price reduction, analogous to above stated methodology, this time the comparison to be between price for the works without the defects and a reasonable price for the works with the defects at the time the defects were discovered.

#### **3.9.1.1.3. DEFECTS FOR WHICH CONTRACTOR IS NOT LIABLE**

UNCITRAL Guide states that, the contract may obligate the contractor, at the purchaser's request, to cure defects for which the contractor is not liable, provided they are notified before the expiry of the guarantee period. The contract may require the contractor to cure the defects within a reasonable period of time of the notification, and may entitle him to a reasonable price for doing so.

### **3.9.1.2. CONTRACTOR'S REMEDIES**

#### **3.9.1.2.1. DELAY IN PAYMENT OF PRICE OR IN PROVIDING SECURITY FOR PAYMENT OF PRICE**

If the purchaser fails to pay the price or a portion of it on the date when it falls due, under UNCITRAL Guide, the contractor will, under the law applicable to the contract, be entitled to require payment; under many legal systems, he may also be entitled to claim interest for the delay in payment. However, UNCITRAL Guide follows that; the parties may wish to include in the contract provisions dealing with the payment of interest. If they so decide, UNCITRAL Guide draws the attention that, they should take into consideration any mandatory legal rules of the applicable law regulating the payment of interest, such as restrictions on the interest rate.

According to UNCITRAL Guide, the parties may also wish to consider whether interest should be payable in cases where an exempting impediment prevents the purchaser from paying the price, and whether, in addition to interest, damages are to be payable for loss suffered by the contractor which is not compensated by an interest payment.

If interest may not be claimed under the applicable law for delay in payment of sums due, UNCITRAL Guide states that, the parties may wish the contract to contain an adequate remedy that could be permitted under that law, such as payment of an agreed sum.

If the purchaser is in such above stated delay; according to UNCITRAL Guide, the contract may entitle the contractor to give written notice to the purchaser requiring him to make the payment or furnish the security within an additional period of a specified or reasonable length or else that the contractor will suspend the construction. The contract may further entitle the contractor to terminate the contract if the purchaser fails to pay the price, specified portion of the price, or furnish the security within a specified period of time after the suspension.

In respect to UNCITRAL Guide, an alternative approach may be to entitle the contractor to immediate termination of the contract if the purchaser fails to pay or furnish security within the additional period. However, UNCITRAL Guide notes that termination of the contract by the contractor for a failure to pay the price is usually not of advantage to him after the completion of construction.

#### **3.9.1.2.2. DELAY IN TAKING OVER OR ACCEPTING WORKS**

If the purchaser is in delay in accepting the works, UNCITRAL Guide states that the contract may provide that acceptance is deemed to occur upon the completion of

successful performance tests. In the exceptional cases where this approach is not feasible (e.g., the contract does not require the conduct of performance tests), UNCITRAL Guide provides that the contract may entitle the contractor to require the purchaser by written notice to perform the act of acceptance within an additional period of a specified or reasonable length commencing to run from the date of the delivery of the notice, and provide that if he fails to do so, the legal consequences of acceptance (e.g., the obligation of the purchaser to pay a portion of the price, or the commencement of the guarantee period) arise as from the date when a written notice stating that the consequences are to arise is delivered to the purchaser by the contractor.

UNCITRAL Guide follows that, as take-over consists of the purchaser taking physical possession of the work, and it may be difficult to provide for a legal presumption that take-over has occurred; if the purchaser is in delay in taking over the works, the contract may entitle the contractor to require the purchaser by written notice to take over the works within an additional period of a specified or reasonable length commencing to run from the date of the delivery of the notice, and provide that, if he fails to do so, the legal consequences of take-over (e.g., passing of risk, commencement of the trial operation period) arise as from the date when a written notice stating that the consequences are to arise is delivered to the purchaser by the contractor.

#### **3.9.1.2.3. FAILURE TO SUPPLY DESIGN, EQUIPMENT OR MATERIALS FOR CONSTRUCTION IN TIME AND FREE OF DEFECTS**

In regard to failure to supply design in time and free of defects, UNCITRAL Guide states that the contract may provide that the period of time within which the construction is to be completed by the contractor commences to run only from the date that a design free of defects is supplied by the purchaser. In respect to UNCITRAL Guide, the contractor may also be entitled to grant the purchaser an additional period of a specified or reasonable length to supply the design and, if the purchaser fails to do so within the additional period, the contractor may be entitled to terminate the contract.

Failure to supply equipment and materials in time and free of defects is not discussed within the context of the Thesis.

## **3.9.2. FIDIC CONDITIONS OF CONTRACT**

### **3.9.2.1. PURCHASER'S REMEDIES**

#### **3.9.2.1.1. DELAY IN CONSTRUCTION BY CONTRACTOR**

It is the responsibility of Contractor to complete the Works and Section (if any) within the time for completion (Sub-Clause 8.2 [Time for Completion]). In this respect, the Contractor is to submit a detailed program for commencement of Works and revise it when required (Sub-Clause 8.3 [Programme]).

During the execution of the Works, according to Sub-Clause 8.6 [Rate of Progress], when the actual progress is too slow to complete within the time for completion or progress has fallen back / will fall back behind the work schedule approved by the Engineer, then Engineer is to instruct the Contractor to submit a revised program together with supporting report to adopt the measures in order to complete within the time for completion or accelerate the progress. It is Contractor's risk and cost if he has to increase the working hours, personnel or equipment on site. In addition to these costs, if the revised methods cause the Employer to incur additional costs, the Contractor has to pay them to the Employer in respect to Sub-Clause 2.5 [Employer's Claims] and 8.6 [Rate of Progress], and as well pay for delay damages if any according to Sub-Clause 8.7 [Delay Damages].

Thus, when the Contractor cannot complete the Works or when agreed as such the Sections within the time of completion foreseen in the Contract, including passing of tests on completion (Clause 9 [Tests on Completion]) and completing all the works required to be completed for the purposes of taking-over (Sub-Clause 10.1 [Taking Over of the Works and Sections]) the Employer would be entitled to receive damages per delay according to Sub-Clause 2.5 [Employer's Claims], 8.6 [Rate of Progress] and 8.7 [Delay Damages] of FIDIC Conditions of Contract.

The procedure per 8.7 [Delay Damages] would be:

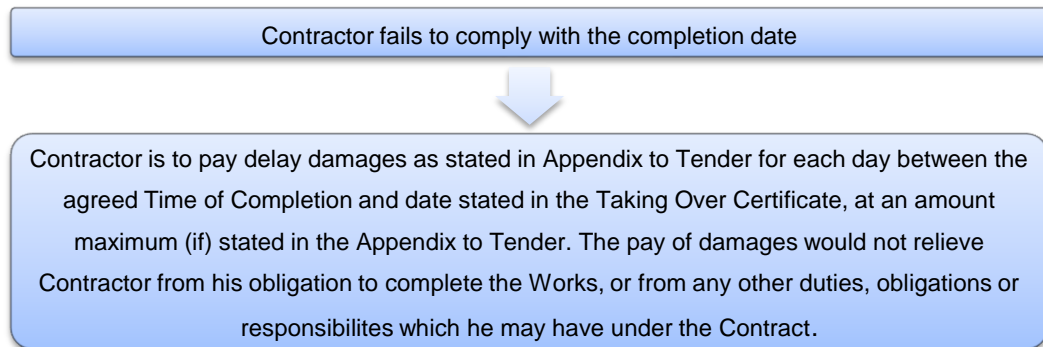


Figure 7: Sub-Clause 8.7 [Delay Damages] of FIDIC Conditions of Contract

On the other hand the procedure foreseen by Sub-Clause 2.5 [Employer's Claims] is:

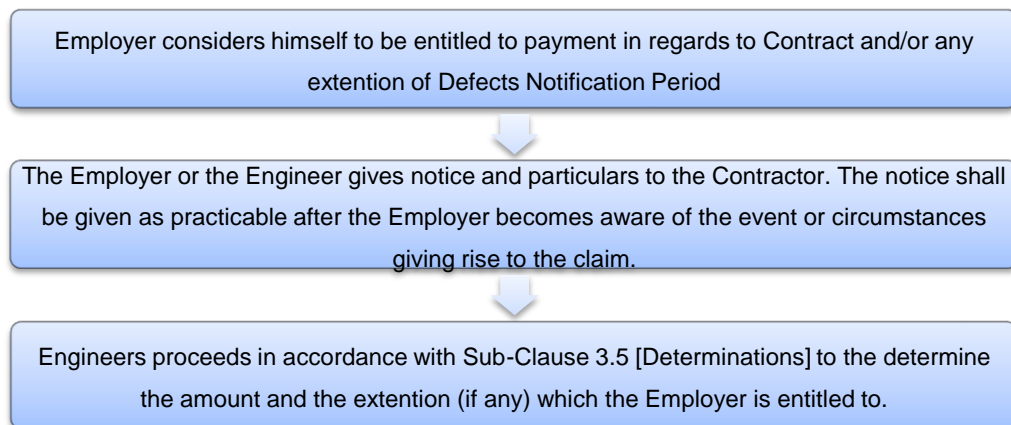


Figure 8: Sub-Clause 2.5 [Employer's Claims] of FIDIC Conditions of Contract

### 3.9.2.1.2. DEFECTIVE CONSTRUCTION BY CONTRACTOR

First of all, arising from the nature of contracts law, it shall be stated that the Contractor has to carry out his duties, obligations and responsibilities in accordance with the Contract and thus associated laws.

Clause 11 [Defects Liability] of FIDIC Conditions of Contract has the heading Defects Liability. However, defects, defects liability and remedies foreseen, extend beyond Clause 11. These are notably:

Sub-Clause 1.8 [Care and Supply of Documents]: When a Party becomes aware of an error or defect of a technical nature in a document for the execution of the Works, the Party shall promptly give notice to the other Party.

Sub-Clause 1.13 [Compliance with Laws]: Contractor shall give all notices, pay all taxes, duties and fees, and obtain all permits, licenses and approvals, as required by the Laws in execution and completion of the Works and remedying of any defects. The Contractor shall indemnify and hold the Employer harmless against and from the consequences of any failure to do so.

Sub-Clause 3.1 [Engineer's Duties and Authority]: (see sub-section 3.8.2. Inspections and Tests During Manufacture and Construction, FIDIC Conditions of Contract, page 52)

Sub-Clause 3.2 [Delegation by the Engineer]: (see sub-section 3.7.2, Consulting Engineer, FIDIC Conditions of Contract, page 45)

Sub-Clause 3.3 [Instructions of the Engineer]: For execution of Works and remedying any defects, Engineer may at any time issue the Contractor instructions and additional or modified Drawings.

Sub-Clause 4.1 [Contractor's General Obligations]: The Contractor shall design (to the extent specified in Contract), provide Plant and Contractor's Documents specified in the Contract, Personnel, Goods, consumables and other services, whether of temporary or permanent nature in respect to completion of Works and remedying defects in the Works.

Sub-Clause 7.3 [Inspection]: (see sub-section 3.8.2. Inspections and Tests During Manufacture and Construction, FIDIC Conditions of Contract, page 52)

Sub-Clause 7.4 [Testing]: (see sub-section 3.8.2. Inspections and Tests During Manufacture and Construction, FIDIC Conditions of Contract, page 52)

Sub-Clause 7.5 [Rejection]: If a result of examination, inspection, measurement or testing, any Plant, Materials or workmanship is found to be defective or not accordance with the Contract, Engineer may reject it, and then the Contractor shall make it good. Retesting may be required by Engineer, under same terms and conditions of the previous tests.

Sub-Clause 7.6 [Remedial Work]: Not subject to any testing, Engineer may instruct the Contractor to remove and replace any Plant or Materials, remove and re-execute any other work, which is not accordance with the Contract.

Sub-Clause 9.4 [Failure to Pass Tests on Completion]: When Works or a Section fails to pass repeated Tests on Completion, the Engineer may further request repetition of Tests on Completion, or if failure deprives the Employer to benefit from the Work, the Engineer may reject the Work and remedies foreseen in Sub-Clause 11.4 [Failure to Remedy Defects] would be provided, or as a third option the Engineer may issue a Taking-Over Certificate if Employer instructs as so.

Sub-Clause 10.1 [Taking Over of the Works and Sections]: In issuing Taking-Over Certificate, the minor outstanding work and defects, which will not substantially affect the use of Works or Section for their intended purpose, would be noted. Alternatively, in lieu of Contractor's application for Taking-Over Certificate, the Engineer would reject it giving reasons and specifying the work required to be done.

Sub-Clause 11.1 [Completion of Outstanding Work and Remedying Defects]: Contractor is to complete any work, which is outstanding as stated in Taking-Over Certificate, and execute all work required to remedy defects or damage which should be notified to him before the Defects Notification Period stated in the Contract.

Sub-Clause 11.2 [Cost of Remedying Defects]: The Cost of Remedying Defects shall be executed at the risk and cost of the Contractor. Sub-Clause 11.2 also defines which defects and damages fall under this article. Then, the defect or damage should be related with any design for which the Contractor is responsible; or Plant, Materials or workmanship not being in accordance with the Contract, or failure by Contractor to comply with any other obligation. If there would be any other cause for defect or damage, then the Contractor shall be notified promptly and Sub-Clause 13.3 [Variation Procedure] shall apply.

Sub-Clause 11.3 [Extension of Defects Notification Period]: If the defect or damage hinders the Employer to benefit from the Work, Section or a major item of Plant for which it was intended, then the Employer may benefit from the remedy of Extension of Defects Notification Period subject to Sub-Clause 2.5 [Employer's Claims]. The maximum period it can be extended is limited to two years. However, in case of suspension, then Contractor's obligations in regards the Plant and / or Materials whose delivery or erection was suspended, would not extend more than 2 years after the Defects Notification Period had otherwise have expired.

Sub-Clause 11.4 [Failure to Remedy Defects]: For the defects and damages, the Contractor is expected to remedy them within a reasonable time. If not, then an end date may be fixed by the Employer and Contractor may would be informed to remedy until or by this day. If the Contractor then fails to do so, together with Sub-Clause 7.6 [Remedial Work], under Sub-Clause 11.2 [Cost of Remedying Defects], the Employer has three choices:

1. Carry out the work himself or by others at Contractor's cost, whereas the Contractor shall have no responsibility for this work, however subject to Sub-Clause 2.5 [Employer's Claims] Contractor is to pay the cost reasonably incurred.
2. Require the Engineer to agree or determine a reasonable reduction in the Contract Price subject to Sub-Clause 3.5 [Determinations]

3. In cases the defect or damage holds back the Employer substantially to benefit of the Works or a major part of it, terminate the Contract to that extend. Then without prejudice to any other rights, the Employer shall be entitles to recover all sums paid for the Works or such part, plus the financing costs, plus dismantling, plus clearing the Site and returning Plant and Materials to the Contractor. (Sub-Clause 11.4 [Failure to Remedy Defects])

Sub-Clause 11.5 [Removal of Defective Work]: If Contractor needs to remove the items from the Site for remedy of defect or damages due to the Employer's consent, than he may also be required to increase the Performance Security by the replacement cost of the subject items or another appropriate security may be required.

Sub-Clause 11.6 [Further Tests]: If remedy may affect the performance of the Work, within 28 days after the remedy repetition of any of the tests may be required by the Employer at the risk and cost of the part liable for the cost of remedial work.

Sub-Clause 11.8 [Contractor to Search]: Work is only deemed to be accepted after issuance of Performance Certificate, which ,is either issued 28 days after the latest of the expiry dates of the Defects Notification Periods or as soon as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects.

Sub-Clause 11.10 [Unfulfilled Obligations]: Although Performance Certificate is issued; each Party would still be liable for fulfillment of any obligation, which was unperformed at that time, in respect to Contract.

Sub-Clause 14.9 [Payment of Retention Money]: When Taking-Over Certificate is issued; only some amount of the Retention Money is paid to the Contractor. Promptly after the latest expiry dates of Defects Notifications Periods, the outstanding balance of Retention Money shall be certified. However, if any work remains to be executed under Clause 11 [Defects Liability], the certification cost of that work will be withhold until it has been executed.

Sub-Clause 15.1 [Notice to Correct]: If Contractor fails to carry out any obligation under the Contract, the Engineer may require the Contractor to make good the failure and to remedy it within a reasonable time.

Sub-Clause 15.2 [Termination by Employer]: The Employer is untitled to terminate the Contract if the Contractor fails to comply with Sub-Clause 15.1 [Notice to Correct]; or to comply the notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work].



The above Sub-Clauses in the order they appear in FIDIC Conditions of Contract. The marginal words and other headings are not included in above, since per Sub-Clause 1.2 [Interpretation] they shall not be taken into consideration in interpretation of the Conditions.

Sub-Clause 2.5 [Employer's Claims] (see sub-section 3.9.2.1.1. Delay in Construction by Contractor, FIDIC Conditions of Contract, page 67) and Sub-Clause 8.7 [Delay Damages] (see sub-section 3.9.2.1.1. Delay in Construction by Contractor, FIDIC Conditions of Contract, page 67) are also associated with Defects by Contractor.

#### **3.9.2.1.2.1. Defects Discovered During Construction**

In regards to Sub-Clauses 1.8 [Care and Supply of Documents], 7.5 [Rejection], 7.6 [Remedial Work], 11.3 [Extension of Defects Notification Period], 11.4 [Failure to Remedy Defects], 11.5 [Removal of Defective Work], 11.6 [Further Tests], 15.1 [Notice to Correct]:

- When Engineer or the Employer becomes aware of an error or defect, the Contractor shall be promptly notified.
- Accordingly, Engineer may reject, or instruct the Contractor to remove and replace any Plant or Materials, remove and re-execute any other work, which is not accordance with the Contract. Then, the Contractor shall make it good, and retesting may be required by Engineer. If the defect or damage hinders the Employer to benefit from the Work, Section or a major item of Plant; Extension of Defects Notification Period is also possible.
- If the Contractor does not remedy the defects within a specified time, the Employer has 3 choices:
  1. Carry out the work himself or by others at Contractor's cost.
  2. Reduce the contract price
  3. In cases the defect or damage holds back the Employer substantially to benefit of the Works or a major part of it, terminate the Contract to that extend.

In addition, termination is not only a remedy per above Sub-Clause. Per Sub-Clause 15.2 [Termination by Employer], the Employer is entitled to terminate the Contract if the Contractor fails to comply with Sub-Clause 15.1 [Notice to Correct]; or to comply the notice issued under Sub-Clause 7.5 [Rejection] or Sub-Clause 7.6 [Remedial Work].

#### **3.9.2.1.2.2. Construction Deemed Defective Because Performance Tests Not Conducted**

Sub-Clauses 1.13 [Compliance with Laws], 11.8 [Contractor to Search], 15.1 [Notice to Correct] and 15.2 [Termination by Employer] are to be dealt under this heading.

According to Sub-Clause 1.13 [Compliance with Laws], it is Contractor's responsibility to carry out tests especially the ones required to obtain permits, licenses and approvals, as required legally.

On the other hand, Work will not be deemed to be accepted until tests are successfully completed, defects are remedied and thus Performance Certificate is issued.

When the Contractor fails to carry out any obligation under the Contract, including conducting performance tests, the Engineer may require the Contractor to make good the failure and to remedy it within a reasonable time; and when Contractor fails to comply with this responsibility, the Employer is entitled to terminate the Contract.

#### **3.9.2.1.2.3. Defects Discovered During Performance Tests**

According to Sub-Clause 9.4 [Failure to Pass Tests on Completion], 10.1 [Taking Over of the Works and Sections], 11.1 [Completion of Outstanding Work and Remedying Defects], 11.2 [Cost of Remedying Defects], 11.3 [Extension of Defects Notification Period], 11.4 [Failure to Remedy Defects], 11.5 [Removal of Defective Work], 11.6 [Further Tests], 15.1 [Notice to Correct], 15.2 [Termination by Employer]:

- When Works or a Section fails to pass repeated Tests on Completion,
  - a) the Engineer may further request repetition of Tests on Completion, or
  - b) if failure deprives the Employer to benefit from the Work, the Engineer may reject the Work and remedies foreseen in Sub-Clause 11.4 [Failure to Remedy Defects] would be provided, or
  - c) the Engineer may issue a Taking-Over Certificate if Employer instructs as so.
- In issuing Taking-Over Certificate,
  - a) the minor outstanding work and defects which will not substantially affect the use of Works or Section for their intended purpose would be noted, or
  - b) in lieu of Contractor's application for Taking-Over Certificate, the Engineer would reject it giving reasons and specifying the work required to be done.

- Contractor is to complete any work which is outstanding as stated in Taking-Over Certificate, and execute all work required to remedy defects or damage which should be notified to him before the Defects Notification Period stated in the Contract, the risk and cost of which shall be borne by the Contractor.
- If the defect or damage hinders the Employer to benefit from the Work, Section or a major item of Plant for which it was intended, then the Employer may benefit from the remedy of Extension of Defects Notification Period subject to Sub-Clause 2.5 [Employers Claims].
- For the defects and damages, the Contractor is expected to remedy them within a reasonable time. If the Contractor then fails to do so, the Employer has 3 choices:
  1. Carry out the work himself or by others at Contractor's cost,
  2. Require the Engineer to agree or determine a reasonable reduction in the Contract Price,
  3. In cases the defect or damage holds back the Employer substantially to benefit of the Works or a major part of it, terminate the Contract to that extend.
- If Contractor needs to remove the items from the Site for remedy of defect or damages, than he may also be required to increase the Performance Security.
- If remedy may affect the performance of the Work, repetition of any of the tests may be required by the Employer.

#### **3.9.2.1.2.4. Defects Discovered After Acceptance And Notified During Guarantee Period**

The Sub-Clauses, which are more closely related with this section, are: Sub-Clause 1.8, 11.1 [Completion of Outstanding Work and Remedying Defects], 11.2 [Cost of Remedying Defects], 11.3 [Extension of Defects Notification Period], 11.4 [Failure to Remedy Defects], 11.5 [Removal of Defective Work], 11.6 [Further Tests], 11.8 [Contractor to Search], 11.10 [Further Tests], 14.9 [Payment of Retention Money], 15.1 [Notice to Correct] and 15.2 [Termination by Employer]. Accordingly:

- Contractor is to complete any work, which is outstanding as stated in Taking-Over Certificate, and execute all work required to remedy defects or damage which should be notified to him before the Defects Notification Period stated in the Contract.

- For the defects and damages, the Contractor is expected to remedy them within a reasonable time. If not, the Employer has 3 choices:
  1. Carry out the work himself or by others at Contractor's cost
  2. Require the Engineer to agree or determine a reasonable reduction in the Contract Price
  3. In cases the defect or damage holds back the Employer substantially to benefit of the Works or a major part of it, terminate the Contract to that extend.
- It should be noted that Work is only deemed to be accepted after issuance of Performance Certificate, which is either issued after the latest of the expiry dates of the Defects Notification Periods or as soon as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects.
- The outstanding balance of retention money is also certified after the latest expiry dates of Defects Notifications Periods.

#### **3.9.2.1.3. DEFECTS FOR WHICH CONTRACTOR IS NOT LIABLE**

The cost of remedying defects shall be executed at the risk and cost of the Contractor. However, Sub-Clause 11.2 [Cost of Remedying Defects] defines which defects and damages fall under this article. If there would be any other cause for defect or damage not covered under Sub-Clause 11.2, then the Contractor shall be notified promptly and Sub-Clause 13.3 [Variation Procedure] shall apply.

In this case, per Engineer's requirements, Contractor should state either why he cannot comply with the Variation or shall submit a description of the work he will execute, the program and proposal. The engineer shall then respond with approval, disapproval or comments, while the Contractor shall not delay any work whilst awaiting response.

#### **3.9.2.2. CONTRACTOR'S REMEDIES**

There are several Sub-Clauses of FIDIC Conditions of Contract, where the consequence of Employer's or Engineer's delay is formulated. For the ease of comparison with UNCITRAL Guide, the headings are organized same as in UNCITRAL Guide.

### **3.9.2.2.1. DELAY IN PAYMENT OF PRICE OR IN PROVIDING SECURITY FOR PAYMENT OF PRICE**

Per Sub-Clause 2.4 [Employer's Financial Arrangements], after receiving the request from Contractor, the Employer shall submit reasonable evidence that the financial agreements have been made and are being maintained which will enable the Employer to pay the Contract Price. The Employer shall also give notice to the Contractor when he intends to make any material change to his financial arrangements.

On the other hand, for a payment to be made, the Employer should have received and approved the Performance Security (Sub-Clause 14.6 [Issue of Interim Payment Certificate]).

For an interim payment to be made, the Contractor shall submit a Statement and supporting documents. Following this, the Engineer shall issue to the Employer an Interim Payment Certificate, which states the fairly determined amount due by the Engineer (Sub-Clause 14.6 [Issue of Interim Payment Certificate]).

Although if anything supplied or work done by the Contractor is not accordance with the Contract, the cost of rectification or replacement may be withheld and/or if the Contractor was not or is failing to perform any work or obligation in accordance with the Contract, and had been so notified by the Engineer, the value of this work or obligation may be withheld; the interim Payment Certificate cannot be withheld for any other reason (Sub-Clause 14.6 [Issue of Interim Payment Certificate]).

The Employer after receiving the Statement and supporting documents, shall realize the payment to Contractor (Sub-Clause 14.7 [Payment]).

If Engineer fails to certify an Interim Payment Certificate or the Employer fails to comply with his responsibilities associated with payment (Sub-Clause 2.4 [Employer's Financial Arrangements] and Sub-Clause 14.7 [Payment]), the Contractor -after giving a notice- has the right to suspend the work or reduce the rate of work. (Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]). Bunni notes that the Sub-Clause 2.4 for the Employer to provide evidence for financial arrangements is introduced in FIDIC Conditions of Contract in 1999 (Bunni, p.491).

The Contractor, as a result of delayed payment shall also receive financing charges compounded monthly on the amount unpaid. Unless otherwise agreed these financial charges shall be calculated at the annual rate of three percentage points above the discount rate of central bank in the country of currency of payment and shall be paid in such currency (Sub-Clause 14.8 [Delayed Payment]).

If the Contractor receives such Payment Certificate, evidence or payment before giving a notice of termination, the Contractor shall resume normal working as soon as is reasonably practicable (Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]).

If the Contractor suffers delay and / or incurs Cost as a result of suspending work (or reducing the rate of work), the Contractor shall be entitled to an extension of time for any such delay, if completion is or will be delayed, and payment of any such Cost plus reasonable profit, which shall be included in the Contract Price (Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work]).

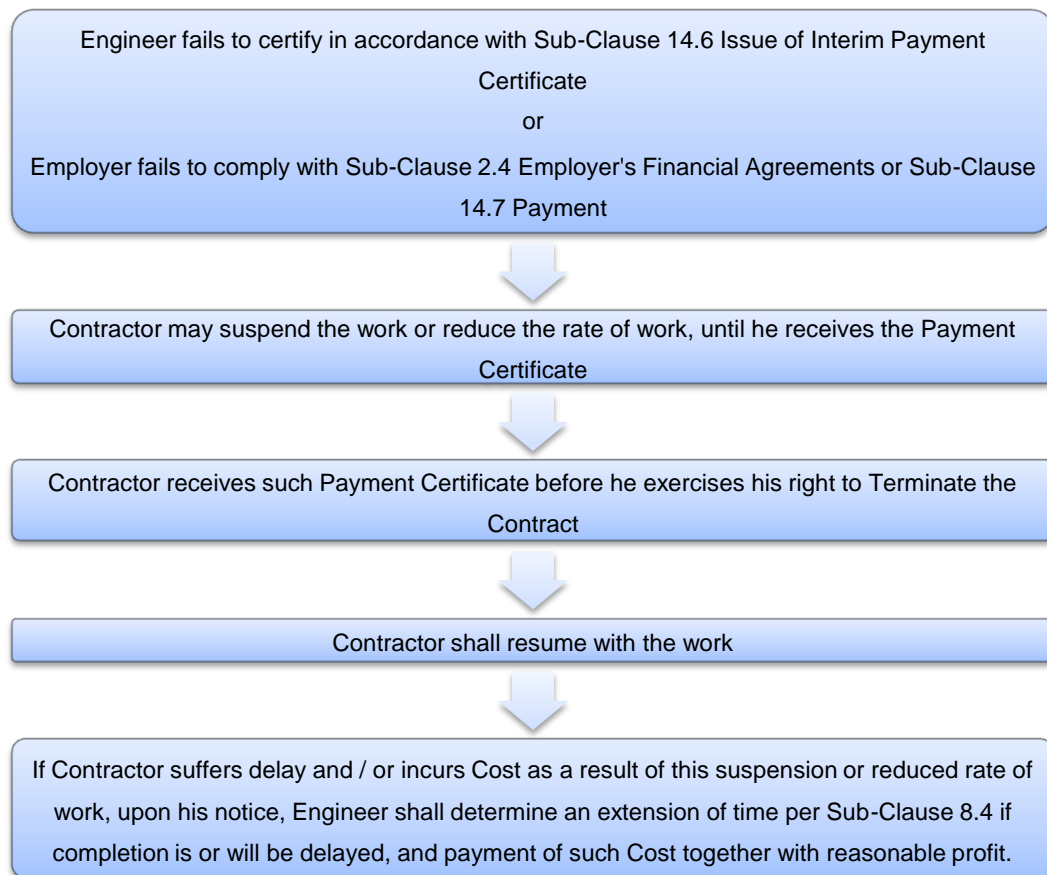


Figure 9: Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] of FIDIC Conditions of Contract

After the Contractor suspends the work, he does not receive payment in a certain time frame, or Employer still fails to submit reasonable evidence that the financial agreements have been made and are being maintained, then the Contractor is entitled to terminate the work.

Sub-Clause 16.1 [Contractor's Entitlement to Suspend Work] is a special clause to be analyzed where in a way Contractor delays the work, however as a result he is awarded

compensation for delay. It is per Contractor's Entitlement to Suspend Work. Schematically the Sub-Clause is summarized in Figure 9.

#### **3.9.2.2.2. DELAY IN TAKING OVER OR ACCEPTING WORKS**

When the Works have been completed in accordance with the Contract and a Taking-Over Certificate has been issued or is deemed to have been issued, then the Works shall be taken over by the Employer. In this purpose, the Contractor applies by a notice to the Employer that works are complete and ready for taking over. If the Work is divided into Sections, the Contractor may similarly apply for a taking over certificate for each Section. After receiving the application, the Engineer shall in a certain period of time either issue the taking over certificate or reject the application by giving reasons and specifying work required. However, if Engineer either fails to issue the Taking-Over Certificate or rejects the application but in fact the Work was substantially in accordance with the Contract, the Taking-Over Certificate is then deemed to have been issued on the last day of the period to issue Taking-Over Certificate (Sub-Clause 10.1 [Taking Over of the Works and Sections]).

### 3.9.2.2.3. FAILURE TO SUPPLY DESIGN, EQUIPMENT OR MATERIALS FOR CONSTRUCTION IN TIME AND FREE OF DEFECTS

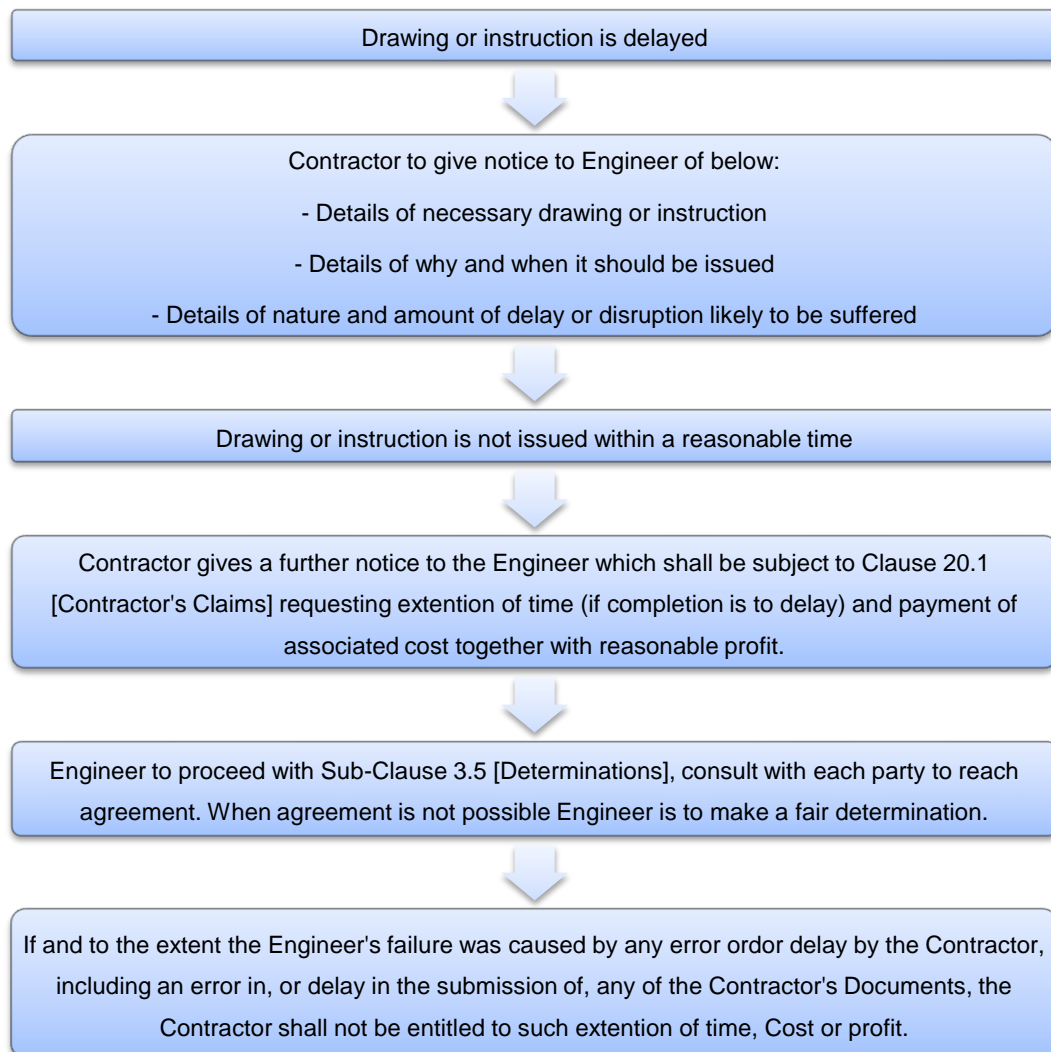


Figure 10: Sub-Clause 1.9 [Delayed Drawings or Instructions] of FIDIC Conditions of Contract

Article 1.9 of FIDIC Conditions of Contract deals with the issue of delayed drawings, which the Employer should provide to the Contractor. It is the Contractor's responsibility to give notice when the Works are likely to be affected, i.e. delayed or disrupted when any necessary drawing or instruction is not issued in time. Below is the sequence summarizing Sub-Clause 1.9 [Delayed Drawings or Instructions] of FIDIC Conditions of Contract.



Similarly, below Sub-Clauses provide remedy to the Contractor in case he suffers delay and/or incurs Cost as a result of:

Sub-Clause 2.1 [Right of Access to the Site]: Failure by the Employer to give right or possession of access to the Site within the time stipulated in the Contract

Sub-Clause 4.7 [Setting Out]: Error in reference points, lines and levels specified in the Contract or notified by the Engineer which an experienced Contractor could not reasonably have discovered and avoided delay secure Works during suspension period.

In case of above stated situations, the remedy provided to the Contractor is schematized below:

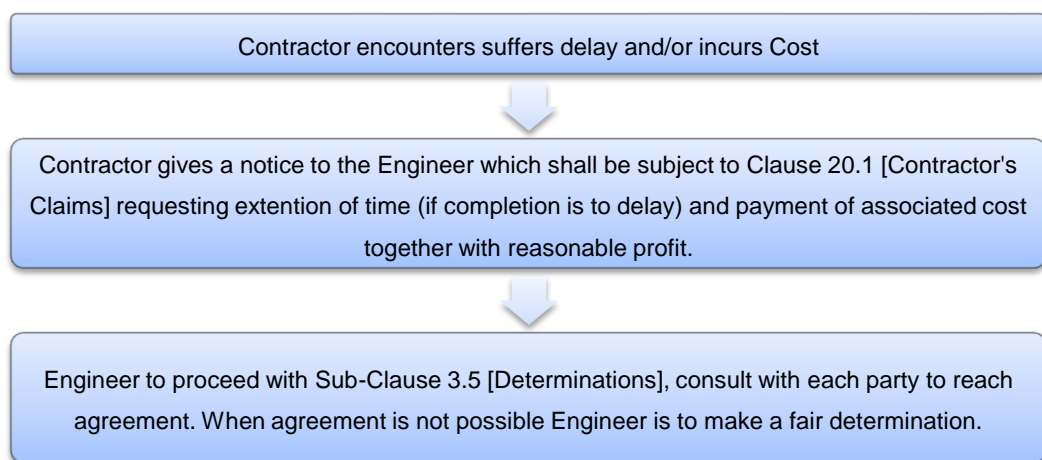


Figure 11: Sub-Clause 7.4 [Testing] of FIDIC Conditions of Contract

### 3.9.3. NOTES ON SUB-SECTION

The sub-section Delays, Defects and Other Failures to Perform has several sub sub-sections. Therefore, the notes are also organized in the same manner for ease of comparison.

#### 3.9.3.1. PURCHASER'S REMEDIES

UNCITRAL Guide, in the case of defects and delays, foresees two remedies in principle: the initial remedy is to require the completion or cure by the contractor of performance. The remedy of termination is given as one of last resort. Per UNCITRAL Guide it is advisable that the contract not permit this additional period (given for completion or cure of performance) to be regarded as an extension of the time for performance so as to affect the purchaser's rights arising from the delayed or defective construction. In any

case, recovery of damages or payment of an agreed sum is additional remedies that can take place.

Per FIDIC Conditions of Contract, termination is also the last remedy for the Employer. On the other hand, similar to UNCITRAL Guide, Sub-Clauses 2.5 [Employer's Claims] and 8.7 [Delay Damages] entitle the Employer for additional remedies and payment of a lump sum amount for damages. These clauses, together with Sub-Clause 8.4 [Extension of Time for Completion] make it clear that the time given to Contractor to commence work or to cure defects, does not entitle the Contractor any additional time. As well, it is stated that it is Contractor's risk and cost if he has to increase the working hours, personnel or equipment on site. In addition to these costs, if the revised methods cause the Employer to incur additional costs, the Contractor has to pay them to the Employer in respect to Sub-Clause 2.5 [Employer's Claims]. When the Contractor is to pay damages, it is explicitly stated in FIDIC Conditions of Contract that it would not relieve Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities, which he may have under the Contract.

UNCITRAL Guide recommends that the purchaser may be given a choice of alternative remedies upon certain failures of performance by the contractor. In this case, UNCITRAL Guide states that, the contract may provide that, after the purchaser chooses one of those remedies, he is not entitled to alter his choice without the consent of the contractor.

#### **3.9.3.1.1. DELAY IN CONSTRUCTION BY CONTRACTOR**

When Contractor delays the construction, the first remedy UNCITRAL Guide foresees is require commencement in order to overcome the delay. However, when the Contractor fails to do so, the purchaser is entitled to terminate the contract. A special case is when the Contractor delays completing the entire construction, and fails to commence in the additional period provided. In this case, instead of terminating the contract, the Purchaser is also entitled to engage a new contractor to complete the works at the expense and risk of the contractor. When this new contractor is engaged at the risk and expense of the existing contractor, UNCITRAL Guide advises that the contract may provide that, the contractor is engaged in the choice of the new contractor and the terms agreed with him. This way, when assessed through the principles of law of obligations, the liability of the contractor for the costs and failure of the new contractor would have a stronger basis.

In comparison, according to FIDIC Conditions of Contract Sub-Clause 11.4 [Failure to Remedy Defects], there is a similar tool provided to the Employer as to carry out the work himself or by others, but this opportunity is limited to if Contractor fails to remedy a defect or damage by a notified date. It does not deal with the case of delay, but of defects.

Thus in case of delay, the only remedy is per Sub-Clauses 2.5 [Employer's Claims], 8.7 [Delay Damages] and 15.2 [Termination by Employer]. There is no option as to continue the contract, but employ others to commence with the work. It is also similar in Article 473 of Turkish Code of Obligations, 2011. In respect of termination; in comparison to the remedies advised by UNCITRAL Guide, FIDIC Conditions of Contract Sub-Clause 15.2 does not formulate partial termination. In this case, where full termination is not desired, but there surely is a considerable delay in a major part of the Work, which is deemed by the Employer that it cannot be covered up by the Contractor, one may think that ordering it as a variation in the form of omission may be a solution. However, Sub-Clause 13.1(d) would not allow omission of a work in order that it is then carried out by others.

It becomes interesting to see that, in case of a defect; partial termination is possible. Similarly, in case of take-over (Sub-Clause 10.1 [Taking Over of the Works and Sections] and 10.2 [Taking Over of Part of the Works]) partial take-over is possible. However, partial termination is not possible in case of a delay. From this, it follows that; even if the delay is only in lieu of a Section of Works, the Contractor has to pay delay damages, as if the delay is affecting the whole works. However, for the non-delayed portion, if Employer chooses to take over (of the Section or of the Parts of the Work), then the delay damages may be minimized.

If one has to make another point regarding termination; UNCITRAL Guide does not see it really as a solution and desires to omit it. UNCITRAL Guide advises parties to consider additional criteria before termination. This criteria may be such that, the delay of the work exceeds a certain percentage of the work (work wise or cost wise) or a specified limit of an agreed sum ("Liquidated damages and penalty clauses") has become due in respect of delay.

Another concern worth to note is the maximum amount of delay damages stated in the Appendix to Tender in respect to FIDIC Conditions of Contract. Scheider and Scherer note, in their article analyzing FIDIC Conditions of Contract under Swiss law, that; when a maximum amount for delay damages is stated in the contract, it is usually inserted to allow the Contractor some means of risk control. However, this can be abused by the Contractor in such a way that, once the amount is exceeded, the Employer will suffer the financial consequences of further delays and the Contractor can use this situation to force the Employer to accept variation orders and pay extra costs for having the Contractor accelerate the works and / or implement alleged variations in order to mitigate the delays. (Knutson, 2005, page 329, article by Michael E. Schneider and Matthias Scherer). In this case, the most logical solution for the Employer would be to bear the delay costs but then case a file before the arbitration body or before the judiciary to recover his actual loss.

Employer keeping well the records to prove Contractors gross negligence and intention would be of crucial importance to cover the additional costs and profit losses.

#### **3.9.3.1.2. DEFECTS**

UNCITRAL Guide and FIDIC Conditions of Contract when viewed together for defects at different intervals of the Work, have a similar approach.

In addition to the remedies foreseen, in each case both of the documents enable the Employer to benefit from additional remedies of a lump sum payment which in fact refers to “Liquidated Damages and Penalty Clauses” and “Damages” as in UNCITRAL Guide and Sub-Clause 2.5 [Employer’s Claims] and Sub-Clause 8.7 [Delay Damages] of FIDIC Conditions of Contract.

That is, either the defects are discovered during construction, or during performance test, or after performance tests are concluded but within the guarantee period, in addition to the remedies discussed, the purchaser may also be entitled to remedies discussed in "Liquidated damages and penalty clauses" and "Damages".

UNCITRAL Guide states that, during construction, if disputes arise between the parties that services being supplied are defective, the contract may obligate the contractor to comply with the directions of the purchaser even if he himself considers that the services are not defective. In this case, regarding a different scenario, UNCITRAL Guide states that, the contractor may be given the same rights as in cases where the purchaser suspends the construction for his convenience and / or if the construction had been varied under a variation order.

This is similar to the Sub-Clause 7.6 [Remedial Work] of FIDIC Conditions of Contract, Engineer’s instruction (to remove and replace any plant or materials, remove and re-execute any other work , or execute any work which is required) does not need to be a consequence of any previous test or certification. The outcome of this instruction although not defined in detail as in UNCITRAL Guide, can be resolved under Sub-Clause 20.1 [Contractor’s Claims] of FIDIC Conditions of Contract.

Similar to UNCITRAL Guide, when construction is defective or not in compliance with the Contract, and this is observed during construction; the associated clauses of FIDIC Conditions of Contract are as follows:

- Sub-Clause 7.5 [Rejection] lets the Engineer to reject the work, and Sub-Clause 2.5 [Employer’s Claims] entitles the Employer to additional costs if any.
- Sub-Clause 7.6 [Remedial Work] lets the Engineer to reject and request remedy. When Contractor does not comply with it, Employer is entitled to employ and pay

other persons to carry out this work. There is also reference to Sub-Clause 2.5 [Employer's Claims] in this respect.

- As well, Sub-Clause 8.8 [Suspension of Work] entitles the Engineer to suspend at any time.
- Sub-Clause 11.4 [Failure to Remedy Defects] entitles the Employer alternatively to carry out the work himself or by others; or reduction in Contract price; or to terminate the Contract as a whole or in respect of such major part.
- Sub-Clause 11.5 [Removal of Defective Work] requires removal of defective work, while the Contractor may also be required to increase the performance security in this respect.
- Employer's right to termination is also stated in Sub-Clauses 15.1 [Notice to Correct] and 15.2 [Termination by Employer].

If defects are discovered during performance tests:

- UNCITRAL Guide's classification requires that, when Works fails to pass performance tests, for the defects that are serious, if it is known that the defects are incurable, the Employer at the time of refusing the Work, may also directly terminate the Contract. However, FIDIC Conditions of Contract does not include such a direct clause. According to Sub-Clause 7.5 [Rejection], the defects should be remedied and the tests should then be repeated. Sub-Clause 9.3 [Retesting] also requires re-testing. Then after re-testing, Sub-Clause 9.4(b) [Failure to Pass Tests on Completion] entitles the Employer to terminate the Contract, thru the fact that it entitles the Employer with the remedy in Sub-Clause 11.4(c) [Failure to Remedy Defects]. The condition in Sub-Clause 9.4(b) is naturally met here, while it is assumed in the beginning that, the defects are serious.

In fact, one would naturally think that, if defects are known to be incurable, asking repetition of tests would not only be waste of resources, but also time. Thus, one may expect the Employer not requesting repetition of tests and directly terminate the Contract.

- On the other hand, in case the Employer rejects the works with defects, through the just mentioned Sub-Clauses, UNCITRAL Guide's remedy to request cure of defects, and then the defects if still exist, alternatively terminate the contract or engage a new contractor are well stated in FIDIC Conditions of Contract. In engaging a new contractor, the UNCITRAL Guide and FIDIC Conditions of Contract differ in such a way that; UNCITRAL Guide advises the cost and responsibility still remains with the Contractor. However, FIDIC Conditions

Contract releases the Contractor for the responsibility that would arise from the work. It may be argued that FIDIC Conditions of Contract Clause 9 [Tests on Completion] – Sub-Clause 9.4 [Failure to Pass Tests on Completion] only entitles the Employer to terminate the contract, but not to engage a new contractor. While this is certainly true, bearing in mind Sub-Clause 1.2 [Interpretation], that marginal words and other headings shall not be taken into consideration in interpretation; in this situation Clause 11 [Defects Liability] - Sub-Clause 11.4 [Failure to Remedy Defects] is the one which enables engaging a new contractor (see page 70).

- Despite the defects, when Employer chooses to accept the Works, as in UNCITRAL Guide, as long as the defects are not cured the end result would be claiming price reduction. Accepting the works despite defects is addressed in FIDIC Conditions of Contract Sub-Clause 9.4(c) [Failure to Pass Tests on Completion] and Sub-Clause 10.1(a) [Taking Over of Works and Sections]. In this case, Sub-Clauses 11.4(a) and 11.4(b) [Failure to Remedy Defects] are also associated. Sub-Clause 11.4(c) is excluded in this case, because the assumption is “Employer accepts the works despite the defects”. However, Sub-Clause 11.4(c) is termination of the Contract, which cannot go together with an acceptance case. Thus in case of defects, when the Contractor does not want to reject the work, termination is not an alternative to be chosen. Then per Sub-Clause 11.4(a), asking remedy is an option. Another option is Sub-Clause 9.4(c) [Failure to Pass Tests on Completion], where price reduction is defined as a must in this case as well. Anyway, Sub-Clause 2.5 [Employer’s Claims] is consistently applicable in any of the circumstances. For Contract price reduction as the remedy, UNCITRAL Guide has detailed suggestions in case the defects are curable or incurable, or in case the Employer engages a new contractor. However, FIDIC Conditions of Contract passes this issue shortly, since every case would need to be handled in its self-special conditions. On the other hand, when a price reduction is in question, UNCITRAL Guide’s below suggestion is worth to note:

“The contract may provide in these cases that the amount of the reduction is to be the difference between a reasonable price which would have been paid for the works without the defects and a reasonable price which would have been paid for the works with the defects at the time the defects are discovered. It may not be advisable for the amount of the price reduction to be calculated by comparing the prices prevailing at the time of the conclusion of the contract for works with and without defects, since changes in the price level occurring during the period of

time between the conclusion of the contract and the discovery of the defects would not be taken into account. Similarly, if the amount of the price reduction were calculated by comparing the contract price with a reasonable price, which would be paid for the works at the time the defects were discovered, changes in the price level, which would have affected the contract price, would not be taken into account".

- Regarding the issue of acceptance and take-over in case defects exist, General Conditions of Construction Works, Turkey (*Yapım İşleri Genel Şartnamesi*) Article 42 closely reminds Sub-Clause 10.1(a) [Taking Over of Works and Sections], 11.1 [Completion of Outstanding Work and Remedying Defects] and 11.4 [Failure to Remedy Defects] of FIDIC Conditions of Contracts. Article 42 requires that, if the defective parts do not exceed 5% of the total construction amount and if they do not hinder the benefit from the construction and would not result in hazard, then provisional acceptance can take place. In this case, for the contractor to complete the defective or missing work, for each day, a corresponding percentage of the liquidated damages shall be calculated. However, if the delay in completing the defective and missing works exceed 30 days, the employer is entitled to complete those through third parties at the cost of the contractor. Meanwhile the penalty for delay, the associated percentage of liquidated damages would continue to run.

For the defects discovered after acceptance and notified during guarantee period, both of the documents require the Employer to inform the Contractor as soon as possible. If such defect occurs, the purchaser anyway retains his right to remedies. However, when he informs the Contractor after a certain period of time, the Contractor may claim that; if he was informed earlier, he would have taken precautions to stop or slow down the deterioration or aggravation. Informing late, may lead to consequences such that the defect affects other parts of the work and thus need more time and financial resources to remedy.

FIDIC Conditions of Contract, requires the Contractor to remedy these defects as soon as possible, if not Employer has the option to invoke his rights arising from Sub-Clause 11.4 [Failure to Remedy Defects]. In this respect, it is worth to note that Work is only deemed to be accepted after issuance of Performance Certificate, which is either issued after the latest of the expiry dates of the Defects Notification Periods or as soon as the Contractor has supplied all the Contractor's Documents and completed and tested all the Works, including remedying any defects. The outstanding balance of retention money is also certified after the latest expiry dates of Defects Notifications Periods.

The remedy of defects notified to the Contractor at this stage (after take-over, before expiration of defects notification period), analogous to the defects notified during construction stage. That is; even if Contractor believes the defect is not attributable to him, he shall take care of the defects as soon as possible (UNCITRAL Guide, p. 209, FIDIC Conditions of Contract Sub-Clauses 7.6 [Remedial Work] and 20.1 [Contractor's Claims]).

Extension of guarantee period per UNCITRAL Guide is discussed in "Description of works and quality guarantee" (see sub-section 3.5.1., page 27) and FIDIC Sub-Clause 11.3 [Extension of Defects Notification Period] (see sub-section 3.9.2.1.2., page 68). On the other hand, both UNCITRAL Guide (page 192) and FIDIC Conditions of Contract Sub-Clause 11.3 require that, the performance bond shall be extended until the Works have been completed and defects have been remedied.

UNCITRAL Guide states that while the contract may provide that the contractor is not liable for defects notified to him after the expiration of the guarantee period, there may be a limit for this non-liability. According to UNCITRAL Guide, the contractor may be liable for defects discovered and notified by the purchaser after the expiration of the guarantee period if the contractor had known of the defects at the time of acceptance and had fraudulently concealed them.

In Turkish Law of Obligations:

- Articles 477 and 478; as the Work is accepted by the Employer, the Contractor is free of his responsibilities of any kind. However, for the defects or failures the contractor fraudulently concealed or could not be noted under suitable inspection by the purchaser; the responsibility of the contractor continues, also after acceptance of works. In this case, purchaser shall inform the Contractor as soon as he discovers the defect; otherwise, purchaser is deemed to have accepted the Work. For immovable properties, the limitation of claims for defects before the courts is 5 years. However, if there is a gross negligence (ağır kusur) of the contractor, the time limit would be 20 years.
- Article 147 of the same law confirms Article 477 such that; for contracting agreements, unless there is a gross negligence of the Contractor, the limitation for claims is 5 years. In continuation, Article 148 states that this 5-year limit cannot be changed.

It is deemed that non-changeable character of Article 148 of Turkish Code of Obligations, should be only that it could not be shortened, but parties shall be free to define a longer period. This follows that in General Conditions of Construction Works, Turkey (*Yapım İşleri Genel Şartnamesi*) which is mainly



utilized for Turkish Governmental contracts, Article 26 requires 15 years of joint responsibility.

- On the other hand, Article 115 of the abovementioned law states that; if a service, act or art is solely performed in lieu of authorization by law or an authority, any agreement of irresponsibility of the obligor in case of insignificant fault (*culpa levissima – hafif kusur*) is void.
- In any case, a contractor working in Turkey or per Turkish Law as the governing law, shall be aware of this longer limits of responsibility.

German Civil Law, BGB, has similar clauses for responsibility of contractor, where he fraudulently conceals the defects.

- The normal limitation of claims for defects in case of buildings is 5 years (Article 634a/(1)-2), however the claim should be presented in one year period that the obligee obtains knowledge of the circumstances giving rise to the claim and of the identity of the obligor, or would have obtained such knowledge if he had not shown gross negligence (Article 634a/(3) and Article 199/(1)-2).
- However, According to Article 199/(2); claims for damages based on injury to life, body, health or liberty, notwithstanding the manner in which they arose and notwithstanding knowledge or a grossly negligent lack of knowledge, are statute-barred thirty years from the date on which the act, breach of duty or other event that caused the damage occurred.
- In addition to the above, according to Article 639; the contractor may not rely on an agreement by which the rights of the customer with regard to a defect are excluded or restricted, insofar as the contractor fraudulently concealed the defect or gave a guarantee for the quality of the work.

In French Civil Code, Article 1792 and continued, there stands ten-year liability for contractor, where any contract excluding or limiting this responsibility is null and void (Knutson, 2005, page 84, article by Marc Filet).

Comparing the above, it is seen that although guarantee required by the Contract may expire, the parties shall be well aware of the law governing the contract, and the local law. In many legal systems, the agreements violating a statutory prohibition will be void, as it is as well stated in Turkish Code of Obligations Article 26 and in BGB Article 134.

Comparing Turkish Code of Obligations and BGB, it is deemed to be fall more into the principle of equity that the contractor is not held responsible for any fraud for 20 years, but of a major effect.

In this respect the below Articles of BGB are worth to note:

- Article 640 (1): The customer is obliged to accept the work produced in conformity with the contract, except to the extent that, in view of the quality of the work, acceptance is excluded. Acceptance may not be refused by reason of trivial defects.
- Article 635 (3): The contractor may refuse cure, without prejudice to section 275 (2) and (3), if it is only possible at disproportionate cost.
- Article 275 (2): The obligor may refuse performance to the extent that performance requires expense and effort which, taking into account the subject matter of the obligation and the requirements of good faith, is grossly disproportionate to the interest in performance of the obligee.

According to above clauses, calling back UNCITRAL Guide's classification of defects, acceptance is mandatory when the defects are not serious. However, in FIDIC Conditions of Contract, it is per Employer's appreciation.

On the other hand, remembering the alternatives provided to Employer in case of defects, BGB Articles 635 and 275, deprive Employer to request cure of defects under certain conditions, leaving him only with the option of reduction in price.

#### **3.9.3.1.3. DEFECTS FOR WHICH CONTRACTOR IS NOT LIABLE**

Both the documents foresee that; the contract may obligate the contractor, at the purchaser's request, to cure defects for which the contractor is not liable, provided they are notified before the expiry of the guarantee period. The contract may require the contractor to cure the defects within a reasonable period of time of the notification, and entitle him to a reasonable price for doing so.

#### **3.9.3.2. CONTRACTOR'S REMEDIES**

##### **3.9.3.2.1. DELAY IN PAYMENT OF PRICE OR IN PROVIDING SECURITY FOR PAYMENT OF PRICE**

If the purchaser fails to pay the price or a portion of it on the date when it falls due, the contractor will be entitled to require payment and even he may also be entitled to claim interest for the delay in payment.

As UNCITRAL Guide states, it may be favorable for the parties –due to local laws- to include in the contract provisions dealing with the payment of interest.

Both for UNCITRAL Guide and FIDIC Conditions of Contract, another remedy the Contractor is entitled to is suspension of construction and further to terminate the contract.

According to FIDIC Conditions of Contract, reducing the rate of work is also an alternative to suspension of Works.

FIDIC Conditions of Contract defines how the Contractor is entitled to interest rate in a detailed way. Per FIDIC Conditions of Contract, the Contractor shall receive financing charges compounded monthly on the amount unpaid, and unless otherwise agreed these financial charges shall be calculated at the annual rate of three percentage points above the discount rate of central bank in the country of currency of payment. (FIDIC Conditions of Contract Sub-Clause 14.8 [Delayed Payment]). According to FIDIC Conditions of Contract, if the Contractor suffers delay and / or incurs Cost as a result of suspending work (or reducing the rate of work), the Contractor shall be entitled to an extension of time for any such delay, if completion is or will be delayed, and payment of any such Cost plus reasonable profit, which shall be included in the Contract Price.

Similar to UNCITRAL Guide and FIDIC Conditions of Contract, in Turkish Law of Obligations,

- Article 118, requires responsibility for damages of the other party, in case of delay, unless he proves that he has no fault.
- Article 119, as well states that the one in delay will also be responsible for damages in lieu of unexpected conditions, unless he proves that he is in no fault for delay.
- The amount of interest rate for delay, if not agreed by parties in the contract, will be determined per Article 120.
- Additional damages (*aşkın zarar, munzam zarar*), which could not be covered under the default (*temerrüt*) clause, can be deemed under Article 122, unless the delayed party proves that he has no fault in this default, that is to prove the remoteness.
- Under contracts, which obligate both parties to perform, as in the case of construction contracts, due to delay, according to Article 124, the other party can entitle a suitable time for performance.
- On the other hand, according to Articles 125 and 126, if there is no circumstance to entitle an additional time, the obligee may always ask for the performance plus the compensation due to late performance. Alternatively, he can renounce the

performance and consequently claim for damages of non-execution or can terminate the contract.

German BGB, has similar clauses as such that: The obligee may specify a reasonable period of time for restoration and declare that he will reject restoration after the period of time ends. After the end of the period of time, the obligee may demand damages in money. To the extent that restoration is not possible or is not sufficient to compensate the obligee, the person liable in damages must compensate the obligee in money. The person liable in damages may also compensate the obligee in money if restoration is only possible with disproportionate expenses. The damage to be compensated for also comprises the lost profits. Those profits are considered lost that in the normal course of events or in the special circumstances, particularly due to the measures and precautions taken, could probably be expected (Articles 250, 251, 252).

#### **3.9.3.2.2. DELAY IN TAKING OVER OR ACCEPTING WORKS**

If the purchaser is in delay in accepting or taking-over the works, both the UNCITRAL Guide and FIDIC Conditions of Contract requires that after a notice by Contractor the works are deemed to be taken over by the purchaser and the legal consequences of take-over (e.g., the obligation of the purchaser to pay a portion of the price, or the commencement of the guarantee period, passing of risk, commencement of the trial operation period) arise.

As a consequence of this, per FIDIC Conditions of Contract, the Contractor would be entitled to the associated percentage of retention money (Sub-Clause 14.9 [Payment of Retention Money]), Contractor is to submit Statement at Completion upon which he shall be entitled to payment (Sub-Clause 14.10 [Statement at Completion]), as well, certain risks will then pass to the Employer (Sub-Clause 17.2 [Contractor's Care of the Works]). In regards Sub-Clause 17.2 [Contractor's Care of the Works], now it is Employer's responsibility to take care of the Works.

#### **3.9.3.2.3. FAILURE TO SUPPLY DESIGN IN TIME AND FREE OF DEFECTS, AND OTHER FAILURES**

In regard to failure to supply design in time and free of defects, UNCITRAL Guide states that the construction period foreseen in the contract commences to run only from the date that a design free of defects is supplied by the purchaser. If in the additional time provided by the contractor, the purchaser fails to supply the design, then the contractor may be entitled to terminate the contract.

In the contrary, FIDIC Conditions of Contract Sub-Clause 8.1 [Commencement of Work] defines the day to commence, unless otherwise stated, to start within 42 days after the Contractor receives Letter of Acceptance. The difference between UNCITRAL Guide and FIDIC Conditions of Contract is such that; UNCITRAL Guide does not bind the purchaser to supply a defect free design in a limited time stipulated in the contract. The purchaser has in a way more freedom. However, FIDIC Conditions of Contract requirement to commence work within 42 days requires that design is also provided in this period.

On the other hand, UNCITRAL Guide's remedy for Contractor to terminate the contract is much more extreme than the FIDIC Conditions of Contract resolution of claiming extension of time and payment of associated costs, if any.

Under the heading of other failures, below Sub-Clauses of FIDIC Conditions of Contract provide remedy to the Contractor in case he suffers delay and/or incurs Cost as a result of:

- Sub-Clause 2.1 [Right of Access to the Site]: Failure by the Employer to give right or possession of access to the Site within the time stipulated in the Contract
- Sub-Clause 4.7 [Setting Out]: Error in reference points, lines and levels specified in the Contract or notified by the Engineer, which an experienced Contractor could not reasonably have discovered and avoided, delay
- Sub-Clause 7.4 [Testing]: Complying with the instructions of Engineer to carry out additional tests or variation in tests; or as a result of delay for which the Employer is responsible
- Sub-Clause 8.9 [Consequences of Suspension]: Complying with the Engineer's instructions under Suspension of Work and/or resuming the work. In this case, the Contractor shall not be entitled to an extension of time or to payment of the Cost incurred in, making good the consequences of Contractor's faulty design, workmanship or materials, or of the Contractor's failure to protect, store or secure Works during suspension period.

On the other hand, Sub-Clause 16.2 [Termination by Contractor] of FIDIC Conditions of Contract defines other failures by Employer where Contractor is entitled to termination. These are:

- Employer's failure for financial arrangements
- Employer's failure to payment
- Employer's failure to perform his obligations under the Contract
- Employer's failure to enter into Contract Agreement (Sub-Clause 1.6 [Contract Agreement]) or his responsibilities arising from Sub-Clause 1.7 [Assignment]

- Prolonged suspension
- Employer becomes bankrupt, insolvent or goes into liquidation

One of the concerns in question is Sub-Clause 8.4(e). According to this Sub-Clause and subject to Sub-Clause 20.1 [Contractor's Claims], Contractor may be entitled to an extension of time. Sub-Clause 8.4(e) is for delay, impediment or prevention caused by or attributable to the Employer, Employer's Personnel, or Employer's other contractors on the Site. The question arises when the Employer is a Government body and delay is caused by another Government authority. In addition to Sub-Clause 8.4 [Extension of Time for Completion], Sub-Clause 8.5 [Delays Caused by Authorities] deals with delays or disruption caused by authorities which was unforeseeable. The question is, whether the Employer (Governmental authority) is hierarchically connected to the Government authority causing delay or disruption. On the other hand, even if there is no connection, a contractor may assume that, since it is the Government's interest in question, in normal circumstances a Governmental authority would not delay or disrupt another Governmental authority's work. In this case arises again the question of foreseeability.

## **3.10. VARIATION CLAUSES**

### **3.10.1. UNCITRAL GUIDE**

In UNCITRAL Guide (page 248-259), while formulating contractual provisions concerning variations, precaution is advised to be taken in balancing between, on the one hand, the objectives of certainty with respect to the contractual obligations, and, on the other hand, the desirability of permitting necessary or desirable variations in order to meet situations which arise during the life of a complex and long-term contract. In addition, it is advised that the parties achieve an equitable balance between the interests of the purchaser and those of the contractor.

For variations by purchaser, three approaches are defined in UNCITRAL Guide:

*1. Under the first approach, the contract would obligate the contractor to implement a variation ordered by the purchaser, so long as it met certain criteria set forth in the contract.*

It is stated that an obligation of the contractor to implement any variation, whatever its nature or scope, ordered by the purchaser, could unduly interfere with the interests of the contractor. For example, a contractor may suffer prejudice if he is compelled to implement a variation which involves such a substantial departure from the obligations which he

undertook in the contract that he does not have the capability to implement the variation; if the scope of the construction is varied to such a degree that other contractual provisions (e.g., those relating to passing of risk, payment conditions or performance guarantees) become inappropriate; or if a variation involving additional work results in a prolongation of the time for completion of construction such that it interferes with the performance of construction obligations in other projects which the contractor has undertaken.

Accordingly, it is added that, the parties may include in the contract certain provisions to take into account the legitimate interests of the contractor. For example, the parties may wish to consider restricting the scope of the variations which could be ordered by the purchaser and which the contractor would be obligated to implement. For example, the contract might entitle the purchaser to order such variations only if the impact of the variations on the contract price would be less than a certain percentage of the price set forth in the contract, or it might entitle the purchaser to order such variations only as to specific aspects of the construction. It is also stated that the contract incorporates a mechanism such that, within a specified period of time, the contractor delivers to the purchaser a statement as to the impact of the variation, then if in a defined period of time the purchaser does not notify the contractor in writing not to implement the variation, the contractor is obligated to implement the variation.

*2. Under the second approach, the contract would obligate the contractor to implement a variation ordered by the purchaser unless he objected to it upon reasonable or specified grounds.*

UNCITRAL Guide states that, if the parties decide to specify particular grounds, the following are possible examples:

- (a) If the variation is beyond the capability of the contractor to implement;
- (b) If implementation of the variation would prevent the contractor from performing any of his other obligations under the contract or unduly interfere with his performance of those obligations;
- (c) If the variation would prevent the achievement of output targets guaranteed by the contractor.

It is advised the contract specify a period of time within which the contractor must deliver any objection he may have against the variation, and, whether or not the contractor objects to the variation, the contractor to deliver to the purchaser a written statement as to the impact of the variation.

It is stated in UNCITRAL Guide that; a dispute between the parties concerning the validity of the grounds asserted by the contractor for objecting to the variation might be referable to the independent person, court or arbitral tribunal. As to whether or not the contractor should be obligated to implement the variation pending the decision on whether the grounds for the contractor's objection were valid, the parties may consider it desirable to provide that the contractor is not obligated to implement the variation until it is decided that the grounds asserted by him were not valid.

The illustrative provisions in UNCITRAL Guide read:

- (1) The purchaser may deliver to the contractor a written order for a variation setting forth all relevant particulars of the variation.
- (2) If, in accordance with paragraph [ ] of this article [see note 4, below], the impact upon the contract price of the variation as set forth in the written variation order does not exceed [ ] per cent of the price set forth in article [ ], the contractor must implement the variation upon delivery to him of the variation order.
- (3) (a) If, in accordance with paragraph [ ] of this article, the impact upon the contract price of the variation as set forth in the written variation order exceeds [ ] per cent of the price set forth in article [ ] but is less than [ ] per cent of that price, the contractor may, within [ ] days after delivery to him of the variation order, deliver to the purchaser a written objection to the variation specifying [reasonable grounds] [one or more of the following grounds: ...].  
(b) If the contractor does not deliver to the purchaser an objection in accordance with the preceding sub-paragraph, he shall commence to implement the variation no later than the expiration of the period of time set forth in that sub-paragraph,  
(c) Any dispute between the parties as to the validity of the grounds set forth by the contractor in an objection to the variation may be referred by either party to [indicate dispute settlement mechanism]. The contractor must implement the variation if and when it is determined in such proceedings that the grounds set forth by the contractor were not valid.
- (4) (a) The contractor shall not be obligated to implement any variation ordered by the purchaser which does not meet the criteria set forth in paragraphs (2) or (3) of this article unless the contractor consents to the variation in writing.  
(b) Any dispute between the parties as to whether a variation ordered by the purchaser meets the criteria set forth in paragraphs (2) or (3) of this article may be referred by either party [indicate dispute settlement mechanism].

*3. Under the third approach, a variation would require the written consent of the contractor.*



That is, the contract may provide that variations requested by the purchaser must be implemented by the contractor only if he consents to them in writing. In this case, it is advised by UNCITRAL Guide that, the contract may also provide that the variations are not to result in a change in the contract price or the time for completion unless otherwise agreed in writing by the parties.

In the first two cases, UNCITRAL Guide states that, it would be useful for the contract to contain provisions concerning the settlement of disputes between the parties as to whether or not a variation ordered by the purchaser satisfied the criteria in the contract.

In case of a variation, UNCITRAL Guide adds that, the parties may, in some cases, consider it appropriate to provide in the contract for reasonable adjustments to be made in the contract price and in the time for completion by the contractor in the event of a variation. It is stated that the purchaser will wish to know the likely impact of a variation sought by him upon the contract price and the time for completion before the contractor becomes obligated to implement it. If the impact is likely to be excessive, the purchaser may decide not to insist upon the variation. When it is contractor's turn to prepare a statement as to the impacts, it is stated that the amount of time, which the contractor will need to evaluate the impact of the variation, will vary depending upon the nature and extent of the variation.

It is foreseen in UNCITRAL Guide that, the parties may wish to consider the consequences of failure of the contractor to deliver the statement to the purchaser within the time specified in the contract. Under one approach, the contract may provide that the contractor is not entitled to claim an increase in the price or a prolongation of the time for completion; however, the purchaser may still be allowed to claim a reduction of the price or of the time for completion, if warranted by the variation. Under another approach, the contractor might be permitted to claim adjustments of the contract price and the time for completion notwithstanding his failure, but entitle the purchaser to be compensated by way of damages for any loss suffered as a result of the failure. In any case, if the contract provides for an adjustment of the contract price and time for completion in the event of a variation, it may obligate the parties to attempt to settle between themselves the amount of the adjustment in accordance with criteria set forth in the contract. It may entitle either party to refer a dispute as to the amount of the adjustment for resolution in accordance with the dispute settlement provisions of the contract. However, UNCITRAL Guide follows that; in the absence of agreement or in the existence of a dispute between the parties it would be desirable not to postpone an obligation of the contractor to implement the variation.

On the other hand, for variations sought by contractor, UNCITRAL Guide states that, these shall not to be implemented unless they were agreed to in writing by the purchaser and as well, the contract may provide that the variations are not to result in a change in the contract price or the time for completion unless otherwise agreed in writing by the parties.

For cases in which a variation is to result in an adjustment of the contract price, below are the illustrative provision provided in UNCITRAL Guide, to assist the parties in settling this issue:

- (1) Except as otherwise provided in this contract, in the event of a variation the price set forth in article [ ] shall be adjusted by a reasonable amount, taking into account the criteria set forth in paragraph (2) of this article. However, the price shall not be adjusted if, taking account of those criteria, no adjustment is reasonable.
- (2) The criteria referred to in the previous paragraph are the following:
  - (a) If the equipment, materials or services to be supplied as a result of a variation are identical in character to, and supplied under the same conditions as, equipment, materials or services specified in [the contract schedule], then the prices therein for such equipment, materials or services shall be applied, unless it is unreasonable to apply those prices, in which case the effect of the variation on the contract price shall be based upon such of the factors in sub-paragraph (c), below, as may be appropriate.
  - (b) If the equipment, materials or services to be supplied as a result of a variation are not of such identical character or supplied under such same conditions, the prices in [the contract schedule] shall be applied whenever reasonable. If it is not reasonable to apply such prices, then the effect of the variation upon the contract price shall be based upon such of the factors in sub-paragraph (c), below, as may be appropriate.
  - (c) The factors referred to in sub-paragraphs (a) and (b), above, are the following:
    - (i) The actual cost of equipment, materials or services to be supplied as a result of a variation (or, in the case of omitted equipment or materials, the market cost thereof);
    - (ii) Reasonable profit;
    - (iii) Any financial effects of a variation upon other aspects of the work to be performed by the contractor;
    - (iv) Any costs and expenses accruing to the contractor from an interruption of work resulting from a variation;

- (v) Any other costs and expenses accruing to the contractor as a result of the variation;
- (vi) Any other factors which it would be equitable to take into consideration with respect to the variation.

### **3.10.2. FIDIC CONDITIONS OF CONTRACT**

It is Clause 13 [Variations and Adjustments] of FIDIC Conditions of Contract dealing with variations.

Sub-Clause 13.1 [Right to Vary]: Variations may be initiated by the Engineer any time prior to issuing the Taking-Over Certificate for the Works, either with an instruction or by a request for the Contractor to submit a proposal. The Contractor shall execute and be bound by each Variation, unless the Contractor promptly gives notice to the Engineer stating (with supporting particulars) that the Contractor cannot readily obtain the goods required for the Variation. Upon receiving the notice, the Engineer shall cancel, confirm or vary the instruction. The Contractor shall not make any alteration and/or modification of the Permanent Works, unless and until the Engineer instructs or approves a Variation.

Sub-Clause 13.2 [Value Engineering]: The Contractor may, at any time, submit to the Engineer a written proposal, which (in the Contractor's opinion) will, if adopted, be of benefit to the Employer. If a proposal, which is approved by the Engineer, includes a change in the design of part of the Permanent Works, then unless otherwise agreed by both Parties, if this change results in a reduction in the contract value of this part, the Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations].

Sub-Clause 13.3 [Variation Procedure]: If the Engineer requests a proposal, prior to instruction a Variation, the Contractor shall respond in writing. The Engineer shall, as soon as practicable after receiving such proposal, respond with approval, disapproval or comments. The Contractor shall not delay any work whilst awaiting a response. Each instruction to execute a Variation shall be issued by the Engineer, who shall acknowledge receipt. Each Variation shall be evaluated in accordance with Clause 12 [Measurement and Evaluation], unless the Engineer instructs or approves otherwise in accordance with this Clause.

### **3.10.3. NOTES ON SUB-SECTION**

When FIDIC Conditions of Contract is reviewed under the light of UNCITRAL Guide, it is observed that the second approach is adopted (see page 93).

## **3.11. CHOICE OF LAW**

### **3.11.1. UNCITRAL GUIDE**

In UNCITRAL Guide (page 299-305) it is stated that, the parties may exercise a degree of control over the application of the rules governing the contract, namely, "the law applicable to the contract", since they are permitted under many legal systems to choose by agreement the law applicable to the contract.

However, it is added that, particular aspects of the construction may be affected by legal rules of an administrative or other public nature in force in the countries of the parties and in the country where the works is being constructed (if that country is different from the country of the purchaser), whatever be the law applicable to the contract. Those legal rules may regulate certain matters in the public interest, for example, safety standards to be observed in construction, protection of the environment, import, export and foreign exchange restrictions, and customs duties and taxes. It is also admitted that, the extent to which the parties may designate particular issues to be governed by the chosen law may be limited. For example, regardless of the choice by the parties of the law applicable to the contract, the law of the country where equipment or materials are situated may govern the transfer of ownership of that property, and the law of the country where the site is situated may govern the transfer of ownership of the works. The question of which legal system's procedural rules are to govern arbitral or judicial proceedings for the settlement of disputes arising in connection with the contract is also another issue.

The things to note in UNCITRAL Guide in lieu of law of contract are:

- The extent to which the parties are allowed to choose the law applicable to the contract will be determined by the rules of the relevant system of private international law. Under some systems of private international law, the autonomy of the parties is limited and they are only permitted to choose a legal system, which has some connection with the contract, such as the legal system of the country of one of the parties or of the place of performance. Since a court that is to settle a dispute will apply the rules of private international law in force in its country, the parties should agree upon a choice of law that would be upheld by the rules of private international law in the countries whose courts might be competent to settle their disputes. If a dispute is settled in arbitral proceedings, the law chosen by the parties will normally be applied by the arbitrators.
- In many legal systems, a choice-of-law clause is interpreted as not to include the application of the rules of private international law of the chosen legal system

even if the clause does not expressly so provide. However, if that interpretation is not certain, the parties may wish to indicate in the clause that the substantive legal rules of the legal system they have chosen are to apply to the contract. Otherwise, the choice of the legal system may be interpreted as including the private international law rules of that legal system and those rules might provide that the substantive rules of another legal system are to apply to the contract.

- If the contract provides for the exclusive jurisdiction of the courts of a particular country to settle disputes arising under the contract, the parties may wish to choose the law of that country as the law applicable to the contract. This could expedite judicial proceedings and make them less expensive, since a court will normally have less difficulty in ascertaining and applying its own law than the law of a different country.
- It is advised to take the following factors into consideration in choosing the law applicable to the contract:
  - o The parties' knowledge of, or possibility of gaining knowledge of, the law;
  - o The capability of the law to settle in an appropriate manner the legal issues arising from a works contract;
  - o The extent to which the law contains mandatory rules, which would prevent the parties from settling in the contract, and in accordance with their needs, issues arising from the contract.
- Changes in the legal rules, which govern the rights and duties of parties to a contract, may or may not be retroactive. If the parties wish that only the legal rules existing at the time the contract is entered into are to apply to the contract, they may expressly so provide in the contract. However, parties should be aware that such a restriction will not be effective if the retroactive character of the changes is mandatory.
- The choice by the parties of the law applicable to the contract relates only to the legal rules governing their mutual contractual rights and obligations; that choice will usually not directly affect the law applicable to rights and duties of persons who are not parties to the works contract (e.g., subcontractors, personnel employed by the contractor or the purchaser, or the creditors of a party). It is advisable for the contractor to choose that same law as the law applicable to all contracts relating to the construction of the works concluded by him with subcontractors and with suppliers.

- In addition to legal rules applicable by virtue of a choice of law by the parties, or by virtue of the rules of private international law, certain rules of an administrative or other public nature in force in the countries of the parties and in other countries (e.g., the country of a subcontractor) may affect certain aspects of the construction. The purpose of these rules is to ensure compliance with the economic, social, financial or foreign policy of the State. The parties should therefore take them into account in drafting the contract.
- If the rules are changed, or new rules are issued after the contract is entered into, a variation of the construction may be needed.

The illustrative provisions in UNCITRAL Guide read alternatively:

The law of ... (specify a country, or, when a country has more than one territorial unit each with its own laws, a particular territorial unit) [as in force on ... (specify date the contract is entered into)] is to govern this contract. [The rules of private international law of ... (specify same country or territorial unit as specified above) do not apply.]

The law of ... (specify country or territorial unit) [as in force on ... (specify date the contract is entered into)] is to govern this contract, and in particular the formation of the contract, the validity of the contract and the consequences of its invalidity.

The law of ... (specify country or territorial unit) [as in force on ... (specify date the contract is entered into)] is to govern [the formation of the contract] [the validity of the contract and the consequences of its invalidity] [the interpretation of the contract] [the rights and obligations of the parties arising from the contract] [the passing of risk of loss or damage] [the failure to perform the contract and the consequences of a failure] [the prescription of rights] [the variation of contractual rights and obligations] [the suspension of contractual rights and obligations] [the transfer and extinction of contractual rights and obligations] [the termination of the contract].

### **3.11.2. FIDIC CONDITIONS OF CONTRACT**

In FIDIC Conditions of Contract, there is a reference to “Governing Law” in Sub-Clause 1.4 [Law and Language].

On the other hand, in Dispute Adjudication Agreement, there is a separate reference to which law the Dispute Adjudication Agreement shall be governed by.

### 3.11.3. NOTES ON SUB-SECTION

After UNCITRAL Guide's detailed determination of law, reviewing FIDIC Condition of Contract the only two clauses one may think that, this seems so easy.

In a view to determining a law to govern the contract, a law to govern the Dispute Adjudication Board Agreement, and by setting the arbitration place as International Chamber of Commerce (ICC) therefore determining the procedural rules to govern is no problem.

The problem will arise mainly when there is a "problem". By this, what is meant is, in most cases it is first the Engineer to make a determination. When this is not satisfactory, practically it will be the parties negotiating. When the problem cannot be resolved, then it is referred to Dispute Adjudication Board. Even in this third step, when it cannot be resolved, it is sure that the issue is not a simple one, either cost wise or time wise or most probably from both aspects. Therefore, it will be referred to arbitration. In many legal systems, if parties do not follow the arbitration decisions on their initiative or with good faith, those decisions are not directly applicable. That is, the arbitration decision should be brought before the court for execution. When an arbitration decision is before the court, it shall be kept in mind that the court will be required to render its decision also taking account the mandatory rules of the country it is situated in.

In this regard, the nature of the parties (private, joint venture, governmental), the law, the nature of work to be performed shall be regarded and studied by both of the parties well before the contracting stage.

Bunni states that, in the early years of Red Book it was customary to stipulate English law to govern, however it has become more usual and appropriate in the recent years to specify as the applicable law of the contract the law of country where the project is constructed (Bunni, p.49-50).

On the other hand, the standard FIDIC Conditions of Contract Clauses require compliance with the local laws. The issue of conflict between the local law and governing law and contractual obligations is another question. Having stated this, Knutson (Knutson, 2005, Introduction, p. xix-xx), mentions a contract in India with French governing law, and questions whether the Indian contractor benefit from the French law concerning payments, such as the right to stop work for non-payment even if Clause 16 [Suspension and Termination by Contractor] is not adhered to.

In this regard, Knutson (Knutson, 2005, page 44) states instead of parties stating the governing law in the Appendix, it would have been very simple to have stated in FIDIC Conditions of Contract that the contract shall be governed by law of the country or other

jurisdiction, where the Site is located unless otherwise stated in the Appendix to Tender. He continues that, in the real world, few Employers will agree to a governing law other than the law of their own country.

In respect to law applicable to a contract, for contracts where a European Union state is a party, Rome Regulation I and Rome Regulation II shall be kept in mind. These two regulations simply replace the laws of the member states. Rome Regulation II for obligations arising non-contractually is in force since the beginning of 2009, and Rome Regulation I for contractual obligations is in force since December 2009. Article 3 (3) of Rome Regulation I read:

Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement

Article 9 (1) and (2) of the same Regulation read:

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

Further Article 12 (1) and (2) of Rome Regulation I read:

1. The law applicable to a contract by virtue of this Regulation shall govern in particular
  - (a) interpretation;
  - (b) performance;
  - (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
  - (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
  - (e) the consequences of nullity of the contract.
2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.



In addition, Article 4 (3) of Rome Regulation II, for torts / delicts arising non-contractually follows that:

Where it is clear from all the circumstances of the case that the tort / delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort / delict in question.

Through application of above clauses it might be possible that the party to a contract to find himself to be bound by set of legal rules which he was not aware at the time of signing the contract.

Another concern Knutson (Knutson, 2005, Introduction, p. xx-xxi) mentions is in respect to subcontractors, suppliers, local procurement or labor laws. He states that, sometimes contractors find that their (foreign) nationals cannot work in a given trade, because for example they are not in the appropriate local union. Or should a dispute arise, the Contractor may find that it has to go before some local board despite the clear Dispute Adjudication Board / Arbitration provisions in the contract, or that the local party has gone to the local judiciary and obtained an order which is intended by the local authorities to be binding. An example to this is the right to appoint a “juge referee” in France, despite the existence of the ICC arbitration provision, as it was used with good effect in both the Channel Tunnel and Euro Disney cases.

Bunni summarizes that, in case of a dispute, the conflict in respect to legal provisions may involve mandatory provisions, envisaged solutions in the contract which may be different than from those under the applicable law of the contract, imported provisions from the applicable law of the contract -whether through additional obligations or through deletions- and some specific problems due to these imported provisions –most common ones being the joint and several liability foreseen in countries following Romano-Germanic system, and decennial liability in France, Belgium, Italy, Saudi Arabia, Egypt, Kuwait and the United Arab Emirates. (Bunni, 117-119).

### **3.11.3.1. NOTES ON FIDIC CONDITIONS OF CONTRACT SUB-CLAUSE 20.1 [CONTRACTOR’S CLAIMS]**

One of the most important issues related with choice of law and which is the consequence of most of the Clauses in question is “Claims”.

Under below Sub-Clauses Contractor is entitled to Sub-Clause 20.1 [Contractor's Claims]:

- 1.9 [Delayed Drawings and Instructions] (see sub-section 3.5.2. - page 30, sub-section 3.5.3. - page 32, sub-section 3.9.2.2.3. - page 79),
- 2.1 [Right of Access to the Site] (see sub-section 3.3.3. - page 22, sub-section 3.9.2.2.3. - page 79, sub-section 3.9.3.2.3. - page 91),
- 3.5 [Determinations] (see sub-section 3.7.2. - page 45, sub-section 3.7.3. - page 46, sub-section 3.9.2.1.2. - page 68, sub-section 3.10.2. - page 98)
- 4.7 [Setting Out] (see sub-section 3.9.2.2.3. - page 79, sub-section 3.9.3.2.3. - page 91),
- 4.12 [Unforeseeable Physical Conditions],
- 4.24 [Fossils],
- 7.4 [Testing] (see sub-section 3.8.2. - page 52, sub-section 3.9.2.1.2. - page 68, sub-section 3.9.2.2.3. - page 79, sub-section 3.9.3.2.3. - page 91),
- 8.4 [Extension of Time for Completion] (see sub-section 3.9.3.1. - page 80, sub-section 3.9.3.2.3. - page 91),
- 8.9 [Consequences of Suspension],
- 10.2 [Taking Over of Parts of the Works] (see sub-section 3.9.3.1.1. - page 81),
- 10.3 [Interference with Tests on Completion],
- 13.7 [Adjustments for Changes in Legislation] (see sub-section 3.6.2. - page 38, sub-section 3.6.3. - page 39),
- 16.1 [Contractor's Entitlement to Suspend Work] (see sub-section 3.9.2.2.1. - page 76),
- 17.4 [Consequences of Employer's Risks],
- 18.1 [General Requirements for Insurances],
- 19.4 [Consequences of Force Majeure].

Under Sub-Clause 20.1 [Contractor's Claims] of FIDIC Conditions of Contract:

- the Contractor must give a notice of Claim for any extension of time and / or any additional payment, not later than 28 days after he became aware, or should have become aware, of the event or circumstance giving rise to a claim, under any Clause of Conditions of Contract or otherwise in connection with the Contract; describing the event and circumstance. If he misses this 28 days

period, it is stated that he will not be entitled for time extension of completion, or additional payment. In addition, Employer will be discharged from any liability in connection with the claim. (The details of the Claim is required to be submitted within 42 days)

- In addition to the notice which is to occur within 28 days, within 42 days after the Contractor became aware or should have become aware of the event or circumstance giving rise to the claim, or within such period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim.
- Within 42 days after receiving a claim, the Engineer shall respond with approval, or disapproval and detailed comments.
- The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine the extension and / or additional payment (if any) to which the Contractor is entitled under the Contract.

The Engineer, when deciding for a claim must proceed in accordance with Sub-Clause 3.5 [Determinations], consulting with the parties and trying to reach an agreement fairly. He cannot merely reject or deny the claim completely. (<http://www.scribd.com/doc/22225659/Claims-Under-New-Fidic-John-Papworth>, last accessed on 26 Jan 2012). On the other hand, it is the Employer paying him, it is the Engineer himself mostly giving instructions to the Contractor. Thus, it is a difficult situation to assess the claim.

If the Engineer, after receiving the claim, cannot put it aside and postpone to assess it timely. His duty is both to the Employer and to the Contractor. If claim is paid later than it should have been, then the Contractor may claim for additional financial charges and these can be sued to the Engineer by the Employer. (<http://www.scribd.com/doc/22225659/Claims-Under-New-Fidic-John-Papworth>, last accessed on 26 Jan 2012).

#### **3.11.3.1.1. IF ALL CLAIMS FALL UNDER SUB-CLAUSE 20.1 [CONTRACTOR'S CLAIMS]**

The issue, which is argued here mostly, is if this Sub-Clause applies only to claims under the Conditions but also the ones in connection with the Contract; that is a claim made under general law, such as breach of contract, or for negligence. Papworth is in this view (<http://www.scribd.com/doc/22225659/Claims-Under-New-Fidic-John-Papworth>, last accessed on 26 Jan 2012). On the other hand, one shall pay attention to the start of Sub-

Clause 20.1 [Contractor's Claims], which reads: "If Contractor considers himself to be entitled to any extension of time for completion and/or any additional payment..." Then it should be remembered that the compensation due law of torts or breach of contract does not need to be solely granting additional time and / or additional payment. Thus, as Rubino-Sammartano (Construction Law International, Volume 4, No 1, March 2009) asserts, claims other than extensions of time and additional payment does not fall under the potential guillotine of Sub-Clause 20.1 and this 28 day deadline. Engineer being part of the Contract may also lead the way that, when there is a claim in respect of breach of Contract, in regards conflict of interests he should not be the one to make a determination. In case of law of torts, as the name implies, apply especially when law of contracts or unjust enrichment cannot be applied. Therefore, it follows that it cannot be the Engineer to make a determination, as the claim is surely not even associated with the Contract.

#### **3.11.3.1.2. 28 DAYS LIMIT TO GIVE NOTICE FOR CLAIM**

There are some instances where this, 28 days short time limit for the Contractor to give a notice to the Employer is not absolute.

First, if the Employer acknowledges, better in writing, or as well as orally the right in question, or through the conduct of Employer and/or of his Engineer if an acknowledgement can be inferred, the Contractor's right becomes enforceable even if the Contractor exceeds his 28 day limit. (Rubino-Sammartano, Construction Law International, Volume 4, No 1, March 2009)

Secondly, a deadline making it excessively difficult for a party to exercise its right will make the 28 days limit void. (Rubino-Sammartano, Construction Law International, Volume 4, No 1, March 2009). In this respect, Rubino-Sammartano gives examples from several jurisdictions and doctrine:

- *Credito Romagnolo v Magni* (Court of Cassation, April 1, no 926 [1974] Mass. Foro it. 230 [1974]), Italy: "the excessive difficulty to exercise a right is not to be established based on a major or minor length of the term, assessed objectively by an absolute and prior appreciation, but in respect of the person who must take action to avoid that her right be forfeited and in particular regard is to be had to the factual circumstances, in which that person was operating at that time."
- From Civil Tribunal of the Seine, 26 February 1929 and Civil Tribunal of Perigueux, 6 July 1954; France; it follows that; in essence the contractual provision which provides for a reduction of the statute of limitation is valid if the time period is "reasonable" and does not de facto prevent all remedies. What is

reasonable then becomes a question of facts, principle of good faith, usages, and interpretations.

- From judgment of Tribunal Supremo of 27 January 1992, Spain it follows that: if the exceptional circumstances have made compliance with the contract [pacta sunt servanda] excessively onerous for one of the contracting parties, the court must make a determination whether the provision has become excessively onerous or not, and if yes, the court will intervene.
- Some German writers take the view that Sub-Clause 20.1 [Contractor's Claims] is null and void because it places an excessive burden upon the contractor and is consequently breach of Article 307 of BGB. Article 307 read: Test of reasonableness of contents; Provisions in standard business terms are ineffective if, contrary to the requirement of good faith, they unreasonably disadvantage the other party to the contract with the user.

On the other hand, it is argued if the contractor fails this 28 days period for claims, if the employer will be entitled to liquidated damages or not, due to late finishing in lieu of the change leading to the subject claim. In personal view, it is the employer who has instructed something new which was not stated in the contract documents. Therefore, it would be unjust enrichment for the employer if he both instructs something different which leads to additional time and gets extra payment in form of liquidated damages.

#### **3.11.3.1.3. COMPARED TO EMPLOYER'S RIGHT TO CLAIM**

Under Sub-Clause 2.5 [Employer's Claims] of FIDIC Conditions of Contract (see Figure 8: Sub-Clause 2.5 [Employer's Claims] of FIDIC Conditions of Contract, page 54) one would observe the difference in approach for the Contractor and the Employer.

First of all, unlike the Contractor there is no strict time limit for Employer's claims, such as 28 days, but the notice should be given as soon as practical, and not even "as soon as possible, which is making the time frame to a give a notice more vague.

Second, it is the Engineer or the Employer who shall give notice and particulars to the Contractor. In this respect, when one views Sub-Clause 3.5 [Determinations], Engineer is expected to act fair in his determinations, considering both parties. However, it is not realistic to expect the Engineer to act fair in regards to a claim notice that he issues himself.

Third, although it is the Employer or Engineer giving the notice to the Contractor, such notice is required to be given as soon as practicable after "the Employer" becomes aware

of the event". Engineer's knowledge is not deemed to be relevant to give a notice. (Knutson, 2005, p. 48)

On the other hand, it is positive that Employer is not allowed to withhold or deduct any sums due payment without following the procedure in Sub-Clause 2.5 [Employer's Claims].

In the below listed Sub-Clauses, there is a reference to Sub-Clause 2.5 [Employer's Claims]:

- 4.19 [Electricity, Water and Gas]
- 4.20 [Employer's Equipment and Free-Issue Material]
- 7.5 [Rejection]
- 7.6 [Remedial Work]
- 8.6 [Rate of Progress]
- 8.7 [Delay Damages] via 8.2 [Time for Completion]
- 9.4 [Failure to Pass Tests on Completion]
- 11.3 [Extension of Defects Notification Period]
- 11.4 [Failure to Remedy Defects]
- 15.4 [Payment After Termination]
- 18.1 [General Requirements for Insurances]
- 18.2 [Insurance for Works and Contractor's Equipment]

#### **3.11.3.1.4. HEADS OF CLAIM**

The heads of claim for payments would normally be the direct costs, indirect costs, overhead, profit, financing charges and loss of profit.

- Profit, when allowed in the claim should be comparable to that in the Tender.
- The financing charges are those; because of loss of interest on capital, which the Contractor has not been paid and put into his bank account; and those of charges he incurs by way of overdraft in using his own money to finance work, where he would normally expect to use the money paid to him under the Contract. (<http://www.scribd.com/doc/22225659/Claims-Under-New-Fidic-John-Papworth>, last accessed on 26 Jan 2012).

- Loss profit usually refers to describe damages suffered when Contractor is kept on the project longer than anticipated, thereby losing the opportunity to earn profit on another project. It is difficult to establish and support this head.

In respect to the above stated common claim heads, Sub-Clause 17.6 [Limitation of Liability] reads: “Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract.”

As well, Sub-Clause 1.1.4.3 [Definitions] defines cost as “all expenditures reasonably incurred (or to be incurred) by the Contractor, whether on or off the Site, including overhead and similar charges, but does not include profit”.

From that it follows that; under Sub-Clause 20.1 [Contractor’s Claims] the Contractor would normally be entitled to direct cost and overhead cost; and not entitled to these losses stated in Sub-Clause 17.6 [Limitation of Liability]. However, in respect of law of torts and breach of contract, such rights would still be reserved (see sub-section 3.11.3.1.1. If All Claims Fall Under Sub-Clause 20.1, page 106). For example Sub-Clause 16.2 confirms that Contractor’s election to terminate the contract should not prejudice any other rights under the Contract or otherwise. Similarly, Sub-Clause 16.4 Employer is to pay the Contractor the amount of any loss of profit or other loss or damage sustained by the Contractor.

In respect to profit, when the following table of Sub-Clauses are studied, it can be said that Contractor is entitled to cost plus profit if Employer can be deemed responsible for the event giving rise to claim.

Table 1: List of Sub-Clauses where Contractor is entitled to cost and profit

Sub-Clause 1.9	Delayed drawings and instructions	If and to the extent Employer's failure was caused by any error or delay by Contractor, the Contractor shall not be entitled to such extension of time, cost or profit.
Sub-Clause 2.1	Right of access to site	
Sub-Clause 4.7	Setting out	Unless the error could not have reasonably have discovered by the Contractor and delay be avoided, Contractor will be entitled to extension of time, cost and reasonable profit.
Sub-Clause 7.4	Testing	When Contractor suffers delay and/or incurs cost from complying instructions or as a result of delay for which Employer is responsible, the Contractor shall be entitled to extension of time, cost and reasonable profit.
Sub-Clause 10.2	Taking over of part of the works	If the Contractor incurs cost as a result of the Employer taking over and/or using a part of the Works, Contractor shall be entitled to cost plus reasonable profit.
Sub-Clause 10.3	Interference with tests on completion	If the Contractor is prevented from carrying out tests on completion, he shall be entitled to extension of time, cost and reasonable profit.
Sub-Clause 11.8	Contractor to search	Unless the defect is to be remedied at the cost of Contractor, the cost of search of defects plus reasonable profit shall be agreed.
Sub-Clause 16.1	Contractor's entitlement to suspend work	When Contractor suffers delay and/or incurs cost as a result of suspending work or reducing rate of work, he shall be entitled to extension of time, cost and reasonable profit.



In the following table, the Sub-Clauses, which the Contractor is only entitled to cost, are listed.

Table 2: List of Sub-Clauses where Contractor is entitled to only cost

Sub-Clause 4.12	Unforeseeable physical conditions
Sub-Clause 4.24	Fossils
Sub-Clause 8.9	Consequences of suspension
Sub-Clause 12.4	Omissions
Sub-Clause 13.7	Adjustments for changes in legislation
Sub-Clause 15.5 and Sub-Clause 19.6, Sub-Clause 19.7	Employer's entitlement to termination, optional termination, release from performance under the law
Sub-Clause 17.3 and Sub-Clause 17.4	Delay and/or cost Contractor suffers to rectify the loss or damage as a result of Employer's risks
Sub-Clause 19.4	Consequences of force majeure

#### **3.11.3.1.5. WHY DISPUTE ADJUCATION BOARD DECISION OR ARBITRATION MAY NOT BE A SOLUTION**

The introduction of Dispute Boards to act during the performance of a contract although said to have many advantages, if the Board is unable to deal with the dispute as it would have wished, or failed to have a satisfactory recommendation or decision; or the parties may have been unwilling or unable to face up to the problem that gave rise to the dispute and accept the financial or human consequences of a decision or a recommendation from the Board, then there is less benefit from the institution of Dispute Adjudication Board (Bunni, p. 599, 600).

Bunni states that; as soon as disputes arise between the parties and come under the scrutiny of lawyers, any conflict which might exist between the common law system, upon which the FIDIC Conditions of Contract is based, and the applicable law of contract would be of great importance. He continues; that irrespective of the scale of the dispute, the legal conflict would amplify and the resolution would usually be extremely costly (Bunni, p.117).

If one would review the time required for dispute resolution foreseen in FIDIC Condition of Contract, the following schematics would take place.

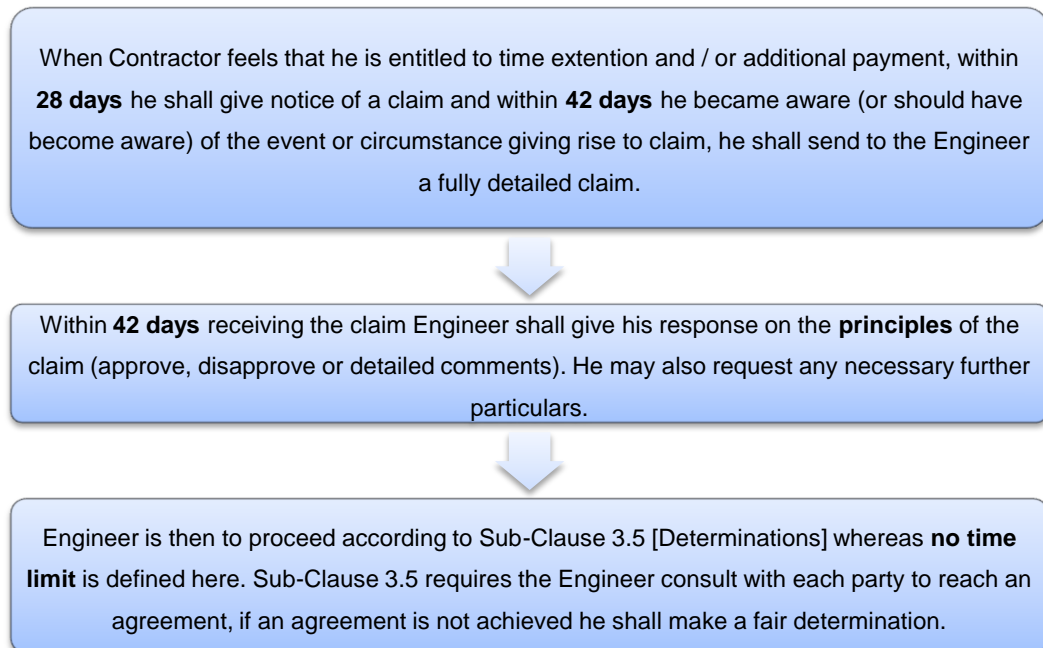


Figure 12: Sub-Clause 20.1 of FIDIC Conditions of Contract

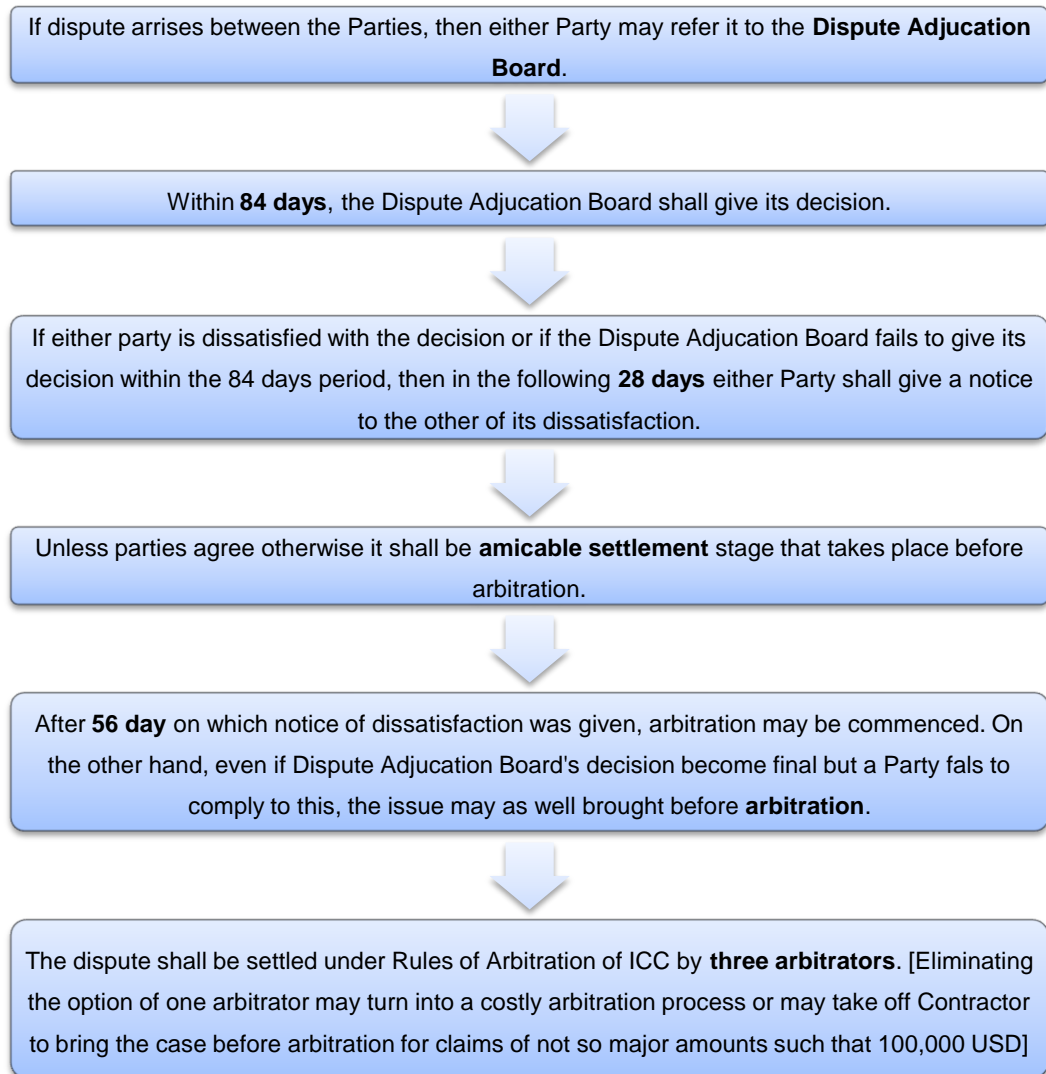


Figure 13: Dispute resolution mechanism per Sub-Clause 20.2-20.7 of FIDIC Conditions of Contract

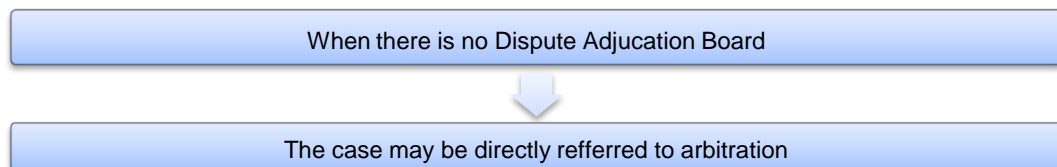


Figure 14: Sub-Clause 20.7 of FIDIC Conditions of Contract

Having gone through the bumpy and time taking path summarized above, the decision of Dispute Adjudication Board or the one rendered through arbitration, if not followed

voluntarily by the parties, then in most legal system, a decision of the local court would be required to assure its enforceability.

Knutson (2005, page 76) mentions this issue for the case of United Kingdom. Considering only the first step, that is, non-execution of Dispute Adjudication Board's decision and referring it to arbitration, Knutson states that, 'While most tribunals would be expected to give effect to the provision requiring that the DAB decision is to be given effect to until revised in arbitration, there is always a danger that a particular tribunal will accept an argument that the Contract should not mean what it says and the DAB decision should not be "given effect to".'

On the other hand, while English Courts respect ICC arbitration and are reluctant to interfere (Knutson, 2005, page 76), in case of Turkey, the result may turn out to be completely different. It should be stated that there are positive steps towards facilitating arbitration, such as the International Arbitration Law being legalized in year 2001. However, the articles and theses on the issue highlight that, the decisions rendered by adjudication boards or by arbitration bodies are not easily enforceable. In regards to International Arbitration Law of Turkey (MTK), they are subject to action to nullity (*iptal davası*), and thus non-enforceability due to several causes most vague one to be public order per Article 15 of MTK. On the other hand, for foreign arbitration decisions, the executory process (*tenfiz süreci*) which can be appealed, may result in a time of dispute resolution to go far beyond what was expected out of it.

It is interesting to note that, despite the numerous theses in Turkey studying FIDIC Conditions of Contract, its application and disputes; there is no concrete study on how the Turkish Court's handle the associated arbitration decisions. (see sub-heading "Theses", page 5)

On the other hand, in respect to MTK Article 1, if a dispute is to be arbitrated per MTK, the disputes in regards to the rem of the immovable property (*taşınmazın aynı*) and the disputes which cannot be left to the parties will, are not allowed to be resolved through MTK. The cases involving criminal law or labor law are generally the ones which cannot be referred to arbitration.

Reviewing MTK Article 5; against a case which is brought before a court, it is possible to make an objection in regard to arbitration. However, Article 6 enables the parties to refer to the court to request preliminary injunction (*ihitiyati tedbir*) or lien (*ihitiyati haciz*). This request can be done before or during the arbitration process. The request can also be referred to the arbitration board, however the arbitration board is not allowed to decide for that kind of preliminary injunction (*ihitiyati tedbir*) or lien (*ihitiyati haciz*) which can solely be rendered by public authorities or which is binding over third persons. According MTK

Article 15/A-1(c) and Article 10/B, for arbitrations of three arbitrators, the decision can be annulled (*iptal*) if the arbitration decision is not obtained within one year that the arbitration board has performed its first meeting. If the arbitration board when rendering its decision fails to decide for any part of the request, this is also a reason for annulment (MTK, Article 15/A-1(e)). The example for this can be as simple as deciding on default interest (*temerrüt faizi*) or additional damages (*munzam zarar*).

In regards to Law on Private International Law and International Civil Procedure of Turkey (MÖHUK), the execution of a foreign court or a foreign arbitration board decision in Turkey is only possible after an execution (*tenfiz*) decision. If the decision is against the public order, per Articles 54 and 62 of MÖHUK, its execution would not be possible in Turkey, where the term “inconsistency with public order” is not a concrete concept. In addition, it should be born in mind that appeal of an execution of an arbitration decision per Turkish Laws is per general rules of law, i.e. appeal of the execution decision will stop the execution of decision.

United Nations’ 1958 Convention On The Recognition And Enforcement Of Foreign Arbitral Awards, shortly “The New York Convention”, which Turkey is a party to, requires that the enforcement of foreign arbitration decisions is possible in regards to the local law where the decision will be executed. Therefore, it is again MÖHUK that is referred to.

## CHAPTER 4

### SUMMARY AND DISCUSSION OF RESULTS

#### *In General...*

Regarding the discussion on the similarities and diverging factors between two international standard contracts, namely the UNCITRAL Guide and FIDIC Conditions of Contract, in the context of the sections discussed, FIDIC Conditions of Contract falls in line with UNCITRAL Guide. This is mainly due to the fact that, both documents are drafted by international bodies. An additional factor is, UNCITRAL Guide does not give a single formulae but advises several alternatives that can be chosen. Some alternatives suggested by UNCITRAL Guide is the reason why there are criticisms in regards to FIDIC Conditions of Contracts by legal professionals or para-legals.

FIDIC Conditions of Contract having its origin in common-law, although re-drafted several times, still falls into common-law understanding. However, the choice of law or the mandatory legal rules where the work is being performed may lead to unexpected or unforeseen claims or consequences when FIDIC Conditions of Contract is utilized and seen as the sole source. It follows that; alternative clauses may be required to be discussed between the parties according to the legal principles in that country.

It is indeed very difficult to know magically in advance about the principles of law, or the peculiarities, found in different legal systems, which can make a difference to the parties' rights, and which not everyone will know about. The principles in India would be different from those in Saudi Arabia, and those will as well be distant to the principles in the continental Europe. Furthermore, searching or going through the written documents would not always have the same results with their local application or the doctrine.

The principle of freedom of contract will let the parties to draft their contract freely, thus deviate from the descriptive or from the complementary rules of law. However, the mandatory rules and how they are interpreted shall be of major concern to the parties. The parties shall bear in mind that it is not only them, namely Employer-Engineer-Contractor, on the scene. Local authorities also play a role, at first, to employ construction

or access permits, sometimes to have a supervisory role during the construction and inspect the works during or at the final stage. The sub-contractors employed by the contractor, although they may have a contract that refers to the main contract between the Contractor and the Employer, would not hesitate to exhaust the rights arising from local regulations at the first instance. From their point of view, it would be more than costly to refer a claim to a dispute adjudication board or to an arbitration body, instead of resolving it directly by the local laws. In this case, the Contractor may be entrapped between the local laws and the law governing his main contract with the Employer.

The hierarchy of documents stated in the very beginning may have unanticipated outcome. According to FIDIC Conditions of Contract, only written documents shall be referred, and those are specifically listed. Therefore, FIDIC do not expect that negotiation talks will have an effect. However, this would certainly be against the understanding in continental Europe, where the main emphasis is on the parties' intentions when interpreting or deciding for an issue. At the end, a judge may focus on those unwritten communication or not listed documents when deciding under mandatory character of local laws.

#### *Description of Works and Quality Control...*

It can be observed that, both of the documents, as well as the legal references discussed, place a burden and much of the risk on the Contractor to execute the work with high responsibility. Contractor is not to construct strictly bounded with the technical documents provided by the contract, but to analyze and indicate any issue that may lead to defect or that may be contradictory to local rules. Employer, in this case, is deemed to know nothing. On this subject, it may be said that the balance shifts to more against the Contractor in FIDIC Conditions of Contract compared to that in UNCITRAL Guide.

#### *Price and Payment...*

UNCITRAL Guide discusses the payment modalities for lump-sum contracts, unit price contracts and cost-reimbursable contracts. Whereas FIDIC Conditions of Contract is designed more for unit price, measurement type contracts.

Although not interdicted, by default there is no bonus payment foreseen in FIDIC Conditions of Contract for early completion.

Due to the long duration and complex character of construction process, price adjustment and variations are available to both documents. However, the availability of the adjustment in the contract may depend on local regulations. In countries where Sharia

law is in force; even if there stands a clause for interest rate in the contract, it would not be applicable. In that situation, parties would have to draft the contract in a way to overcome such obstacles. On the other hand, in case of unexpected conditions arise after signing the contract, as a result of which, adjustment of the contract becomes necessary in a view to hardship and equity, it would mainly be the risk of contractor and the assessment of the Engineer, adjudication body, arbitration or judiciary. However, it should be restated that, although adjudication or arbitration is seen as a dispute resolution method, in some legal practices it would be possible to refer the issue directly to the judiciary.

For revision and adjustment of price, both documents agree that revision and adjustment shall be of limited character. In this case UNCITRAL's suggestion; that price revision only applies where it would result in a revision exceeding a certain percentage of the contract price or that price revision clauses not to be used for short contract durations; is worth to note.

Retention money to be kept for certain duration, for defects and guarantee period is another common point for both of the documents.

#### *Engineer...*

Through each document reviewed, it becomes more obvious that – contrary to the continental Europe or to say Romano-Germanic law tradition- the authority of Engineer in FIDIC Conditions of Contract is above everything. Although UNCITRAL Guide puts forward various modalities how to employ the Engineer, his functions and way of selection; FIDIC Conditions of Contract leaves the right to determine the Engineer only to the Employer; and on the contrary authorizes the Engineer to the deepest extent. Thus, Engineer is the essence, is the key factor to FIDIC Conditions of Contract. Other documents and legal systems require that, when Engineer is such empowered, than he will act as an agent of Employer thus no “fair determination” function is expected from him. Alternatively, the Contractor would also be involved in the process of determining who the Engineer is.

Nonetheless, in respect to Engineer's determinations, UNCITRAL Guide's approach is worth to note, as it suggests; to save from dispute resolution procedure, up to a certain extent the acts of Engineer to be binding and non-reviewable.



### *Inspection and Testing...*

The responsibility of the Contractor is confirmed in several articles, such that the Contractor is to assure the quality of the work, make sure that the work conforms to technical standards of contract, as well as to local regulations. Contractor is also to advise and notify the Employer for potential risks or default if the work is executed per the documents supplied by the Employer. Any approval of the Employer or the Engineer would not relieve the Contractor from his responsibilities. In fact it can be said that; he shall always be alert. On the other hand, if some tests specified in the contract is already foreseen by local laws, then it might be considered as a saving.

### *Delay, Defects and Other Failures...*

It is the Contractor's one of the main responsibilities to complete the work on time. On the other hand, it is the Employer's one of the main duty not to hinder the work.

Thus, in case of delay, which is attributable to the Contractor, in general, Employer has the right to request an accelerated program. Employer will be entitled to liquidated damages, and under certain circumstances and as the local laws permit he may be entitled to additional profit loss in respect to law of torts, whereas any additional cost for acceleration shall be borne by the contractor.

Similarly, when delay is attributable to the Employer, Contractor will have to claim for time extension and additional costs, if any.

When it is the Employer in delay for payment, as local laws permit Contractor may be entitled to interest and to other damages which are not compensated by interest payment. If Employer does not proceed with the payment; suspension of the works, reduced rate of work and termination are additional remedies provided to the contractor. In connection to this, FIDIC Conditions of Contract requiring employer to submit evidence for his financial capacity is a new concept introduced in 1999 version recognizing the risk of contractor.

If Employer is in delay taking over the works, both of the documents require that, upon notice by contractor, take-over and acceptance will be deemed to occur with its consequences.

However, it is not wrong to say that the main risk during the contract lies on the Contractor. When delay is attributable to Contractor, Employer is entitled to the liquidated damages automatically. It is the Contractor to put forward the facts that, delay is not attributable to him, or that he shares the responsibility with the Employer. On the other hand, when Contractor is of the opinion that, Employer has caused a delay in the works, it

is again the Contractor to put forward the facts at the first instance and request for compensation in terms of time extension and / or additional payment. For delays not attributable to both parties, none of them is entitled to additional cost, they both bear the risk of it. However the Contractor may claim for time extension. When delay cannot be covered up in a given time frame, or the responsible party does not have an intention for such, the other party is then entitled to terminate the contract. UNCITRAL Guide in this case states that, additional prerequisite may be added for termination; such that defect or delay affects a certain percentage of work or a specified agreed sum is reached. In connection with claims, regarding the risk is more on the Contractor's side, the differences in time constraints for Employer and for Contractor to place a claim is worth to note.

Defects being obvious or latent are a subject of law, studied extensively. In short, the Contractor has to proceed without defect, unless he gives a notice to the Employer when he assesses that the design is not appropriate, or else he is all of the time responsible for the defects and default. The Employer may always request cure of defects by the Contractor, or replacement of work. When does not proceed accordingly, Employer would have the right to do it himself or through others. In this case, when Employer is to employ third parties, whether he is completely free or independent, to choose the third party and agree upon the terms is a matter of discussion. Since Employer bears the risk and cost of a new contract, which then would be recouped against the Contractor, UNCITRAL Guide advises the Contractor is involved in selection of the new contractor or to comment on the terms of the new contract. This way UNCITRAL Guide suggests several alternatives to the degree of responsibility of the Contractor cost wise and liability wise in case of defects associated with the new contract. FIDIC Conditions of Contract does not involve the Contractor in this selection issue, because of the fact that the Contractor will only be responsible for the cost of the new contract, but not for the quality. Depending on the seriousness of defects to be cured, termination of the contract is seen as a last remedy in both documents. If defect occurs during guarantee period; per both of the documents Employer is to inform Contractor without any delay. Even if there is delay, contractor is still entitled to cure and repair. However, Contractor may claim that; if he had been informed earlier, he would stop deterioration and aggravation in the work, so that less repair cost would take place.

On the other hand, in case of defective construction claimed by the employer, the following statements in UNCITRAL Guide are worth to note: "If the contractor is forbidden to supply services for the purposes of the construction and it is later determined in dispute settlement proceedings that the services were not defective, the contractor may be given the same rights against the purchaser as in cases where the purchaser

suspends the construction for his convenience. If the contractor is, in addition, required to supply different equipment, materials or services, the contractor may be given the same rights against the purchaser as if the construction had been varied under a variation order.” From legal perspective, the statements formulize the consequences neatly.

Furthermore to note, even if defects exist; within the principle of honesty and equity, both of the documents and many legal systems enable and -more than enabling- require acceptance and taking over of works, provided that those defects do not impair the benefit from the works for which the works are intended. In this manner, BGB Article 272(2) and Turkish Code of Obligations (2011) Article 475/3 state that the contractor shall perform repair, taking into account the subject matter of the obligation and the requirements of good faith, the expense and effort is not grossly disproportionate.

Not mentioning if the defect is obvious or latent, fraudulently concealed or not; for defects notified to the contractor after defects notification period or to say after guarantee period, one should record the mandatory rules requiring responsibility and liability even extending up to 20 years under some legal systems. The responsibility hidden in the local regulations highlights the importance of selection of law and study of local application before agreeing into a contract.

#### *Variation...*

Enabling and limiting the course and extent of variations requires a balance between stability of the contract, on the contrary flexibility of the contract to adjust to current conditions.

Engineer having the right to order a variation is somewhat different to the legal tradition in continental Europe. His functions extended extensively in such a manner even to modify the contract through variation, in Romano-Germanic tradition is usually recognized under a separate authorization. Although this right has its limitations stated in the contract between Employer and Engineer, it is surprising to observe the right to variation recognized to a 3<sup>rd</sup> person not a party to the contract between the Contractor and the Engineer.

Parties shall be aware if there exists local mandatory provisions limiting variations to a certain extent. In this connection, the doctrine, claiming that variation, if exceeds a certain percentage would change the nature of the contract is remarkable. In which case, another contractor could have had a lower bid than the existing situation.

It shall be Contractor's right to accept or -on its grounds- to reject implementation of a variation. It is not always benefit of the Contractor to implement a variation. If the variation

involves substantial departure from the original contract, he may not have the capability to implement the variation. Or the variation may be such that, other contractual provisions, those relating to passing of risk, payment conditions or performance guarantees become inappropriate. Or it may result in a prolongation of the time for completion of construction such that it interferes with obligations in other projects which the contractor has undertaken.

It is ironic to note that, in respect to FIDIC Conditions of Contract, when the Engineer orders a variation, the Contractor shall not delay any work while awaiting response to his proposal. This will lead Engineer to be more free, to be under less stress when evaluating Contractor's proposal. Once again, this will lead the balance of risks to shift against the Contractor, as it will be then the Contractor to file a dispute case if he is not convinced with Engineer's determination. At the end, the varied works would have already been constructed and Engineer will be under no pressure to grant additional time and payment for the varied works in respect to Contractor's proposal.

#### *Choice of Law*

It is discussed through several aspects that choice of law may lead to unforeseeable results to parties through execution and –although not desired- through dispute resolution. Selection of law would have its consequences in many areas. In this respect, it is deemed as the best solution if it was drafted in FIDIC Conditions of Contract that unless otherwise stated the law to govern the Contract is the law where the Work is executed. This will, although not overcome, minimize the problems.

Overriding mandatory provisions by definition are those; regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization; applicable to any situation falling within their scope. In this connection, Article 12(2) of Rome Regulation I is more than worth to note; which states; "In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place."

The choice of law would certainly affect how claims are handled, especially in regards the debate on the applicability and legality of the 28 day limit provided to Contractor to submit his claims per FIDIC Conditions of Contract Sub-Clause 20.1 [Contractor's Claims], especially when reviewed together with the unequal terms provided to the Engineer to submit his claims "as soon as possible".

In case of disputes, it shall be recalled by the parties that, the selection of law and furthermore understanding the application of local law is of crucial importance. The claims

do not always arise from contract but also from torts and delicts, breach of contract, negligence or from relationships with other actors such as the Government or the subcontractors. The local law will also be of crucial importance when the assessment to a dispute rendered either by Engineer or Dispute Board or arbitration body is not followed voluntarily by the parties but decision of the local judiciary is required for execution.

In the last sentences, it may be concluded that, the parties, unless their experience in construction of certain structures or familiarity with certain type of contract or past experience in certain land, the all three, do not arise at the same time, it is of crucial importance to review the facts of the country and to review the contract again and again. It does not matter how standard is the document such as FIDIC Conditions of Contract. The cases presented highlight that the construction business may turn out to be a less technical issue than it is deemed to be.

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## APPENDIX A

### TURKISH LAW OF OBLIGATIONS LAW NO: 6098

ASSOCIATED CLAUSES, ACCEPTED ON: 11 JANUARY 2011, AS OF 21.02.2012

#### BİRİNCİ KISIM

#### Genel Hükümler

#### BİRİNCİ BÖLÜM

#### Borç İlişkisinin Kaynakları

#### BİRİNCİ AYIRIM

#### Sözleşmeden Doğan Borç İlişkileri

##### A. Sözleşmenin kurulması

##### I. İrade açıklaması

##### 1. Genel olarak

**MADDE 1-** Sözleşme, tarafların iradelerini karşılıklı ve birbirine uygun olarak açıklamalarıyla kurulur.

İrade açıklaması, açık veya örtülü olabilir.

##### 2. İkinci derecedeki noktalar

**MADDE 2-** Taraflar sözleşmenin esaslı noktalarında uyuşmuşlarsa, ikinci derecedeki noktalar üzerinde durulmamış olsa bile, sözleşme kurulmuş sayılır.

İkinci derecedeki noktalarda uyuşamazsa hâkim, uyuşmazlığı için özelliğine bakarak karara bağlar.

Sözleşmelerin şekline ilişkin hükümler saklıdır.

##### D. Sözleşmelerin yorumu, muvazaalı işlemler

**MADDE 19-** Bir sözleşmenin türünün ve içeriğinin belirlenmesinde ve yorumlanmasında, tarafların yanlışlıkla veya gerçek amaçlarını gizlemek için kullandıkları sözcüklere bakılmaksızın, gerçek ve ortak iradeleri esas alınır.



Borçlu, yazılı bir borç tanınmasına güvenerek alacağı kazanmış olan üçüncü kişiye karşı, bu işlemin muvazaalı olduğu savunmasında bulunamaz.

#### **F. Sözleşmenin içeriği**

##### **I. Sözleşme özgürlüğü**

**MADDE 26-** Taraflar, bir sözleşmenin içeriğini kanunda öngörülen sınırlar içinde özgürce belirleyebilirler.

##### **II. Kesin hükümsüzlük**

**MADDE 27-** Kanunun emredici hükümlerine, ahlaka, kamu düzenine, kişilik haklarına aykırı veya konusu imkânsız olan sözleşmeler kesin olarak hükümsüzdür.

Sözleşmenin içerdiği hükümlerden bir kısmının hükümsüz olması, diğerlerinin geçerliliğini etkilemez. Ancak, bu hükümler olmaksızın sözleşmenin yapılmayacağı açıkça anlaşılırsa, sözleşmenin tamamı kesin olarak hükümsüz olur.

##### **III. Aşırı yararlanma**

**MADDE 28-** Bir sözleşmede karşılıklı edimler arasında açık bir oransızlık varsa, bu oransızlık, zarar görenin zor durumda kalmasından veya düşüncesizliğinden ya da deneyimsizliğinden yararlanılmak suretiyle gerçekleştirildiği takdirde, zarar gören, durumun özelliğine göre ya sözleşme ile bağlı olmadığını diğer tarafa bildirerek ediminin geri verilmesini ya da sözleşmeye bağlı kalarak edimler arasındaki oransızlığın giderilmesini isteyebilir.

Zarar gören bu hakkını, düşüncesizlik veya deneyimsizliğini öğrendiği; zor durumda kalmada ise, bu durumun ortadan kalktığı tarihten başlayarak bir yıl ve her hâlde sözleşmenin kurulduğu tarihten başlayarak beş yıl içinde kullanabilir.

### **İKİNCİ AYIRIM**

#### **Haksız Fiillerden Doğan Borç İlişkileri**

##### **A. Sorumluluk**

###### **I. Genel olarak**

**MADDE 49-** Kusurlu ve hukuka aykırı bir fiille başkasına zarar veren, bu zararı gidermekle yükümlüdür.

Zarar verici fiili yasaklayan bir hukuk kuralı bulunmasa bile, ahlaka aykırı bir fiille başkasına kasten zarar veren de, bu zararı gidermekle yükümlüdür.

##### **B. Kusursuz sorumluluk**

###### **3. Yapı malikinin sorumluluğu**

###### **a. Giderim yükümlülüğü**

**MADDE 69-** Bir binanın veya diğer yapı eserlerinin maliki, bunların yapımındaki bozukluklardan veya bakımındaki eksikliklerden doğan zararı gidermekle yükümlüdür.

İntifa ve oturma hakkı sahipleri de, binanın bakımındaki eksikliklerden doğan zararlardan, malikle birlikte müteselsilen sorumludurlar.

Sorumluların, bu sebeplerle kendilerine karşı sorumlu olan diğer kişilere rücu hakkı saklıdır.

#### **b. Zarar tehlikesini önleme**

**MADDE 70-** Bir başkasına ait bina veya diğer yapı eserlerinden zarar görme tehlikesiyle karşılaşan kişi, bu tehlikenin giderilmesi için gerekli önlemlerin alınmasını hak sahiplerinden isteyebilir.

Kişilerin ve malların korunması hakkındaki kamu hukuku kuralları saklıdır.

#### **C. Zamanaşımı**

##### **I. Kural**

**MADDE 72-** Tazminat istemi, zarar görenin zararı ve tazminat yükümlüsünü öğrendiği tarihten başlayarak iki yılın ve her hâlde fiilin işlendiği tarihten başlayarak on yılın geçmesiyle zamanaşımına uğrar. Ancak, tazminat ceza kanunlarının daha uzun bir zamanaşımı öngördüğü cezayı gerektiren bir fiilden doğmuşsa, bu zamanaşımı uygulanır.

Haksız fiil dolayısıyla zarar gören bakımından bir borç doğmuşsa zarar gören, haksız fiilden doğan tazminat istemi zamanaşımına uğramış olsa bile, her zaman bu borcu ifadan kaçınabilir.

##### **II. Rücu isteminde**

**MADDE 73-** Rücu istemi, tazminatın tamamının ödendiği ve birlikte sorumlu kişinin öğrenildiği tarihten başlayarak iki yılın ve her hâlde tazminatın tamamının ödendiği tarihten başlayarak on yılın geçmesiyle zamanaşımına uğrar.

Tazminatın ödenmesi kendisinden istenilen kişi, durumu birlikte sorumlu olduğu kişilere bildirmek zorundadır. Aksi takdirde zamanaşımı, bu bildirimin dürüstlük kurallarına göre yapılabileceği tarihte işlemeye başlar.

### **İKİNCİ BÖLÜM**

#### **Borç İlişkisinin Hükümleri**

##### **BİRİNCİ AYIRIM**

##### **Borçların İfası**

##### **A. Genel olarak**

##### **5. Faiz**

**MADDE 88-** Faiz ödeme borcunda uygulanacak yıllık faiz oranı, sözleşmede kararlaştırılmamışsa faiz borcunun doğduğu tarihte yürürlükte olan mevzuat hükümlerine göre belirlenir.

Sözleşme ile kararlaştırılacak yıllık faiz oranı, birinci fıkra uyarınca belirlenen yıllık faiz oranının yüzde elli fazlasını aşamaz.

##### **VI. Karşılıklı borç yükleyen sözleşmelerde**

##### **2. İfa güçsüzlüğü**

**MADDE 98-** Karşılıklı borç yükleyen bir sözleşmede, taraflardan birinin borcunu ifada güçsüzlüğe düşmesi ve özellikle iflas etmesi ya da hakkındaki haciz işleminin sonuçsuz

kalması sebebiyle diğer tarafın hakkı tehlikeye düşerse bu taraf, karşı edimin ifası güvence altına alınıncaya kadar kendi ediminin ifasından kaçınabilir.

Hakkı tehlikeye düşen taraf, ayrıca uygun bir sürede istediği güvence verilmezse sözleşmeden dönebilir.

#### **E. Alacaklının temerrüdü**

##### **I. Koşulları**

**MADDE 106-** Yapma veya verme edimi gereği gibi kendisine önerilen alacaklı, haklı bir sebep olmaksızın onu kabulden veya borçlunun borcunu ifa edebilmesi için kendisi tarafından yapılması gereken hazırlık fiillerini yapmaktan kaçınırsa, temerrüde düşmüş olur.

Alacaklı, müteselsil borçlulardan birine karşı temerrüde düşerse, diğerlerine karşı da temerrüde düşmüş olur.

##### **II. Hükümleri**

##### **2. Diğer edimlerde**

**MADDE 110-** Borcun konusu bir şeyin teslimini gerektirmiyorsa, alacaklının temerrüdü hâlinde borçlu, borçlunun temerrüdüne ilişkin hükümlere göre sözleşmeden dönebilir.

### **İKİNCİ AYIRIM**

#### **Borçların İfa Edilmemesinin Sonuçları**

##### **A. Borcun ifa edilmemesi**

##### **I. Giderim borcu**

##### **1. Genel olarak**

**MADDE 112-** Borç hiç veya gereği gibi ifa edilmezse borçlu, kendisine hiçbir kusurun yüklenemeyeceğini ispat etmedikçe, alacaklının bundan doğan zararını gidermekle yükümlüdür.

##### **2. Yapma ve yapmama borçlarında**

**MADDE 113-** Yapma borcu, borçlu tarafından ifa edilmediği takdirde alacaklı, masrafı borçluya ait olmak üzere edimin kendisi veya başkası tarafından ifasına izin verilmesini isteyebilir; her türlü giderim isteme hakkı saklıdır.

Yapmama borcuna aykırı davranan borçlu, bu aykırı davranışının doğurduğu zararı gidermekle yükümlüdür.

Alacaklı, ayrıca borca aykırı durumun ortadan kaldırılmasını veya bu konuda masrafı borçluya ait olmak üzere kendisinin yetkili kılınmasını isteyebilir.

##### **II. Sorumluluğun ve giderim borcunun kapsamı**

##### **1. Genel olarak**

**MADDE 114-** Borçlu, genel olarak her türlü kusurdan sorumludur. Borçlunun sorumluluğunun kapsamı, işin özel niteliğine göre belirlenir. İş özellikle borçlu için bir yarar sağlamıyorsa, sorumluluk daha hafif olarak değerlendirilir.

Haksız fiil sorumluluğuna ilişkin hükümler, kıyas yoluyla sözleşmeye aykırılık hâllerine de uygulanır.

## **2. Sorumsuzluk anlaşması**

**MADDE 115-** Borçlunun ağır kusurundan sorumlu olmayacağına ilişkin önceden yapılan anlaşma kesin olarak hükümsüzdür.

Borçlunun alacaklı ile hizmet sözleşmesinden kaynaklanan herhangi bir borç sebebiyle sorumlu olmayacağına ilişkin olarak önceden yaptığı her türlü anlaşma kesin olarak hükümsüzdür.

Uzmanlığı gerektiren bir hizmet, meslek veya sanat, ancak kanun ya da yetkili makamlar tarafından verilen izinle yürütülebiliyorsa, borçlunun hafif kusurundan sorumlu olmayacağına ilişkin önceden yapılan anlaşma kesin olarak hükümsüzdür.

## **B. Borçlunun temerrüdü**

### **I. Koşulları**

**MADDE 117-** Muaccel bir borcun borçlusunu, alacaklının ihtarıyla temerrüde düşer.

Borcun ifa edileceği gün, birlikte belirlenmiş veya sözleşmede saklı tutulan bir hakka dayanarak taraflardan biri usulüne uygun bir bildirimde bulunmak suretiyle belirlemişse, bu günün geçmesiyle; haksız fiilde fiilin işlendiği, sebepsiz zenginleşmede ise zenginleşmenin gerçekleştiği tarihte borçlu temerrüde düşmüş olur. Ancak sebepsiz zenginleşenin iyiniyetli olduğu hâllerde temerrüt için bildirim şarttır.

## **II. Hükümleri**

### **1. Genel olarak**

#### **a. Gecikme tazminatı**

**MADDE 118-** Temerrüde düşen borçlu, temerrüde düşmekte kusuru olmadığını ispat etmedikçe, borcun geç ifasından dolayı alacaklının uğradığı zararı gidermekle yükümlüdür.

#### **b. Beklenmedik hâlden sorumluluk**

**MADDE 119-** Temerrüde düşen borçlu, beklenmedik hâl sebebiyle doğacak zarardan sorumludur.

Borçlu, temerrüde düşmekte kusuru olmadığını veya borcunu zamanında ifa etmiş olsaydı bile beklenmedik hâlin ifa konusu şeye zarar vereceğini ispat ederek bu sorumluluktan kurtulabilir.

### **2. Temerrüt faizi**

#### **a. Genel olarak**

**MADDE 120-** Uygulanacak yıllık temerrüt faizi oranı, sözleşmede kararlaştırılmamışsa, faiz borcunun doğduğu tarihte yürürlükte olan mevzuat hükümlerine göre belirlenir.

Sözleşme ile kararlaştırılacak yıllık temerrüt faizi oranı, birinci fıkra uyarınca belirlenen yıllık faiz oranının yüzde yüz fazlasını aşamaz.

Akdî faiz oranı kararlaştırılmakla birlikte sözleşmede temerrüt faizi kararlaştırılmamışsa ve yıllık akdî faiz oranı da birinci fıkrada belirtilen faiz oranından fazla ise, temerrüt faizi oranı hakkında akdî faiz oranı geçerli olur.

#### **Aşkın zarar**

**MADDE 122-** Alacaklı, temerrüt faizini aşan bir zarara uğramış olursa, borçlu kendisinin hiçbir kusuru bulunmadığını ispat etmedikçe, bu zararı da gidermekle yükümlüdür.

Temerrüt faizini aşan zarar miktarı görülmekte olan davada belirlenebiliyorsa, davacının istemi üzerine hâkim, esas hakkında karar verirken bu zararın miktarına da hükmeder.

#### **4. Karşılıklı borç yükleyen sözleşmelerde**

##### **a. Süre verilmesi**

**MADDE 123-** Karşılıklı borç yükleyen sözleşmelerde, taraflardan biri temerrüde düştüğü takdirde diğeri, borcun ifa edilmesi için uygun bir süre verebilir veya uygun bir süre verilmesini hâkimden isteyebilir.

##### **b. Süre verilmesini gerektirmeyen durumlar**

**MADDE 124-** Aşağıdaki durumlarda süre verilmesine gerek yoktur:

1. Borçlunun içinde bulunduğu durumdan veya tutumundan süre verilmesinin etkisiz olacağı anlaşılıyorsa.
2. Borçlunun temerrüdü sonucunda borcun ifası alacaklı için yararsız kalmışsa.
3. Borcun ifasının, belirli bir zamanda veya belirli bir süre içinde gerçekleşmemesi üzerine, ifanın artık kabul edilmeyeceği sözleşmeden anlaşılıyorsa.

##### **c. Seçimlik haklar**

**MADDE 125-** Temerrüde düşen borçlu, verilen süre içinde, borcunu ifa etmemişse veya süre verilmesini gerektirmeyen bir durum söz konusu ise alacaklı, her zaman borcun ifasını ve gecikme sebebiyle tazminat isteme hakkına sahiptir.

Alacaklı, ayrıca borcun ifasından ve gecikme tazminatı isteme hakkından vazgeçtiğini hemen bildirerek, borcun ifa edilmemesinden doğan zararın giderilmesini isteyebilir veya sözleşmeden dönebilir.

Sözleşmeden dönme hâlinde taraflar, karşılıklı olarak ifa yükümlülüğünden kurtulurlar ve daha önce ifa ettikleri edimleri geri isteyebilirler. Bu durumda borçlu, temerrüde düşmekte kusuru olmadığını ispat edemezse alacaklı, sözleşmenin hükümsüz kalması sebebiyle uğradığı zararın giderilmesini de isteyebilir.

##### **d. Sürekli edimli sözleşmelerde**

**MADDE 126-** İfasına başlanmış sürekli edimli sözleşmelerde, borçlunun temerrüdü hâlinde alacaklı, ifa ve gecikme tazminatı isteyebileceği gibi, sözleşmeyi feshederek, sözleşmenin süresinden önce sona ermesi yüzünden uğradığı zararın giderilmesini de isteyebilir.

**ÜÇÜNCÜ BÖLÜM**  
**Borçların ve Borç İlişkilerinin Sona Ermesi, Zamanaşımı**  
**BİRİNCİ AYIRIM**  
**Sona Erme Hâlleri**

**E. İfa imkânsızlığı**

**I. Genel olarak**

**MADDE 136-** Borcun ifası borçlunun sorumlu tutulamayacağı sebeplerle imkânsızlaşırsa, borç sona erer.

Karşılıklı borç yükleyen sözleşmelerde imkânsızlık sebebiyle borçtan kurtulan borçlu, karşı taraftan almış olduğu edimi sebepsiz zenginleşme hükümleri uyarınca geri vermekle yükümlü olup, henüz kendisine ifa edilmemiş olan edimi isteme hakkını kaybeder. Kanun veya sözleşmeyle borcun ifasından önce doğan hasarın alacaklıya yükletilmiş olduğu durumlar, bu hükmün dışındadır.

Borçlu ifanın imkânsızlaştığını alacaklıya gecikmeksizin bildirmez ve zararın artmaması için gerekli önlemleri almazsa, bundan doğan zararları gidermekle yükümlüdür.

**II. Kısmi ifa imkânsızlığı**

**MADDE 137-** Borcun ifası borçlunun sorumlu tutulamayacağı sebeplerle kısmen imkânsızlaşırsa borçlu, borcunun sadece imkânsızlaşan kısmından kurtulur. Ancak, bu kısmi ifa imkânsızlığı önceden öngörülseydi taraflarca böyle bir sözleşmenin yapılmayacağı açıkça anlaşılırsa, borcun tamamı sona erer.

Karşılıklı borç yükleyen sözleşmelerde, bir tarafın borcu kısmen imkânsızlaşır ve alacaklı kısmi ifaya razı olursa, karşı edim de o oranda ifa edilir. Alacaklının böyle bir ifaya razı olmaması veya karşı edimin bölünemeyen nitelikte olması durumunda, tam imkânsızlık hükümleri uygulanır.

**III. Aşırı ifa güçlüğü**

**MADDE 138-** Sözleşmenin yapıldığı sırada taraflarca öngörülmeyen ve öngörülmesi de beklenmeyen olağanüstü bir durum, borçludan kaynaklanmayan bir sebeple ortaya çıkar ve sözleşmenin yapıldığı sırada mevcut olguları, kendisinden ifanın istenmesini dürüstlük kurallarına aykırı düşecek derecede borçlu aleyhine değiştirir ve borçlu da borcunu henüz ifa etmemiş veya ifanın aşırı ölçüde güçleşmesinden doğan haklarını saklı tutarak ifa etmiş olursa borçlu, hâkimden sözleşmenin yeni koşullara uyarlanmasını isteme, bu mümkün olmadığı takdirde sözleşmeden dönme hakkına sahiptir. Sürekli edimli sözleşmelerde borçlu, kural olarak dönme hakkının yerine fesih hakkını kullanır.

Bu madde hükmü yabancı para borçlarında da uygulanır.

## İKİNCİ AYIRIM

### Zamanaşımı

#### A. Süreler

##### I. On yıllık zamanaşımı

**MADDE 146-** Kanunda aksine bir hüküm bulunmadıkça, her alacak on yıllık zamanaşımına tabidir.

##### II. Beş yıllık zamanaşımı

**MADDE 147-** Aşağıdaki alacaklar için beş yıllık zamanaşımı uygulanır:

1. Kira bedelleri, anapara faizleri ve ücret gibi diğer dönemsel edimler.

...

6. Yüklenicinin yükümlülüklerini ağır kusuruyla hiç ya da gereği gibi ifa etmemesi dışında, eser sözleşmesinden doğan alacaklar.

##### III. Sürelerin kesinliği

**MADDE 148-** Bu ayırımda belirlenen zamanaşımı süreleri, sözleşmeyle değiştirilemez.

#### C. Zamanaşımının durması

**MADDE 153-** Aşağıdaki durumlarda zamanaşımı işlemeye başlamaz, başlamışsa durur:

...

6. Alacağı, Türk mahkemelerinde ileri sürme imkânının bulunmadığı sürece.

#### D. Zamanaşımının kesilmesi

##### I. Sebepleri

**MADDE 154-** Aşağıdaki durumlarda zamanaşımı kesilir:

1. Borçlu borcu ikrar etmişse, özellikle faiz ödemiş veya kısmen ifada bulunmuşsa ya da rehin vermiş veya kefil göstermişse.

2. Alacaklı, dava veya def'i yoluyla mahkemeye veya hakeme başvurmuşsa, icra takibinde bulunmuşsa ya da iflas masasına başvurmuşsa.

##### III. Yeni sürenin başlaması

##### 1. Borcun ikrar edilmesi veya karara bağlanması hâlinde

**MADDE 156-** Zamanaşımının kesilmesiyle, yeni bir süre işlemeye başlar.

Borç bir senetle ikrar edilmiş veya bir mahkeme ya da hakem kararına bağlanmış ise, yeni süre her zaman on yıldır.

##### 2. Alacaklının fiili hâlinde

**MADDE 157-** Bir dava veya def'i yoluyla kesilmiş olan zamanaşımı, dava süresince tarafların yargılamaya ilişkin her işleminden veya hâkimin her kararından sonra yeniden işlemeye başlar.

Zamanaşımı, icra takibiyle kesilmişse, alacağın takibine ilişkin her işlemten sonra yeniden işlemeye başlar.

Zamanaşımı, iflas masasına başvurma sebebiyle kesilmişse, iflasa ilişkin hükümlere göre alacağın yeniden istenmesi imkânının doğumundan itibaren yeniden işlemeye başlar.

#### **G. Zamanaşımından feragat**

**MADDE 160-** Zamanaşımından önceden feragat edilemez.

...

#### **H. İleri sürülmesi**

**MADDE 161-** Zamanaşımı ileri sürülmedikçe, hâkim bunu kendiliğinden göz önüne alamaz.

### **DÖRDÜNCÜ BÖLÜM**

#### **Borç İlişkilerinde Özel Durumlar**

#### **ÜÇÜNCÜ AYIRIM**

#### **Bağlanma Parası, Cayma Parası ve Ceza Koşulu**

#### **C. Ceza koşulu**

##### **I. Alacaklının hakları**

##### **1. Cezanın sözleşmenin ifası ile ilişkisi**

**MADDE 179-** Bir sözleşmenin hiç veya gereği gibi ifa edilmemesi durumu için bir ceza kararlaştırılmışsa, aksi sözleşmeden anlaşılmadıkça alacaklı, ya borcun ya da cezanın ifasını isteyebilir.

Ceza, borcun belirlenen zaman veya yerde ifa edilmemesi durumu için kararlaştırılmışsa alacaklı, hakkından açıkça feragat etmiş veya ifayı çekincesiz olarak kabul etmiş olmadıkça, asıl borçla birlikte cezanın ifasını da isteyebilir.

Borçlunun, kararlaştırılan cezayı ifa ederek sözleşmeyi, dönme veya fesih suretiyle sona erdirmeye yetkili olduğunu ispat etme hakkı saklıdır.

##### **2. Ceza ile zarar arasındaki ilişki**

**MADDE 180-** Alacaklı hiçbir zarara uğramamış olsa bile, kararlaştırılan cezanın ifası gerekir.

Alacaklının uğradığı zarar kararlaştırılan ceza tutarını aşıyorsa alacaklı, borçlunun kusuru bulunduğunu ispat etmedikçe aşan miktarı isteyemez.

##### **II. Cezanın miktarı, geçersizliği ve indirilmesi**

**MADDE 182-** Taraflar, cezanın miktarını serbestçe belirleyebilirler.

Asıl borç herhangi bir sebeple geçersiz ise veya aksi kararlaştırılmadıkça sonradan borçlunun sorumlu tutulamayacağı bir sebeple imkânsız hâle gelmişse, cezanın ifası istenemez. Ceza koşulunun geçersiz olması veya borçlunun sorumlu tutulamayacağı bir sebeple sonradan imkânsız hâle gelmesi, asıl borcun geçerliliğini etkilemez.

Hâkim, aşırı gördüğü ceza koşulunu kendiliğinden indirir.



**İKİNCİ KISIM**  
**Özel Borç İlişkileri**  
**YEDİNCİ BÖLÜM**  
**Eser Sözleşmesi**

**A. Tanımı**

**MADDE 470-** Eser sözleşmesi, yüklenicinin bir eser meydana getirmeyi, işsahibinin de bunun karşılığında bir bedel ödemeyi üstlendiği sözleşmedir.

**B. Hükümleri**

**I. Yüklenicinin borçları**

**1. Genel olarak**

**MADDE 471-** Yüklenici, üstlendiği edimleri işsahibinin haklı menfaatlerini gözeterek, sadakat ve özenle ifa etmek zorundadır.

Yüklenicinin özen borcundan doğan sorumluluğunun belirlenmesinde, benzer alandaki işleri üstlenen basiretli bir yüklenicinin göstermesi gereken meslekî ve teknik kurallara uygun davranışı esas alınır.

Yüklenici, meydana getirilecek eseri doğrudan doğruya kendisi yapmak veya kendi yönetimi altında yaptırmakla yükümlüdür. Ancak, eserin meydana getirilmesinde yüklenicinin kişisel özellikleri önem taşıyorsa, işi başkasına da yaptırabilir.

Aksine âdet veya anlaşma olmadıkça yüklenici, eserin meydana getirilmesi için kullanılacak olan araç ve gereçleri kendisi sağlamak zorundadır.

**2. Malzeme bakımından**

**MADDE 472-** Malzeme yüklenici tarafından sağlanmışsa yüklenici, bu malzemenin ayıplı olması yüzünden işsahibine karşı, satıcı gibi sorumludur.

Malzeme işsahibi tarafından sağlanmışsa yüklenici, onları gereken özeni göstererek kullanmakla ve bundan dolayı hesap ve artanı geri vermekle yükümlüdür.

Eser meydana getirilirken, işsahibinin sağladığı malzemenin veya eserin yapılması için gösterdiği yerin ayıplı olduğu anlaşılır veya eserin gereği gibi ya da zamanında meydana getirilmesini tehlikeye düşürecek başka bir durum ortaya çıkarsa, yüklenici bu durumu hemen işsahibine bildirmek zorundadır; bildirmezse bundan doğacak sonuçlardan sorumlu olur.

**3. İşe başlama ve yürütme**

**MADDE 473-** Yüklenicinin işe zamanında başlamaması veya sözleşme hükümlerine aykırı olarak işi geciktirmesi ya da işsahibine yüklenemeyecek bir sebeple ortaya çıkan gecikme yüzünden bütün tahminlere göre yüklenicinin işi kararlaştırılan zamanda bitiremeyeceği açıkça anlaşılırsa, işsahibi teslim için belirlenen günü beklemek zorunda olmaksızın sözleşmeden dönebilir.

Meydana getirilmesi sırasında, eserin yüklenicinin kusuru yüzünden ayıplı veya sözleşmeye aykırı olarak meydana getirileceği açıkça görülüyorsa, işsahibi bunu önlemek

üzere vereceği veya verdireceği uygun bir süre içinde yükleniciye, ayıbın veya aykırılığın giderilmesi; aksi takdirde hasar ve masrafları kendisine ait olmak üzere, onarımın veya işe devamın bir üçüncü kişiye verileceği konusunda ihtarla bulunabilir.

#### **4. Ayıp sebebiyle sorumluluk**

##### **a. Ayıbın belirlenmesi**

**MADDE 474-** İşsahibi, eserin tesliminden sonra, işlerin olağan akışına göre imkân bulur bulmaz eseri gözden geçirmek ve ayıpları varsa, bunu uygun bir süre içinde yükleniciye bildirmek zorundadır.

Taraflardan her biri, giderini karşılayarak, eserin bilirkşi tarafından gözden geçirilmesini ve sonucun bir raporla belirlenmesini isteyebilir.

##### **b. İşsahibinin seçimlik hakları**

**MADDE 475-** Eserdeki ayıp sebebiyle yüklenicinin sorumlu olduğu hâllerde işsahibi, aşağıdaki seçimlik haklardan birini kullanabilir:

1. Eser işsahibinin kullanamayacağı veya hakkaniyet gereği kabule zorlanamayacağı ölçüde ayıplı ya da sözleşme hükümlerine aynı ölçüde aykırı olursa sözleşmeden dönme.
2. Eseri alıkoyup ayıp oranında bedelden indirim isteme.
3. Aşırı bir masrafı gerektirmediği takdirde, bütün masrafları yükleniciye ait olmak üzere, eserin ücretsiz onarılmasını isteme.

İşsahibinin genel hükümlere göre tazminat isteme hakkı saklıdır.

Eser, işsahibinin taşınmazı üzerinde yapılmış olup, sökülüp kaldırılması aşırı zarar doğuracaksa işsahibi, sözleşmeden dönme hakkını kullanamaz.

##### **c. İşsahibinin sorumluluğu**

**MADDE 476-** Eserin ayıplı olması, yüklenicinin açıkça yaptığı ihtara karşın, işsahibinin verdiği talimattan doğmuş bulunur veya herhangi bir sebeple işsahibine yüklenebilecek olursa işsahibi, eserin ayıplı olmasından doğan haklarını kullanamaz.

##### **d. Eserin kabulü**

**MADDE 477-** Eserin açıkça veya örtülü olarak kabulünden sonra, yüklenici her türlü sorumluluktan kurtulur; ancak, onun tarafından kasten gizlenen ve usulüne göre gözden geçirme sırasında fark edilemeyecek olan ayıplar için sorumluluğu devam eder.

İşsahibi, gözden geçirmeyi ve bildirimde bulunmayı ihmal ederse, eseri kabul etmiş sayılır.

Eserdeki ayıp sonradan ortaya çıkarsa işsahibi, gecikmeksizin durumu yükleniciye bildirmek zorundadır; bildirmezse eseri kabul etmiş sayılır.

##### **e. Zamanaşımı**

**MADDE 478-** Yüklenici ayıplı bir eser meydana getirmişse, bu sebeple açılacak davalar, teslim tarihinden başlayarak, taşınmaz yapılar dışındaki eserlerde iki yılın; taşınmaz yapılarda ise beş yılın ve yüklenicinin ağır kusuru varsa, ayıplı eserin niteliğine bakılmaksızın yirmi yılın geçmesiyle zamanaşımına uğrar.

## **II. İşsahibinin borçları**

### **1. Bedelin muacceliyeti**

**MADDE 479-** İşsahibinin bedel ödeme borcu, eserin teslimi anında muaccel olur.

Eserin parça parça teslim edilmesi kararlaştırılmış ve bedel parçalara göre belirlenmişse, her parçanın bedeli onun teslimi anında muaccel olur.

### **2. Bedel**

#### **a. Götürü bedel**

**MADDE 480-** Bedel götürü olarak belirlenmişse yüklenici, eseri o bedelle meydana getirmekle yükümlüdür. Eser, öngörülenden fazla emek ve masrafı gerektirmiş olsa bile yüklenici, belirlenen bedelin artırılmasını isteyemez.

Ancak, başlangıçta öngörülemeyen veya öngörülebilip de taraflarca göz önünde tutulmayan durumlar, taraflarca belirlenen götürü bedel ile eserin yapılmasına engel olur veya son derece güçleştirirse yüklenici, hâkimden sözleşmenin yeni koşullara uyarlanmasını isteme, bu mümkün olmadığı veya karşı taraftan beklenemediği takdirde sözleşmeden dönme hakkına sahiptir. Dürüstlük kurallarının gerektirdiği durumlarda yüklenici, ancak fesih hakkını kullanabilir.

Eser, öngörülenden az emek ve masrafı gerektirmiş olsa bile işsahibi, belirlenen bedelin tamamını ödemekle yükümlüdür.

#### **b. Değere göre bedel**

**MADDE 481-** Eserin bedeli önceden belirlenmemiş veya yaklaşık olarak belirlenmişse bedel, yapıldığı yer ve zamanda eserin değerine ve yüklenicinin giderine bakılarak belirlenir.

## **C. Sözleşmenin sona ermesi**

### **I. Yaklaşık bedelin aşılması**

**MADDE 482-** Başlangıçta yaklaşık olarak belirlenen bedelin, işsahibinin kusuru olmaksızın aşırı ölçüde aşılabacağı anlaşılırsa işsahibi, eser henüz tamamlanmadan veya tamamlandıktan sonra sözleşmeden dönebilir.

Eser, işsahibinin arsası üzerine yapılıyorsa işsahibi, bedelden uygun bir miktarın indirilmesini isteyebileceği gibi, eser henüz tamamlanmamışsa, yükleniciyi işe devamdan alıkoyarak, tamamlanan kısım için hakkaniyete uygun bir bedel ödemek suretiyle sözleşmeyi feshedebilir.

## **II. Eserin yok olması**

**MADDE 483-** Eser teslimden önce beklenmedik olay sonucu yok olursa işsahibi, eseri teslim almada temerrüde düşmedikçe yüklenici, yaptığı işin ücretini ve giderlerinin ödenmesini isteyemez. Bu durumda malzemeye gelen hasar, onu sağlayana ait olur.

Eserin işsahibince verilen malzeme veya gösterilen arsanın ayıbı veya işsahibinin talimatına uygun yapılması yüzünden yok olması durumunda yüklenici, doğabilecek olumsuz sonuçları zamanında bildirmişse, yaptığı işin değerini ve bu değere girmeyen

giderlerinin ödenmesini isteyebilir. İşsahibinin kusuru varsa, yüklenicinin ayrıca zararının giderilmesini de isteme hakkı vardır.

### **III. Tazminat karşılığı fesih**

**MADDE 484-** İşsahibi, eserin tamamlanmasından önce yapılmış olan kısmın karşılığını ödemek ve yüklenicinin bütün zararlarını gidermek koşuluyla sözleşmeyi feshedebilir.

### **IV. İşsahibi yüzünden ifanın imkânsızlaşması**

**MADDE 485-** Eserin tamamlanması, işsahibi ile ilgili beklenmedik olay dolayısıyla imkânsızlaşırsa yüklenici, yaptığı işin değerini ve bu değere girmeyen giderlerini isteyebilir.

İfa imkânsızlığının ortaya çıkmasında işsahibi kusurluysa, yüklenicinin ayrıca tazminat isteme hakkı vardır.

### **V. Yüklenicinin ölümü veya yeteneğini kaybetmesi**

**MADDE 486-** Yüklenicinin kişisel özellikleri göz önünde tutularak yapılmış olan sözleşme, onun ölümü veya kusuru olmaksızın eseri tamamlama yeteneğini kaybetmesi durumunda kendiliğinden sona erer. Bu durumda işsahibi, eserin tamamlanan kısmından yararlanabilecek ise, onu kabul etmek ve karşılığını vermekle yükümlüdür.

## **DOKUZUNCU BÖLÜM**

### **Vekâlet İlişkileri**

#### **BİRİNCİ AYIRIM**

##### **Vekâlet Sözleşmesi**

#### **ONUNCU BÖLÜM**

##### **Vekâletsiz İşgörme**

### **A. İşgörenin hak ve borçları**

#### **I. İşin görülmesi**

**MADDE 526-** Vekâleti olmaksızın başkasının hesabına işgören, o işi sahibinin menfaatine ve varsayılan iradesine uygun olarak görmekle yükümlüdür.

### **B. İşsahibinin hak ve borçları**

#### **I. İşin işsahibinin menfaatine yapılması hâlinde**

**MADDE 529-** İşsahibi, işin kendi menfaatine yapılması hâlinde, işgörenin, durumun gereğine göre zorunlu ve yararlı bulunan bütün masrafları faiziyle ödemek ve gördüğü iş dolayısıyla üstlendiği edimleri ifa etmek ve hâkimin takdir edeceği zararı gidermekle yükümlüdür. Bu hüküm, umulan sonuç gerçekleşmemiş olsa bile, işi yaparken gereken özeni göstermiş olan işgören hakkında da uygulanır.

İşgören, yapmış olduğu giderleri alamadığı takdirde, sebepsiz zenginleşme hükümlerine göre ayırıp alma hakkına sahiptir.

## **II. İşin işgörenin menfaatine yapılması hâlinde**

**MADDE 530-** İşsahibi, kendi menfaatine yapılmamış olsa bile, işgörmekten doğan faydaları edinme hakkına sahiptir; ancak zenginleştiği ölçüde, işgörenin masraflarını ödemek ve girdiği borçlardan onu kurtarmakla yükümlüdür.

## **III. İşin işsahibi tarafından uygun bulunması hâlinde**

**MADDE 531-** İşsahibi yapılan işi uygun bulmuşsa, vekâlet hükümleri uygulanır.

## **Türk Medenî Kanunu ile ilişkisi**

**MADDE 646-** Bu Kanun, 22/11/2001 tarihli ve 4721 sayılı Türk Medenî Kanununun Beşinci Kitabı olup, onun tamamlayıcısıdır.

## **Yürürlükten kaldırılan Kanun**

**MADDE 647-** 22/4/1926 tarihli ve 818 sayılı Borçlar Kanunu yürürlükten kaldırılmıştır.

## **Yürürlük**

**MADDE 648-** Bu Kanun 1 Temmuz 2012 tarihinde yürürlüğe girer.

## **Yürütme**

**MADDE 649-** Bu Kanun hükümlerini Bakanlar Kurulu yürütür.

# **APPENDIX B**

## **GERMAN LAW OF OBLIGATIONS**

[HTTP://WWW.GESETZE-IM-INTERNET.DE/ENGLISCH\\_BGB/INDEX.HTML](http://www.gesetze-im-internet.de/englisch_bgb/index.html), AS OF  
21.02.2012, ASSOCIATED CLAUSES

### **Title 9**

#### **Contract to produce a work and similar contracts**

##### **Subtitle 1**

##### **Contract to produce a work**

##### **Section 631**

##### **Typical contractual duties in a contract to produce a work**

(1) By a contract to produce a work, a contractor is obliged to produce the promised work and the customer is obliged to pay the agreed remuneration.

(2) The subject matter of a contract to produce a work may be either the production or alteration of a thing or another result to be achieved by work or by a service.

##### **Section 632**

##### **Remuneration**

(1) Remuneration for work is deemed to be tacitly agreed if the production of the work, in the circumstances, is to be expected only in return for remuneration.

(2) If the amount of remuneration is not specified, then if a tariff exists, the tariff remuneration is deemed to be agreed; if no tariff exists, the usual remuneration is deemed to be agreed.

(3) In case of doubt, remuneration is not to be paid for a cost estimate.

##### **Section 632a**

##### **Part payments**

(1) The contractor may demand a part payment from the customer for work carried out in accordance with the contract in the amount in which the customer has received an increased value by virtue of the work. The part payment may not be refused because of

minor defects. Section 641 (3) applies with the necessary modifications. The work must be documented by a list which must facilitate a rapid, secure evaluation of the work. Sentences 1 to 4 also apply to required materials or building components that are supplied or specially prepared and made available if ownership of the materials or building components is transferred to the customer or an appropriate security is provided for this, at his option.

(2) If the subject-matter of the contract is the construction or conversion of a house or comparable building and at the same time entails an obligation incumbent on the contractor to assign to the customer ownership of the plot of land or to establish or assign a hereditary building right, part payments may only be demanded insofar as they have been agreed in accordance with an ordinance based on Article 244 of the Introductory Act to the Civil Code.

(3) If the customer is a consumer, and if the subject-matter of the contract is the construction or conversion of a house or comparable building, the customer must be given a security amounting to five percent of the remuneration claim on effecting the first part payment for the correct implementation of the work without major defects. If the remuneration claim increases by more than ten percent as a result of amendments to or supplements of the contract, the customer is to be given a further security of five percent of the additional remuneration claim on effecting the next part payment. At the request of the contractor, the security is to be provided by retention such that the customer retains the part payments up to the total amount of the security owed.

(4) Securities in accordance with this provision may also be provided by means of a guarantee or other payment undertaking by a financial institution or credit insurer entitled to operate in the scope of application of this Code.

### **Section 633**

#### **Material defects and legal defects**

(1) The contractor must procure the work for the customer free of material defects and legal defects.

(2) The work is free of material defects if it is of the agreed quality. To the extent that the quality has not been agreed, the work is free from material defects

1. if it is suitable for the use envisaged in the contract, or else
2. if it is suitable for the customary use and is of a quality that is customary in works of the same type and that the customer may expect in view of the type of work.

It is equivalent to a material defect if the contractor produces a work that is different from the work ordered or too small an amount of the work.

(3) The work is free of legal defects if third parties, with regard to the work, either cannot assert any rights against the customer or can assert only such rights as are taken over under the contract.

## **Section 634**

### **Rights of the customer in the case of defects**

If the work is defective, the customer, if the requirements of the following provisions are met and to the extent not otherwise specified, may

1. under section 635, demand cure,
2. under section 637, remedy the defect himself and demand reimbursement for required expenses,
3. under sections 636, 323 and 326 (5), revoke the contract or under section 638, reduce payment, and
4. under sections 636, 280, 281, 283 and 311a, demand damages, or under section 284, demand reimbursement of futile expenditure.

## **Section 634a**

### **Limitation of claims for defects**

(1)The claims cited in section 634 nos. 1, 2 and 4 are statute-barred

1. subject to no. 2, in two years in the case of a work whose result consists in the manufacture, maintenance or alteration of a thing or in the rendering of planning or monitoring services for this purpose,
2. in five years in the case of a building and in the case of a work whose result consists in the rendering of planning or monitoring services for this purpose, and
3. apart from this, in the regular limitation period.

(2)In the cases of subsection (1) nos. 1 and 2, limitation begins on acceptance.

(3)Notwithstanding subsection (1) nos. 1 and 2, and subsection (2), claims are statute-barred in the standard limitation period if the contractor fraudulently concealed the defect. However, in the case of subsection (1) no. 2, claims are not statute-barred before the end of the period specified there.

(4)The right of revocation referred to in section 634 is governed by section 218. Notwithstanding the ineffectiveness of revocation under section 218 (1), the customer may refuse to pay the remuneration to the extent that he would be entitled to do so by reason of the revocation. If he uses this right, the contractor may revoke the contract.

(5)Section 218 and subsection (4) sentence 2 above apply with the necessary modifications to the right to reduce the price specified in section 634.

## **Section 635**

### **Cure**

(1)If the customer demands cure, then the contractor may, at his option, remedy the defect or produce a new work.

(2)The contractor must bear the expenditure necessary for cure, including, without limitation, transport, workmen's travel, work and materials costs.



(3)The contractor may refuse cure, without prejudice to section 275 (2) and (3), if it is only possible at disproportionate cost.

(4)If the contractor produces a new work, he may demand from the customer return of the defective work in accordance with sections 346 to 348.

#### **Section 636**

##### **Special provisions on revocation and damages**

Except in the cases of sections 281 (2) and 323 (2), there is no need for a period to be set even if the contractor refuses cure under section 635 (3) or if cure has failed or cannot be reasonably expected of the customer.

#### **Section 637**

##### **Self-help**

(1)If there is a defect in the work, the customer may, after the expiry without result of a reasonable period specified by him for cure, remedy the defect himself and demand reimbursement of the necessary expenses, unless the contractor rightly refuses cure.

(2)Section 323 (2) applies with the necessary modifications. A period of time need not be specified even if cure has failed or cannot reasonably be expected of the customer.

(3)The customer may demand from the contractor advance payment of the expenses necessary to remedy the defect.

#### **Section 638**

##### **Reduction of price**

(1)Instead of revocation of the contract, the customer may reduce the remuneration by declaration to the contractor. The ground for exclusion under section 323 (5) sentence 2 does not apply.

(2)If the customer or the contractor consists of more than one person, reduction of price may be declared only by or to all of them.

(3)In the case of reduction of price, the payment is to be reduced in the proportion which, at the time when the contract was entered into, the value of the work in a state free of defects would have had to the actual value. To the extent necessary, the price reduction is to be established by appraisal.

(4)If the customer has paid more than the reduced remuneration, the contractor must reimburse the surplus. Section 346 (1) and section 347 (1) apply with the necessary modifications.

#### **Section 639**

##### **Exclusion of liability**

The contractor may not rely on an agreement by which the rights of the customer with regard to a defect are excluded or restricted, insofar as the contractor fraudulently concealed the defect or gave a guarantee for the quality of the work.

## **Section 640**

### **Acceptance**

(1)The customer is obliged to accept the work produced in conformity with the contract, except to the extent that, in view of the quality of the work, acceptance is excluded. Acceptance may not be refused by reason of trivial defects. It is equivalent to acceptance if the customer does not accept the work within a reasonable period of time specified for him by the contractor, although he is under a duty to do so.

(2)If the customer accepts a defective work under subsection (1) sentence 1, even though he knows of the defect, he only has the rights designated in section 634 nos. 1 to 3 if he reserves his rights with regard to the defect when he accepts the work.

## **Section 641**

### **Due date of remuneration**

(1)The remuneration must be paid upon acceptance of the work. If the work is to be accepted in parts and the remuneration for the individual parts is specified, then the remuneration is to be paid for each part when it is accepted.

(2)The remuneration of the contractor for a work whose production the customer has promised to a third party is due at the latest

1. to the extent that the customer has received from the third party his remuneration or parts of his remuneration for the production of the promised work,
2. to the extent that the work of the customer has been accepted by the third party or is deemed to have been accepted, or
3. to the extent that the contractor has unsuccessfully set the customer a suitable deadline for information on the circumstances referred to in Nos. 1 and 2.

If the customer has given the third party security on account of possible defects of the work, sentence 1 applies only if the contractor gives the customer an appropriate security.

(3)If the customer may demand remedy of a defect, he may, after becoming due, refuse to pay a reasonable portion of the remuneration; twice the costs necessary to remedy the defect are appropriate as a rule.

(4)If the remuneration is assessed in money, the customer must pay interest on it from the acceptance of the work on, except to the extent that remuneration is deferred.

## **Section 642**

### **Collaboration by the customer**

(1)If, in the production of the work, an act by the customer is necessary, then the contractor may demand reasonable compensation if the customer, by failing to perform the act, is in default of acceptance.

(2)The amount of compensation is assessed on the one hand on the basis of the duration of the default and the amount of the agreed remuneration, and on the other hand on the

basis of what expenses the contractor saves or what the contractor can earn by employing his working capacity elsewhere.

#### **Section 643**

##### **Termination for failure to collaborate**

In the case of section 642, the contractor is entitled to give the customer a reasonable period of time for making up for the act to be performed by declaring that he will terminate the contract if the act is not undertaken by the end of the period of time. The contract is deemed to be cancelled if the act is not made up for by the end of the period of time.

#### **Section 644**

##### **Allocation of risk**

(1)The contractor bears the risk until acceptance of the work. If the customer is in default of acceptance, then the risk passes to him. The contractor is not liable for any accidental destruction or accidental deterioration of the materials supplied by the customer.

(2)If, at the demand of the customer, the contractor ships the work to a place other than the place of performance, then the provisions of section 447 governing purchase apply with the necessary modifications.

#### **Section 645**

##### **Responsibility of the customer**

(1)If the work, before acceptance, is destroyed or deteriorates or becomes impracticable as the result of a defect in the materials supplied by the customer or as the result of an instruction given by the customer for the carrying out of the work, without a circumstance for which the contractor is responsible contributing to this, then the contractor may demand a part of the remuneration that corresponds to the work performed and reimbursement of those expenses not included in the remuneration. The same applies if the contract is cancelled under section 643.

(2)A more extensive liability of the customer for fault is unaffected.

#### **Section 646**

##### **Completion in lieu of acceptance**

If acceptance is excluded due to the quality of the work, then, in the cases of sections 634a (2) and 641, 644 and 645, completion of the work takes the place of acceptance.

#### **Section 647**

##### **Security right of the contractor**

For his claims under the contract, the contractor has a security right over the movable things of the customer that he has produced or repaired if they have come into his possession during the production or for the purpose of repair.

## **Section 648**

### **Mortgage of a building contractor**

(1)The contractor for a building or an individual part of a building may demand, for satisfaction of his claims under the contract, that a mortgage over the building plot of the customer is granted. If the work is not yet completed, then he may demand that a mortgage is granted for a portion of the remuneration corresponding to the work performed and for expenses not included in the remuneration.

(2)The owner of a shipyard, for his claims in relation to the building or repair of a ship, may demand to be granted a ship mortgage over the ship under construction or ship of the customer; subsection (1) sentence 2 applies with the necessary modifications. Section 647 does not apply.

## **Section 648a**

### **Builder's security**

(1)A contractor for a building, outdoor facilities or a part thereof may demand a security from the customer for the remuneration also agreed in additional commissions and not yet paid, including associated incidental claims, which are to be estimated at ten per cent of the remuneration claim to be secured. Sentence 1 also applies to the same degree to claims replacing the remuneration. The claim of the contractor for a security is not ruled out by the customer being able to demand fulfilment or having accepted the work. Claims with which the customer is able to offset against the contractors right to remuneration are disregarded when calculating the remuneration unless they are non-contentious or have been ascertained with the force of law. The security is to be deemed sufficient even if the provider of the security reserves the right to revoke his promise, in case of substantial deterioration of the financial circumstances of the customer, with effect for claims to remuneration for building work that the contractor has not yet performed when the declaration of revocation is received.

(2)The security may also be provided by means of a guarantee or other promise of payment by a banking institution or credit insurer authorised to conduct business operations within the area of application of this Code. The banking institution or credit insurer may only make payments to the contractor to the extent that the customer recognises the claim of the contractor to remuneration or has been ordered by a provisionally enforceable judgment to pay the remuneration and the requirements are met under which execution of judgment may be commenced.

(3)The contractor must pay to the customer the customary costs of provision of security up to a maximum amount of two per cent per year. This does not apply to the extent that the security must be maintained because of objections of the customer to the remuneration claim of the contractor and the objections turn out to be unfounded.

(4) To the extent that the contractor has obtained a security for his claim to remuneration under subsections (1) and (2), the claim to be granted a mortgage under section 648 (1) is excluded.

(5) If the contractor has unsuccessfully set the customer a suitable deadline to provide the security in accordance with subsection (1), the contractor may refuse to carry out the work or may terminate the contract. If he terminates the contract, the contractor is also entitled to claim the agreed remuneration; he must however allow set-off of the expenses he saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of his labour. There is a presumption that the contractor is accordingly entitled to five percent of the remuneration accounted for by the part of the work not yet provided.

(6) The provisions of subsections (1) to (5) are not applicable if the customer

1. is a legal person under public law or a special fund under public law with regard to the property of which insolvency proceedings are not permissible, or
2. is a natural person and is having the construction work done to build or repair a one-family house with or without a self-contained apartment attached.

Sentence 1 no. 2 does not apply if the construction project is looked after by a construction agent authorised to dispose of the financial resources of the customer.

(7) Any agreement deviating from the provisions of subsections (1) to (5) above is ineffective.

#### **Section 649**

##### **Right of termination of the customer**

The customer may terminate the contract at any time up to completion of the work. If the customer terminates the contract, then the contractor is entitled to demand the agreed remuneration; however, he must allow set-off of the expenses he saves as a result of cancelling the contract or acquires or wilfully fails to acquire from other use of his labour. There is a presumption that the contractor is accordingly entitled to five percent of the remuneration accounted for by the part of the work not yet provided.

#### **Section 650**

##### **Cost estimate**

(1) If the contract is based on a cost estimate without the contractor guaranteeing the accuracy of the estimate and if it turns out that the work cannot be carried out without substantially exceeding the estimate, then the contractor is only entitled, if the customer terminates the contract for this reason, to the claim specified in section 645 (1).

(2) If such exceeding of the estimate is to be expected, then the contractor must notify the customer of this without undue delay.

## APPENDIX C

### GENERAL CONDITIONS OF CONSTRUCTION WORKS

YAPIM İŞLERİ GENEL ŞARTNAMESİ, FOR CONTRACTS IN LIEU PUBLIC WORKS  
CONTRACTS LAW, LAW NO: 4735, ASSOCIATED CLAUSES, AS OF 21.02.2012

#### BİRİNCİ BÖLÜM

##### Genel Hükümler

##### Tanımlar

**Madde 4-** Bu Genel Şartnamenin uygulanmasında, 4734 sayılı Kamu İhale Kanununun 4 üncü maddesinde yer alan tanımlar aynen geçerlidir. Bunlara ilaveten:

İş: Sözleşmeye bağlanan her türlü yapım işini,

Yapı denetim görevlisi: İdare tarafından, işlerin denetimi için görevlendirilecek bir memur veya bir heyeti ve/veya idare dışından bu işleri yapmak üzere görevlendirilen gerçek veya tüzel kişi veya kişileri,

Yüklenici vekili: Sözleşme konusu işle ilgili olarak yükleniciyi temsil eden, o iş için yükleniciden noterce düzenlenmiş bir vekaletname ile tam yetki almış ve idarece kabul edilmiş olan gerçek kişiyi,

Üçüncü taraf : İdare, yapı denetim görevlisi ve yüklenici dışındaki kişi ve kişileri,

İşyeri: Yapım işinin meydana getirildiği yerler ile iş süresince geçici veya sürekli olarak kullanılan bina, arazi, arsa, malzeme ocakları vb. yerleri,

...

İfade eder.

#### İKİNCİ BÖLÜM

##### İşyerleri

##### İşyerinin yükleniciye teslimi

**Madde 6-** Sözleşmenin imzalanmasından sonra yüklenicinin sözleşmede yazılı süre içinde işe başlayabilmesi için işyeri, eksen kazıkları, someler, röperler vb., zemin üzerinde

kontrol edilerek yapı denetim görevlisi tarafından yükleniciye teslim edilir ve bu hususta iki taraf arasında ortak bir tutanak düzenlenir.

...

İşyeri yükleniciye kısımlar halinde de teslim edilebilir.

...

İşlerin yapılacağı yerlerin yükleniciye tesliminde gecikme olması ve bunun işin bir kısmının veya tamamının zamanında bitirilmesini geciktirmesi halinde, sözleşmede tespit edilen iş süresi, işin bir kısmı veya tamamı için gecikmeyi karşılayacak şekilde uzatılır.

...

## ÜÇÜNCÜ BÖLÜM

### Projeler

**Birim fiyat sözleşmelerde ön ve/veya kesin projeler ile uygulama projelerinin hazırlanması ve yükleniciye teslimi**

**Madde 12-** Birim fiyat esaslı sözleşmelerde, işlerin ön veya kesin projeleri, şartnameler ve diğer belgelerle birlikte, sözleşmenin imzalanması sırasında yükleniciye verilir.

...

Yüklenicinin yapacağı uygulama projeleri, hesaplar vb. sözleşme ve eklerinde belirtilen şartlara, idare tarafından kendisine verilen ön/kesin projelere, talimatlara, esaslara, fen ve sanat kurallarına uygun olarak iş programını aksatmayacak şekilde hazırlanır ve uygulamada gerekli görülecek tüm ölçüleri ve ayrıntıları kapsar.

Uygulama projelerinin hazırlanması sırasında, farklı tercihlerin mümkün olması hallerinde, yüklenici, seçim yapılabilmesini sağlamak üzere bu tercihleri gösteren projeleri, hesapları ve diğer gerekli bilgi ve raporları hazırlayıp idareye verir.

...

Yüklenici tarafından hazırlanan proje ve hesapların belirlenen tarihlerde idareye verilmemesinden, verilen proje ve hesapların hata ve eksiklerinden dolayı, idarece onaylanmadan geri verilmiş olmalarından kaynaklanan zaman kayıpları ve gecikmelerden yüklenici sorumludur.

**Projelerin uygulanması**

**Madde 13-** Sözleşme konusu işler, idare tarafından yükleniciye verilen veya yüklenici tarafından hazırlanıp idarece onaylanan uygulama projelerine uygun olarak yapılır.

...

İdarenin veya yapı denetim görevlisinin yazılı bir tebliği olmaksızın yüklenici, projelerde herhangi bir değişiklik yaptığı takdirde sorumluluk kendisine ait olup bu gibi değişiklikler nedeniyle bir hak iddiasında bulunamaz.

İşlerin devamı sırasında yüklenici, proje uygulaması konusunda kendisine yapılan tebligatın sözleşme hükümlerine aykırı olduğu veya tebligat konusunun fen ve sanat kurallarına uygun olmadığı görüşüne varırsa, bu husustaki karşı görüşlerini 15 inci madde

hükümlerine göre idareye bildirmek zorundadır. Aksi halde aynı maddenin diğer hükümlerine göre işlem yapılır.

#### **Projelerin tesliminde gecikme olması**

**Madde 14-** Birim fiyat sözleşmelerde, iş için gerekli olan projelerle diğer teknik belgelerin yükleniciye tesliminde gecikme olması veya uygulanmak üzere yükleniciye verilen proje ve teknik belgelerde, yeni proje veya belge hazırlanmasını gerektirecek ve dolayısıyla zamana ihtiyaç gösterecek şekilde değişiklik yapılması hallerinde yüklenici hiçbir itiraz öne süremeyecektir. Ancak bu gecikme, işin bir kısmının veya hepsinin zamanında bitirilmesini geciktirirse sözleşmedeki iş süresi, işin bir kısmı veya tamamı için gecikmeyi karşılayacak şekilde uzatılır.

### **DÖRDÜNCÜ BÖLÜM**

#### **Yapı Denetim Hizmetleri**

##### **İşlerin denetimi**

**Madde 15-** Sözleşmeye bağlanan her türlü yapım işleri, idare tarafından görevlendirilen yapı denetim görevlisinin denetimi altında, yüklenici tarafından yönetilir ve gerçekleştirilir. Herhangi bir işin, yapı denetim görevlisinin denetimi altında yapılmış olması yüklenicinin, üstlenmiş olduğu işi bütünüyle projelerine, sözleşme ve şartnamelerine, fen ve sanat kurallarına uygun olarak yapmak hususundaki yükümlülüklerini ve sorumluluğunu ortadan kaldırmaz.

Yüklenici, üstlenmiş olduğu işleri, sorumlu bir meslek adamı olarak fen ve sanat kurallarına uygun olarak yapmayı kabul etmiş olduğundan, kendisine verilen projeye ve/veya teknik belgelere göre işi yapmakla, bu projenin ve/veya teknik belgelerin iş yerinin gereklerine, fen ve sanat kurallarına uygun olduğunu, ayrıca işin yapılacağı yere, kullanılacak her türlü malzemenin nitelik bakımından yeterliliğini incelemiş, kabul etmiş ve bu suretle işin teknik sorumluluğunu üstlenmiş sayılır

Bununla birlikte yüklenici, kendisine verilen projelerin ve/veya şartnamelerin, teslim edilen işyerinin veya malzemenin veyahut talimatın, sözleşme ve eklerinde bulunan hükümlere aykırı olduğunu veya fen ve sanat kurallarına uymadığı hususundaki karşı görüşlerini teslim ediliş veya talimat alış tarihinden başlayarak on beş gün içinde (özellikli bakımından incelenmesi uzun sürebilecek işlerde, yüklenicinin isteği halinde bu süre idarece artırılabilir) hem yapı denetim görevlisine, hem de idareye yazı ile bildirmek zorundadır. Bu sürenin aşılması halinde yüklenicinin itiraz hakkı kalmaz.

Yüklenicinin iddia ve itirazlarına rağmen, idare işi kendi istediği gibi yaptırdığı takdirde yüklenici, bu uygulamanın sonunda doğabilecek sorumluluktan kurtulur.

...

Yüklenici ile yapı denetim görevlisi arasında anlaşmazlık olursa, bu anlaşmazlık 52 nci madde hükümlerine göre idarece karara bağlanır.



### **Yapı denetim görevlisinin yetkileri**

**Madde 16-** Yüklenici bütün işleri yapı denetim görevlisinin, sözleşme ve eklerindeki hükümlere aykırı olmamak şartı ile vereceği talimata göre yapmak zorundadır.

Yüklenici kullanacağı her türlü malzemeyi yapı denetim görevlisine gösterip iş için elverişli olduğunu kabul ettirmeden iş başına getiremez.

...

Yüklenici tarafından fen ve sanat kurallarına aykırı olarak kusurlu yapıldıkları anlaşılan iş kısımlarını yıktırıp yükleniciye yeniden yaptırmak hususunda yapı denetim görevlisi yetkilidir. Yüklenici, bu konuda kendisine yazılı olarak verilen talimat üzerine, belirlenen süre içinde söz konusu iş kısımlarını ayrıca bir bedel istemeksizin yıkıp yeniden yapmak zorundadır. Bu hususta bir gecikme olursa sorumluluğu yükleniciye aittir.

## **BEŞİNCİ BÖLÜM**

### **İşin Yürütülmesi**

#### **İşin sözleşme bedelinin altında tamamlanması**

**Madde 22-** Birim fiyat esaslı işin sözleşme bedelinin altında bir bedelle tamamlanacağını anlaşılmaması halinde, yüklenici her hangi bir tazminat talebinde bulunmaksızın işi sözleşme ve şartnamesindeki hükümler çerçevesinde bitirmekle yükümlüdür.

#### **Sözleşme ve eklerine uymayan işler**

**Madde 24-** Yüklenici projelerde kendiliğinden hiç bir değişiklik yapamaz. Proje ve şartnamelere uymayan, eksik ve kusurlu oldukları tespit edilen işleri yüklenici, yapı denetim görevlisinin talimatı ile belirlenen süre içinde bedelsiz olarak değiştirmek veya yıkıp yeniden yapmak zorundadır. Bundan dolayı bir gecikme olursa sorumluluğu yükleniciye aittir.

Bununla birlikte, yüklenici tarafından proje ve şartnameden farklı olarak yapılmış olan işlerin, fen ve sanat kurallarına ve istenen özelliklere uygun oldukları idarece tespit edilirse, bu işler yeni durumları ile de kabul edilebilir.

Ancak bu takdirde yüklenici, daha büyük boyutta veya fazla miktarda malzeme kullandığını ve daha fazla emek harcadığını öne sürerek fazla bedel isteyemez. Bu gibi hallerde hakediş raporlarına, proje ve şartnamelerde gösterilen veya yazılı talimatla bildirilen boyutlara göre hesaplanmış miktarlar yazılır. Bu şekilde yapılan işlerin boyutları, emeğin değeri ve malzemesi daha az ise bedeli ona göre ödenir.

#### **Hatalı, kusurlu ve eksik işler**

**Madde 25-** ... Sorumluluğu yükleniciye ait olduğu anlaşılan hatalı, kusurlu ve malzemesi şartnameye uymayan işlerin bedelleri, geçici hakedişlere girmiş olsa bile, yüklenicinin daha sonraki hakedişlerinden veya kesin hakedişinden veyahut teminatından kesilir.

### **Yüklenicinin bakım ve düzeltme sorumlulukları**

**Madde 26-** Taahhüt konusu yapım işinin her türlü sorumluluğu, kesin kabul işlemlerinin idarece onaylanacağı tarihe kadar tamamen yükleniciye aittir.

...

İdare, yüklenicinin yaptığı işlerde kesin kabul tarihine kadar geçen zaman içinde herhangi bir aksaklık gördüğü takdirde, bu aksaklıkları yukarıda belirtildiği şekilde düzelttirip onarmakla birlikte, işin niteliğine göre aksaklığı tespit edilen yapım işlerinin kesin kabul işlemlerini uygun bir tarihe erteleyebilir. Bu takdirde kabulü ertelenen kısım için, idarenin uygun göreceği bir miktarda teminat alıkonur.

Yapılan işlerde yüklenicinin kusurundan kaynaklanan ve acilen ele alınması gereken aksaklıklar meydana geldiğinde, yüklenicinin o anda işle ilgilenip konuyu ele alması imkanı yoksa bu takdirde idare, yazılı olarak haber vermek suretiyle yüklenici adına bu aksaklığı giderir.

Yapım işlerinde yüklenici ve alt yükleniciler, yapının fen ve sanat kurallarına uygun olarak yapılmaması, hileli malzeme kullanılması ve benzeri nedenlerle ortaya çıkan zarar ve ziyandan, yapının tamamı için işe başlama tarihinden itibaren kesin kabul tarihine kadar sorumlu olacağı gibi, kesin kabul onay tarihinden itibaren de on beş yıl süreyle müteselsilen sorumludur. Bu zarar ve ziyan genel hükümlere göre yüklenici ve alt yüklenicilere ikmal ve tazmin ettirilir. Ayrıca haklarında 4735 sayılı Kanunun 27 nci maddesi hükümleri uygulanır.

### **Yüklenicinin kusuru dışındaki hasar ve zararlar**

**Madde 27-** Olağanüstü haller ve doğal afetlerin işyerlerinde ve yapılan işlerde meydana getireceği hasar ve zararlar ile sigortalanabilir riskler (all risk) sigorta kapsamında bulunduğundan yüklenici, bu hasar ve zararlar için idareden hiç bir bedel isteyemez. Ancak bu hasar ve zararlardan meydana gelecek gecikmeler için yükleniciye gerekli ek süre verilir.

Savaş, yurt içinde seferberlik, ayaklanma, iç savaş ve bunlara benzer olaylar veya bir nükleer yakıttan kaynaklanan radyasyonlar ve bunlar için alınan önlemler sonucunda meydana gelecek riskler gibi sigortalanması mümkün olmayan riskler ile idarenin işlerin tamamlanmış kısımlarını teslim alarak kullanmasından dolayı bu kısımlardan doğacak riskler idareye aittir.

### **İşin süresi ve sürenin uzatılması**

**Madde 30-** İşin, sözleşmesinde belirlenen zamanda tamamlanıp geçici kabule hazır hale getirilmemesi durumunda, gecikilen her takvim günü için sözleşmesinde öngörülen günlük gecikme cezası uygulanır.

Yüklenicinin, sürenin uzatılmasını gerektiren hallerin meydana geldiği tarihi izleyen yirmi gün içinde, idareye yazılı olarak bildirimde bulunması ve yetkili merciler tarafından usulüne göre düzenlenmiş belgelerle mücbir sebebin meydana geldiğini tevsik etmesi

zorunludur. Yüklenici bildiriminde, iş üzerinde gecikmeye yol açtığını düşündüğü sebeplerin ayrıntılarını, işin süresinin ne kadar uzatılması gerektiğini belirtecektir. Uzatılacak sürenin tespiti o anda mümkün değilse bunun da sebeplerini ayrıca belirtecek, durumun netlik kazanmasından sonra istediği süre uzatımını da ayrı bir yazı ile derhal bildirecektir. Ancak idarenin sebep olduğu süre uzatımını gerektiren gecikmelerde, yüklenicinin yirmi gün içinde yazılı bildirimde bulunma şartı aranmaz.

Zamanında yapılmayan yazılı bildirimler dikkate alınmaz ve yüklenici müracaat süresini geçirdikten sonra süre uzatımı talebinde bulunamaz. Mücbir sebeplerin devamı sırasında yapılacak bildirim, yirmi gün öncesinden geçerli olmak üzere dikkate alınabilir.

...

## **SEKİZİNCİ BÖLÜM**

### **Hakediş Raporları**

#### **Geçici hakediş raporları**

**Madde 40-** Yüklenici tarafından yapılan işlerin bedelleri,

- a) Birim fiyat esasına göre yaptırılan işlerde;

...

Düzenlenen hakediş raporunun işleme konulabilmesi için, yüklenici veya işbaşında bulunan vekili tarafından imzalanmış olması gereklidir. Yüklenici veya vekili, bildirilen günde, hakedişe esas ölçülerin alınmasında hazır bulunmazsa yapı denetim görevlisi ölçümleri tek başına yaparak hakediş raporunu düzenler ve yüklenicinin bu husustaki itirazları kabul edilmez.

Hakediş raporu düzenlendikten sonra bir hafta içinde yüklenici raporu imzalamazsa yapı denetim görevlisi, hakediş raporunu idareye gönderir ve rapor yüklenici tarafından imzalanıncaya kadar idarede hiçbir işlem yapılmaksızın bekletilir. Yüklenici hakediş raporlarını zamanında imzalamamış olursa ödemede meydana gelecek gecikmeden dolayı hiçbir şikayet ve istekte bulunamaz.

...

Yüklenicinin geçici hakedişlere itirazı olduğu takdirde, karşı görüşlerinin neler olduğunu ve dayandığı gerçekleri, idareye vereceği ve bir örneğini de hakediş raporuna ekleyeceği dilekçesinde açıklaması ve hakediş raporunun "idareye verilen .....tarihli dilekçemde yazılı ihtirazı kayıtlı" cümlesini yazarak imzalaması gereklidir. Eğer yüklenicinin, hakediş raporunun imzalanmasından sonra tahakkuk işlemi yapılıncaya kadar, yetkililer tarafından hakediş raporunda yapılabilecek düzeltmelere bir itirazı olursa hakedişin kendisine ödendiği tarihten başlamak üzere en çok on gün içinde bu itirazını dilekçe ile idareye bildirmek zorundadır. Yüklenici itirazlarını bu şekilde bildirmediği takdirde hakediş olduğu gibi kabul etmiş sayılır.

...

- b) Anahtar teslimi götürü bedel esasına göre yaptırılan işlerde;

Bu işlerin hakediş raporları, sözleşmesinde ve eklerinde yazılı esaslara göre düzenlenir. Bu hakediş raporlarının imzalanma, düzeltme ve ödemeleri yukarıda (a) bendinde yazılı hükümlere göre yapılır.

...

## **DOKUZUNCU BÖLÜM**

### **Kabul İşlemleri**

#### **Geçici kabul**

**Madde 42-** Sözleşme konusu iş tamamlandığında, yüklenici idareye vereceği dilekçe ile (faksla da olabilir) geçici kabul isteğinde bulunur. ...

Kabul komisyonunun oluşturulması ve işyerine gönderilebilmesi, yapılan işin kusurlu ve eksik kısımlarının bedelleri toplamının işin sözleşme bedelinin yüzde beşinden fazla olmamasına bağlıdır. Bu oranı geçmeyen kusur ve eksiklikler, aynı zamanda işin idareye teslimine ve kullanılmasına engel olmayacak ve herhangi bir tehlikeye meydan vermeyecek nitelikte olmalıdır.

...

Kabul komisyonunun tespit ettiği eksiklikler, belirlenen sürede yüklenici tarafından giderilmezse bu sürenin bitiminden sonra eksikliklerin giderilmesine kadar geçecek her gün için, giderilecek eksikliklerin durumuna göre sözleşmesinde günlük gecikme cezası olarak yazılan miktarın belli bir oranında günlük ceza uygulanır ve geçici kabul tarihi kusur ve eksikliklerin giderilmesi tarihine ertelenir. Ancak bu gecikme otuz günü geçtiği takdirde idare, yüklenici hesabına eksiklerin giderilmesini kendisi yaptırabilir. Bu takdirde de eksikler tamamlanıncaya kadar ceza uygulaması devam eder ve kabul tarihi ertelenir.

..

Geçici kabul tutanağı, idarece onaylandıktan sonra geçerli olur. Geçici kabulün yapılmasını müteakip yapının işgal edilmesi, işin kesin kabulü mana ve hükmünü tazammun etmez.

Aynı sözleşme çerçevesinde bulunan yapım işlerinin kısım kısım ve değişik zamanlarda tamamlanacağı sözleşmesinde öngörülmüşse, taahhüdün tamamlanan ve müstakil kullanıma elverişli bu kısımları için idarenin isteği üzerine işin bütününe geçici kabulünü tazammun etmemek şartıyla kısmi kabul yapılabilir.

...

Geçici kabul için yapılan incelemede, teknik olarak kabulünde sakınca görülmeyen ve giderilmesi de mümkün olmayan veya fazla harcama ve zaman kaybını gerektiren, kusur ve eksiklikler görülecek olursa yüklenicinin hakediş veya teminatından uygun görülecek bir bedel kesilmek şartı ile, iş idare tarafından bu hali ile kabul edilebilir. Bu gibi kusur ve eksikliklerin niteliğinin ve kesilecek bedelin kabul tutanağında gösterilmesi gereklidir. Yüklenici bu işleme razı olmazsa, her türlü gideri kendisine ait olmak üzere, kusur ve eksiklikleri verilen sürede düzeltmek ve gidermek zorundadır.

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#### **Teminat süresi**

**Madde 43-** Geçici kabul ile kesin kabul arasında geçecek süre teminat süresidir. Yapım işlerinde teminat süresi, sözleşmesinde aksine bir hüküm yoksa on iki aydan az olamaz.

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#### **Teminat süresindeki bakım ve giderler**

**Madde 44-** Yüklenici işlerin, teminat süresi içindeki bakımını yapmak ve tümünü iyi bir şekilde korumak ve çıkabilecek kusur ve aksaklıkları gidermek zorundadır.

...

Ancak bitirilmiş yapıların idare tarafından kullanılma ve işletilmesinden kaynaklanan veya yüklenicinin kusurları dışındaki hallerin gerektiği onarımlar bakım yükümlülüğünün dışındadır.

Kullanma ve işletme sonucu olmaksızın ortaya çıkan kusur ve aksaklıkların giderilmesi ve teminat süresince işlerin bakım giderleri yükleniciye aittir.

#### **Kesin kabul**

**Madde 45-** Kesin kabul için belirlenen tarihte, yüklenicinin yazılı müracaatı üzerine, kesin kabul komisyonu oluşturularak geçici kabuldeki esas ve usullerle kesin kabul yapılır.

Geçici ve kesin kabuller arasında, yüklenici tarafından yapılması gereken, sürekli bakım niteliğindeki işlerin sözleşme uyarınca yapılıp yapılmadığı kabul komisyonu tarafından incelenerek tespit olunur.

Devamlı bakım hususunda yüklenicinin herhangi bir yükümlülüğü yoksa kesin kabul komisyonu, geçici kabul sırasında iyi durumda ve kabule elverişli olduğu tespit edilmiş olan işlerde teminat süresince kullanılma sonucunda meydana gelen normal aşınma ve eksilmeden doğan durumlar haricinde, işin fen ve sanat kurallarına uygun yapılmamasından kaynaklanabilecek herhangi bir bozukluğun veya geçici kabulden sonra ortaya çıkan bir kusurun olup olmadığını inceler.

Teminat süresi içinde yüklenicinin, bütün yükümlülüklerini yerine getirmiş olduğu ve kendisine yüklenebilecek kesin kabulü engelleyecek bir kusur ve eksiklik görülmediği takdirde kesin kabul tutanağı düzenlenir.

Eğer bu süre içinde, sorumluluğu yükleniciye atfedilmeyecek bir kusur veya eksiklik tespit edilmişse bu da tutanakta ayrıca belirtilir.

İşin kesin kabulüne engel herhangi bir durum görüldüğü takdirde, kabulü engelleyen kusur ve eksikler kabul komisyonu tarafından bir tutanakla tespit edilir ve kesin kabul işlemi yapılmaksızın kusur ve eksiklerin giderilmesi için bir süre belirlenerek durum idareye bildirilir. İdare bu kusur ve eksiklerin tutanakta belirlenen süre içerisinde giderilmesi hususunu yükleniciye tebliğ eder. Kusur ve eksiklerin yüklenici tarafından giderildiği idarece tespit edildiğinde kabul işlemi sonuçlandırılır.

Yüklenici teminat süresi veya yukarıdaki fıkrada söz konusu edilen süre sonunda, idarenin kabul edebileceği gecikmeler dışında, sözleşme ve şartname hükümlerine göre işi kesin kabule elverişli duruma getirmeyerek bir gecikmeye yol açmış ise, idare ya yükleniciye 42 inci maddede belirtilen şekilde ceza uygulayarak eksik ve kusurların giderilmesini bekler, ya da gecikme otuz günü geçerse ceza uygulamasına devam etmekle birlikte kusur ve eksiklikleri yüklenici hesabına kendisi giderir.

İdare, gerek kusur ve eksikliklerin yüklenici hesabına giderilmesi bedellerini, gerekse vukuunda belirtilen bekleme cezalarını yüklenicinin hakedişinden, hakedişi kalmamışsa teminatından kesmeye yetkilidir.

Kesin kabul tutanağının yetkili makam tarafından onaylanması ile kesin kabul işlemi tamamlanmış olur.

#### **Kesin teminatın iadesine ait şartlar**

**Madde 46-** Taahhüdün, sözleşme ve ihale dokümanı hükümlerine uygun olarak yerine getirilmesinden ve varsa işe ait eksik ve kusurların giderilerek geçici kabul tutanağının onaylanmasından ve yüklenicinin sözleşme konusu işten dolayı idareye herhangi bir borcunun olmadığı tespit edildikten sonra, alınmış olan kesin teminat ve varsa ek kesin teminatların yarısı; Sosyal Sigortalar Kurumundan ilişiksiz belgesi getirilmesi ve kesin kabul tutanağının onaylanmasından sonra kalanı, yükleniciye iade edilir.

...

### **ONUNCU BÖLÜM**

#### **Sözleşme ilişkileri**

##### **Sözleşmenin feshi ve tasfiye durumları**

**Madde 48-** Sözleşme yapıldıktan sonra mücbir sebep halleri dışında yüklenicinin mali acz içinde bulunması nedeniyle taahhüdünü yerine getiremeyeceğini gerekçeleri ile birlikte yazılı olarak bildirmesi halinde, ayrıca protesto çekmeye gerek kalmaksızın kesin teminat ve varsa ek kesin teminatlar gelir kaydedilir ve sözleşme feshedilerek hesabı genel hükümlere göre tasfiye edilir.

Aşağıda belirtilen hallerde idare sözleşmeyi fesheder:

a) Yüklenicinin taahhüdünü ihale dokümanı ve sözleşme hükümlerine uygun olarak yerine getirmemesi veya işi süresinde bitirmemesi üzerine, ihale dokümanında belirlenen oranda gecikme cezası uygulanmak üzere, idarenin en az yirmi gün süreli ve nedenleri açıkça belirtilen ihtarına rağmen aynı durumun devam etmesi,

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Ancak, taahhüdün en az % 80'inin tamamlanmış olması ve taahhüdün tamamlattırılmasında kamu yararı bulunması kaydıyla;

İvediliği nedeniyle taahhüdün kalan kısmının yeniden ihale edilmesi için yeterli sürenin bulunmaması,

Taahhüdün başka bir yükleniciye yaptırılmasının mümkün olmaması,

Yüklenicinin yasak fiil veya davranışının taahhüdünü tamamlamasını engelleyecek nitelikte olmaması,

Hallerinde, idare sözleşmeyi feshetmeksizin yükleniciden taahhüdünü tamamlamasını isteyebilir ve bu takdirde yüklenici taahhüdünü tamamlamak zorundadır.

...

Öngörülemeyen durumlar nedeniyle işin, sözleşme bedelinin üzerinde bir artış ile tamamlanabileceğinin tespit edilmesi halinde, hesabı genel hükümlere göre tasfiye edilerek kesin teminat ve varsa ek kesin teminatlar iade edilir. Ancak bu durumda, işin tamamının ihale dokümanı ve sözleşme hükümlerine uygun olarak yerine getirilmesi zorunludur.

Yüklenici ile idarenin, Borçlar Kanunu hükümleri çerçevesinde karşılıklı anlaşması halinde sözleşme tasfiye edilir.

...

#### **Anlaşmazlıkların çözümü**

**Madde 52-** İşin yürütülmesi veya kesin hesapların çıkarılması aşamasında yapı denetim görevlisi ile yüklenici arasında çıkabilecek anlaşmazlıklar, öncelik sırası sözleşmesinde belirtilen, sözleşme eklerindeki hükümler dikkate alınmak suretiyle aşağıda yazılı olduğu şekilde idare tarafından çözüme bağlanacaktır. Yüklenici, anlaşmazlığa yol açan konuda, bu durumun ortaya çıktığı günden başlamak üzere on beş gün içinde itiraz ve şikayetlerinin sebeplerini açıklayan bir dilekçe ile idareye başvuracaktır.

İdare, bu dilekçeyi aldığı tarihten başlamak üzere en çok iki ay içinde inceleyip bu husustaki kararını yükleniciye bildirecektir. İki ay içinde kendisine bir cevap verilmediği veya verilen karara razı olmadığı takdirde, yüklenici anlaşmazlıkların çözümüne ilişkin sözleşme hükümlerine göre hareket etmekte serbesttir.

## **APPENDIX D**

### **REGULATION (EC) NO 864/2007 (ROME II)**

REGULATION (EC) NO 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 11 JULY 2007 ON THE LAW APPLICABLE TO NON-CONTRACTUAL OBLIGATIONS (ROME II)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,  
Having regard to the Treaty establishing the European Community, and in particular Articles 61(c) and 67 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Economic and Social Committee,

Acting in accordance with the procedure laid down in Article 251 of the Treaty in the light of the joint text approved by the Conciliation Committee on 25 June 2007,

Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65(b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement the principle of mutual recognition.



(4) On 30 November 2000, the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme, adopted by the European Council on 5 November 2004, called for work to be pursued actively on the rules of conflict of laws regarding non-contractual obligations (Rome II).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and the instruments dealing with the law applicable to contractual obligations.

(8) This Regulation should apply irrespective of the nature of the court or tribunal seised.

(9) Claims arising out of *acta iure imperii* should include claims against officials who act on behalf of the State and liability for acts of public authorities, including liability of publicly appointed office-holders. Therefore, these matters should be excluded from the scope of this Regulation.

(10) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(11) The concept of a non-contractual obligation varies from one Member State to another. Therefore for the purposes of this Regulation non-contractual obligation should be understood as an autonomous concept. The conflict-of-law rules set out in this Regulation should also cover noncontractual obligations arising out of strict liability.

(12) The law applicable should also govern the question of the capacity to incur liability in tort/delict.

(13) Uniform rules applied irrespective of the law they designate may avert the risk of distortions of competition between Community litigants.

(14) The requirement of legal certainty and the need to do justice in individual cases are essential elements of an area of justice. This Regulation provides for the connecting factors which are the most appropriate to achieve these objectives. Therefore, this Regulation provides for a general rule but also for specific rules and, in certain provisions,

for an 'escape clause' which allows a departure from these rules where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country. This set of rules thus creates a flexible framework of conflict-of-law rules. Equally, it enables the court seised to treat individual cases in an appropriate manner.

(15) The principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the Member States, but the practical application of the principle where the component factors of the case are spread over several countries varies. This situation engenders uncertainty as to the law applicable.

(16) Uniform rules should enhance the foreseeability of court decisions and ensure a reasonable balance between the interests of the person claimed to be liable and the person who has sustained damage. A connection with the country where the direct damage occurred (*lex loci damni*) strikes a fair balance between the interests of the person claimed to be liable and the person sustaining the damage, and also reflects the modern approach to civil liability and the development of systems of strict liability.

(17) The law applicable should be determined on the basis of where the damage occurs, regardless of the country or countries in which the indirect consequences could occur. Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

(18) The general rule in this Regulation should be the *lex loci damni* provided for in Article 4(1). Article 4(2) should be seen as an exception to this general principle, creating a special connection where the parties have their habitual residence in the same country. Article 4(3) should be understood as an 'escape clause' from Article 4(1) and (2), where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with another country.

(19) Specific rules should be laid down for special torts/delicts where the general rule does not allow a reasonable balance to be struck between the interests at stake.

(20) The conflict-of-law rule in matters of product liability should meet the objectives of fairly spreading the risks inherent in a modern high-technology society, protecting consumers' health, stimulating innovation, securing undistorted competition and facilitating trade. Creation of a cascade system of connecting factors, together with a foreseeability clause, is a balanced solution in regard to these objectives. The first element to be taken into account is the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country. The other elements of the cascade are triggered if the product was not marketed in that country, without prejudice to Article 4(2) and to the possibility of a manifestly closer connection to another country.

(21) The special rule in Article 6 is not an exception to the general rule in Article 4(1) but rather a clarification of it. In matters of unfair competition, the conflict-of-law rule should protect competitors, consumers and the general public and ensure that the market economy functions properly. The connection to the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected generally satisfies these objectives.

(22) The non-contractual obligations arising out of restrictions of competition in Article 6(3) should cover infringements of both national and Community competition law. The law applicable to such non-contractual obligations should be the law of the country where the market is, or is likely to be, affected. In cases where the market is, or is likely to be, affected in more than one country, the claimant should be able in certain circumstances to choose to base his or her claim on the law of the court seised.

(23) For the purposes of this Regulation, the concept of restriction of competition should cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

(24) 'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms.

(25) Regarding environmental damage, Article 174 of the Treaty, which provides that there should be a high level of protection based on the precautionary principle and the principle that preventive action should be taken, the principle of priority for corrective action at source and the principle that the polluter pays, fully justifies the use of the principle of discriminating in favour of the person sustaining the damage. The question of when the person seeking compensation can make the choice of the law applicable should be determined in accordance with the law of the Member State in which the court is seised.

(26) Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved. For the purposes of this Regulation, the term 'intellectual property rights' should be interpreted as meaning, for instance, copyright, related rights, the *sui generis* right for the protection of databases and industrial property rights.

(27) The exact concept of industrial action, such as strike action or lock-out, varies from one Member State to another and is governed by each Member State's internal rules. Therefore, this Regulation assumes as a general principle that the law of the country where the industrial action was taken should apply, with the aim of protecting the rights and obligations of workers and employers.

(28) The special rule on industrial action in Article 9 is without prejudice to the conditions relating to the exercise of such action in accordance with national law and without prejudice to the legal status of trade unions or of the representative organisations of workers as provided for in the law of the Member States.

(29) Provision should be made for special rules where damage is caused by an act other than a tort/delict, such as unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*.

(30) *Culpa in contrahendo* for the purposes of this Regulation is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 or other relevant provisions of this Regulation should apply.

(31) To respect the principle of party autonomy and to enhance legal certainty, the parties should be allowed to make a choice as to the law applicable to a non-contractual obligation. This choice should be expressed or demonstrated with reasonable certainty by the circumstances of the case. Where establishing the existence of the agreement, the court has to respect the intentions of the parties. Protection should be given to weaker parties by imposing certain conditions on the choice.

(32) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. In particular, the application of a provision of the law designated by this Regulation which would have the effect of causing noncompensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum.

(33) According to the current national rules on compensation awarded to victims of road traffic accidents, when quantifying damages for personal injury in cases in which the accident takes place in a State other than that of the habitual residence of the victim, the court seised should take into account all the relevant actual circumstances of the specific victim, including in particular the actual losses and costs of after-care and medical attention.

(34) In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident.

(35) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, does not exclude the possibility of inclusion of conflict-of-law rules relating to noncontractual obligations in provisions of Community law with regard to particular matters. This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

(36) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(37) The Commission will make a proposal to the European Parliament and the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude on their own behalf agreements with third countries in individual and exceptional cases, concerning sectoral matters, containing provisions on the law applicable to non-contractual obligations.

(38) Since the objective of this Regulation cannot be sufficiently achieved by the Member States, and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity set out in Article 5 of the Treaty. In accordance with the principle of proportionality set out in that Article, this Regulation does not go beyond what is necessary to attain that objective.

(39) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland annexed to the Treaty on European Union and to the Treaty establishing the

European Community, the United Kingdom and Ireland are taking part in the adoption and application of this Regulation.

(40) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark does not take part in the adoption of this Regulation, and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### SCOPE

#### *Article 1*

##### **Scope**

1. This Regulation shall apply, in situations involving a conflict of laws, to non-contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters or to the liability of the State for acts and omissions in the exercise of State authority (*acta iure imperii*).

2. The following shall be excluded from the scope of this Regulation:

- (a) non-contractual obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects including maintenance obligations;
- (b) non-contractual obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
- (c) non-contractual obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
- (d) non-contractual obligations arising out of the law of companies and other bodies corporate or unincorporated regarding matters such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies corporate or unincorporated, the personal liability of officers and members as such for the obligations of the company or body and the personal liability of auditors to a company or to its members in the statutory audits of accounting documents;
- (e) non-contractual obligations arising out of the relations between the settlors, trustees and beneficiaries of a trust created voluntarily;
- (f) non-contractual obligations arising out of nuclear damage;
- (g) non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Articles 21 and 22.

4. For the purposes of this Regulation, 'Member State' shall mean any Member State other than Denmark.

#### *Article 2*

#### **Non-contractual obligations**

1. For the purposes of this Regulation, damage shall cover any consequence arising out of tort/delict, unjust enrichment, *negotiorum gestio* or *culpa in contrahendo*.

2. This Regulation shall apply also to non-contractual obligations that are likely to arise.

3. Any reference in this Regulation to:

(a) an event giving rise to damage shall include events giving rise to damage that are likely to occur; and

(b) damage shall include damage that is likely to occur.

#### *Article 3*

#### **Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

### CHAPTER II

#### **TORTS/DELICTS**

#### *Article 4*

#### **General rule**

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.

3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

#### *Article 5*

#### **Product liability**

1. Without prejudice to Article 4(2), the law applicable to a non-contractual obligation arising out of damage caused by a product shall be:

- (a) the law of the country in which the person sustaining the damage had his or her habitual residence when the damage occurred, if the product was marketed in that country; or, failing that,
- (b) the law of the country in which the product was acquired, if the product was marketed in that country; or, failing that,
- (c) the law of the country in which the damage occurred, if the product was marketed in that country.

However, the law applicable shall be the law of the country in which the person claimed to be liable is habitually resident if he or she could not reasonably foresee the marketing of the product, or a product of the same type, in the country the law of which is applicable under (a), (b) or (c).

2. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

#### *Article 6*

#### **Unfair competition and acts restricting free competition**

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

3. (a) The law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected.

(b) When the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court.

4. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.



#### *Article 7*

##### **Environmental damage**

The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred.

#### *Article 8*

##### **Infringement of intellectual property rights**

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.
2. In the case of a non-contractual obligation arising from an infringement of a unitary Community intellectual property right, the law applicable shall, for any question that is not governed by the relevant Community instrument, be the law of the country in which the act of infringement was committed.
3. The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

#### *Article 9*

##### **Industrial action**

Without prejudice to Article 4(2), the law applicable to a noncontractual obligation in respect of the liability of a person in the capacity of a worker or an employer or the organisations representing their professional interests for damages caused by an industrial action, pending or carried out, shall be the law of the country where the action is to be, or has been, taken.

#### **CHAPTER III**

##### **UNJUST ENRICHMENT, *NEGOTIORUM GESTIO* AND *CULPA IN CONTRAHENDO***

#### *Article 10*

##### **Unjust enrichment**

1. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.
2. Where the law applicable cannot be determined on the basis of paragraph 1 and the parties have their habitual residence in the same country when the event giving rise to unjust enrichment occurs, the law of that country shall apply.
3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the unjust enrichment took place.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of unjust enrichment is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

#### *Article 11*

##### ***Negotiorum gestio***

1. If a non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that non-contractual obligation, it shall be governed by the law that governs that relationship.

2. Where the law applicable cannot be determined on the basis of paragraph 1, and the parties have their habitual residence in the same country when the event giving rise to the damage occurs, the law of that country shall apply.

3. Where the law applicable cannot be determined on the basis of paragraphs 1 or 2, it shall be the law of the country in which the act was performed.

4. Where it is clear from all the circumstances of the case that the non-contractual obligation arising out of an act performed without due authority in connection with the affairs of another person is manifestly more closely connected with a country other than that indicated in paragraphs 1, 2 and 3, the law of that other country shall apply.

#### *Article 12*

##### ***Culpa in contrahendo***

1. The law applicable to a non-contractual obligation arising out of dealings prior to the conclusion of a contract, regardless of whether the contract was actually concluded or not, shall be the law that applies to the contract or that would have been applicable to it had it been entered into.

2. Where the law applicable cannot be determined on the basis of paragraph 1, it shall be:

(a) the law of the country in which the damage occurs, irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occurred; or

(b) where the parties have their habitual residence in the same country at the time when the event giving rise to the damage occurs, the law of that country; or

(c) where it is clear from all the circumstances of the case that the non-contractual obligation arising out of dealings prior to the conclusion of a contract is manifestly more closely connected with a country other than that indicated in points (a) and (b), the law of that other country.

*Article 13*

**Applicability of Article 8**

For the purposes of this Chapter, Article 8 shall apply to noncontractual obligations arising from an infringement of an intellectual property right.

CHAPTER IV

**FREEDOM OF CHOICE**

*Article 14*

**Freedom of choice**

1. The parties may agree to submit non-contractual obligations to the law of their choice:
  - (a) by an agreement entered into after the event giving rise to the damage occurred; or
  - (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred.

The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties.

2. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

3. Where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in one or more of the Member States, the parties' choice of the law applicable other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

CHAPTER V

**COMMON RULES**

*Article 15*

**Scope of the law applicable**

The law applicable to non-contractual obligations under this Regulation shall govern in particular:

- (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them;
- (b) the grounds for exemption from liability, any limitation of liability and any division of liability;
- (c) the existence, the nature and the assessment of damage or the remedy claimed;
- (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation;

(e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance;

(f) persons entitled to compensation for damage sustained personally;

(g) liability for the acts of another person;

(h) the manner in which an obligation may be extinguished and rules of prescription and limitation, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation.

#### *Article 16*

#### **Overriding mandatory provisions**

Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.

#### *Article 17*

#### **Rules of safety and conduct**

In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability.

#### *Article 18*

#### **Direct action against the insurer of the person liable**

The person having suffered damage may bring his or her claim directly against the insurer of the person liable to provide compensation if the law applicable to the non-contractual obligation or the law applicable to the insurance contract so provides.

#### *Article 19*

#### **Subrogation**

Where a person (the creditor) has a non-contractual claim upon another (the debtor), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether, and the extent to which, the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

#### *Article 20*

#### **Multiple liability**

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the question of that debtor's right to demand compensation from the other debtors shall be governed by the law applicable to that debtor's non-contractual obligation towards the creditor.

#### *Article 21*

##### **Formal validity**

A unilateral act intended to have legal effect and relating to a non-contractual obligation shall be formally valid if it satisfies the formal requirements of the law governing the noncontractual obligation in question or the law of the country in which the act is performed.

#### *Article 22*

##### **Burden of proof**

1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of noncontractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. Acts intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 21 under which that act is formally valid, provided that such mode of proof can be administered by the forum.

#### CHAPTER VI

##### **OTHER PROVISIONS**

#### *Article 23*

##### **Habitual residence**

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. Where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or any other establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

2. For the purposes of this Regulation, the habitual residence of a natural person acting in the course of his or her business activity shall be his or her principal place of business.

#### *Article 24*

##### **Exclusion of renvoi**

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.

#### *Article 25*

##### **States with more than one legal system**

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of non-contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State within which different territorial units have their own rules of law in respect of non-contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

*Article 26*

**Public policy of the forum**

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

*Article 27*

**Relationship with other provisions of Community law**

This Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to non-contractual obligations.

*Article 28*

**Relationship with existing international conventions**

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to non-contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

CHAPTER VII

**FINAL PROVISIONS**

*Article 29*

**List of conventions**

1. By 11 July 2008, Member States shall notify the Commission of the conventions referred to in Article 28(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. The Commission shall publish in the *Official Journal of the European Union* within six months of receipt:

- (i) a list of the conventions referred to in paragraph 1;
- (ii) the denunciations referred to in paragraph 1.

*Article 30*

**Review clause**

1. Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include:

(i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation;

(ii) a study on the effects of Article 28 of this Regulation with respect to the Hague Convention of 4 May 1971 on the law applicable to traffic accidents.

2. Not later than 31 December 2008, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality, taking into account rules relating to freedom of the press and freedom of expression in the media, and conflict-of-law issues related to Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

#### *Article 31*

#### **Application in time**

This Regulation shall apply to events giving rise to damage which occur after its entry into force.

#### *Article 32*

#### **Date of application**

This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008. This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

#### **Commission Statement on the review clause (Article 30)**

The Commission, following the invitation by the European Parliament and the Council in the frame of Article 30 of the 'Rome II' Regulation, will submit, not later than December 2008, a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality. The Commission will take into consideration all aspects of the situation and take appropriate measures if necessary.

#### **Commission Statement on road accidents**

The Commission, being aware of the different practices followed in the Member States as regards the level of compensation awarded to victims of road traffic accidents, is prepared to examine the specific problems resulting for EU residents involved in road traffic accidents in a Member State other than the Member State of their habitual residence. To that end the Commission will make available to the European Parliament and to the Council, before the end of 2008, a study on all options, including insurance

aspects, for improving the position of cross-border victims, which would pave the way for a Green Paper.

**Commission Statement on the treatment of foreign law**

The Commission, being aware of the different practices followed in the Member States as regards the treatment of foreign law, will publish at the latest four years after the entry into force of the 'Rome II' Regulation and in any event as soon as it is available a horizontal study on the application of foreign law in civil and commercial matters by the courts of the Member States, having regard to the aims of the Hague Programme. It is also prepared to take appropriate measures if necessary.



## **APPENDIX E**

### **REGULATION (EC) NO 593/2008 (ROME I)**

REGULATION (EC) NO 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL OF 17 JUNE 2008 ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,  
Having regard to the Treaty establishing the European Community, and in particular Article 61(c) and the second indent of Article 67(5) thereof,  
Having regard to the proposal from the Commission,  
Having regard to the opinion of the European Economic and Social Committee (1),  
Acting in accordance with the procedure laid down in Article 251 of the Treaty (2),  
Whereas:

(1) The Community has set itself the objective of maintaining and developing an area of freedom, security and justice. For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market.

(2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

(3) The European Council meeting in Tampere on 15 and 16 October 1999 endorsed the principle of mutual recognition of judgments and other decisions of judicial authorities as the cornerstone of judicial cooperation in civil matters and invited the Council and the Commission to adopt a programme of measures to implement that principle.

(4) On 30 November 2000 the Council adopted a joint Commission and Council programme of measures for implementation of the principle of mutual recognition of

decisions in civil and commercial matters. The programme identifies measures relating to the harmonisation of conflict-of-law rules as those facilitating the mutual recognition of judgments.

(5) The Hague Programme, adopted by the European Council on 5 November 2004, called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations (Rome I).

(6) The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought.

(7) The substantive scope and the provisions of this Regulation should be consistent with Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I) and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to noncontractual obligations (Rome II).

(8) Family relationships should cover parentage, marriage, affinity and collateral relatives. The reference in Article 1(2) to relationships having comparable effects to marriage and other family relationships should be interpreted in accordance with the law of the Member State in which the court is seised.

(9) Obligations under bills of exchange, cheques and promissory notes and other negotiable instruments should also cover bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character.

(10) Obligations arising out of dealings prior to the conclusion of the contract are covered by Article 12 of Regulation (EC) No 864/2007. Such obligations should therefore be excluded from the scope of this Regulation.

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

(12) An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

(13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.

(15) Where a choice of law is made and all other elements relevant to the situation are located in a country other than the country whose law has been chosen, the choice of law should not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. This rule should apply whether or not the choice of law was accompanied by a choice of court or tribunal. Whereas no substantial change is intended as compared with Article 3(3) of the 1980 Convention on the Law Applicable to Contractual Obligations (the Rome Convention), the wording of this Regulation is aligned as far as possible with Article 14 of Regulation (EC) No 864/2007.

(16) To contribute to the general objective of this Regulation, legal certainty in the European judicial area, the conflict-of-law rules should be highly foreseeable. The courts should, however, retain a degree of discretion to determine the law that is most closely connected to the situation.

(17) As far as the applicable law in the absence of choice is concerned, the concept of 'provision of services' and 'sale of goods' should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.

(18) As far as the applicable law in the absence of choice is concerned, multilateral systems should be those in which trading is conducted, such as regulated markets and multilateral trading facilities as referred to in Article 4 of Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments, regardless of whether or not they rely on a central counterparty.

(19) Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

(20) Where the contract is manifestly more closely connected with a country other than that indicated in Article 4(1) or (2), an escape clause should provide that the law of that other country is to apply. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(21) In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or

as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.

(22) As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention.

Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier and the term 'the carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

(23) As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict-of-law rules that are more favourable to their interests than the general rules.

(24) With more specific reference to consumer contracts, the conflict-of-law rule should make it possible to cut the cost of settling disputes concerning what are commonly relatively small claims and to take account of the development of distance-selling techniques. Consistency with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 states that 'for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities'. The declaration also states that 'the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.'

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing his commercial or professional

activities in the country where the consumer has his habitual residence, directs his activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

(26) For the purposes of this Regulation, financial services such as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS), should be subject to Article 6 of this Regulation. Consequently, when a reference is made to terms and conditions governing the issuance or offer to the public of transferable securities or to the subscription and redemption of units in collective investment undertakings, that reference should include all aspects binding the issuer or the offeror to the consumer, but should not include those aspects involving the provision of financial services.

(27) Various exceptions should be made to the general conflict-of-law rule for consumer contracts. Under one such exception the general rule should not apply to contracts relating to rights *in rem* in immovable property or tenancies of such property unless the contract relates to the right to use immovable property on a timeshare basis within the meaning of Directive 94/47/EC of the European Parliament and of the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis.

(28) It is important to ensure that rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to different laws being applicable to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. Likewise, whenever such instruments are issued or offered, the contractual relationship established between the issuer or the offeror and the consumer should not necessarily be subject to the mandatory application of the law of the country of habitual residence of the consumer, as there is a need to ensure uniformity in the terms and conditions of an issuance or an offer. The same rationale should apply with regard to the multilateral systems covered by Article 4(1)(h), in respect of which it should be ensured that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to contracts concluded within those systems or with the operator of such systems.

(29) For the purposes of this Regulation, references to rights and obligations constituting the terms and conditions governing the issuance, offers to the public or public take-over bids of transferable securities and references to the subscription and redemption of units in collective investment undertakings should include the terms governing, *inter alia*, the

allocation of securities or units, rights in the event of over-subscription, withdrawal rights and similar matters in the context of the offer as well as those matters referred to in Articles 10, 11, 12 and 13, thus ensuring that all relevant contractual aspects of an offer binding the issuer or the offeror to the consumer are governed by a single law.

(30) For the purposes of this Regulation, financial instruments and transferable securities are those instruments referred to in Article 4 of Directive 2004/39/EC.

(31) Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems.

(32) Owing to the particular nature of contracts of carriage and insurance contracts, specific provisions should ensure an adequate level of protection of passengers and policy holders. Therefore, Article 6 should not apply in the context of those particular contracts.

(33) Where an insurance contract not covering a large risk covers more than one risk, at least one of which is situated in a Member State and at least one of which is situated in a third country, the special rules on insurance contracts in this Regulation should apply only to the risk or risks situated in the relevant Member State or Member States.

(34) The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(35) Employees should not be deprived of the protection afforded to them by provisions which cannot be derogated from by agreement or which can only be derogated from to their benefit.

(36) As regards individual employment contracts, work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily.

(37) Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.

(38) In the context of voluntary assignment, the term 'relationship' should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. However, the term 'relationship' should not be understood as relating to any relationship that may exist between assignor and assignee. In particular, it should not cover preliminary questions as regards a voluntary assignment or a contractual subrogation. The term should be strictly limited to the aspects which are directly relevant to the voluntary assignment or contractual subrogation in question.

(39) For the sake of legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated. Unlike Article 60(1) of Regulation (EC) No 44/2001, which establishes three criteria, the conflict-of-law rule should proceed on the basis of a single criterion; otherwise, the parties would be unable to foresee the law applicable to their situation.

(40) A situation where conflict-of-law rules are dispersed among several instruments and where there are differences between those rules should be avoided. This Regulation, however, should not exclude the possibility of inclusion of conflict-of-law rules relating to contractual obligations in provisions of Community law with regard to particular matters. This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

(41) Respect for international commitments entered into by the Member States means that this Regulation should not affect international conventions to which one or more Member States are parties at the time when this Regulation is adopted. To make the rules more accessible, the Commission should publish the list of the relevant conventions in the *Official Journal of the European Union* on the basis of information supplied by the Member States.

(42) The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations.

(43) Since the objective of this Regulation cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Community level, the Community may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty. In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary to attain its objective.

(44) In accordance with Article 3 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Ireland has notified its wish to take part in the adoption and application of the present Regulation.

(45) In accordance with Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and to the Treaty establishing the European Community, and without prejudice to Article 4 of the said Protocol, the United Kingdom is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

(46) In accordance with Articles 1 and 2 of the Protocol on the position of Denmark, annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application,

HAVE ADOPTED THIS REGULATION:

## CHAPTER I

### **SCOPE**

#### *Article 1*

#### **Material scope**

1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

- (a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
- (b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
- (c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;



- (d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
- (e) arbitration agreements and agreements on the choice of court;
- (f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
- (g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
- (h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
- (i) obligations arising out of dealings prior to the conclusion of a contract;
- (j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term 'Member State' shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

#### *Article 2*

#### **Universal application**

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

### **CHAPTER II**

#### **UNIFORM RULES**

#### *Article 3*

#### **Freedom of choice**

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

#### *Article 4*

##### **Applicable law in the absence of choice**

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

(c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected.

#### *Article 5*

#### **Contracts of carriage**

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

- (a) the passenger has his habitual residence; or
- (b) the carrier has his habitual residence; or
- (c) the carrier has his place of central administration; or
- (d) the place of departure is situated; or
- (e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

#### *Article 6*

##### **Consumer contracts**

1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

(b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours;

(c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

(e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

## *Article 7*

### **Insurance contracts**

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom. To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1) (g) of Directive 2002/83/EC.

#### *Article 8*

##### **Individual employment contracts**

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

#### *Article 9*

##### **Overriding mandatory provisions**

1. Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

#### *Article 10*

##### **Consent and material validity**

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.

#### *Article 11*

##### **Formal validity**

1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.
2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.
3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country

where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.

4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.

5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:

- (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
- (b) those requirements cannot be derogated from by agreement.

#### *Article 12*

##### **Scope of the law applicable**

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

- (a) interpretation;
- (b) performance;
- (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
- (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
- (e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

#### *Article 13*

##### **Incapacity**

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

#### *Article 14*

##### **Voluntary assignment and contractual subrogation**

1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.



2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.

3. The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.

#### *Article 15*

#### **Legal subrogation**

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

#### *Article 16*

#### **Multiple liability**

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

#### *Article 17*

#### **Set-off**

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

#### *Article 18*

#### **Burden of proof**

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

## CHAPTER III

### OTHER PROVISIONS

#### *Article 19*

##### **Habitual residence**

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.
3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

#### *Article 20*

##### **Exclusion of *renvoi***

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

#### *Article 21*

##### **Public policy of the forum**

The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

#### *Article 22*

##### **States with more than one legal system**

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.
2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between  
the laws of such units.

#### *Article 23*

##### **Relationship with other provisions of Community law**

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

#### *Article 24*

##### **Relationship with the Rome Convention**

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.
2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

#### *Article 25*

##### **Relationship with existing international conventions**

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.
2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

#### *Article 26*

##### **List of Conventions**

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.
2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the *Official Journal of the European Union*:
  - (a) a list of the conventions referred to in paragraph 1;
  - (b) the denunciations referred to in paragraph 1.

#### *Article 27*

##### **Review clause**

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:
  - (a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and
  - (b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.
2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the

priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

*Article 28*

**Application in time**

This Regulation shall apply to contracts concluded after 17 December 2009.

CHAPTER IV

**FINAL PROVISIONS**

*Article 29*

**Entry into force and application**

This Regulation shall enter into force on the 20th day following its publication in the *Official Journal of the European Union*.

It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.