

CONSTRUCTION LAW

CLAIMS FOR DELAY ON
INTERNATIONAL
CONSTRUCTION PROJECTS

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CONSTRUCTION IN AFRICA

- World Bank:

“In most African countries, particularly the lower-income countries, infrastructure is a major constraint on doing business, and is found to depress firm productivity by around 40 percent.”

“For most countries, the negative impact of deficient infrastructure is at least as large as that associated with corruption, crime, financial market and red tape constraints.”

CONSTRUCTION IN AFRICA

- World Bank:

Power is cited by more than half of African countries as a major business obstacle.

The 48 countries of Sub-Saharan Africa, with a combined population of 800 million generate roughly the same amount of power as Spain (with a population of 45 million).



CONSTRUCTION IN AFRICA

- World Bank:

The cost of redressing Africa's infrastructure deficit is estimated at US\$ 38 billion of investment per year, a further US\$37 billion per year in operations and maintenance; an overall price tag of US\$75 billion.

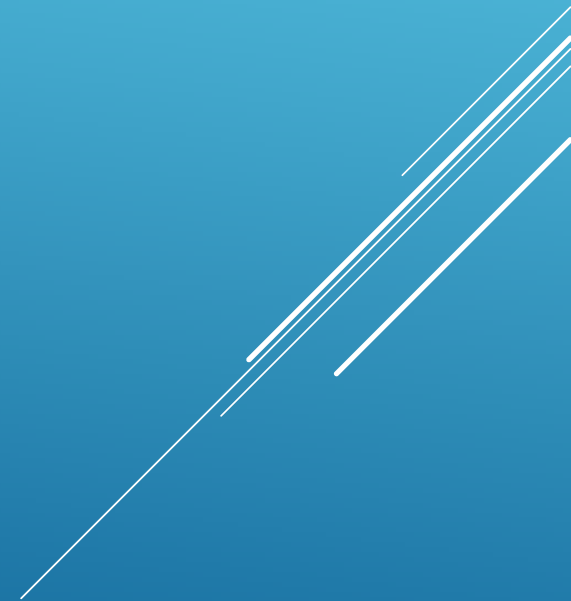
The total required spending translates into 12% of Africa's GDP.

CONSTRUCTION IN AFRICA

- World Bank:

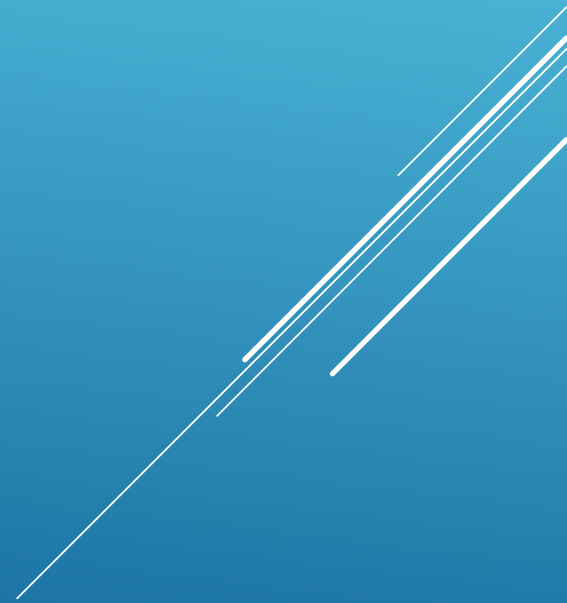
If all African countries were to catch up with Mauritius in infrastructure, per capita economic growth in the region could increase by 2.2 percentage points.

Catching up with Korea's level would increase economic growth per capita by up to 2.6% per year.



CONSTRUCTION IN AFRICA

- Construction law expertise is vital to allow Africa to realise its infrastructure needs



CONSTRUCTION IN AFRICA

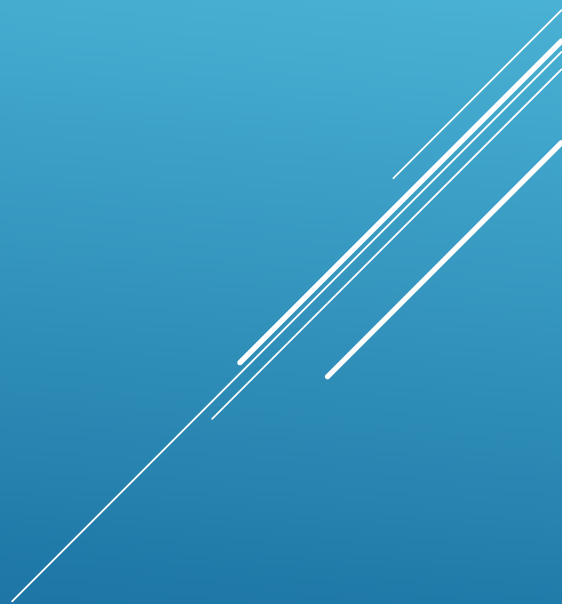
- And yet:
 - construction law courses are hard to come by in Africa
 - most construction lawyers in Africa are qualified by experience
 - this creates a significant barrier to entry for African lawyers who wish to specialise in this field

DELAY IN INFRASTRUCTURE PROJECTS:

Infrastructure projects are notorious for overrunning on time and cost, with serious economic and political consequences



DELAY IN INFRASTRUCTURE PROJECTS:

- Study data:
 - In Saudi Arabia, 70% of projects experienced time overruns, with an average of between 10-30% of original duration
 - In Qatar, 80% of infrastructure projects suffered from delay, with an average delay of 25%
 - In India, out of 894 projects, 82.33% of projects suffered time overruns, and delays are one of the crucial causes behind cost overruns
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DELAY IN INFRASTRUCTURE PROJECTS:

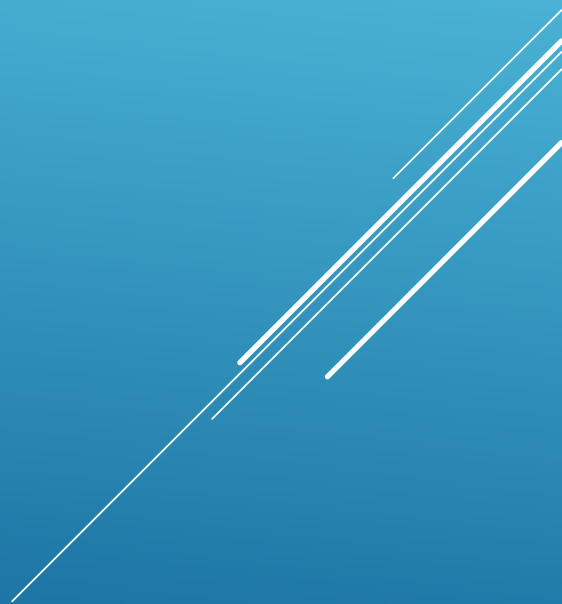
- Study data:
 - PWC November 2014 report:

“Trends, challenges and future outlook
Capital projects and infrastructure in East
Africa, Southern Africa and West Africa”

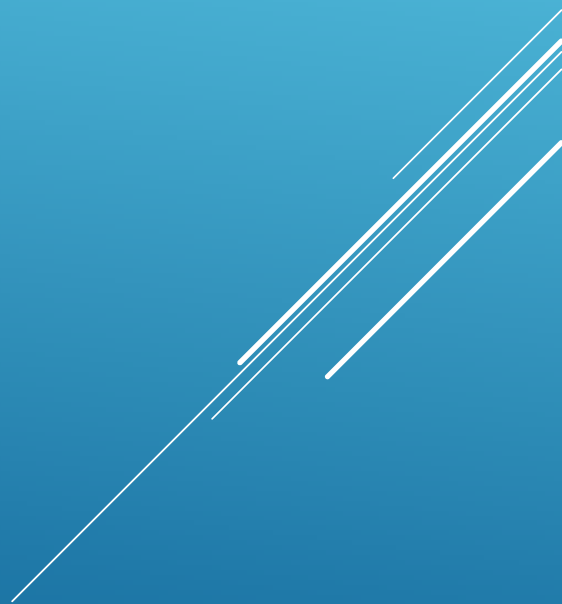
DELAY IN INFRASTRUCTURE PROJECTS:

- Study data: PWC November 2014 report:
 - Infrastructure spend in sub-Saharan Africa to reach US\$180 billion by 2025 – transport 36% and energy 30% - 2% of global infrastructure market
 - Key finding: need for better planning, procurement, project management and controls to reduce number of delays and size of cost overruns
 - 50% of respondents report delays of more than 6 months, and more than a third indicate projects went 10-50% over budget

DELAY IN INFRASTRUCTURE PROJECTS:

- It is an international problem
 - It has major costs implications on large projects
 - It has national economic and political effect
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MAIN THEME BUILD-UP:

- Introduction to "Construction Law"
 - Introduction to standard form construction contracts
 - Time for Performance, delays and penalties
 - Claims for delay in terms of FIDIC Red Book standard form of contract
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INTRODUCTION TO "CONSTRUCTION LAW"

Construction project environment:

- Parties and stakeholders in large construction projects:

Main participants:

- Employer
- Designer
- Constructor

INTRODUCTION TO "CONSTRUCTION LAW"

Construction project environment:

Other participants and stakeholders:

- Employer / Developer:
 - Financier/Treasury
 - Purchasers / Operators of facility
 - Political stakeholders
 - End users of facility
 - Local community
 - Planning and environmental agencies

INTRODUCTION TO "CONSTRUCTION LAW"

Construction project environment:

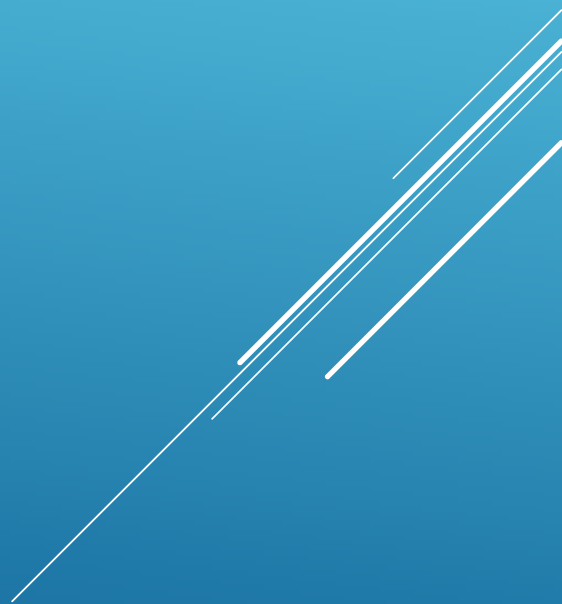
Design team:

- Geotechnical engineers
- Civil engineers
- Structural engineers
- Mechanical engineers
- Architects
- Building services engineers
- Specialist subcontractors

INTRODUCTION TO "CONSTRUCTION LAW"

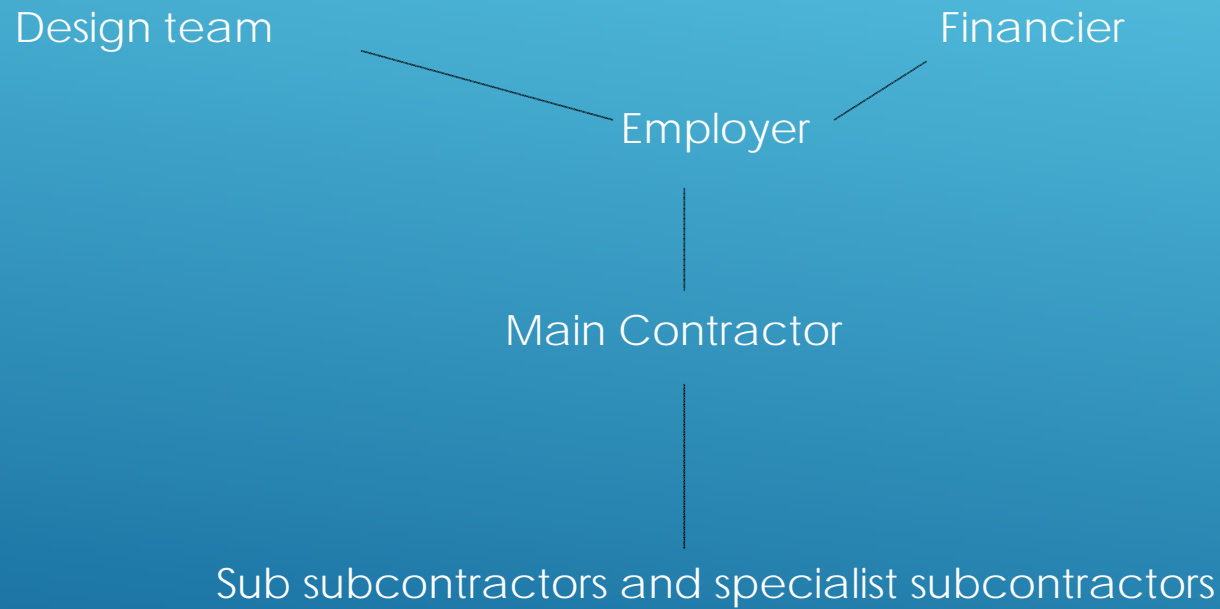
Construction project environment:

Constructor:

- Main contractor
 - Subcontractors
 - Specialist subcontractors
 - Material suppliers
 - Plant and equipment suppliers
 - Labour force / unions
 - Local communities
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INTRODUCTION TO "CONSTRUCTION LAW"

Traditional procurement:



INTRODUCTION TO “CONSTRUCTION LAW”

- Intersected areas of law?
 - Main fields:
 - Law of Contract – immediate parties to contracts: Employer – Designer; Employer-Contractor; Contractor-Subcontractor
 - Law of Tort/Delict – extra-contractual liability: responsibility for damages to 3rd party for negligent acts, eg negligent design causing collapse of structure, injuring occupants (who have no contract with designer)

INTRODUCTION TO "CONSTRUCTION LAW"

- Intersected areas of law?
 - Many other fields are intersected, eg:
 - Law of property: - construction projects are inextricably tied to land and become part of it; right to enter upon property, to possess site; rights of security established through improvement of site

INTRODUCTION TO “CONSTRUCTION LAW”

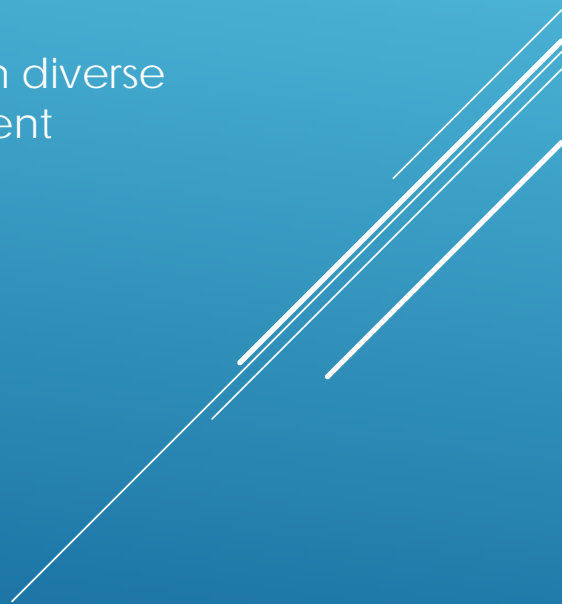
- Intersected areas of law?
 - Many other fields are intersected, eg:
 - Law of Agency – relationship of Engineer to Employer
 - Insurance and banking law – performance bonds and payment guarantees
 - Law of Insolvency
 - Corporate and tax law relating to structure of entities and project transactions

INTRODUCTION TO "CONSTRUCTION LAW"


- Intersected areas of law?
 - Many other fields are intersected, eg:
 - Administrative and constitutional law, particularly for financing and procurement
 - Planning and land use legislation
 - Health and Safety, national standards and labour legislation

INTRODUCTION TO "CONSTRUCTION LAW"

Conclusion:

- Not a distinct jurisprudential branch of law, such as eg. contract or tort law
 - A specialised area of practice which draws legal principles from diverse areas of law for application in a construction specific environment
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INTRODUCTION TO STANDARD FORM CONTRACTS

- There are a number of suites of standard form construction contracts available for infrastructure projects
 - These are published by various national and international organisations or professional bodies
 - Some standard forms are more popular than others
 - A working knowledge of the most prevalent standard forms is essential in construction law practice
 - The World Bank is partial to the FIDIC suite of standard forms, and these are encountered often in Africa
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INTRODUCTION TO STANDARD FORM CONTRACTS

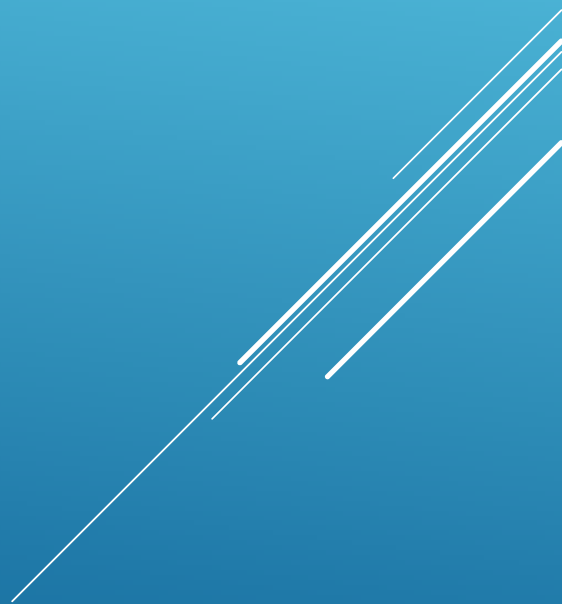
Why have a contract at all?

- TCC Judge Bowsher QC in VHE Construction Ltd v A McAlpine [1997] EWHC Technology 370: *" the most frequent issue raised in the construction industry...*

" Was there a contract between the parties, and if so, what were its terms?"

INTRODUCTION TO STANDARD FORM CONTRACTS

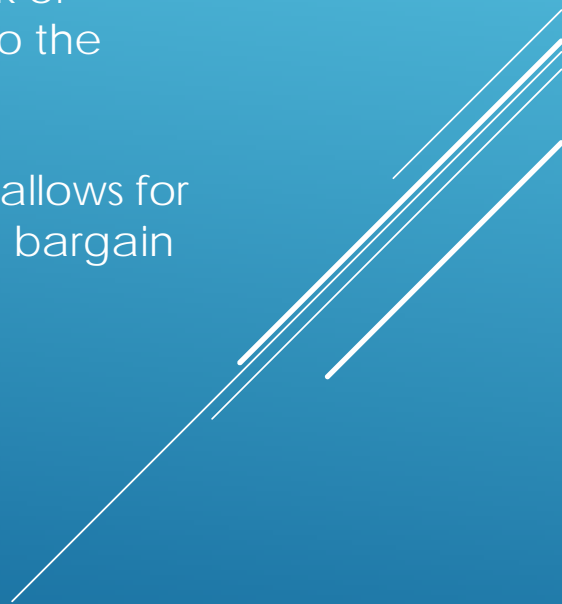
Why have a contract at all?

- Certainty as to the parties' contractual obligations is fundamental to a successful contract
 - Certainty is required in respect of:
 - The parties
 - The specific performance required
 - The price payable
 - The date by which the performance is to be complete
 - But this is not practically sufficient...
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INTRODUCTION TO STANDARD FORM CONTRACTS

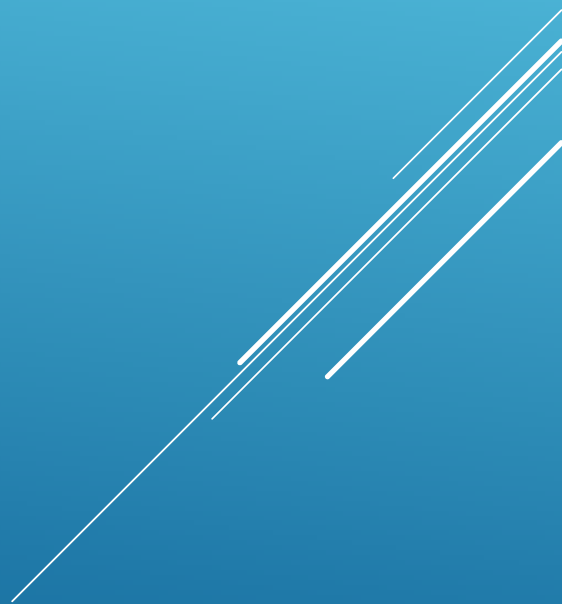
- In construction, uncertainty is the only certainty
- Eg:
 - Unexpected design changes leading to variations
 - Unexpected adverse geological conditions
 - Unexpected civil unrest
 - Force majeure
 - Unexpected delays in procurement of materials / goods/ plant/ labour
 - Exceptionally adverse weather conditions
 - National power shortages
 - A substantial unexpected change in quantities of materials required

INTRODUCTION TO STANDARD FORM CONTRACTS

- These events can destroy contractual consensus, putting the entire project at risk
 - Appropriate contractual mechanisms can cater equitably for the risk of unforeseen events, thereby preserving not only the contract, but also the underlying bargain
 - Eg incorporation of rates and prices, rather than using a fixed price, allows for valuation of additional work in accordance with the parties' original bargain
- 

INTRODUCTION TO STANDARD FORM CONTRACTS

- Purpose:

- To provide for uncertainty which would otherwise destroy consensus.
 - To provide balanced and equitable risk distribution regime
 - To amend or supplement the normal common law rules
- 

INTRODUCTION TO STANDARD FORM CONTRACTS

A word of warning:

- Amendments to standard form contracts are very common
- Each suite of standard forms have an underlying philosophy - cutting and pasting clauses from standard form with different philosophy can have disastrous consequences
- International contractors price their tenders carefully in accordance with the risk distribution of the contract – a seemingly clever amendment which shifts risk better managed by the employer to the contractor can be false economy

INTRODUCTION TO STANDARD FORM CONTRACTS

- Typically distinguish between:
 - Building contracts – eg JCT, JBCC
 - Civil engineering/ infrastructure contracts – eg NEC3, FIDIC, new ICC, PPC 2000 contracts
- Building/ civil engineering risks differ

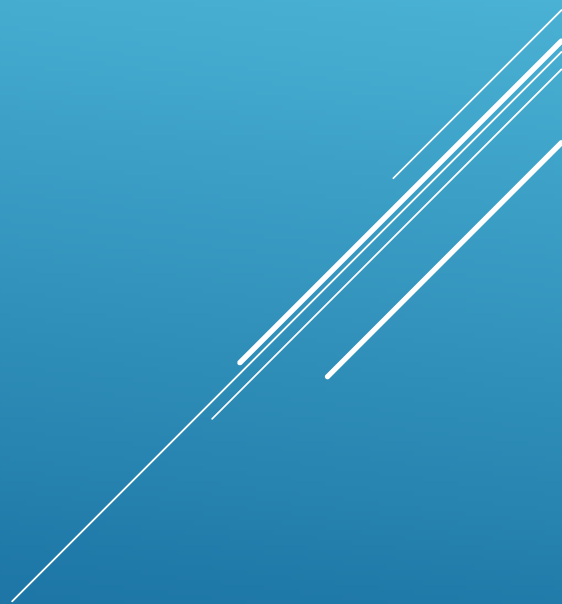
INTRODUCTION TO STANDARD FORM CONTRACTS

Traditional standard forms:

- 3 dramatis personae:
 - 1) Employer
 - 2) Contractor
 - 3) Engineer / Architect

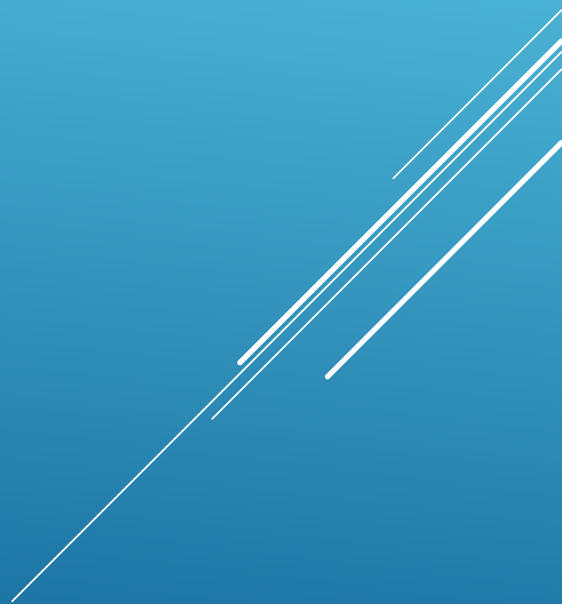
INTRODUCTION TO STANDARD FORM CONTRACTS

Role of engineer/architect:

- Usually designer of facility
 - Agent of employer
 - Contract administrator
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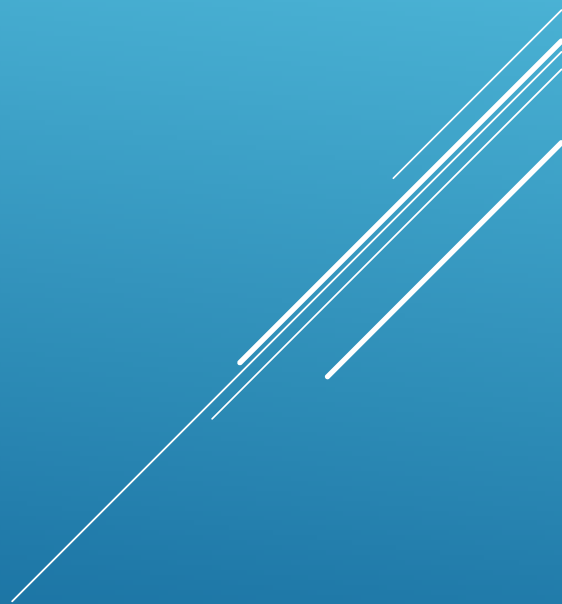
INTRODUCTION TO STANDARD FORM CONTRACTS

Engineer/Architect as contract administrator:

- 1) Instructions to contractor, including variations in respect of manner in which project to be executed
 - 2) Assessment of quality and progress of the work
 - 3) Interim and final payment certificates
 - 4) Valuation of claims for additional compensation and delay
 - 5) First tier decision maker – subject to reconsideration by adjudicator, arbitrator and/or Courts of law.
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INTRODUCTION TO STANDARD FORM CONTRACTS

Time for Completion and delay:

- Employer wants facility completed by a certain stipulated date.
 - Penalties are usually stipulated for every day contractor's performance is overdue.
- 

INTRODUCTION TO STANDARD FORM CONTRACTS

Time for Completion and delay:

- Contractor may be delayed for various reasons:
 - 1) employer/engineer's risk event – eg failure to provide access to site
 - 2) contractor's risk event – eg contractor's failure to timeously place an order for a time critical component
 - 3) Event in respect of which neither contractor or employer is at fault

TIME FOR PERFORMANCE AND DELAY

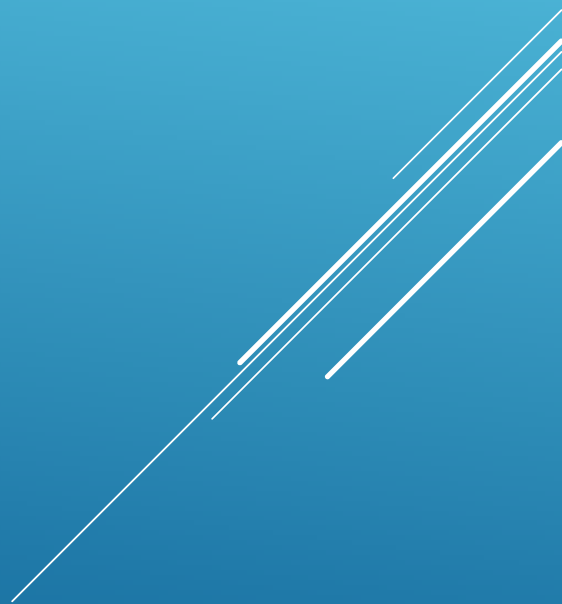
General common law principles applying to delay:

1) Reasonable time :

- Where the contract has no express provision as to time for completion of works, it is implied that contractor is obliged and entitled to complete works within a reasonable time;
- In context of large projects very difficult to quantify in practice
- When we say “time is at large” – it means contractor has to perform within a reasonable time, ie. not by a specific date.
- Impossible to couple penalties to “reasonable time” – penalties have to be coupled to specific date.

TIME FOR PERFORMANCE AND DELAY

2) Completion by specific date:

- Basic clause in standard form contracts
 - Invariably contract coupled to penalties for late completion
 - What happens in the case of delay?
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TIME FOR PERFORMANCE

3) If delay due to Employer's fault/ risk?

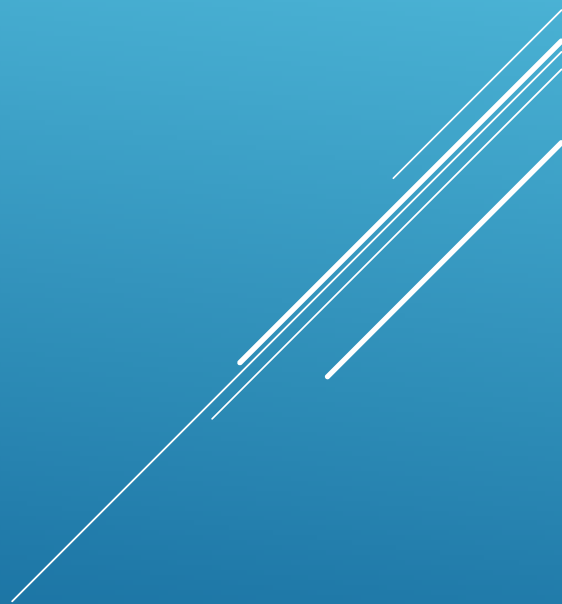
- If contract does not provide for Extension of Time ("EOT") clause:
 - Time at large – completion within reasonable time
 - No penalties claimable
- EOT clause:
 - Attempts to preserve Employer's right to claim penalties by preventing time from becoming "at large"
 - Affords the contractor an extension of the time for completion commensurate to delay caused by Employer
 - Usually also affords monetary compensation for period of Employer's risk delay

TIME FOR PERFORMANCE

4) If delay is due to contractor's fault/risk?

- Contractor's problem:
 - No EOT
 - No compensation
 - No relief from penalties

TIME FOR PERFORMANCE

- 5) What if neither Contractor nor Employer responsible for delay:
 - Usually, in terms of standard forms with EOT:
 - EOT, but no additional compensation
 - EOT provides relief from penalties for period of delay
 - But where no EOT – usually contractor's risk
- 

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

The FIDIC “Rainbow Suite” suite of standard forms:

- Published by the International Federation of Consulting Engineers (FIDIC)
 - FIDIC is an international standards organisation for the engineering and construction industry
 - Enjoys World Bank support and is used in Africa
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CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

- The FIDIC Rainbow Suite 1999 Edition has several main standard forms:

- The Red Book:

for building and engineering works designed by the Employer

- The Yellow Book:

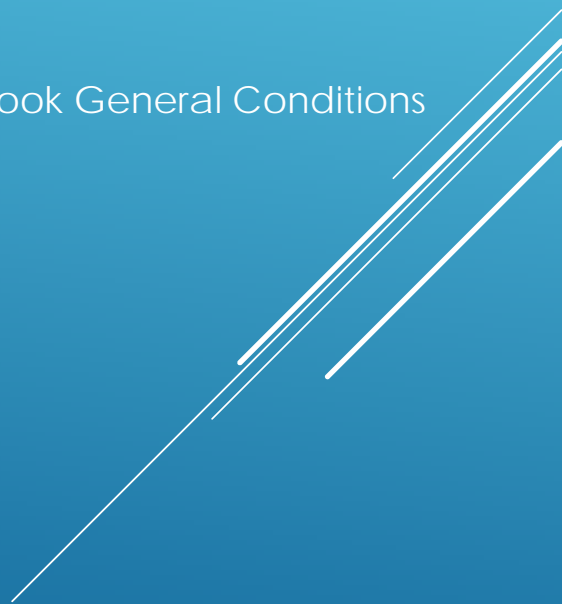
for electrical and mechanical plant, and for building and engineering works, designed by the Contractor

- The Silver Book:

for EPC/Turnkey Projects

- Also has several other forms eg "Green Book": short form of contract, Red Book subcontract etc

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

- Why the Red Book?
 - a good example of a traditional infrastructure standard form contract
 - general principles governing delay claims in terms of FIDIC Red Book General Conditions are similar across many standard forms
- 

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

Basic scheme of Red Book:

- The parties: employer and contractor
- Engineer appointed as contract administrator on behalf of employer

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

Time for performance:

- Contractor to commence works with 42 days of Letter of Acceptance (clause 8.1)
- Contractor to complete the whole of the works within a stipulated Time for Completion for the Works
- Contractor to submit detailed time programme to Engineer – for project management purposes
- Contractor liable for agreed sum of delay damages to Employer if fails to complete within the Time for Completion
- Clause 8.4: Contractor in certain circumstances entitled to an extension of Time for Completion

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

Extension of time for completion:

- Awarded if contractor delayed as a result of:
 - 1) a variation
 - 2) exceptionally adverse climatic conditions
 - 3) unforeseeable shortages in availability of personnel or goods caused by epidemic or governmental actions
 - 4) any delay caused by or attributable to the Employer, Employers' personnel or Employers' other contractors

or

- 5) "a cause of delay giving an entitlement to extension of time under a sub-clause of these conditions"

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

Provided that Contractor complies with clause 20.1 notification:

- Contractor must give notice to Engineer in terms of clause 20.1 no later than 28 days after contractor became aware / or should have become aware of event or circumstance
- Failure to notify in time:
 - "the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment and the Employer shall be discharged from all liability in connection with the claim".

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

Engineer agrees or determines:

(i) The extension (if any) of the Time for Completion (before or after its expiry)

and/or

(ii) The additional payment (if any) to which the Contractor is entitled under the Contract

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

Multi-tiered process:

- Engineer agrees or determines EOT and compensation
- If dispute arises in respect of Engineers determination, then may be referred to Dispute Adjudication Board (clause 20.4)
- If dissatisfaction with DAB decision, amicable settlement period (clause 20.5)
- Unless settled, international arbitration in terms of clause 20.6
- Arbitrators have full unfettered power to open up review and revise any determination or certificate issued by Engineer or DAB

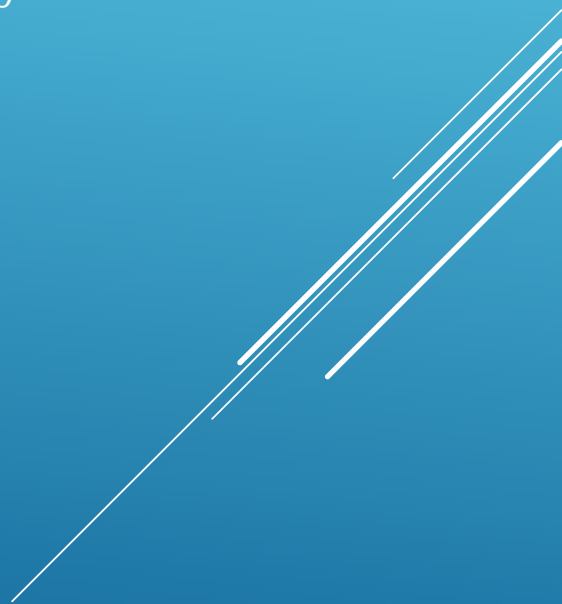
CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

How much time and money is to be awarded to the Contractor?

- The million dollar question
- It would seem obvious that the contractor should be awarded an EOT commensurate to the delay attributable to the Employer's risk event
- But issues of causality, concurrency and the general approach to analysis of the delay results in significant complexity
- Dr Tony Farrow will deal with this in his presentation.

CLAIMS FOR DELAY IN TERMS OF FIDIC RED BOOK

Concluding comments:

- Delay claims on international construction projects significantly impact on the capital cost of the project
 - An international problem, but also very prevalent in Africa
 - It is important for construction law knowledge in Africa to be developed to ensure efficient contractual mechanisms are in place to deal with delays and delay claims on African construction projects.
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SCLAFRICA INTERNATIONAL CONSTRUCTION LAW CONFERENCE



27 & 28 OCTOBER 2016, CAPE TOWN

KEYNOTE SPEAKER: JUDGE KEES VAN DIJKHORST

With Robert Gaitskell QC (Keating Chambers, London); Abdul Jinadu (Keating Chambers, London); Dr John Fletcher (RICS); Julian Bailey (White & Case); Rob Morson (Bowman Gilfillan); Richard Laudy (Pinsent Mason); Chris Ennis (Time Quantum Expert Forensics); Adv. Johan Beyers (Cape Town Bar); Uwe Pottlitz (CEO JBCC); Nikita Lalla (ENS); Damian James (James NW Ltd); Luca Sommeriva (Gattai, Minoli, Agostinelli & Partners, London & Milan) & more to be announced.

VENUE:
*Radisson Blue Hotel and Conference
Centre, V&A Waterfront, Cape Town*

CONTACT:
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info@sclaftrica.org | www.sclaftrica.org*

On 27 & 28 October 2016 thought leaders in the African and International Construction Law field will meet in Cape Town for the 2nd International Construction Law Conference proudly presented by the Society of Construction Law for Africa (SCLAfrica).

The conference aims to cover topical issues in Construction Law through presentations by International and African experts in this field providing an interactive debate structure where delegates will have the opportunity to share their views and experiences with their peers.

This conference, which is aimed at all participants in the construction industry, including employers, contractors, engineers, quantity surveyors, architects, lawyers, project managers, claims consultants and experts, also presents the perfect opportunity to meet your peers in the construction industry.

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