

**HOW EFFECTIVE ARE STANDARD
FORM CONSTRUCTION CONTRACTS
IN DEALING WITH CONTRACT
VARIATIONS AND CONTRACTORS'
CLAIMS**

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HOW EFFECTIVE ARE STANDARD FORM CONSTRUCTION CONTRACTS IN DEALING WITH CONTRACT VARIATIONS AND CONTRACTORS' CLAIMS

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Declaration by student

I, the undersigned, hereby confirm that the attached treatise is my own work and that any sources are adequately acknowledged in the text and listed in the bibliography.

Signature of acceptance and
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Abstract

Title of treatise	:	How effective are standard form construction contracts in dealing with contract variations and contractor's claims
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Construction disputes between clients and contractors usually arise when contractors claim additional expenses caused by delays, variation orders, and extra work, among others.

The objective of this treatise is to investigate how effective the four accepted standard form construction contracts in the South African construction industry (i.e. JBCC PBA; NEC 1, 2/3; GCC and FIDIC) are in dealing with contract variations and contractor's claims by comparing the type of provisions they provide the contracting parties, supplemented with information from guidance textbooks dealing with the various standard form construction contracts and textbooks on construction claims.

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Chapter One

Introduction to the Main Problem

1.1 Brief overview

Although designers and project managers in the construction industry attempt to fully plan and define the desired final product as per the client's requirements at the start of a contract, in reality, due to the continuous changing environment in which construction takes place as well as the unique nature of construction contracts, unanticipated variations and claims inevitably form part of the construction process. Construction contracts differ from classical single exchange transaction contracts because they are usually conducted over a long time as opposed to instantaneous, once-off contracts. This often leads to problems as it is impossible to accurately foresee or calculate the impact of external forces on the construction process over a long time. Within the context of a construction contract, the term "variation" is used to describe these changes brought about by external forces or changes demanded by the Employer. It means an alteration, whether by extra or omission, to the physical work content specified in the contract but which the contractor is required to perform (Othman, Ying, et al, 2005). Apart from variations, circumstances may arise during the construction period as a result of adverse weather conditions or default by the Employer or his agents, among others, which will lead to a claim by the main contractor for extension of time and/or adjustment to the contract value. Consequently variations and claims have been described as the cause for disputes and/or conflicts (Othman, Ying, et al, 2005).

According to MDA Consulting, a contract has to define the objectives of the parties, qualified by constraints. The contract does so by defining what each party has to do, and making provision for a range of “what if” scenarios. The emphasis must be on using the contract to reduce uncertainty or provide mechanisms for action when particular uncertainties eventuate into reality (MDA Consulting: 2008). Such mechanisms could thus be easier provided for when the contracting parties are aware of how standard form contracts prescribe to deal with variations arising from uncertainties.

1.2 The Main Problem

In the South African construction industry projects are usually procured using standard form construction contracts such as the JBCC, NEC (1, 2 or 3), GCC or FIDIC contracts, all of which have been designed to specifically cater for the special circumstances relating to construction. Although the roots of these standard form contracts in modern commercial practices can be traced back to contract law they do not always manage to specifically cover all kinds of possible claims and variations which may arise during the construction process. This often leads to large cost overruns and time wasted on lengthy dispute resolution procedures in order to settle such claims. The main problem can be stated as follows: how effective are standard form construction contracts in dealing with contract variations and contractors’ claims through the provisions they provide?

1.3 The Sub Problems

The following sub problems will be investigated in order to come to a final conclusion:

1. What are the most likely causes and sources of variation orders and claims on construction projects?
2. What are the communication and claim notification procedures prescribed by each of the Standard form construction contracts and how do they impact on the contractor?
3. How are contractors' claims prepared and submitted in terms of the standard form construction contracts and how are such claims assessed and determined?
4. How do Standard form contracts deal with the rejection of claims and what relief options do they offer the contractor?

1.4 The Hypothesis

Sub problem 1: The most common causes of variation orders from the Employer include a) a change in design due to omission or addition to scope by the Employer; b) change in specification due to lack of information at tender procurement stage; c) change in specification due to unavailability of materials at construction stage.

Sub problem 2: Each standard form contract has clauses that specify the contractually accepted means of communication between the Project Managers and the Contractor which may include posted, faxed, emailed or hand delivered signed letters; meeting minutes and verbal confirmations. Furthermore it can be expected that the contracts will specify a procedure to be followed when notifying claims. It is expected that Contractors would generally be against short time periods within which they are permitted to make claims.

Sub problem 3: As far as the valuation, acceptance or rejection of claims is concerned, Project Managers will have to follow a specified procedure to determine the circumstantial facts relating to the claim. The Contractor will have to give a break-down of new claimed rates for additional work or proof of losses suffered. The contracts will stipulate a time period in which the Project Manager will have to respond to a claim, relating to its acceptance or rejection. It might stipulate that no response by the Project Manager will constitute a deemed rejection.

Sub problem 4: The contract will refer the rejection of a claim to an agreed or specified form of alternative dispute resolution such as mediation, arbitration or adjudication or in extreme cases litigation.

1.5 Delimitations

The research conducted in this treatise will be limited to the following standard construction contracts:

- Joint Building Contracts Committee Inc (JBCC) Principal Building Agreement 5th edition, July 2007
- *Federation Internationale des Ingenieurs-Conseils* (FIDIC) Conditions of Contract for Construction for Building and Engineering works designed by the Employer, 1st edition, 1999
- New Engineering Contract – the engineering and construction contract (ECC), 2nd edition November 1995 and 3rd edition 2005.
- General Conditions of Contract for construction works (GCC), 1st edition, 2004

Furthermore, the research will mainly focus on the application of these construction contracts in the civil engineering industry as applied in the South African context.

1.6 Definitions of terms

Construction Contract:	The Contract Agreement, the Letter of Acceptance, the Letter of Tender, the selected Standard Contract Conditions, any Special conditions, the Specification, the Drawings and Schedules and the further documents (if any) which are listed in the Contract Agreement or the Letter of Acceptance.
Party/ Parties:	The Employer and/or the Contractor.
Employer:	The Party contracting with the Contractor to do specialist work on site prior to practical completion of the construction project.
Contractor:	The Party contracting with the Employer for the execution of the works as named in the Contract Agreement.
Subcontractor:	Any person named in the Contract Agreement as a Subcontractor or any person appointed as a Subcontractor, for a part of the works, and the legal successors in title to each of these persons.

Site:	The land or place on, over, under, in or through which the works is to be executed as defined in the Contract Agreement.
Works:	The works described and detailed in the Contract Agreement, ordered in contract instructions and including the Contractor's temporary works.
Contract Instruction/ Variation:	A written instruction which constitutes a change to the Works and may include drawings and other construction information, signed and issued by or under the authority of the Employer's Agent to the Contractor.
Contract administrator:	The natural or juristic person or partnership named in the contract data by the Employer to and notified to the Contractor to act as the Employer's representative. Depending on the standard form contract being used, this person is also known as the Engineer, Project Manager or Principal Agent. These terms will be used interchangeably throughout this treatise.

1.7 Assumptions

No assumptions have been made while compiling this treatise.

1.8 Importance of the Study

By understanding the circumstances out of which variations arise and how the standard contracts prescribe to deal with them, this study has the potential to give some insight into how to prevent possible future disputes arising from variations. By being aware of what shortfalls in the provisions of standard contracts could pose a problem in the later contract administration procedure, the parties could introduce additional provisions from the start of the contract in their agreement. Also, the proper implementation, down to operational level, of “*early warning*” type clauses to prevent claims and disputes before they happen. This study can thus provide valuable information to Contractors, Employers and other professional consultants in the construction industry who wish to complete their projects effectively and without unnecessary disputes that could have been avoided.

1.9 Research Methodology

The treatise is based on information obtained from the following sources:

- 1.) various textbooks on construction contract law;
- 2.) the four main standard form construction contracts (JBCC, NEC(2/3), GCC and FIDIC) used in South Africa;
- 3.) scientific journals obtained from the UP library on the subject; and
- 4.) electronic media such as the latest articles published on the internet on the subject

Chapter Two

Main causes of variations and claims on construction projects

2.1 Introduction

Before one establishes the causes of construction claims and variation orders, it would be helpful to understand what exactly is meant by these two terms. A definition of the term “claim” as used and interpreted in the construction industry is given by Powell-Smith et al (1988) as

“...any application by the contractor for payment which arises other than under the ordinary contract payment provisions...a claim includes an application for an ex gratia payment...the word is also used to describe a contractor’s application for extension of time under a building contract...claims for loss and expense are regulated provisions for the payment of damages.”

Powell-Smith et al (1988) then continues to explain that there exist four types of claims that can be made by contractors against employers. These four types include:

1. **Contractual claims:** claims that arise out of the express provisions of the particular construction contract between the contractor and employer.
2. **Common law claims:** claims for damages for breach of contract at common law and/or legally enforceable claims for breach of some other aspect of the law, e.g. breach of copy right. Such claims for breach may avoid some of the restrictions under the contract, such as giving notices and so on.

3. **Quantum meruit claims:** ('as much as he has earned') provides remedy for a person who has carried out work where no price has been agreed or where the original contract has been replaced by a new one and payment is claimed for work done under the substituted contract. The contractor may seek to recover a 'reasonable sum' for work executed by him.
4. **Ex gratia claims:** ('out of kindness') relates to claims that the employer is under no legal obligation to meet. Also called a 'sympathetic' claim, these claims are often put forward by contractors but are seldom met unless some benefit may accrue to the employer as a result. For example where an employer agrees to meet an *ex gratia* claim to save a contractor from insolvency because the cost of employing another contractor to finish the work will be greater than the *ex gratia* claim.

Furthermore, claims can also be distinguished from what is being claimed and who is making the claim. As to the 'what', claims can be made for an extension of time to complete the contract as well as for additional compensation. The parties that make the claims can either be the contractor that claims from the employer for extension of time and/or additional compensation (which is usually the case) or the employer that claims from the contractor for liquidated damages. For the purpose of this study the main focus will be on claims made by the contractor to the employer.

A comprehensive definition for 'variations' is already given in chapter one under the heading "Definitions of Terms" and should need no further explanation.

2.2 Causes of variations

Now that it is clear what exactly is meant by these terms, one can consider the causes of their emergence during the execution of construction contracts.

Before starting off with the reasons for variations, it is necessary to understand how it is possible for variations to be made to a contract in the first place.

Finsen (2005) explains that one should keep in mind that construction contracts differ from almost any other form of contract in one significant respect: that after the parties have reached agreement about all the aspects of the contract, one of them, the employer, has the unilateral right to vary the extent and nature of the performance to be rendered by the contractor. This is not a common law right but rather a right created by the agreement. This special right therefore allows the employer to vary or omit the work described in the original agreement or to order additional work to be added to the original contract. As this right forms part of the agreement, the contractor cannot refuse to carry out the varied obligation, and his only remedies would be an adjustment to the contract price, and, in appropriate circumstances, an extension of time in which to complete the contract.

When considering the causes of variations then, different authors have similar views as to why variations occur. Powell-Smith et al (1988) state that “*variations are a fact of life and inevitable in even the best-planned contracts because, in a matter as complicated as the construction of a building, it is virtually impossible for the building owner and the design team to foresee every eventuality.*”

Murdoch et al (1992) concurs with this when he says changes are frequently made to projects before they are completed because construction projects are so complex. He goes further to say that it is rare for design to be completely detailed at the time of tender and this has the result that changes have to be made in order simply to make the building work. Davison (2003) further exaggerates on the problem of incomplete designs which result in unnecessary

variations relating to omissions in the documentation and/or contradictions between contract documents. He is of the opinion that such problems often result from inadequate or badly managed pre-contract phases where the preparation of design and contract documentation is compressed in too short a time frame. He continues to agree that pressures in pre-contract periods are understandable due to the fact that the client regularly views the construction process as a means to his end and is thus anxious not to spend either more time or expense on it than he absolutely has to.

Causes of variations are however not always the fault of the employer who cannot make up his mind or who insisted to continue construction with incomplete designs to save time and expense. Variations during construction can also be caused by advances made in technology. For example, as explained in Powell-Smith et al (1988) on hospital projects, for instance, medical science advances so rapidly that it is often necessary to make major design changes during the course of construction to accommodate new techniques required by the end users. Furthermore, according to Finsen (2005), variations can also be a result of unavailability of specified materials or goods. If the contractor is unable to obtain specified materials or goods at any time, this would render it impossible for the contractor to complete the contract and would release him from his contractual obligations. In order to thus preserve the contract in such case, the employer or his agent should intervene by issuing a variation to substitute the unavailable materials or goods with others in ready supply.

2.3 Causes of claims made by the contractor to the employer

As already mentioned in the introduction to this chapter, there exist four types of construction contract claims. Greater consideration will now be given to three of these types of claims, namely contractual claims; common law claims and

quantum meruit claims. No further consideration will be given to *ex gratia* claims since they raise no legal issues:

2.3.1 Contractual Claims

In order to assist contracting parties in dealing with claims that might arise during the execution of the construction contract, most standard form construction contracts contain provisions under which the contractor can recover compensation from the employer for various losses suffered where the project is prolonged or disrupted by certain specified causes. The Principal Building Agreement (PBA) (2005), which forms part of the JBCC contract documents, for example sets out in detail in clause 29.1-3 circumstances, which if they cause a delay to practical completion, would entitle the contractor to a revision of the date of practical completion and an adjustment to the contract value where such delay is due to the employer exercising his rights in terms of the agreement or by default of the employer. The principle thus followed by this standard contract relates that for circumstances caused by neither the employer nor the contractor and for which neither is to blame, would not entitle the contractor to an adjustment to the contract value but only an extension of time.

Some circumstances that provide for extension of time to the contractor where there is no fault by either party, as laid down in the PBA (2005) include:

a) Inclement Weather Conditions

The three other standard form contracts mentioned in the first chapter (i.e. NEC, GCC and FIDIC) also entitle the contractor to additional time when he is delayed by exceptionally inclement weather. This is also a reason under common law to excuse late completion. Finsen (2005) explains that under standard forms of agreement, it is expected of the contractor to make allowance for the normal vagaries of weather that can reasonably be expected, and to

accept the risk of any delays that may result. The problem however arises when having to define and interpret the term 'exceptionally', which in the past often lead to disputes. Finsen (2005) addresses this problem when he explains that although parties to a contract sometimes insert terms in the agreement in an attempt to deal with the problem, such as a stipulation that any rainfall in excess of x mm per month, or lasting more than y days would constitute a claim for extension of time, this does not solve the problem. This is because rain that falls during a period when excavations or site leveling or consolidation is being executed could cause severe delays, while rain falling while the building is weatherproof and internal fitting out is proceeding, might have very little or no effect whatsoever on the date of practical completion

b) Inability to obtain materials and goods

For the contractor to be able to rely on this circumstance, he is required to have taken all practical steps to avoid or reduce such delay. This reiterates the contractor's common law obligation to mitigate his damages. The contractor is thus responsible for placing orders of materials, especially when it is common knowledge that certain materials are in short supply, in good time. Finsen (2005) explains that in this context, 'inability' should be interpreted as inability to obtain the materials and goods at such a time as it would be possible for the contractor to complete the works by due date.

c) *Vis major*, civil commotion, etc and making good physical loss or repairing damage to the works

Although clause 8.1 of the PBA (2005) states that the contractor shall take full responsibility for the works from the date on which possession of the site is given to him, he shall not be liable for the cost of making good physical loss and repairing damage to the works where this resulted from circumstances such as:

- War, invasion and hostile acts of foreign enemies;
- Rebellion, insurrection, revolution, terrorism, military or usurped power or civil war
- Civil commotion, riot, strike, lockout or disorder by persons other than the contractor's personnel, employees or his subcontractors
- Confiscation, nationalization or requisition by any public or local authority
- Sonic shock waves caused by aircraft or other aerial devices and ionizing radiation and contamination
- An act or omission of the employer, his servant's or agents or by any direct contractor appointed by him.

The above mentioned list of circumstances causing delay is by no means exhaustive, but cover the most common events that must be unforeseeable and beyond the control of the contractor. The principle is that while the contractor is under an obligation to make good any physical loss and to repair damage to the works during the construction period, he could not have foreseen the circumstances nor be blamed nor penalized for it, and should therefore be entitled to additional time and financial compensation if he is not at risk for the loss or damage.

Some circumstances that provide for extension of time to the contractor where the employer is at fault, as laid down by Stokes and Finuf (1986) include:

a) Delay in providing access to the site

Failure of the employer to give possession of the site by the date specified in the contract or as agreed between the parties, once the contractor has

performed what was expected of him (e.g. submitting his securities and priced bill of quantities) would constitute a breach by the employer, causing delay that would entitle the contractor to additional time.

b) Delay caused by the actions of the employer's separate contractors

Under the JBCC such separate contractors are referred to as Nominated or Selected Subcontractors. Finsen (2005) explains that the employer has certain obligations towards nominated/selected subcontractors under their agreement, such as issuing payment certificates at regular intervals and paying them. Failure by the employer or his agent to carry out these obligations entitles the subcontractor to suspend work. Suspension of the subcontractor's work will most likely cause delay to practical completion, and since the cause will have been due to a default on the employer's part, the contractor will be entitled to additional time.

c) Errors in drawings and specifications issued by the employer

If the contractor were issued with incorrect specifications and had no way of knowing that the specified information was in fact wrong, and proceeded with its construction and installation, he cannot be held liable and should be granted extra time and cost, if necessary to rectify the wrong design. A common example of this is incorrect bending schedules issued by the design team and then used by the contractor to order the reinforcing steel from. Any redundant steel resulting from the incorrect bending schedule should be for the employer's account.

d) Delay in inspection or granting approvals

Potgieter (2009) explains for work executed under the PBA the contractor must inform the employer's Principal Agent in advance if approvals of work are required to continue with construction work. Work that usually requires approval includes excavations, shuttering and reinforcing, among others. The Principal agent must ensure that all inspections take place in time and that approvals are given to the contractor without causing a delay in construction. The contractor will be entitled to apply for extension of time if the delay in approval of work done had an effect on the contract as a whole.

e) Failure to make payment when required

Under the agreement the employer is obliged to issue payment certificates at regular intervals and make payment to the contractor when those certificates become due. (Different standard contracts stipulate different payment terms, e.g. JBCC PBA stipulates payment to be made within 7 days of issuing an interim payment certificate, but under FIDIC the employer only has to pay the contractor within 56 days of receiving his statement and supporting documents) Thus, under the PBA provisions the contractor is entitled to suspend execution of the works until payment has been received. In this case the contractor won't claim for extension of time but rather for default interest and standing time.

f) Delay in issuing construction information

As the contractor's progress is directly linked to the timeously issuing of information of scheduled work, any delay with regard to information will have a huge impact on the contractor's progress. Late information will constitute grounds for a claim for extension of time and additional cost under all four

standard contracts as this will be a fault on the Employer's side if design responsibility does not lie with the contractor.

2.3.2 Common law claims

As mentioned in the above text, delays and disruptions caused as a result of fault on the part of the employer often also permit the contractor to maintain an action for breach of contract. Murdoch and Hughes (1992) therefore explains where this is the case, the contractor has a free choice as to which remedy to pursue, unless the contract itself clearly provides otherwise. Practical considerations will often lead the contractor to rather favour making a claim under the contract. The reason for this is because a claim under the contract can be made as soon as the relevant event occurs and the loss is suffered whereas a contractor's action for breach of contract, at least where it falls within the scope of an arbitration clause, will often have to wait until practical completion of the works is achieved before proceedings can be commenced. Another reason why the contractor would rather opt for a contractual claim is because it is likely to result in much earlier payment. Earlier payment is possible because claims are normally decided by the contract administrator and once he has made his award, this will result in an adjustment of the contract value which will be reflected in the next interim payment certificate. In contrast, it is only too obvious that the time necessary to secure and enforce a court judgment or an arbitrator's award by far exceeds that of a contractual claim award.

2.3.3 *Quantum meruit* claims

As stated by Murdoch and Hughes (1992), the most likely situations in which *quantum meruit* claims arise in the construction context includes:

- a) Where work is requested but no price is agreed, such as when a letter of intent is issued;
- b) Where a price fixing clause in a contract fails to operate;
- c) Where variations (as discussed earlier) in fact go beyond the scope of the contract altogether or;
- d) Where the contract is declared 'void'.

In assessing the 'reasonable sum' in a *quantum meruit* claim, Murdoch and Hughes (1992) states that the court is likely to consider both the value of the employer of the work done and the cost to the contractor in doing it.

2.4 Conclusion

In conclusion, the most frequent causes of variations to construction contracts include (a) incomplete design documentation at tender stage; (b) advances made in technology that dictates changes to be made to the original design during construction and (c) complete unavailability of specified construction materials or goods.

There exist 4 types of claims that the contractor can make to the employer, namely contractual claims; common law claims; *quantum meruit* claims and *ex gratia* claims. The major causes for contractual claims which relate to circumstances where there is no fault by either contracting party include:

- a) Inclement weather conditions
- b) Inability to obtain materials and goods
- c) *Vis major*, civil commotion, etc and making good physical loss or repairing damage to the works

The major causes for contractual claims which relate to circumstances where the fault is on the part of the employer include:

- a) Delay in providing access to the site
- b) Delay caused by the actions of the employer's separate contractors
- c) Errors in drawings and specifications issued by the employer
- d) Delay in inspection or granting approvals
- e) Failure to make payment when required
- f) Delay in issuing construction information
- g)

2.5 Testing of Hypothesis

The hypothesis stated in chapter one stated:

"The most common causes of variation orders from the Employer include a) a change in design due to omission or addition to scope by the Employer; b) change in specification due to lack of information at tender procurement stage; c) change in specification due to unavailability of materials at construction stage."

In testing this hypothesis, it can be said that the hypothesis was partially correct as it only addressed the causes for variations to the contract and failed to mention causes for contractor's claims. The causes that were however mentioned for variations very closely related to what have been said above. Except for mentioning variations due to technological advancements, the other points were spot on.

Chapter Three

Communication and claim notification procedures prescribed by each of the Standard form construction contracts and their impact on the contractor

3.1 Introduction

One of the things that make standard form contracts appealing to its users is the fact that it offers specific provisions or procedures that should be followed by users when executing works under the contract, specifically with regard to communication, and claim notification procedures, which facilitates the testing and evaluation of disputes which may arise from the contract. If parties thus fail to comply with such provisions and procedures, especially stipulated time limits, it could give rise to grounds on which claims may be rejected by the Employer. This chapter will firstly look at the specific communication and claim notification procedures prescribed by the four main standard form construction contracts and then continue to investigate what their impact is on the contractor bound by such provisions.

In the interest of clarification, a new term that will be introduced in this chapter, namely, “time bar provisions” has been defined by MDA Consulting (2008) as: *“A contractual mechanism aimed at promoting the prompt response to certain events, usually risks. There are two elements to a time bar provision, namely:*

- *A time bar period within which a procedure needs to be complied with;*
and

- *A sanction for non-compliance.”*

3.2 Communication and Claim Notification procedures as per:

3.2.1 The JBCC Principal Building Agreement (PBA) (2005)

Under clause 1.6 of the PBA the accepted procedures for communications and notifications are clearly stated. Clause 1.6 reads:

“1.6 Notice shall be presumed to have been duly given when:

1.6.1 Hand delivered – on the working day of deliver

1.6.2 Sent by registered post – five (5) working days after posting

1.6.3 Sent by telefax – one (1) working day after transmission

1.6.4 Sent by email – one (1) working day after transmission”

By specifying the means of transmission as well as the time period after which delivery is assumed, it eliminates any confusion relating to which date the communication or notification was received by the other party. This is vital because further on in the contract there are numerous instances where time limits only allows the contractor a specified number of days from receipt of a notification within to act, which failing to comply, will cause him to be liable for expenses and loss suffered by the Employer. An example of such clause is clause 17.4 of the PBA which relates to contract instructions by the Employer:

“17.4 Should the contractor fail to proceed with due diligence with a contract instruction the principal agent may notify the contractor to proceed within five (5) working days from receipt of such notice. Without further notice on default by the contractor, the employer may employ other parties to give effect to such contract instruction in addition to any other rights that the employer may have. The employer may recover expense and loss [33.0] resulting from such employment.”

With regard to claim notification procedure to be followed by the contractor, the PBA clearly states in clauses 29.4 and 32.6 the following:

*“29.4 Should a circumstance as listed [29.1-3] occur which could, in the opinion of the contractor, cause a delay to **practical completion** the contractor shall:*

*29.4.1 Give the **principal agent** reasonable and timeous notice of such circumstances, and*

29.4.2 Take all reasonable steps to avoid or reduce the delay

*29.4.3 Within twenty (20) **working days** from the date upon which the **contractor** became aware or ought reasonably have become aware of the potential delay notify the **principal agent** of his intention to submit a claim for a revision to the date for **practical completion** or any previous revision thereof resulting from such delay, failing which the **contractor’s** right to claim shall lapse*

32.6 The contractor shall notify the principal agent within forty (40) working days from becoming aware or from when he ought reasonably to have become aware of such expense and loss [32.5] failing which no compensation will be made.”

From the above it is stated very clearly that if the contractor fails to adhere to the stipulated time periods to notify the Principal Agent of claims for additional time or money, he forfeits his right to claim.

3.2.2 The General Conditions of Contract for Construction Works (GCC) (2004)

Clause 1.2 of the GCC deals with the communication procedures under this contract when it states:

1.2 Any written communication, including, but without limiting the generality of the word “communication”, any letter, notice, drawing, order, instruction, account, claim, determination, certification or site meeting minutes, to be delivered by the Employer or the Engineer to the Contractor, or by the Contractor to the Employer or the Engineer, shall deemed to have been duly delivered if:

- 1.2.1** Handed to the addressee or to his duly authorized agent, or
- 1.2.2** Delivered at the address of the addressee as stated in the Contract Data;
Provided that the Employer, Engineer and Contractor shall be entitled by written notice to each other to change their said addresses.

From the above it should be noted that this contract does not make provision for registered post to be recognized as an accepted form of delivery neither does it specify a time period after which delivery is assumed. This communication provision rather focuses on the types of documents that can be defined as means of communications between the parties.

The GCC also provides for claim notification procedures in clauses 48.1, 48.2 and 48.4. These clauses read as follows:

- 48.1.1** The Contractor shall, within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen or occurred, deliver to the Engineer a written claim, referring to the Clause and setting out: ...
- 48.1.2** If, by reason of the nature and circumstances of the claim, the Contractor cannot reasonably comply with all or any of the provisions of Clause 48.1.1 within the said period of 28 days, he shall:
 - 48.1.2.1** Within the said period notify the Engineer in writing of his intention to make the claim and comply with such of the requirements of Clause 48.1.1 as he reasonably can,
 - 48.1.2.2** Deliver to the Engineer in writing such additional information as the Engineer shall, in writing, reasonably require, and
 - 48.1.2.3** Comply as soon as is practicable with such of the requirements of Clause 48.1.1 as have not been complied with.
- 48.1.3** If the events or circumstances relating to the claim are of an ongoing nature, the Contractor shall, each month, deliver to the Engineer in writing updated particulars required in terms of Clauses 48.1.1 and 48.1.2 and submit his final claim within 28 days after the end of the event or circumstances.
- 48.2** If, in respect of any claim, the Contractor did not comply with the provisions of Clause 48.1 because he was not and could not have reasonably been aware of the

implications of the facts or circumstances concerned, the period of 28 days referred to in Clause 48.1 shall commence to run from the date when he should reasonably have become so aware.

- 48.4 If, in respect of any claim to which the Clause refers, the Contractor fails to comply with the 28 day notice period in Clause 48.1, as read with Clause 48.2, the Due Date for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged of all liability in connection with the claim.

From the above clause it is clear that the specific time limits are set in which the contractor must notify claims otherwise he suffers the consequence of forfeiting his claim.

3.2.3 The New Engineering Contract: ECC (NEC2 & 3) (1995, 2005)

Communication procedures are dealt with in clause 13 of the NEC2 contract and reads as follows:

Communications 13

- 13.1 Each instruction, certificate, submission proposal, record, acceptance, notification and reply which this contract requires is communicated in a form which can be read, copied and recorded. Writing is in the *language of this contract*.
- 13.2 A communication has effect when it is received at the last address notified by the recipient for receiving communications or, if none is notified, at the address of the recipient stated in the Contract Data.
- 13.6 The *Project Manager* issues his certificates to the *Employer* and the *Contractor*. The *Supervisor* issues his certificates to the *Project Manager* and the *Contractor*.

13.7 A notification which this contract requires is communicated separately from other communications.

This contract does not place emphasis on the time after which communications are deemed to have been received but rather focuses on the place of delivery of the communication.

Another special feature that the NEC contract offers which relates to notifications is known as the *Early Warning system*. Clause 16.1 of the contract states that:

16.1 The Contractor and the Project Manager give an early warning by notifying the other as soon as either becomes aware of any matter which could

- **Increase the total of the Prices,**
- **Delay completion or**
- **Impair the performance of the works in use.**

This “*early warning*” notification procedure is thus implemented in an attempt to prevent large claims (or compensation events as they are referred to under the NEC) and take corrective action on anything that might lead to the existence of compensation events.

As far as the claims notification provisions under NEC are concerned, it is interesting how this specific clauses have changed from NEC2 to NEC3, resulting in having a much greater impact on the Contractor’s ability to institute and be compensated for a claim successfully.

Firstly, Clause 61.3 and 61.4 of NEC2 merely states the following with regards to claim notification:

61.3 The Contractor notifies an event which has happened or which he expects to happen to the Project Manager as a compensation event if:

- **The Contractor believes that the event is a compensation event,**
- **It is less than two weeks since he became aware of the event and**
- **The Project Manager has not notified the event to the Contractor.**

61.4 The Prices and the Completion Date are not changed if the Project Manager decides that an event notified by the Contractor

- **Arises from fault of the Contractor,**
- **Has not happened and is not expected to happen,**
- **Has no effect upon the Actual Cost or Completion or**
- **Is not one of the compensation events stated in this contract.**

When reading this clause, one notices there is no time limit expressly stated for claim notifications, that, if not adhered to by the contractor, will result in him forfeiting his entitlement to a claim for additional time or cost. In other words there exists no time-bar clause. This is however not the case in clause 61.3 of the NEC3, which states:

61.3 The Contractor notifies the Project Manager of an event which has happened or which he expects to happen as a compensation event if

- **the Contractor believes that the event is a Compensation Event and**
- **the Project Manager has not notified the event to the Contractor**

If the Contractor does not notify a Compensation Event within eight weeks of becoming aware of the event, he is not entitled to a change in the Prices, the Completion Date or a Key Date unless the Project Manager should have notified the event to the Contractor but did not.

As is the case with the afore-mentioned standard form contracts, the NEC3 revised clause 61.3 to also set out the need for notice within a limited period

and states the consequence of failure to provide that notice: in the absence of a valid notice claims will be time barred.

3.2.4 FIDIC Conditions of Contract for Construction for Building and Engineering works designed by the Employer, 1st edition (FIDIC) (1999)

Similar to the NEC2, FIDIC also dedicates an entire clause to deal with communication procedures during contract execution.

“1.3

Communications

Wherever these Conditions provide for the giving or issuing of approvals, certificates, consents, determinations, notices and requests, these communications shall be:

- (a) in writing and delivered by hand (against receipt), sent by mail or courier, or transmitted using any of the agreed systems of electronic transmission as stated in the Appendix to Tender; and**
- (b) delivered, sent or transmitted to the address for the recipient’s communications as stated in the Appendix to Tender. However:**
 - (i) if the recipient gives notice of another address, communications shall thereafter be delivered accordingly; and**
 - (ii) if the recipient has not stated otherwise when requesting an approval or consent, it may be sent to the address from which the request was issued.**

Approvals, certificates, consents and determinations shall not be unreasonably withheld or delayed. When a certificate is issued to a Party, the certifier shall send a copy to the other Party. When a notice is issued to a Party, by the other Party or the Engineer, a copy shall be sent to the Engineer or the other Party, as the case may be.”

FIDIC thus specifically requires all communications to be reduced to writing in order for it to be binding upon the parties. It also specifies which type of delivery is accepted but does not give a time period after which delivery is deemed to have taken place.

The claim notification procedures required in terms of the FIDIC contracts is expressly stated in clause 20.1:

“20.1 Contractor’s claims

If the Contractor considers himself to be entitled to any extension of Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the

Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.

If the Contractor fails to give notice of a claim within such period of 28 days, 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. Otherwise, the following provisions of this sub-clause shall apply..."

Once again the contract provides for contractor's claims to be time barred in absence of valid notice.

At this point, after having discussed how all of the four standard form contracts deal with and provide for claim notification procedures, it becomes apparent that the clauses in each of the abovementioned forms are similarly structured, in that each sets out the need for notice within a limited period and states the consequence of failure to provide that notice.

There however also exist certain elements in the clauses that are treated differently in each form. An example of such element relates to the duty of the contractor to inform the Principal Agent/Engineer. Under the JBCC PBA, the GCC and FIDIC contract forms, the duty is to notify an entitlement to either additional time or money as opposed to the duty under NEC3, where the duty relates to notifying an event that the contractor believes to be a compensation event. In his 2008 article on this subject, Champion (2008) explains that these duties differ because an event may occur at the start of the contract (e.g. a modest variation on a drawing) that would be a compensable event under each form. Under the NEC3 form the duty would be to notify within eight weeks of becoming aware of the event. But under the JBCC PBA, the GCC and FIDIC contract forms, the duty to notify only arises when it is perceived that he may be entitled to additional time or money, which may be months or years later.

Champion (2008) continues to emphasize another feature of significance, namely the fact that the timing of notification is not rigid, but conditioned in all four forms on the extent of awareness of the parties. The NEC3 for example requires notification by the contractor within eight weeks of becoming aware of the event. He states that reports from early use of this contract form indicated that contractors have welcomed this provision and have been quick to adopt two arguments circumvent this provision. These arguments were that:

1. They were ignorant of all changes and have only recently become aware of the “events”, and hence notification was not late.
2. They *were* aware of an event, but they did not have sufficient information to ascertain whether it was a compensation event, and notified as soon as they became aware that it might be!

Furthermore, what evidence may be required to prove knowledge, or lack thereof, could itself be contentious. As far as the three other standard contract forms are concerned, they require notification of claims when the contractor is aware or, should have been aware, of a potential claim. One might wonder how exactly the Employer intends to convince a tribunal that the notice should have been issued earlier.

Finally, the NEC3 also contains an original provision that places on the project manager an obligation to notify the contractor of a compensation event at the time of giving an instruction to the contractor or changing an earlier decision. If the project manager fails to do so, the contractor’s claim does not fail for want of a valid notice. It could be noted that no such provision appears in any of the other three standard contract forms. Champion (2008) explains that the significance of such provision is to make the time-bar of contractor’s claim conditional upon performance on the part of the project manager, and thus by

failing to act, the project manager may effectively expose the employer to risk of additional costs.

3.3 Impact on the contractor

Potential impacts that time-bar provisions can have on the contractor, as stated by Champion, includes the following:

- Projects with time-bar provisions require considerable commercial support during project execution from personnel experienced in handling similar commercial arrangements. Constraints in staff experience may restrict the number of tenders sought by contractors.
- Once the project has been awarded, the contractor will need to maintain a continuous check over matters from two simultaneous perspectives:
 1. What is the impact on the work to be done of any change or instruction; and
 2. Whether there will be a commercial impact.
- From the start of the project the contractor will need to see that the project is overseen by attentive and experienced staff always looking out for potential variations, both in main contracts and subcontracts. This will require new ways of working, for example, the quantity surveyor or commercial manager that used to be in the habit to visit a site merely once a month to carry out a valuation of works risks missing variations and a more frequent regime will thus be required.
- An argument over the form in which notice is provided could pursue. For example, if a notice should be in writing must it be stated to be notice? And if not, will a mention of a problem within a contractor's report, or minutes of a meeting suffice?
- The requirement to notify additional time if required so by the contractor, will establish the need to constantly update the programmes,

incorporation progress achieved, variations and constraints in order to be in a position to advise as the job proceeds.

- Finally, the livelihood of a contractor's business depends on the profitable execution of projects, which includes successful settlement of claims. In order for claims thus not to be lost through time-bar provisions, contractors have realised that they need to change their entire approach to risk management for projects. This might necessitate the need for a claims manager or a lawyer dedicated to each project to manage the risk of financial loss for want of notice.

3.4 Conclusion

In conclusion, the specified communication procedures dictated by the various standard form contracts generally differs in the amount of specific details given on what constitutes a communication in terms of the contract.

The JBCC PBA simply states the accepted form of transmission and the time period after which delivery is assumed.

The GCC is more specific when it states that the communication should be in writing and goes on to name examples of accepted forms of communications. The GCC also dictates where and how a communication will be deemed duly delivered.

The NEC2 requires communications to be able to be "read, copied or recorded" in order to be recognized as an acceptable communication. Examples of acceptable communications are listed. The contract also states the required language of communications and where a communication will be deemed duly delivered.

FIDIC also specifically state that any communication should be in writing and also list examples of acceptable forms of communication. It also states where and how a communication will be deemed duly delivered.

Furthermore, following such an elaborate discussion on the different claim notification procedures under the various standard form contracts, it was decided to rather summarise what has been said in a table format for easy review. See table 1 below for this summary.

Table 1 Features of claim notification procedures of standard form contracts (source: own)

	JBCC PBA	GCC 2004	NEC2	NEC3	FIDIC 1999
Time period to notify claim	20 working days: notifying delay 40 working days: notifying expense/loss	28 calendar days: notifying claim for additional time and/or money	2 weeks: notifying compensation event	8 weeks: notifying compensation event	28 calendar days: notifying claim for additional time and/or money
Duty to inform	Notify for entitlement to additional time and/or money	Notify for entitlement to additional time and/or money	Notify compensation event	Notify compensation event	Notify for entitlement to additional time and/or money
Extent of awareness	Notify when contractor becomes aware or ought reasonably to have become aware of event/circumstance	Notify when contractor should have become so aware of event/circumstance	Notify when contractor became aware of compensation event	Notify when contractor became aware of compensation event	Notify when contractor becomes aware or should have become aware of event/circumstance

	JBCC PBA	GCC 2004	NEC2	NEC3	FIDIC 1999
Consequences of failure to comply with notice period	Contractor's right to claim lapses	<ul style="list-style-type: none"> • Due date for completion not extended • No entitlement to additional payment • Employer is discharged of all liability in connection of claim 	Has no effect	<ul style="list-style-type: none"> • Completion Date or Key date not changed • No entitlement to change Prices 	<ul style="list-style-type: none"> • Time for completion not extended • No entitlement to additional payment • Employer is discharged of all liability in connection of claim
Possible remedy available	No remedy available	No remedy available	Not applicable	Only if contractor can prove that Project Manager should have notified compensation event to contractor	No remedy available

3.5 Testing of Hypothesis

The hypothesis in chapter one stated:

“Each standard form contract has clauses that specify the contractually accepted means of communication between the Project Managers and the Contractor which may include posted, faxed, emailed or hand delivered signed letters; meeting minutes and verbal confirmations. Furthermore the writer would expect that the contracts will specify a procedure to be followed when notifying claims. It is expected that Contractors would generally be against short time periods within which they are permitted to make claims.”

The hypothesis was mostly correct, in that each standard form of contract did have specific provisions as to communication procedures on the project. The communication procedures however differed between the contracts with only

some similarities such as stating the delivery means and address. Furthermore, the standard form contracts definitely had specific rigid provisions to be followed with respect to claim notification procedures, which mostly had serious consequences if not adhered to. Finally, after considering the impact of time-bar type provisions on the contractor, the writer agrees that contractors would generally be against short time periods within which they are allowed to make their claims.

Chapter Four

Contractors' claim preparation and submission procedures as prescribed by the Standard form construction contracts and the assessment and determination thereof

4.1 Introduction

As mentioned in previous chapters, contract provisions under which a contractor may claim for loss/expense almost invariably lay down particular procedures which have to be strictly followed by the contractor. Although these procedures naturally vary from one contract to another, they usually require the contractor to give notice to the Engineer/ Principal Agent in terms of the contract before submitting a detailed claim for the concerned loss, damage or expense incurred. The notification of claims was already dealt with in the previous chapter. This chapter will now focus on what is further expected of the contractor when preparing and submitting his detailed claim. Consideration will also be given to the assessment and determination of claims by the Engineer/ Principal Agent in terms of the standard contract forms.

4.2 Contractors' claim procedures as prescribed by:

4.2.1 The JBCC Principal Building Agreement (PBA) (2005)

In the previous chapter the first part of the claim procedure for additional time and/ or cost has already been discussed. This related to the notification of claims by the contractor to the Principal Agent, while adhering to standard form contract provisions in doing so. The next step in the process is stated in

clauses 29.5 - 29.6 or 32.6, depending on the nature of the claim, i.e. a claim for the revision of the date of practical completion and/or an adjustment to the contract value, or a claim resulting from expense or loss suffered by the contractor due to no fault of the contractor, respectively. These clauses read as follows:

- “29.5 The **contractor** shall, within forty (40) **working days** of the delay ceasing, submit such claim to the **principal agent**, failing which the **contractor** shall forfeit such claim*
- 29.6 Where the **contractor** requests a revision of the date for **practical completion** the claim shall in respect of each circumstance separately state:*
- 29.6.1 The relevant clause or clauses (29.1-3) on which the **contractor** relies, and*
- 29.6.2 The particulars of the effect of the delay on critical progress towards **practical completion**, and*
- 29.6.3 The extension period claimed in **working days**, and the calculation thereof*
- 32.6 The **contractor** shall notify the **principal agent** within forty (40) **working days** from becoming aware or from when he ought reasonably to have become aware of such expense or loss [32.5] failing which no compensation will be made. Where such notification has been given:*
- 32.6.1 The **contractor** shall submit details of the expense and loss once these can be quantified,”*

From the above provisions together with what has been said in the previous chapter, one notices that there is a definite distinction between claim provisions for claims for the revision of the date of practical completion and claims for the adjustment of the contract value. The difference relates to varying time-bar requirements for the two types of claims. Accordingly, a claim for the revision to the date for practical completion has to strictly comply to the 20 working day notification time-bar as well as the 40 working day time-bar for submitting details of the claim in order to not forfeit such claim, whereas a claim for the adjustment of the contract value only requires compliance to the 40 working day

notification time-bar, after which no particular time limit is set in which details or particulars of the claim must be submitted.

4.2.2 The General Conditions of Contract for Construction Works (GCC) (2004)

With regards to the claim procedure in this form of contract the relevant clauses read as follows:

- “48.1.1 The Contractor shall, within 28 days after the circumstance, event, act or omission giving rise to such a claim has arisen or occurred, deliver to the Engineer a written claim, referring to the Clause and setting out:**
- 48.1.1.1 The particulars of the circumstance, event, act or omission giving rise to the claim concerned,**
 - 48.1.1.2 The provisions of the Contract on which he relies in making his claim**
 - 48.1.1.3 The length of the extension of time, if any, claimed and the basis of calculation thereof, and**
 - 48.1.1.4 The amount of money, if any, claimed and the basis of calculation thereof.**
- 48.2 If, in respect of any claim, the Contractor did not comply with the provisions of Clause 48.1 because he was not and could not reasonably have been aware of the implications of the facts or circumstances concerned, the period of 28 days referred to in Clause 48.1 shall commence to run from the date when he should reasonably have become so aware.**
- 48.3 In order that the extent and validity of claims in terms of this Clause may be properly addressed when they are submitted, the following provisions shall apply:**
- 48.3.1 All facts and circumstances relating to the claims shall be investigated as and when they occur or arise. For this purpose the Contractor shall deliver to the Engineer records, in a form approved by the Engineer, of all the facts and circumstances which the Contractor considers relevant and wishes to rely upon in support of his claims, including details of all Construction Equipment, labour and materials relevant to each claim. Such records shall be delivered promptly after the occurrence of the event giving rise to the claim concerned.**
- 48.4 If, in respect of any claim to which this Clause refers, the Contractor fails to comply with the 28 day notice period in Clause 48.1, as read with Clause 48.2, the**

Due Date for Completion shall not be extended, the Contractor shall not be entitled to additional payment and the Employer shall be discharged of all liability in connection with the claim.”

From the above it is very clear that if the contractor does not comply with the stated time period in which he has to submit his detailed claim, he will forfeit his right to claim in terms of the contract.

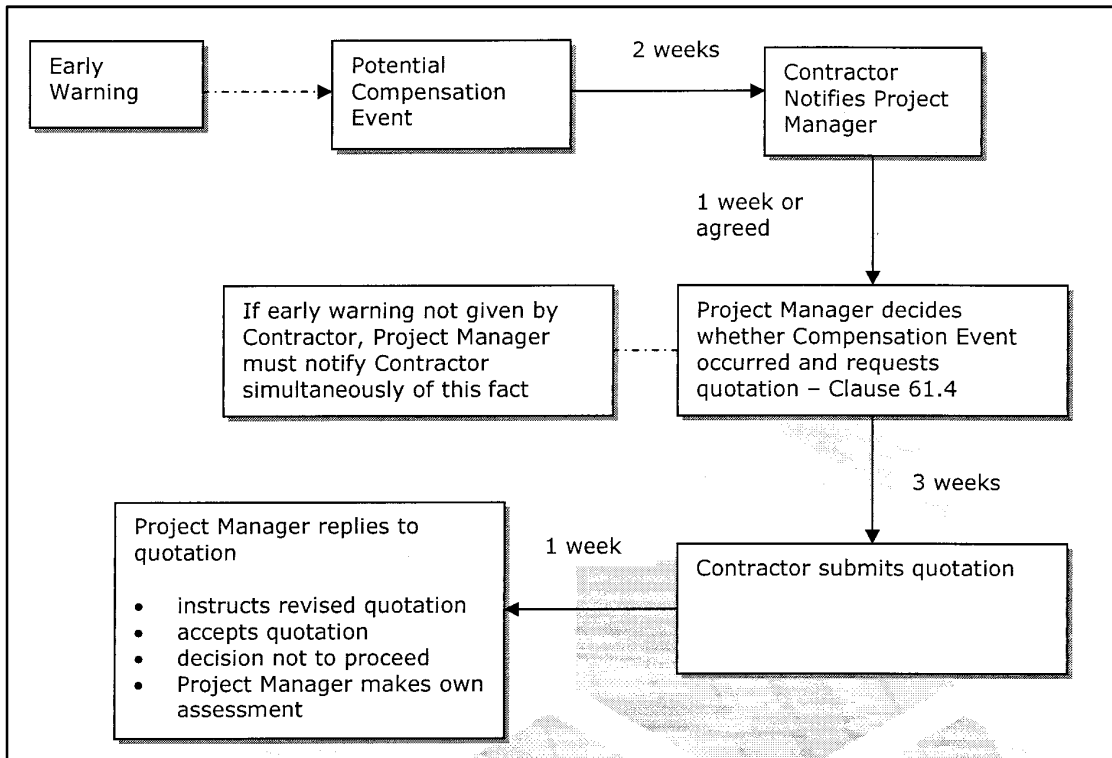
4.2.3 New Engineering Contract: ECC (second edition) (1995)

The NEC contract sets out various provisions related to the submission of quotations for compensation events by the contractor, but the most significant clauses for our purposes are the following:

- “61.4 ... If the Project Manager decides otherwise, he instructs the Contractor to submit quotations for the event. Within either:**
- One week of the Contractor’s notification or**
 - A longer period to which the Contractor has agreed**
- The Project Manager notifies his decision to the Contractor or instructs him to submit quotations.**
- 62.2 Quotations for compensation events comprise proposed changes to the Prices and any delay to the Completion Date assessed by the Contractor. The Contractor submits details of his assessment with each quotation. If the programme for remaining work is affected by the compensation event, the Contractor includes a revised programme in his quotation showing the effect.**
- 62.3 The Contractor submits quotations within three weeks of being instructed to do so by the Project Manager. ...”**

Figure 1 below indicates the above mentioned process by means of a diagrammatic flowchart.

Figure 1: NEC 2 Compensation event notified by contractor (source: MDA Consulting, 2008)



When it comes to the practical implementation of the above-mentioned clauses, as explained by Broome (1999) it is not always practicable for small to medium compensation events as

- The work would have to stop while the compensation event was evaluated and agreed, which will lead to lots of small delays in addition to those arising directly from the compensation event. As a result completion and hence the Completion Date would be affected adversely.
- As virtually all compensation events will affect remaining work to some extent, this implies (i.e. clause 62.2) that new programmes would be an everyday occurrence, imposing an unnecessarily heavy administrative load on those attempting to operate the contract.

As a result, in reality (i.e. as gathered from a research sample of contracts) the procedure for evaluating the time effects of minor compensation events evolved to adopt the following form:

- An event was agreed to be a compensation event
- Work proceeded so as not to delay the progress of the works
- Any additional people and equipment hours were recorded together with additional Plant and materials used
- Actual costs plus the Fee were assigned to these direct costs and submitted within the three week period for quotations
- The Project Manager and Contractor met and agreed the cumulative effect of minor compensation events in terms of disruption to other work and overall delay to Completion, before a new programme was assembled by the Contractor and submitted for acceptance.
- Actual costs plus Fee were assigned to associated indirect costs and submitted within the three week period for quotations.

Broome (1999) continues to explain that although this procedure does not provide the Employer and Contractor time and cost certainty at any point in the construction as was intended by the authors of the NEC, it does have the advantage of creating a rolling final account and an up-to-date estimate of when Completion can be expected to be achieved.

4.2.4 FIDIC Conditions of Contract for Construction for Building and Engineering works designed by the Employer, 1st edition (FIDIC) (1999)

The applicable clause reads as follows:

“20.1 continue The Contractor shall keep such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer. Without admitting the Employer’s liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer

to inspect all these records, and shall (if instructed) submit copies to the Engineer.

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 other period as may be proposed by the Contractor and approved by the Engineer, the Contractor shall send to the Engineer a fully detailed claim which includes full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed. If the event or circumstance giving rise to the claim has a continuing effect:

- (a) This fully detailed claim shall be considered as interim;
- (b) The Contractor shall send further interim claims at monthly intervals, giving the accumulated delay and/or amount claimed, and such further particulars as the Engineer may reasonably require; and
- (c) The Contractor shall send a final claim within 28 days after the end of the effects resulting from the event or circumstance, or within such other period as may be proposed by the Contractor and approved by the Engineer.”

This clause prescribes procedural requirements a Contractor is obliged to comply with in order to successfully prosecute a claim for extension of time or for additional payment. The first part of this clause has already been discussed in the previous chapter. The second part to this clause calls for records to be kept and for a fully detailed claim with full supporting particulars to be provided in effect within 14 days of the initial notice or for interim (updated) claims to be submitted monthly where the circumstances giving rise to such a claim are ongoing.

4.3 Claim evaluation procedures as prescribed by:

4.3.1 The JBCC Principal Building Agreement (PBA) (2005)

The applicable clauses read as follows:

“29.7 The **principal agent** shall within fifteen (15) **working days** of receipt of a claim [29.6] grant in full, reduce or refuse the **working days** claimed. The **principal agent** shall:

29.7.1 Determine the revised date for **practical completion** in relation to the **working days** granted, and

- 29.7.2 *Identify each circumstance and relevant sub-clause for each revision granted or amended or*
- 29.7.3 *Give reasons for refusing such claim*
- 29.8 *Where the **principal agent** fails to act [29.7] the claim shall be deemed to be refused*
- 32.6.2 *The **principal agent** shall make a reasonable assessment of the compensation to be added to the **contract value** within twenty (20) **working days** of receipt of such details*
- 32.6.3 *The claim shall be deemed to have been refused where the **principal agent** fails to make such an assessment”*

It could be noted that the last mentioned “deemed rejection clause” (32.6.3) allows the Principal Agent to avoid assessing a claim without contravening the contract provisions.

4.3.2 The General Conditions of Contract for Construction Works (GCC) (2004)

The applicable clauses read as follows:

- “48.5** *Unless otherwise provided in the Contract, the Engineer shall, within 28 days after the Contractor has delivered his claim in terms of Clause of 48.1 as read with Clause with 48.2, give effect to Clause 2.2 and deliver to the Contractor and the Employer his written ruling on the claim (referring specifically to this Clause), and the amount, if any, thereof allowed by the Engineer shall be included to the credit of the Contractor in the next payment certificate,*
- Provided that:*
- 48.5.1** *The said period of 28 days may be extended if so agreed between the Contractor and the Engineer, and*
- 48.5.2** *If, before the Engineer’s ruling on the whole claim, any amount thereof shall have been established to his satisfaction, that*

amount shall be included to the credit of the Contractor in the next payment certificate.”

Interestingly, under this contract form, the ruling of a claim will be delivered to both the Contractor *and* the Employer within the stipulated 28 days after having received the Contractor’s detailed claim. Thus, a mere non response by the Engineer to imply the refusal of a claim will not suffice under this contract.

4.3.3 New Engineering Contract: ECC (second edition) (1995)

The applicable clauses read as follows:

“62.3 ... The Project Manager replies within two weeks of the submission. His reply is:

- **An instruction to submit a revised quotation,**
- **An acceptance of a quotation,**
- **A notification that a proposed instruction or a proposed changed decision will not be given or**
- **A notification that he will be making his own assessment**

62.4 The Project Manager instructs the Contractor to submit a revised quotation only after explaining his reasons for doing so to the Contractor. The Contractor submits the revised quotation within three weeks of being instructed to do so.”

After having studied a number of contracts administered under the NEC2 contract, Broome (1999) notices the following trend regarding the assessment of quotations for compensation events. It was gathered that the contractor was usually given initial parameters and assumptions to prepare the quotation after which there would then be little or no consultation with the Project Manager until the quotation was submitted. Once submitted, the Project Manager would see the final figure for the first time, think it was excessively high and instruct the Contractor to resubmit the quotation. As a result, much of the detailed work was abortive because, for instance, productivity and risks had not been agreed.

Having been asked to resubmit the quotation, it was only then that the two parties would discuss and agree these principles, and, having done so, the next formal quotation submission by the Contractor was agreed informally. Thus, in an attempt to reduce the possibility of quotations being rejected and required to be resubmitted it appeared to be much more beneficial to both parties to first engage in interim discussions before the Contractor submitted his first formal quotation.

4.3.4 FIDIC Conditions of Contract for Construction for Building and Engineering works designed by the Employer 1st edition (FIDIC) (1999)

“20.1 continues further

Within 42 days after receiving a claim or any further particulars supporting a previous claim, or within such other period as may be proposed by the Engineer and approved by the Contractor, the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time.

Each Payment Certificate shall include such amounts for any claim as have been reasonably substantiated as due under the relevant provision of the Contract. Unless and until the particulars supplied are sufficient to substantiate the whole of the claim, the Contractor shall only be entitled to payment for such part of the claim as he has been able to substantiate.

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

The requirements of this Sub-Clause are in addition to those of any other Sub-Clause which may apply to a claim. If the Contractor fails to comply with this or another Sub-Clause in relation to any claim, any extension of time and/or additional payment shall take account of the extent (if any) to which the failure has prevented or prejudiced proper investigation of the claim, unless the claim is excluded under the second paragraph of this Sub-Clause.”

FIDIC stipulates a given time period in which the Engineer has to respond to a contractor’s claim by either granting his approval or disapproval with detailed

comments explaining reasons for his disapproval. Unlike the JBCC PBA, the Engineer's failure to act on a claim does not automatically constitute a refusal or rejection of a claim. Having commented on the claim the Engineer will be called upon to make a determination in terms of FIDIC sub-clause 3.5 [Determination].

4.4 Assessment of claims

Now if it can be assumed that a contractor's work has been delayed by some event that qualifies him to claim in terms of the contract, and that he has complied with the contractual procedures for making such claim, the final question to be addressed is how the claim is to be quantified in financial terms (Murdoch and Hughes: 1996). This will primarily depend on the wording of the particular contract, but the courts have made it clear that terms such as 'expense' and 'loss' (which appears in the JBCC PBA) provide an entitlement which is equivalent to an award of damages for breach of contract. Murdoch and Hughes (1996) continues to explain that this interpretation has the important consequence that, notwithstanding the use of words such as 'loss' and 'expense', the contractor will also be able to recover for *loss of profit*. The other three standard contracts however avoid this normal judicial interpretation by making use of alternative words such as 'Cost' (GCC and FIDIC) or 'Actual Cost' (NEC2) which is for example defined in clause 1 of the FIDIC contract to include overheads but *not* profit. This has the result that the contractor will only be entitled to his profit margin under those clauses which expressly provide for this.

With everything that has been said up to now it is perhaps hardly necessary to point out that a contractor who claims in respect of some loss must be able to prove that he has actually incurred it. Murdoch and Hughes (1996) explains a particular tricky problem of loss-proving will concern a contractor that is ahead

of schedule and expects to finish the work early when he is delayed by the employer, which will result in the contractor's 'slack' being taken up. The question which then arises is whether the contractor can claim for the expenses of prolongation, or whether it can be said that he had in any event priced on the assumption of remaining on site for the whole contract period.

Another example to illustrate the difficulty of factually and legally proving that the loss suffered was caused by a qualifying event stated in the contract, is given by Murdoch and Hughes (1996). Suppose a contract administrator's delay in providing the contractor with necessary information results that a contract which was due for completion in March in fact drags on until July. Winter working conditions is in general terms more expensive than summer working and so, if the contractor can identify increased costs, these will be recoverable from the employer. However, supposed further in June a totally unforeseen strike takes place which keeps the contractor on site for an extra month. The question would thus be if it can really be said that the employer has 'caused' this strike to occur and should therefore be held responsible for its effects? These are just a few examples of obstacles faced by employer's representatives when having to determine claims submitted by contractors.

4.5 Conclusion

In conclusion, the aforementioned can be summarized as follows:

The JBCC PBA only time-bars the submission of a claim for extension to the date for Practical Completion but no time limit is stated for a claim for additional payment in terms of the contract. It should also be noted that it could in some cases be expected of the contractor to prove a delay in order to ensure his entitlement to loss and expense claimed. Furthermore, although it is stipulated that the Principal Agent shall within 15 working days (for revision to the date for Practical Completion) and 20 working days for (adjustment to the contract

value) grant in full, reduce or refuse such claims, no response from the Principal Agent will also be accepted as a refusal of a claim.

The GCC contract provisions make it clear that the Contractor's right to claim will be forfeited if he fails to adhere to the 28 days allowed in which to submit his detailed claim. This contract also further requires the Engineer to deliver his ruling on any claim within 28 days from receipt of a detailed claim from the Contractor to the Contractor and the Employer.

The NEC provisions requires the Contractor to submit his quotation for a compensation event either within one week from his notification, or a longer period as agreed between the parties or within three weeks from being instructed to do so by the Project Manager. Thereafter the Project Manager has two weeks in which to reply to the Contractor with his acceptance, rejection, instruction for a revised quotation to be submitted or declaration that he will conduct his own assessment of the claim.

FIDIC stipulates a 28 Day notice period for any claims which constitutes a time-bar provision. Furthermore it requires the Contractor to either submit a fully detailed claim within 42 Days from becoming aware of the event causing the delay and/or additional costs or to submit interim claims for ongoing events. There is no time-bar for late submissions of claims.

4.6 Testing of Hypothesis

The hypothesis in chapter one stated:

“As far as the valuation, acceptance or rejection of claims is concerned, Project Managers will have to follow a specified procedure to determine the circumstantial facts relating to the claim. The Contractor will have to give a break-down of new claimed rates for additional work or proof of losses suffered. The contracts will stipulate a time period in which the Project Manager will have

to respond to a claim, relating to its acceptance or rejection. It might stipulate that no response by the Project Manager will constitute an implied rejection.”

The hypothesis was correct as all the standard form agreements laid down specific procedures as to the submission of a contractor's claim and a time frame in which this has to occur. The Standard forms also had specific clauses which either stipulated the time period in which the Project Manager will award in full, reduce or refuse a claim or deeming rejection clauses which constitutes an implied rejection of a claim when the Project Manager fails to respond to a submitted claim.

Chapter Five

How standard form contracts deal with the reduction/rejection of claims by the type of relief options to they offer the contractor

5.1 Introduction

After having dealt with the Contractors' claim procedures with regard to the notification, compilation and determination of claims as stipulated by standard form contracts in the preceding chapters, the final process to consider relates to the remedies available to the Contractor when he disagrees with the reduction or rejection of a claim. It appears to be quite common for claim disagreements to end in disputes when Murdoch and Hughes (1992) go as far to say that "*it is an unfortunate but undeniable feature of building contracts that they engender a large number of disputes, both while the contract work is being carried out and after it has been completed*". In order to give the reader a better understanding of the most frequently used dispute resolution procedures, this chapter will first focus on the procedures itself and then continue to see which procedures are prescribed by which Standard form contracts.

5.2 Dispute resolution procedures available

Murdoch and Hughes (1992) group the most widely used dispute settlement techniques into three main groups. Firstly, and perhaps most familiar to legal practitioners, is the twin possibilities of **litigation** or **arbitration**. This first group represents an adversarial approach to dispute resolution.

The second group of techniques, and to some extent a method for the prevention of disputes from arising in the first place, relates to contractual provisions for binding **third party determination** of certain contentious issues. This technique usually consists of certification by the Contract Administrator or by an external adjudicator.

The third group includes a range of techniques whose common aim is to enable the parties to a dispute to reach a settlement of it through their own negotiations. This third group is generally termed “**Alternative Dispute Resolution**” and the techniques differ widely in terms of their formality.

5.2.1 Litigation and Arbitration

Finsen (2005) explains litigation in layman’s terms as follows: if two people have a dispute and are unable to resolve it between themselves, the courts are available to assist them. Simply put, the party who considers that he has a claim against the other (essentially the Contractor in our scenario) may issue summons through the court of appropriate jurisdiction to compel the other party to appear before the court, and defend himself against the first party’s claim. It will then be up to the court to decide whether the claim was valid, in which case it will make an order to compel the other party to honour the claim. Once the claim has been decided, it cannot be brought again, and finality is reached. Litigation is however often an unsatisfactory process due to the various disadvantages it poses to the nature of building disputes. Such disadvantages as laid down by Finsen (2005) include:

- Construction disputes often involve technicalities about which the presiding judge or magistrate is, by convention if not in fact, ignorant, and thus requires expert witnesses to be called to explain technical issues to the court and express an expert opinion on them. Apart from the additional costs and time coupled with these experts, it also happens that the experts called by the opposing party disagrees with the first expert

and the judge or magistrate is then faced with the difficult decision of which expert to believe.

- Litigation is a long, slow process that can only take place once the contract has been concluded or cancelled. Not only may it take months for a dispute to come to a hearing due to the long backlog of cases on the court roll, once a judgment has been handed down, the unsuccessful party may decide to take it to appeal. The other party might however not have the resources to fight the appeal and may be forced to withdraw and lose what he has done.

As an alternative to litigation, arbitration is therefore often the preferred procedure for settling disputes. Arbitration is defined by Butler and Finsen (1993) as:

“A procedure whereby the parties to a dispute refer that dispute to a third party, known as an arbitrator, for a final decision, after the arbitrator has first impartially received and considered evidence and submissions from the parties. The reference to the arbitrator takes place pursuant to an agreement between the parties. The arbitrator, in resolving the dispute, is not an ordinary court of law, but a person chosen by the parties.”

For further clarification on this procedure, Butler and Finsen (1993) highlight five essential characteristics of arbitration:

1. Arbitration is a process for resolving disputes between the parties regarding their existing rights. There thus exists a requirement for a dispute to exist (*dispute* is usually clearly defined under the various standard contracts to ensure there is no confusion as when a disagreement becomes known as a dispute) in order to distinguish arbitration from other contractual provisions for referring matters to a third party (e.g. certification) and to render the arbitration agreement enforceable.

2. Arbitration takes place in terms of an enforceable agreement between the parties and has thus the consequence that the power vested in the arbitrator to bind the parties by his decision is derived from the consent themselves and not from external sources. Due to its consensual basis, arbitration also allows a particular flexible procedure, one which the parties can adapt to suit their specific requirements.
3. Because the parties can decide which Arbitrator to use they may choose someone with specialised knowledge and experience regarding the matters in dispute, thereby greatly reducing the amount of expert evidence.
4. The arbitration agreement must consider that the arbitrator will determine the rights of the parties in an impartial manner and that he will reach his decision after receiving and considering evidence and submissions from the parties by following a procedure which is equally fair to both parties. An arbitrator must comply with the laws of natural justice at all times.
5. The arbitrator's award is final and the parties agree in advance to be bound by it. Unless specifically qualified, it is thus not subject to appeal to the courts.

Canny (2001) highlights an important advantage of arbitration relates to the fact that proceedings are very confidential, with third parties not allowed to attend. The parties to an arbitration can thus be assured that any evidence lead during the procedure will not enter the public domain, as is the case in litigation. This is particularly important where the dispute involves matters that are regarded as being commercially secret such as the contractor's pricing policies.

The South African legal system recognises arbitration as a legitimate alternative means of dispute resolution and in the Arbitration Act 42 of 1965, provision is

made for the courts to support and assist the process of arbitration in a variety of ways (Finsen, 2005)

5.2.2 Third Party determination

According to Murdoch and Hughes (1992) standard building and construction contracts have for a long time given powers to the Contract Administrator to make various decisions which affect the rights and obligations of the contracting parties. Although these powers may for convenience be grouped together under the heading of “certification”, they also include decisions, for example on contractor’s claims, which are not always evidenced by the issue of a formal certificate. An example of such a provision in a standard form construction contract is encountered in FIDIC under sub-clause 3.5 which gives the Engineer the authority to agree and determine certain matters by consulting with each party in an endeavour to reach agreement. If an agreement is not achieved, the Engineer may proceed by making a fair determination in accordance with the contract while taking due regard of all relevant circumstances.

The second type of third party determination is conducted through the process of adjudication, which aims to reach a fair, rapid and inexpensive determination of a dispute by means of a “documents-only” procedure (i.e. formal hearings in which evidence is lead is replaced by written submissions of facts to the dispute). The Adjudicator is a named third party individual, appointed under the Adjudicator’s Agreement and who shall act impartially and in accordance with the rules of natural justice. In making his decision, the Adjudicator may take the initiative in ascertaining the facts and the law as well as rely on his own expert knowledge and experience. A determination made by an Adjudicator shall be binding until the dispute is finally determined by legal proceedings, arbitration or by agreement. This has the effect that the Parties shall be obliged to implement an Adjudicator’s decision without delay regardless if the dispute is referred to

legal proceedings or arbitration. (CIDB Adjudication Procedure, 2004) It is because of this feature that adjudication is the preferred method of dispute resolution when the dispute relates to amounts certified in interim payment certificates as it offers a quick decision which is immediately enforceable while the contract works are still in progress. It should however be noted that there does not exist any South African legislation to date that governs adjudication. This has, among others, the consequence that there is no statutory provision for the enforcement of the adjudicator's determination and results in the successful party having to ask the court to enforce it as an obligation arising from an agreement if he wishes to enforce it against the other party.

5.2.3 Alternative Dispute Resolution

There is a variety of techniques available to assist parties in reaching some form of settlement without having to resort to arbitration or litigation. These procedures are mainly informal and their chief features are that they are cheap, non-binding and investigatorial rather than accusatorial. These procedures include among others conciliation, mediation and the mini-trial.

Conciliation is the process whereby the parties themselves, together with the assistance of the conciliator attempt to reach an agreement and to decide upon the precise terms of that agreement. It is essential for the conciliator to be impartial, since the purpose of the process is to precipitate an agreement by persuasion and suggestion. Conciliators are not supposed to take sides, take decisions or make judgments, but instead they talk to each party separately in confidentially, after which they may bring the parties together to have an open discussion which they chair and lead. A conciliator always seeks to establish common ground, ascertaining the facts which are in dispute (Murdoch and Hughes, 1992).

Mediation on the other hand retains the flexibility of pure conciliation but the mediator adopts a slightly more interventionist role as it requires him/ her to come to a decision thus leaving the process less open-ended (Murdoch and Hughes, 1992). The mediator thus becomes the negotiator of settlement between the parties. This process aims to preserve and enhance the relationship between the parties to bring about a win-win situation (Association of Arbitrators, 1992). Murdoch and Hughes (1992) also notes that mediation is expected to give the parties a useful indication of the outcome of an arbitration procedure. In the interests of clarity, it should be stressed that mediation brings about a non-binding opinion which can be rejected by either party at any time, having the dispute referred by arbitration instead.

Butler and Finsen (1993) defines the mini-trial as a voluntary, expedited and non-judicial process, whereby the lawyers acting for the parties to a dispute present an abbreviated version of their respective clients' cases to a panel consisting of a senior executive of each party and (optionally) a neutral expert. After the presentation, the executives adjourn and try to settle the dispute by negotiation, with the assistance of the neutral expert, if required. This is said to be a voluntary process from which any party can withdraw at any time, without prejudice to that party's position in pending or subsequent litigation or arbitration proceedings.

5.3 Standard form contract dispute resolution provisions

After having focused on the definitions of some of the most frequently used construction dispute resolution procedures, a closer look will now be given to how standard form construction contracts incorporate these procedures into their agreements.

5.3.1 The JBCC Principal Building Agreement (PBA) (2005)

In clause 40 of this agreement it is provided that should any disagreement arise between the parties arising out of or concerning the agreement or its termination, either party may give notice to the other to resolve such disagreement (clause 40.1). Where such disagreement is not resolved within ten working days of receipt of such notice, it shall be deemed to be a dispute and shall be referred to the party which gave such a notice to either adjudication or arbitration (clause 40.5). The parties however also remain entitled to resolve the dispute by mediation at any time (clause 40.5). If the dispute is referred to adjudication the adjudicator's decision shall be binding on the parties unless either party is dissatisfied with it, in which case the dispute must be referred to arbitration. The arbitrator must be appointed by the body selected by the parties whose rules of arbitration apply, or appointed by the Chairman of the Association of Arbitrators. The clause also provides that where provision was made for naming an arbitrator in a contract and no person was named, the arbitration clause nevertheless remains effective (McKenzie, 2009).

5.3.2 The General Conditions of Contract for Construction Works (GCC) (2004)

The clause in this agreement that deals with "Settlement of Disputes" (clause 58) provides a third party determination in respect of the claims procedure, or in respect of a notice of disagreement (clause 57) submitted by the Contractor to the Engineer, is unacceptable to either party, that party shall give written notice (dispute notice) to the Engineer disputing the validity or correctness of the whole or specified part of the ruling within 28 days of receipt of the ruling, or within 28 days after the ruling should have been given. If the Contractor fails to do this within 28 days, the Employer shall be discharged from all liability in connection with the claim or disagreement. If either party has given such notice the dispute is referred immediately to mediation or adjudication, whichever is

stated in the contract data. If after mediation or adjudication the dispute is still not resolved, it shall be determined by either arbitration or by court proceedings depending on the specific terms of the contract. If the contract provides for arbitration the arbitrator is either agreed on by the parties or nominated by the President of the South African Institution of Civil Engineering.

5.3.3 New Engineering Contract: ECC (second edition) (1995)

The settlement of disputes is covered under clause 90 of this contract. Any dispute that arises under this contract will be submitted to and settled by the Adjudicator. For easy reference sub-clause 90.1 includes an “Adjudication Table” as below:

Table 2: Adjudication Table (source: NEC 2, 2005)

Dispute about:	Which Party may submit it to the Adjudicator?	When may it be submitted to the Adjudicator?
An action of the Project Manager or the Supervisor	The Contractor	Between two and four weeks after the Contractor’s notification of the dispute to the Project Manager, the notification itself being made not more than four weeks after the Contractor becomes aware of the action
The Project Manager or Supervisor <i>not</i> having taken an action	The Contractor	Between two and four weeks after the Contractor’s notification of the dispute to the Project Manager, the notification itself being made not more than four weeks after the Contractor becomes aware that the action was not taken
Any other matter	Either Party	Between two and four weeks after notification of the dispute to the other Party and the Project Manager

Sub-clause 90.2 provides for the Adjudicator to settle the dispute by notifying the Parties and the Project Manager of his decision together with his reasons within the time allowed by the contract. The appointment of the Adjudicator is stipulated in the contract data. Until or unless a dispute is settled by the Adjudicator, the Parties and the Project Manager will proceed as if the action, inaction or other matter disputed were not disputed. Sub-clause 90.2 also clearly states that the Adjudicator's decision is final and binding unless and until revised by the *tribunal*.

Furthermore, clause 93 provides the option of having a decision by the Adjudicator to be reviewed by the tribunal. Sub-clause 93.1 contains another time-bar provision by stipulation that a dispute is not referable to the tribunal unless the dissatisfied Party notifies his intension within four weeks of

- Notification of the Adjudicator's decision or
- The time provided in the contract data for such notification if the Adjudicator fails to notify his decision within that time,

whichever is the earlier. The tribunal proceedings can also only be commenced after Completion of the whole of the Works. If the parties are still dissatisfied by the tribunal's decision, if so agreed, they can still refer the dispute to Arbitration or litigation for the final settlement of the dispute.

5.3.4 FIDIC Conditions of Contract for Construction for Building and Engineering works designed by the Employer, 1st edition, 1999 (FIDIC)

Under the FIDIC agreement, disputes are required to be submitted to a Dispute Adjudication Board (DAB) for decision. The DAB comprises three persons (referred to as "members"), one nominated by each Party for the approval of the

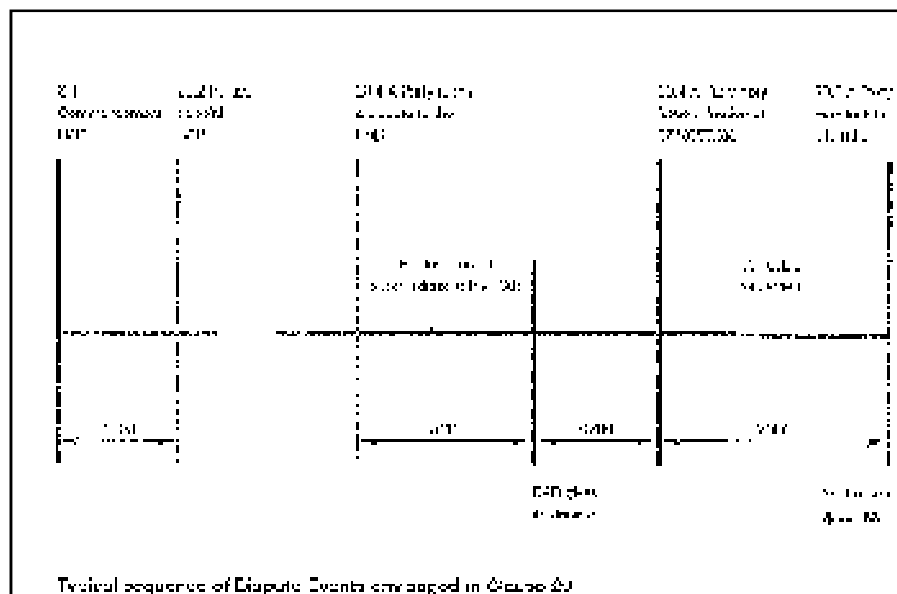
other Party. The Parties shall then consult both members and jointly agree upon the third member, who shall be appointed as the Chairman of the DAB.

Any dispute that arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer may be referred in writing to the DAB for its decision (sub-clause 20.4).

Within 84 days after receiving such reference the DAB shall give its reasoned decision which shall be binding on the Parties. The Parties are obliged to promptly give effect to the DAB's decision unless and until the decision is revised in an amicable settlement (i.e. mediation), an arbitral award or a court's judgment. In order for an unsatisfied Party to refer the dispute to these other proceedings that Party should give notice of its dissatisfaction within 28 days after receiving the DAB's decision. Failing to comply with the 28 day notification period will result in the DAB's decision to become final and binding upon the Parties (sub-clause 20.4).

This dispute resolution process is depicted on a timeline below in figure 2 for easier reference.

Figure 2: FIDIC typical sequence of dispute events (source: FIDIC, 1999)



5.4 Conclusion

In conclusion, there exist three main categories of dispute resolution options for aggrieved parties to a construction contract, namely:

1. Arbitration or litigation;
2. Third party determination, and
3. Alternative Dispute Resolution

All of the standard form contracts incorporate these procedures at some stage during the contract, always attempting to settle a dispute as quick and amicable as possible initially and leaving the options of Arbitration and Litigation as last resort options right at the end of the contract after the works has been executed.

5.5 Testing of Hypothesis

The hypothesis in chapter one stated:

“The contract will refer the rejection of a claim to an agreed or specified form of alternative dispute resolution such as mediation, arbitration or adjudication or in extreme cases litigation.”

The hypothesis was correct as all the standard form agreements laid down specific dispute resolution procedures, most governed by time-bar provisions.

Chapter Six

Concluding the main problem

6.1 Background

Construction disputes between clients and contractors usually arise when contractors claim additional expenses caused by delays, variation orders, and extra work, among others. In order to avoid unnecessary problems, clients should consider potential problem areas before drafting the contract while contractors should familiarise themselves with the specific provisions of the contract they sign with the client. If a dispute does occur, however, contracting parties must know what claims, counterclaims and defences are available to them in terms of their contract. The contracting parties' effective use of these methods is a powerful tool in effectuating a settlement with each other, or in the case of litigation, in assessing liability of claims and liquidated damages.

When alternative dispute resolution procedures or arbitration are not successful, the contracting parties should be able to enforce the protections granted by the contract. If court action is necessary, the contracting parties should assert all their legal rights and valid claims against each other in order to prove that they are entitled to compensation or damages.

In the South Africa, the Construction Industry Development Board (CIDB) has proposed in its *Standard for Uniform Construction Procurement* document which was published in the Government Gazette No. 26427 of 9 June 2004 that only the under-mentioned standard form construction contracts should be considered for use by the State for construction procurement. (Compliance with

this standard was made mandatory from this date for organs of state who solicit tenders in the construction industry) (Maritz: 2009):

- i. JBCC Series 2000
- ii. New Engineering Contract (NEC3)
- iii. Federation Internationale des Ingenieurs – Conceils (FIDIC)
- iv. General Conditions of Contract (for Works of Civil Engineering Construction) (GCC) 2004

The main problem of this treatise thus investigates how effective the above-mentioned standard form construction contracts are in dealing with contract variations and contractors' claims by the type of provisions they provide the contracting parties.

6.2 Summary

In order to attempt to answer the main problem, four sub-problems had to be considered so as to gain a deeper understanding of the underlying factors that relate to the problem.

The **first** sub-problem considered, dealt with the: "*Main causes of variations and claims on construction projects*"

By consulting a number of textbooks on the subject, the most frequent causes of construction contract variations were established and discussed.

It was also found that there exist 4 types of claims that the contractor can make against the employer. The major causes for contractual claims which relate to circumstances where there is no fault by either contracting were considered.

Also, the major causes for contractual claims which relate to circumstances where the fault is on the part of the employer were considered.

The **second** sub-problem considered, dealt with the: *“Communication and claim notification procedures prescribed by each of the Standard form construction contracts and their impact on the contractor”*

This Sub-problem was answered by looking at each of the standard form construction contracts and considering the communication and notification procedures prescribed by them. It was found that the prescribed communication procedures differed between the contracts with only some similarities such as stating the delivery means and address. Furthermore, it was found that all the standard form contracts had specific rigid provisions to be followed with respect to claim notification procedures, which mostly had serious consequences if not adhered to.

The impact of time-bar type provisions on the contractor was explored by having a look at what Champion (2008) had to say on the subject in his award winning article which appeared in the Construction Law Journal.

The **third** sub-problem considered, dealt with the: *“Contractors’ claim preparation and submission procedures as prescribed by the Standard form construction contracts and the assessment and determination thereof”*

Again, each of the standard form construction contracts was considered when answering this sub-problem. Furthermore guidance textbooks dealing with the various standard form construction contracts together with textbooks on the assessment of construction claims were also consulted when answering this particular sub-problem.

The **fourth and final** sub-problem considered, dealt with: *“How standard form contracts deal with the reduction/rejection of claims by the type of relief options to they offer the contractor”*.

This sub-problem was answered by first considering the various types of dispute resolution options available and their definitions as described by a number of textbooks on the subject. Thereafter, each of the standard form construction contracts were consulted once again to determine which of the dispute resolution options they prescribe to contracting parties when a dispute arises as well as which procedures are to be followed when during the execution of the contract.

6.3 Conclusion

Finally the time has come to reach a conclusion on the main problem of this treatise. Throughout the preceding supporting chapters a lot of focus has been placed on how the various standard form construction contracts prescribe its users to deal with contract variations and contractors' claims.

It is therefore, based on the findings and comparisons between the various contracts, that it can be said that all four standard form contracts manage to deal fairly effectively with contract variations and contractors' claims. This conclusion is founded on the grounds that firstly, all of the contracts acknowledge that contract variations are likely to occur during the execution of the contract and as a result prescribe a specific procedure to be followed by the contracting parties to ensure that sufficient compensation is effected to the deserving party.

Secondly, all of the contracts anticipate circumstances to arise which will result in contractors submitting a claim of additional compensation for unforeseen expense or loss. Once again, the contracts go on to provide for this by either laying down a list of circumstances that would entitle the contractor to a claim (JBCC, NEC and GCC) or mention the circumstances which will entitle compensation within the various clauses of the contract (FIDIC) and

furthermore include clauses that specifically prescribe procedures to be followed by the contractor in notifying and submitting his claim. By clearly laying down a procedure and restricted time period to be adhered to by a contractor when submitting a claim, there's no room for dissatisfaction or excuses when the contractor then fails to adhere thereto, because he committed himself to those provisions when he accepted the contract. Furthermore, the contracts also deal with the assessment and determination of contractors' claims by prescribing specific time periods to be followed by the client's representative.

Possible criticisms that could perhaps be given to some of the contracts which makes them less effective in dealing with contractors' claims relates to unrealistic short time limits in which claims has to be notified; deemed rejection or acceptance clauses and no specific methods of assessment and determination of claims as this is usually subject to the interpretation of the Engineer. These criticisms could however be overcome to some extent if the contractor qualifies these issues before committing himself to the agreement.

Thus, in final conclusion, it is found that all four standard form construction contracts manage to deal rather effectively with contract variations and contractors' claims.

Bibliography

1. Association of Arbitrators. 1992. *Guidelines for mediation under construction contracts*. 1st Edition. South Africa: Association of Arbitrators.
2. Broome, J. 1999. *NEC Engineering and Construction Contract: User's Guide*. 1st Edition. London: Thomas Telford Publishers.
3. Butler, D. and Finsen, E .1993. *Arbitration in South Africa Law and Practice*. South Africa: Juta & Co. Ltd.
4. Canny, J. 2001. *Construction and Building Law*. 1st Edition. Dublin: Round Hall Ltd.
5. Champion, R. 2008. Variations, time limits and unanticipated consequences. *Construction Law Journal*, 2008, 24(3), 208-220.
6. CIDB. 2004. *CIDB document 1014: CIDB Adjudication Procedure*.1st Edition. Website:
http://www.cidb.org.za/Documents/PDM/Proc_Docs/proc_docs_cidb_adjudication_procedure1014.pdf accessed on 23 August 2009
7. Davison, R. P. 2003. *Evaluating Contract Claims*. 1st Edition. Oxford: Blackwell Publishing Ltd.
8. *Federation Internationale des Ingenieurs-Conseils (FIDIC). Conditions of Contract for Construction for Building and Engineering works designed by the Employer*. 1999. 1st edition. Published by FIDIC.
9. Finsen, E. 2005. *The Building Contract: A commentary on the JBCC Agreements*. 2nd ed. Juta & Co. Ltd. Cape Town: Mercury Crescent.
10. General Conditions of Contract for Construction Works (GCC). 2004. 1st edition.
11. Joint Building Contracts Committee (JBCC) Series 2000. 2007. *Principal Building Agreement*. 5th Edition. Published by the JBCC.

12. Maritz, J. 2009. *Core notes: The JBCC Suite of Contracts*. Unpublished study material for honours construction economics students as part of the subject Construction Contract Law 730. Pretoria: University of Pretoria
13. McKenzie, H.S. and McKenzie, S.D. 2009. *McKenzie's Law of Building and Engineering Contracts and Arbitration*. Revised and updated by Ramsden, P.A. 6th edition. Juta & Co. Ltd. Cape Town: Mercury Crescent.
14. MDA Consulting. 2008. *Stefanutti & Bressan one day NEC (2nd edition) workshop workbook*. Unpublished training course notes. MDA Consulting: Johannesburg.
15. Murdoch, J. and Hughes, W. 1996. *Construction Contracts: Law and Management*. 2nd Edition. London: E & FN Spon.
16. Murdoch, J. and Hughes, W. 1992. *Building Contract Law*. 1st Edition. London: Longman Law.
17. New Engineering Contract. 1995 and 2005. *The engineering and construction contract (ECC)*, 2nd edition (1995) and 3rd edition (2005).
18. Othman, N., Ying, L. C., Misnan, M. S. and Yusof, Z. M. 2005. *Sources and causes of disputes: a guide to future contract drafters towards improving clarity to construction contracts*. Unpublished research. University of Technology, Malaysia.
19. Potgieter, F. J. 2009. *Core Notes: Delays and Work Stoppages*. Unpublished study material for honours construction economics students as part of the subject Quantity Surveying Practice 700. Pretoria: University of Pretoria
20. Powell-Smith, V. and Sims, J. 1988. *Building Contract Claims*. 2nd Edition. London: Oxford.
21. Stokes, M. and Finuf, J.L. 1986. *Construction Law for Owners and Builders*. 1st Edition. New York: McGraw-Hill Book Company.