

Results from the FIDIC Questionnaire - March 2020

Introduction

At end of March 2020, we launched a FIDIC questionnaire through AfiTaC's website and LinkedIn and want to share the results with you.

This was in the framework of [Hemant Sharma](#)'s MBA thesis at one of the world's top 100 business schools, [GEM – Grenoble Ecole de Management](#).



The objective of [Hemant](#)'s thesis was to study (as applied to FIDIC):

- the impact of legal systems on international contracts,
- the development of standard contract conditions, and
- its acceptance by the international contracting community (including contract professionals supporting Employers, Contractors and Engineers).

Any data collected as in the FIDIC questionnaire has been used only for academic purposes. The participants to the questionnaire have had priority access to the aggregated data (thus preserving confidentiality of individual participants). Once again, we thank all participants!

Results from the FIDIC questionnaire

Here is the detailed report of results from the FIDIC questionnaire, with some analysis:

1. How often have you used FIDIC standard contracts for international construction contracts?

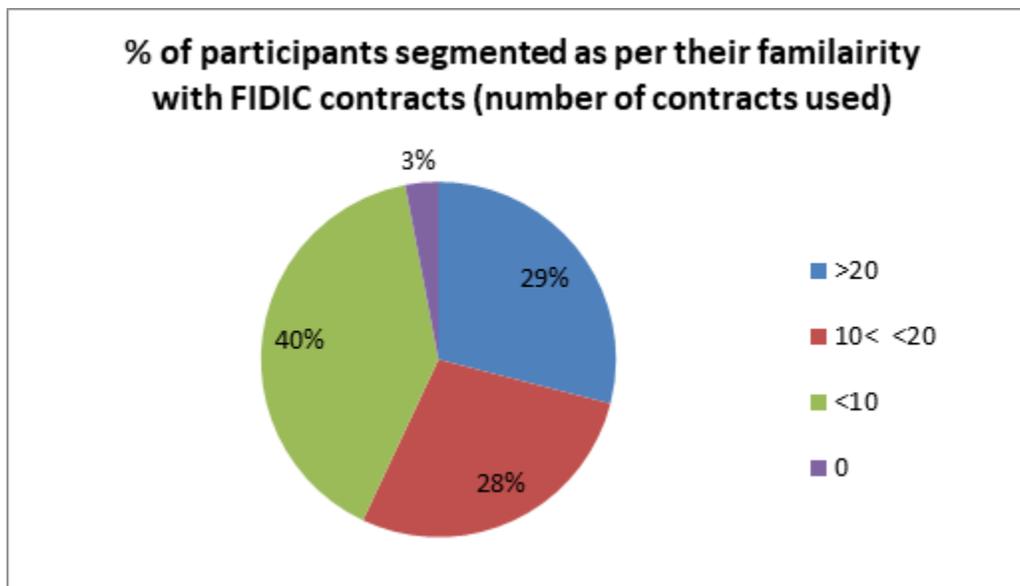
1. 20 or above
2. between 10 and 20
3. less than 10
4. never

Results and Interpretation:

The objective of this question was to understand the level of familiarity of the participants with FIDIC. We also use this information to give a weighting to the answers.

Around 60% of the participants are very experienced. They have used FIDIC more than 10 times for international construction contracts.

This gives our survey more credibility and accuracy.



2. In these contracts based on FIDIC, how often did contracts contain major deviations from, or substantial amendments to, the General Conditions?

1. all of the cases
2. majority of the cases
3. minority of the cases
4. rarely or never

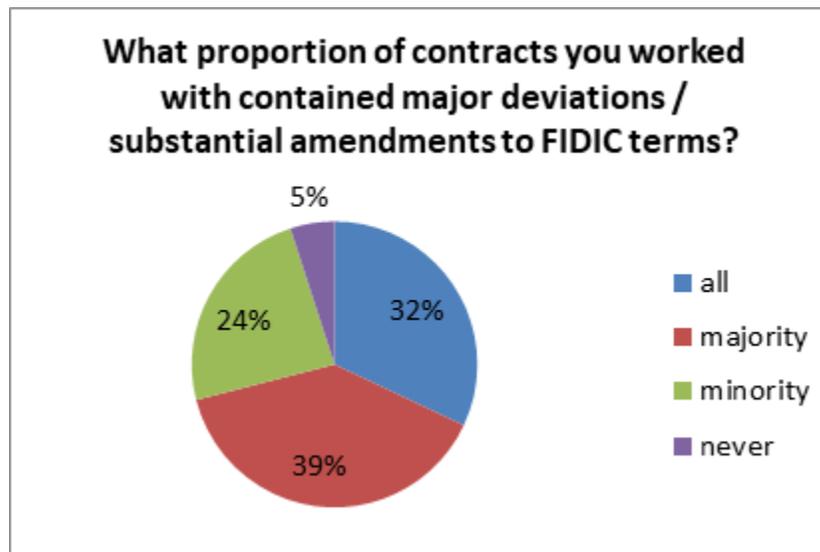
Results and Interpretation:

With this question, we try to understand whether modifying the FIDIC terms is "the rule" or rather "an exception".

Looking at the numbers, we can see that the participants very frequently encountered substantial amendments or major deviations to the FIDIC General Conditions. Around 70% of the participants chose the replies corresponding to having major deviations in "all of the cases" or the "majority of the cases".

This indicates that parties to a FIDIC construction contract are usually willing to make amendments within their contracts. This can be for different reasons:

- giving up some existing rights due to the power balance,
- granting additional rights or imposing new obligations to a party,
- assuming additional obligations if the contract is breached etc.



3. How many clauses were amended / contained deviations from the standard FIDIC wording through particular conditions? *Considering that there are 20 [1999]/21 [2017] clauses in standard FIDIC*

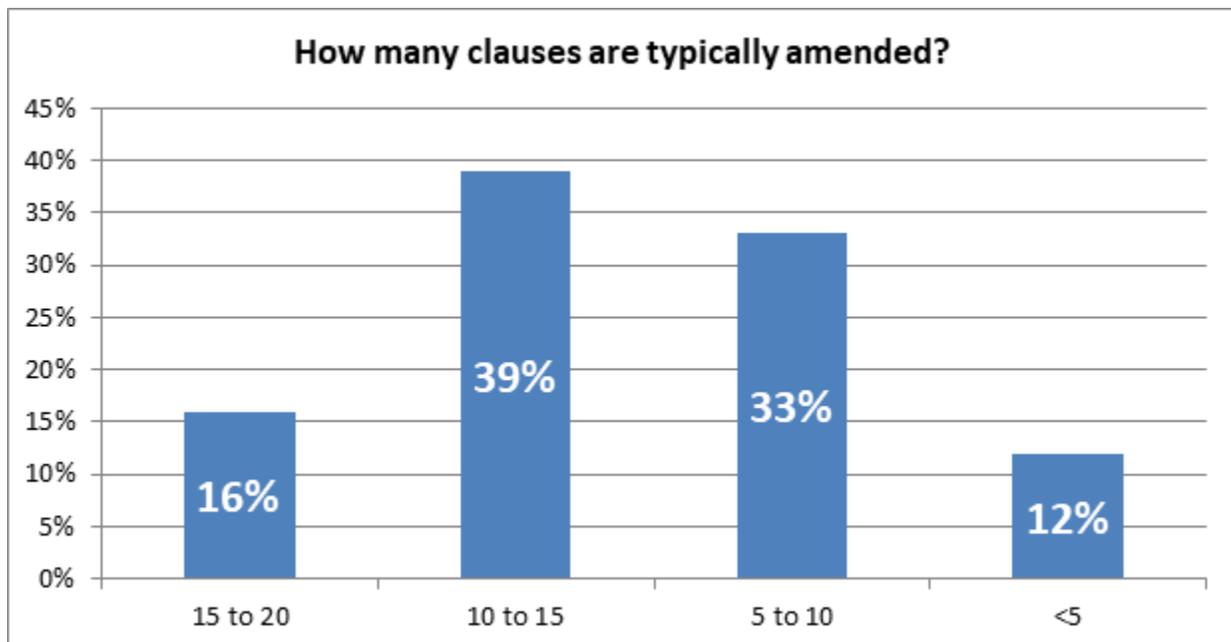
1. 15 to 20/21 clauses
2. 10 to 15 clauses
3. 5 to 10 clauses
4. less than 5 clauses

Results and Interpretation:

The objective of this question is to understand the extent of modifications to the original FIDIC contract.

In 55% of contracts, more than half of the clauses were amended or contained deviation from the standard FIDIC wording through particular conditions.

We can therefore conclude that construction contracts, based on FIDIC standards, are widely amended with deviations on most of the clauses. However, this is not necessarily a judgement on the quality of FIDIC's clauses. For many contract professionals, amending the general conditions is an essential part of their business.



4. Which type/category of deviations/amendments were made?

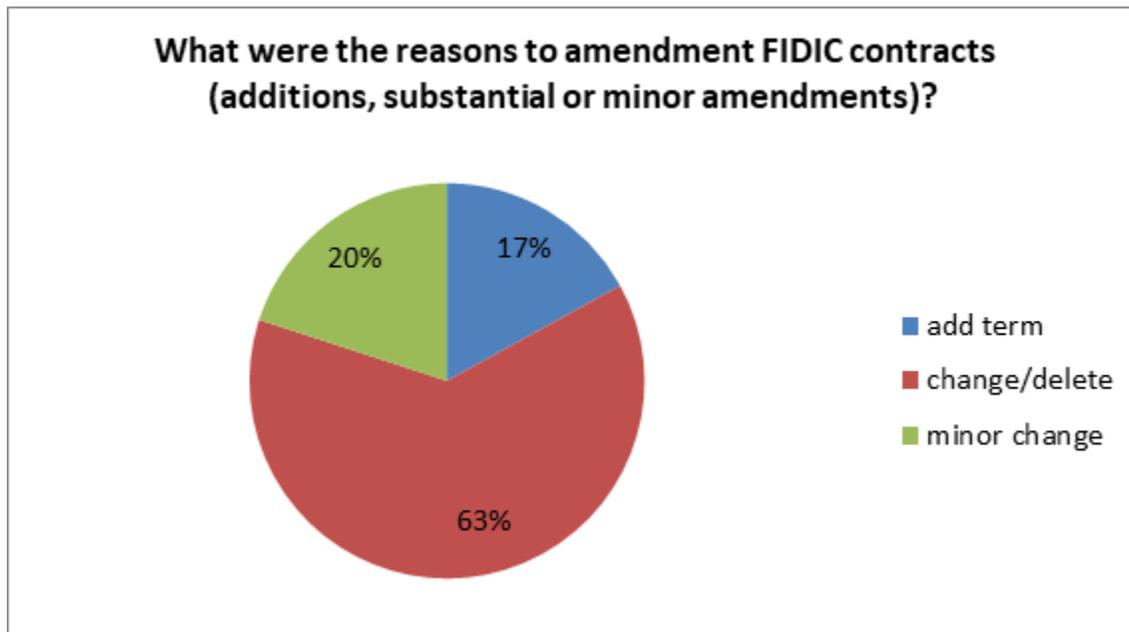
1. mostly adding terms/clauses not existing in FIDIC
2. substantial amendments or deletion of (an) existing term(s)
3. minor amendment(s) to the term(s)

Results and Interpretation:

This question helps us to establish whether additional terms were included because some provisions were missing. Or, was it just touching up? Or, was it necessary to amend or delete existing terms for some more profound reason?

The survey's results show that most of these amendments (above 60%) were in the form of substantial changes to, or deletion of, existing terms.

The contracting parties were not satisfied with some of the standard clauses and felt the need to change them. In the next questions, we will try to find out what clauses were most renegotiated and what were the underlying drivers.



5. Please provide your top 5 of conditions that were amended: (choose 5 items out of the following list)

1. Limitation of Liabilities (maximum liability of Contractor, carve-outs)
2. Indemnities (third party property, injury & death, IPR/patents)
3. Commencement, Delays and Suspension (Conditions Precedent, Extension of Time, Delay by Authority, Delay damages, Suspension and resumption by Employer, acceleration measures)
4. Taking over (partial or stage wise, test on completion)
5. Variations and adjustment (variation limits, change in law/cost, adjustment mechanism)
6. Payment (Advance, interim, final; deductions, delay compensation)
7. Termination by Employer (valuation and compensation upon contractor's default or employer's convenience)
8. Suspension and Termination by Contractor (non-payment, material breach, financial incapacity)
9. Exceptional events (Force Majeure, unforeseen, prolonged suspension, optional termination)
10. Performance Damages (LD rate, LD cap, remedy below min. performance guarantees)
11. Defects after Taking Over (defect period-notice-extension-remedy)
12. Claims (categories, notification, time bars)
13. Dispute resolution (types of dispute resolution/mechanism, applicable law)

Results and Interpretation:

Here, we tried to identify which clauses were most often amended. Note that this is a factual question. In the last question (N° 10) we are looking to the “preferred subjects” of the respondents. Indeed, there can be a substantial difference in what is amended and what negotiators or contract professionals believe is important. [IACCM](#), has made some interesting studies exposing the differences between these two.

In spite of what could be expected, the clauses identified by the participants as usually modified are not the more adversarial ones (indemnities, suspension, termination and dispute resolution).

Event the risk allocation clauses did not make it to the top of the list (limitations of liability, exceptional events, performance damages, defects after taking-over).

The operational subjects (variations, payment and time related issues) are getting the top marks. Somehow, that is reassuring because that's where most execution problems, and disputes, come from. Of course, changing well-tested FIDIC clauses, can bring its own set of problems around interpretation, intention, power balance etc. (including in arbitration and court proceedings).

Conditions that were amended	% of participants
Variations and adjustment	66%
Payment	59%
Commencement, Delays and Suspension	47%
Dispute resolution	43%
Claims	41%
Taking over	38%
Limitation of Liabilities	33%
Performance Damages	29%
Termination by Employer	24%
Exceptional events	24%
Suspension and Termination by Contractor	22%
Defects after Taking Over	16%
Indemnities	10%

6. The main source of these amendments was:

1. mostly coming from local or chosen law
2. specific to industry
3. public procurement guidelines
4. strategic (power balance such as buyer and seller market)

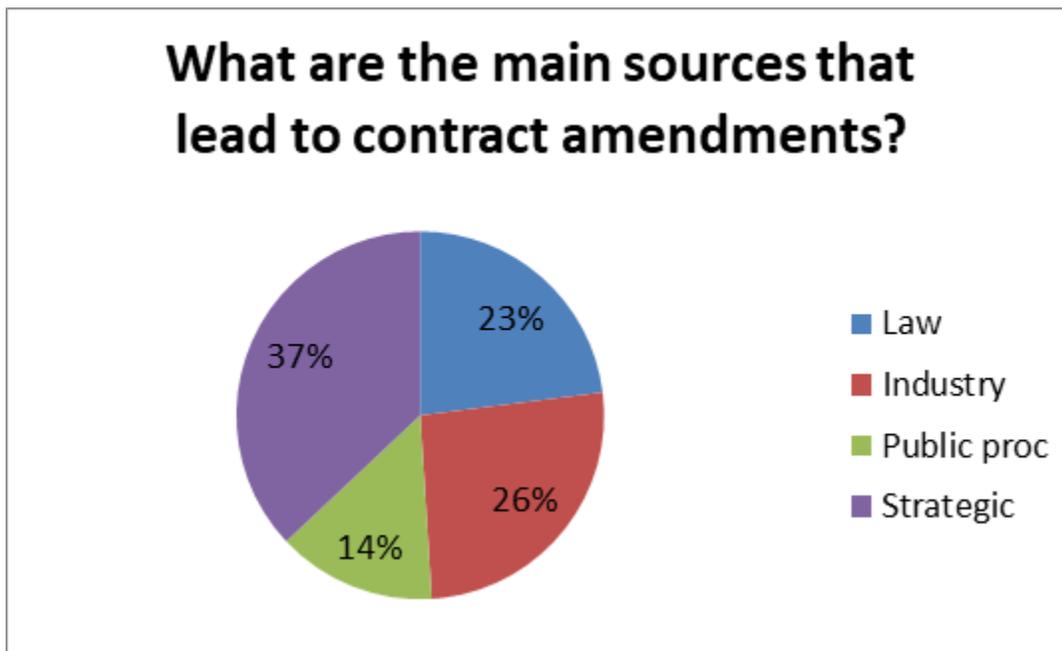
Results and Interpretation:

Here we try to find the driver for modifications: laws, industry practices, procurement rules or strategic considerations.

The answers show that each of the proposed drivers contributes to contract amendments. A clear first place, though, is for “strategic” reasons. This means that more powerful parties change contracts to their advantage. This can be either Employers or Contractors depending on whether we are in a Buyers’ or Sellers’ market.

With a bit of sarcasm, we can admit that – in the recent past – we were more frequently in a Buyers’ market (apart from a period where gas turbines were in high demand).

Public procurement is cited less frequently (only indicated in 14% of the cases as the prime cause of amendments). The problems start when Employers have (too much) discretionary power and nobody stops them from using it (except maybe arbitrators or judges in dispute resolution) ...



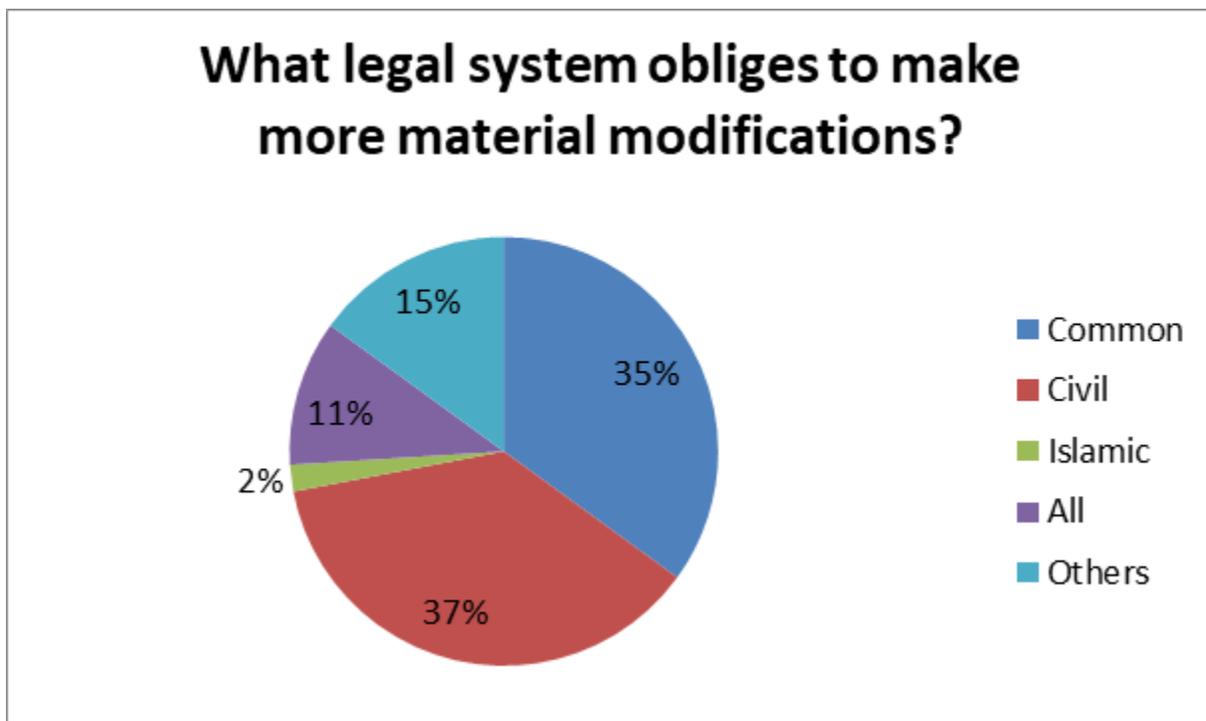
7. If the deviation/amendment was due to the legal system, which legal system obliged you to make material modifications?

1. Common law
2. Civil law
3. Islamic law
4. All of them
5. Others (please specify in the comment block below)

Results and Interpretation:

The objective of this question is to see if material amendments are coming from one specific legal system.

Common law and civil law represent more or less equal parts of the pie, jointly covering more than 70% of the participants' answers. We can therefore make an important conclusion: FIDIC conditions are not made for, nor more appropriate for, a specific legal system.



8. Would you be willing to sign a FIDIC contract with only contract data while keeping all original terms?

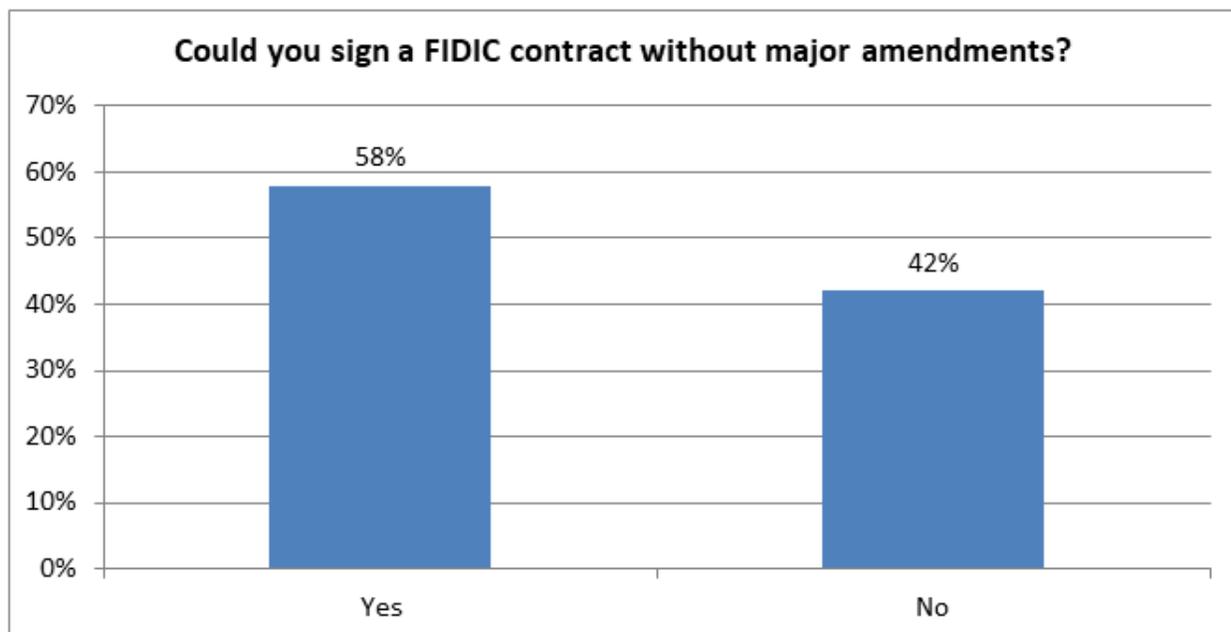
1. Yes
2. No

Results and Interpretation:

A very simple question. Personally, I was always curious to know the answer.

- 58% of participants declared that they are willing to sign a FIDIC contract with only contract data and keeping all original terms substantially non-amended.
- 42% could not sign a “pure” FIDIC contract. Considering that a substantial part of respondents is in the business of advising parties (Employers or Contractors) to adapt or negotiate their contracts, this is quite a low number.

When we look back at the answers on questions 2 and 3, I wonder: could we not stick more to the original FIDIC clauses? I am making this question without any bias towards the FIDIC organization or its standard contracts.



9. If you answered "no" on the preceding question, what was the reason?

1. The deviation is due to insufficiency of FIDIC conditions (i.e. issues not addressed by FIDIC)
2. It is due to a matter of principle (i.e. something which is unacceptable in FIDIC contracts)

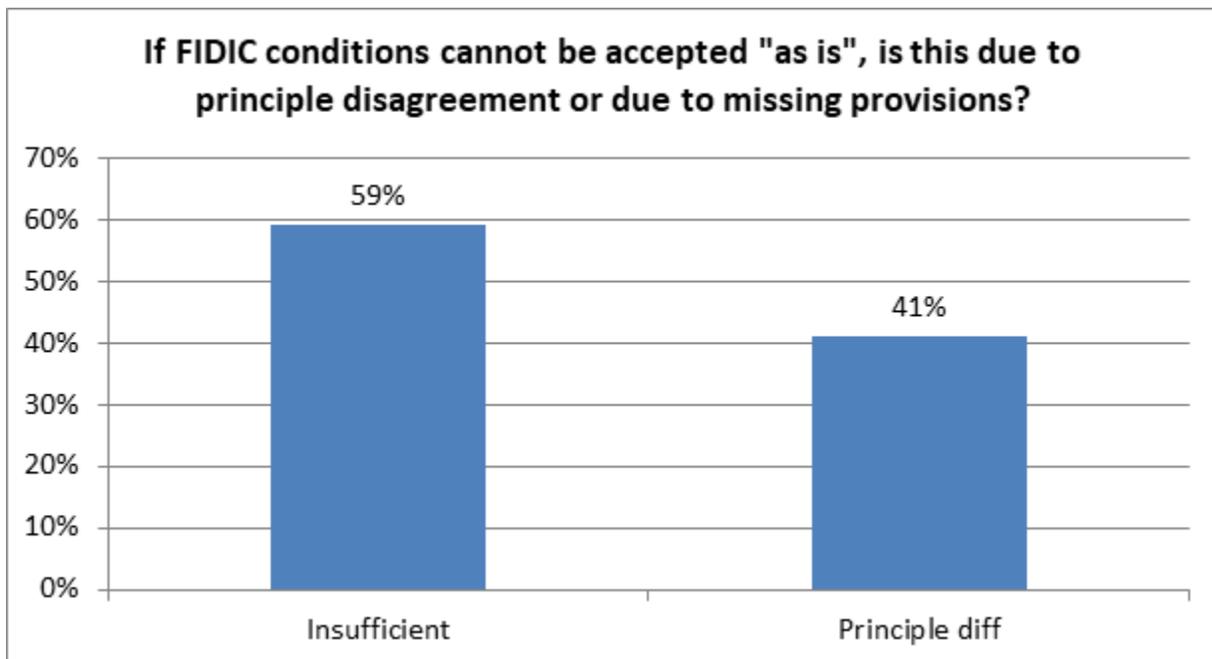
Results and Interpretation:

The objective of this question is to find the fundamental reason why some people cannot accept the FIDIC conditions "as is".

- Around 60% of the participants state that they are not willing to sign a FIDIC contract without doing some amendments because something was missing.
- Only 41% consider some FIDIC conditions as unacceptable having to be modified as a matter of principle.

Considering the answers on questions 8 and 9, we can establish that only 15 to 20% of the respondents could not accept FIDIC conditions because of a principle matter (42% x 41%), i.e. something they fundamentally disagree with. That's quite low.

While some additions could be necessary because of the legal system, the country or the business we are operating in, the vast majority considers that we do not absolutely have to modify the core FIDIC conditions. Quite reassuring for FIDIC and for the majority of its users.



10. What are the 5 most important issues you look for when analyzing a draft contract? (*Choose 5 out of the following list of 10 terms*)

1. Governing law
2. Risk Balance between parties
3. Payment conditions
4. Dispute resolution
5. Suspension and termination rights
6. Delay and liquidated damages
7. Indemnities
8. Changes/Claims (change in law, EOT, additional costs, etc)
9. Limitation of liability
10. What constitutes a material breach of contract?

Results and Interpretation:

This clause helps us to establish what contract professionals consider as really important (regardless of whether it is often a subject of negotiation or not; see question 5).

The most important issues that the participants look for when analyzing a draft contract are the risk balance between parties, changes & claims (change in law, EOT, additional costs, etc.) and delay & performance liquidated damages.

Fortunately so, the replies are not fundamentally different from those on question 5. This means that we are negotiating and amending contracts where contract professionals really believe it is important.

Important issues when analyzing a draft contract	Identified by which % of participants?
Risk Balance between parties	78%
Changes/Claims (change in law, EOT, additional costs, etc.)	72%
Delay and performance liquidated damages	71%
Payment conditions	67%
Dispute resolution	48%
Governing law	43%
Limitation of liability	41%
Suspension and termination rights	31%
What constitutes a material breach of contract?	14%
Indemnities	10%

These are the results from the FIDIC questionnaire. Thank you for your interest. If you have any questions or comments, please add them here below.

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