

# KEY FEATURES IN CONSTRUCTION LAW. 5 Common Disputes & their Solutions

A Paper Presented to Uganda Christian Lawyers' Fraternity  
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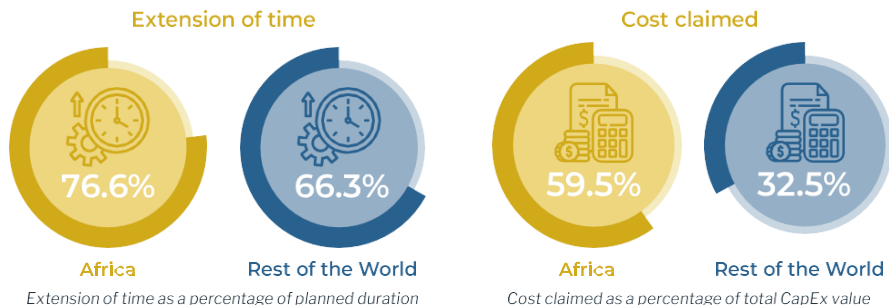


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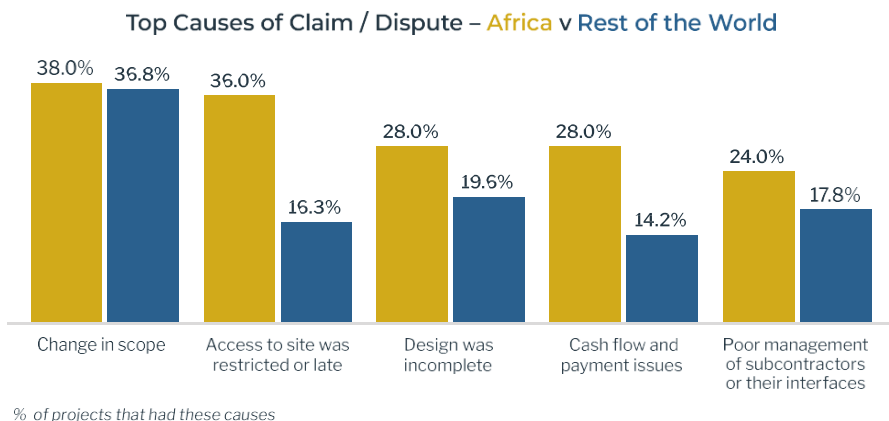


# MAJOR CAUSES OF CONSTRUCTION DISPUTES IN AFRICA

Projects in Africa were subject to long overrun claims – extending planned schedules by more than three quarters (76.6%) – exceeded only in the Middle East. Claimed costs (at 59.5% of budgeted CapEx) also surpassed the average for the rest of the world.



Some causal factors in claims and disputes were also more pronounced than elsewhere, but change in scope (affecting 38.0% of projects) was closer to that norm. While incomplete designs were more common on the continent (impacting 28.0%), design errors and late design information have been pushed down the regional causation ranking by other factors.



**Top causes**

- 1 Change in scope
- 2 Access to site was restricted or late
- 3 Design was incomplete

*Restricted access to sites or workfaces – on 36.0% of projects – often stems from errors in procurement setup, which can leave the employer responsible for a series of delays affecting multiple contractors.*

Conflicts over cashflow and payment hit more than a quarter of projects (28.0%), in the absence of statutory adjudication. Other notably prevalent drivers of claims and disputes on the continent – disrupting around one in five projects – included inadequate levels of skill or experience, late approvals, and spurious claims (which were higher than in any other region).

# 1. ACCESS TO SITE AND COMMENCEMENT

- FIDIC SC 8.1 states when the construction works will commence.
- The Engineer is required to give the Contractor not less than 14 days' notice of the Commencement Date.
- The Commencement Date must be within 42 days of the Letter of Acceptance.
- The Contractor must commence as soon as reasonably practicable.
- The Notice to Commence shall prescribe a Commencement Date, which shall be the start of the works up to the **Time for Completion**.



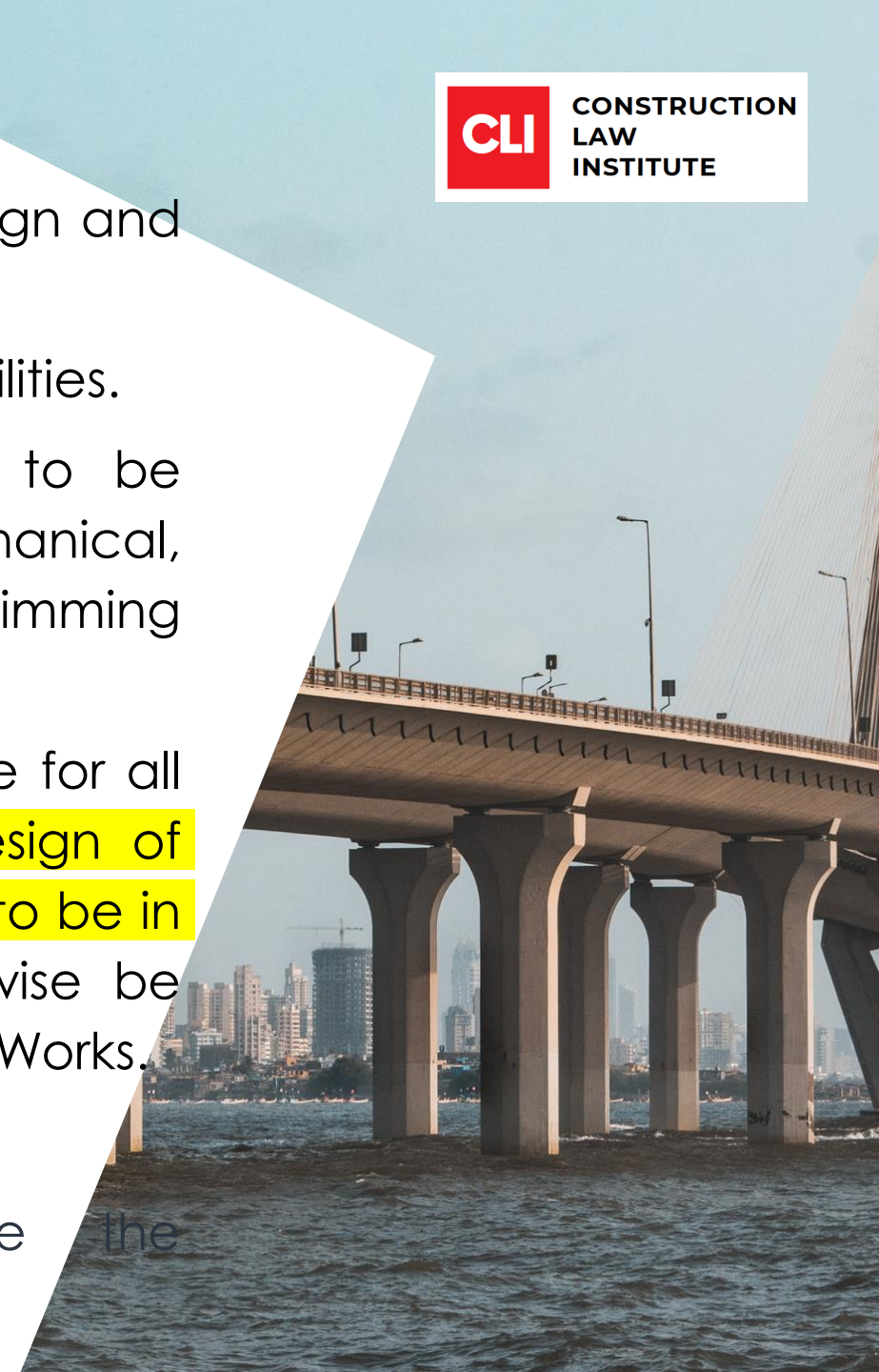
# FAILURE TO GRANT ACCESS TO SITE

- Where the Engineer or Employer fails to give notice of the Commencement Date amounts to a **breach of contract**.
- The Contractor will be entitled to claim an Extension of Time and Costs.
- The Employer may withhold the right to possession of the site until the contractor provides the Performance Security.
- To avoid claims for breach of contract, the Employer should not execute a binding contract unless he is ready to hand over the site.



## 2. INCOMPLETE DESIGNS

- Under the FIDIC Red book, the Employer develops the design and bears the risk for design errors.
- However, the developed design may lack some parts or facilities.
- The works may include deferred parts of the design to be developed by the potential contractor, including civil, mechanical, electrical, and/or construction works, e.g., Olympic-size swimming pool or digester.
- FIDIC Red 2017, SC 4.1, The Contractor shall be responsible for all Contractor's Documents, Temporary Works, and such design of each item of Plant and Materials as is required for the item to be in accordance with the Contract; and (ii) shall not otherwise be responsible for the design or specification of the Permanent Works.
- To avoid the design risk, some Employers have adopted the FIDIC Yellow and Silver Contracts, which place the Design responsibility and risk upon the Contractor.



### 3. CHANGE IN SCOPE/VARIATIONS.

- A 'Variation' is defined as any change in the Works or in the Employer's Requirements which is instructed or approved on behalf of the Employer pursuant to other provisions in the Conditions.
- The FIDIC 2017 Yellow Book provides that the Engineer can initiate a Variation at any time before a Taking-Over Certificate is issued.
- However, a Contractor can object to the Variation under these circumstances;
- The varied work was unforeseeable, considering the nature and scope of the work described in the Employer's Requirements.
- The Contractor cannot readily obtain the Goods required for the purpose.



## CHANGE IN SCOPE/VARIATIONS.

- The proposed Variation will adversely affect the Contractor's ability to comply with its health and safety obligations under the Contract and those relating to the protection of the environment.
- That the proposed Variation will have an adverse impact on the achievement of the Schedule of Performance Guarantees.
- The proposed Variation may adversely affect the Contractor's obligation contained in Sub-Clause 4.1 to complete the Works so that they will be fit for the purpose(s) for which they are intended as defined in the Employer's Requirements.



## CHANGE IN SCOPE/VARIATIONS.

- A dispute arises when an instruction is given by the Engineer verbally or during site meetings, and the Contractor implements it without a Determination and or a Variation Order issued by the Engineer.
- In some cases, the Employers have refused to pay the Contractor for such works for lack of a Variation Order or approval by the Contracts committee under the PPDA Regulations.
- The Courts have applied the law of restitution and
- allowed Contractors to recover money under quasi-contracts based on the principle of unjust benefit.



## 4. CASH FLOW

- “Cashflow is the lifeblood of the building industry.” Lord Denning.
- Adjudication promotes cash flow.
- SC 1.1.1 **Accepted Contract Amount** means the amount accepted in the Letter of Acceptance for the execution of the Works in accordance with the Contract.
- FIDIC SC 14.1 defines **Contract Price** to mean the value of the Works subject to adjustments, additions including Cost or Cost Plus Profit to which the Contractor is entitled to under the Contract and or deductions in accordance with the Contract.



## 4. CASH FLOW

- Under SC 2.4, the Employer is obliged to provide, within 28 days after receiving a request from the Contractor for reasonable evidence that financial arrangements have been made and are being maintained which will enable the Employer to pay the part of the **Contract Price** remaining to be paid at that time as estimated by the Engineer.
- FIDIC SC 14.7 The Employer's time for payment runs from when the application for the IPC is made by the Contractor.
- This is 56 days for all IPCs except the Final Payment Certificate.
- The FPC is payable 56 days after its receipt by the Employer.



# DELAYED PAYMENT

- SC14.8, the Contractor is entitled to financing charges due to delayed payment, compounded monthly during the period of delay.
- The rate is calculated at an annual rate of 3% above the rates charged to borrowers at the place for payment or, if there is no such rate, the rate in the country of the currency of payment.
- Payment of financing charges is to be made without any requirement for a notice from the contractor.
- The Final Payment Certificate is issued 28 days after the Final Statement or Partially Agreed Final Statement.



## 5. SUB CONTRACTORS

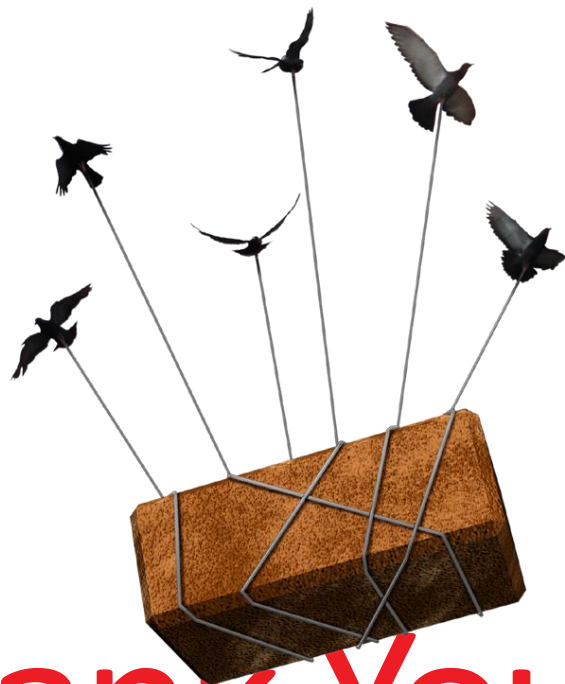
### **Payment delays**

- The subcontractor is only paid when the contractor is paid, so the subcontractor bears the burden for any payment delays.

### **Failure to claim interest**

- The subcontractor must claim interest in writing to receive it, but they are still entitled to any interest the contractor receives from the employer.





# Thank You!

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