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International Quarterly provides informative and practical information regarding legal and commercial developments in construction and energy sectors around the world.

Inside this issue

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Welcome to Issue 22

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Welcome to the latest issue of International Quarterly.

In this issue we continue our review of the proposed changes to the FIDIC form of Contract. In Issue 21, Robbie McCrae set out part 1 of his discussion of the new FIDIC Yellow Book dispute resolution procedure by looking at the proposed new dispute resolution mechanism. You can read that *here*. Now, in Part 2, Robbie asks whether Dispute Adjudication Boards are worthwhile as he considers the benefits, problems as well as commenting on FIDIC's security of payment regime.

Without wanting to give out too much of a spoiler, at Fenwick Elliott we consider that, with the right contractual support, there are many benefits to Dispute Adjudication Boards and they can be a valuable dispute avoidance tool. Other contract bodies clearly agree as I discuss in my article on the new NEC contract. Unlike FIDIC, the NEC simply introduced its new contract, NEC4, at a conference held on 22 June 2017. One of the new features was the option of a dispute board. The NEC form is used quite widely in the UK (as well as in South Africa and on government projects in Hong Kong). It is drafted in a very different style to the FIDIC form, and so our discussion on the changes introduced by NEC4 also compares the NEC form with FIDIC.

2017 has also seen the issue of the second edition of the SCL Delay and Disruption Protocol. This is often used as a statement of best practice and in Issue 22 of IQ we take a look at some of the changes that have been introduced. By way of example, Core Principle 1 of the Second Edition notes that: *"Contracting parties should reach a clear agreement on the type of records to be kept and allocate the necessary resources to meet that agreement."*

Under the new FIDIC Form, the Engineer may monitor the record keeping and/or instruct the Contractor to keep additional contemporary records. Sana Mahmud reviews this as well as other obligations of the Engineer under the pre-release FIDIC Yellow Book. Under previous editions, an Engineer has been required to act "fairly" when making a determination, now the Engineer must act "neutrally". Sana looks at what that might mean.

Finally, one of the most controversial aspects of the proposed new FIDIC Forms has been the changes to clauses 17-19 which deal with risk and liability. In particular concern was raised about the changes made to the Indemnities and Limitations on Liability wording in clause 17. Jatinder Garcha explain why there is such concern. As Jatinder notes, FIDIC has agreed that it would take away and look at the indemnity wording again. It will be interesting to see whether or not the new indemnity wording will survive in its current form when the Second Edition is finally issued later this year. We will of course let you know.

If you have any feedback or questions arising out of the articles in this edition of IQ or equally if there are any issues you would like us to cover in the future, please let me know.

Regards

Jeremy

News and events

Trends, topics and news from Fenwick Elliott

Our international arbitration credentials

With thirty years of expertise, Fenwick Elliott has a well-deserved reputation for handling large, complex, high value construction and energy related international arbitrations. Our international arbitration practice is truly global and we have advised on major projects located in the UK, Africa, Asia, India, CIS, Caribbean, Europe, the Middle East, South Africa and Turkey. Our lawyers are known as specialists in their field, for example Ahmed Ibrahim, Partner in our Dubai office was selected by the Dubai International Arbitration centre to prepare the programme for the practical training interactive workshops "How to conduct an arbitration under the DIAC Arbitration rules" which took place in March in Dubai.

Ahmed was also an instructor at the workshops. For more information on our arbitration practice please contact Richard Smellie rsmellie@fenwickelliott.com

Events

In May Fenwick Elliott hosted a half day conference in Dubai which was held in conjunction with Claims Class. The conference explored '11 Key Contractual Problems'.

May also saw Fenwick Elliott Partners Nicholas Gould and Jeremy Glover speak about dispute avoidance and strategies at the DRBF International Conference and Workshop in Madrid.

Growing team

As our practice in the MENA region continues to expand we are pleased to announce the arrival of Business Development Manager Shelly Burke to the Fenwick Elliott team.

Shelly joined the team based in our Dubai office at the end of March and is currently working closely with Partners Nicholas Gould and Ahmed Ibrahim on a number of exciting projects.

This publication

We aim to provide you with articles that are informative and useful to your daily role. We are always interested to hear your feedback and would welcome suggestions regarding any aspects of construction, energy or engineering sector that you would like us to cover. Please contact Jeremy Glover with any suggestions jglover@fenwickelliott.com.

Commentary:

The SCL Delay and Disruption Protocol: a second edition

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The Society of Construction Law's (SCL) Delay and Disruption Protocol was first published in 2002. The intention was to provide a scheme whereby delay could be better controlled and managed during the construction process. The SCL has always said that, overall, the Protocol aims to set out and be consistent with good practice (rather than best practice). Although the Protocol has no force of law (unless it is adopted into a contract, which is a very rare occurrence), it is often used as a benchmark for how to approach delay analysis. Following the publication of an intermediary update, known as Rider 1, on 1 July 2015, in February 2017 the Second Edition of the Protocol was released.[1] There were eight specific terms of reference:

(i) whether the expressed preference should remain for time-impact analysis as a programming methodology where the effects of delay events are known;

(ii) the menu and descriptions of delay methodologies for after the event analysis;

(iii) whether the Protocol should identify case law (UK and international) that has referenced the Protocol;

(iv) record keeping;

(v) global claims and concurrent delay;

(vi) approach to consideration of claims (prolongation/disruption – time and money) during currency of project;

(vii) model clauses; and

(viii) disruption.

The Second Edition helpfully builds on the guidance provided in the Frist Edition and Rider 1. We set out below one to two of the key elements.

Forms of delay analysis

The Second Edition of the Protocol makes it clear that prompt, indeed contemporary, evaluation is to be preferred. There is a new Core Principle 4 which notes as follows:

> *"4 Do not 'wait and see' regarding impact of delay events (contemporary analysis)*
>
> *The parties should attempt as far as possible to deal with the time impacts of Employer Risk Events as the work proceeds (both in terms of EOT and compensation). Applications for an EOT should be made and dealt with as close in time as possible to the delay event that gives rise to the application..."*

If this is not possible, the Protocol also considers the most appropriate form of delay analysis after the event. Here, the original Protocol recommended that one particular form of delay analysis, namely the time-impact form of delay analysis methodology, be used wherever the circumstances permitted, "both for prospective and (where the necessary information is available) retrospective delay analysis". This was not universally supported and was one of the main reasons for the review of the existing Protocol. One particular issue with the time-impact analysis can be its reliance upon theoretical modelling and not the actual sequence of events. At the same time, the original Protocol made no mention of the "windows" form of delay analysis which has certainly become one of the most used forms of delay analysis, arguably because it is considered to be one of the most reliable.

This omission has now been rectified and under the Second Edition of the Protocol, no one form of delay analysis is preferred, where that analysis is carried out some time after the delay event or its effect. Instead the Second Edition of the Protocol sets out the factors that need to be taken into account in selecting the most appropriate form of delay analysis as well as providing a helpful explanation of many of the delay analysis methodologies currently in common use. It begins with the prudent comment that:

> *"Irrespective of which method of delay analysis is deployed, there is an overriding objective of ensuring that the conclusions derived from that analysis are sound from a common sense perspective."*

The Protocol then lists a number of criteria which should help determine the choice of the appropriate method of delay analysis. These include: the Contract terms, the circumstances of the project, the nature of the relevant or causative events, the claim or dispute, the value of the project, the time available and the available project records as well as the need to ensure that a proportionate approach

is taken. There is an emphasis on what actually happened and a recognition that a theoretical delay analysis which is divorced from the facts and common sense can be unhelpful in ascertaining whether in fact the relevant delay event caused critical delay to the completion date and the amount of that delay. The key to establishing the critical path to completion is often the practical analysis of the relevant facts including production and/or resource data, not what the software says.

Concurrent delay

The 2016 pre-release version of the FIDIC Yellow Book included at sub-clause 8.5 the following new provision:

> *"If a delay caused by a matter which is the Employer's responsibility is concurrent with a delay caused by a matter which is the Contractor's responsibility, the Contractor's entitlement to EOT shall be assessed in accordance with the rules and procedures stated in the Particular Conditions (if not stated, as appropriate taking due regard of all relevant circumstances)."*

The SCL say that the approach to concurrent delay in the original Protocol has been amended in the Second Edition to reflect recent case law. The Second Edition defines concurrent delay in this way:

> "True concurrent delay is the occurrence of two or more delay events at the same time, one an Employer Risk Event, the other a Contractor Risk Event, and the effects of which are felt at the same time. For concurrent delay to exist, each of the Employer Risk Event and the Contractor Risk Event must be an effective cause of Delay to Completion (i.e. the delays must both affect the critical path). Where Contractor Delay to Completion occurs or has an effect concurrently with Employer Delay to Completion, the Contractor's concurrent delay should not reduce any EOT due."

Where concurrent delay occurs, then any Contractor Delay should not reduce the amount of an extension of time that may be due to the Contractor as a result of the Employer Delay. The Second Edition of the Protocol recognises that true concurrency is rare[2], and this definition is clearly based on the English approach where concurrency is said to arise only where there are events that are equally causative of critical delay. In other words, if one of the events was the dominant cause of delay, then the other would not be truly concurrent because it would not be an effective cause of delay.

When discussing contemporary delay analysis, the Second Edition of the Protocol also notes that, where Employer Risk Events and Contractor Risk Events occur sequentially but have concurrent effects, the delay analysis should determine whether there is concurrent delay and, if so, whether an extension of time is due for the period of that concurrency.

The Second Edition of the Protocol gives the following example. A Contractor Risk Event will result in

five weeks' Contractor Delay to Completion, delaying the contract completion date from 21 January to 25 February. Independently and a few weeks later, a variation is instructed on behalf of the Employer which, in the absence of the preceding Contractor Delay to Completion, would result in Employer Delay to Completion from 1 February to 14 February. The Protocol takes the position that the Employer Delay will not result in the works being completed later than would otherwise have been the case because the works were already going to be delayed by a greater period because of the Contractor Delay to Completion. The only effective cause of the Delay to Completion is the Contractor Risk Event.

The approach to notices

We have previously discussed in **IQ** the importance of complying with project notice procedures and time bars. This is, unsurprisingly, endorsed by Rider 1 which stresses that:

> "The parties and the CA should comply with the contractual procedural requirements relating to notices, particulars, substantiation and assessment in relation to delay events..."

This will become ever more important under the new FIDIC Forms which have an increased emphasis on time limits for notices and the provision of further particulars.

Global claims

The Second Edition says this of global claims:

> "The not uncommon practice of contractors making composite or global claims without attempting to substantiate cause and effect is discouraged by the Protocol, despite an apparent trend for the courts to take a more lenient approach when considering global claims."

Again, the reference to courts really means "English Courts". The Second Edition continues that Contractors should be aware that there is a risk that a global claim will fail entirely if any material part of the global loss can be shown to have been caused by a factor or factors for which the Employer bears no responsibility. The Contractor must try to provide adequate records to enable the Engineer or other adjudicator to establish a causal link between the Employer's Risk Event and any resultant costs or delay.

BIM Information Manager

This further confirms the importance of maintaining records. The new FIDIC Form will impose a greater burden on all parties. Both the Employer and Contractor must keep such contemporary records as may be necessary to substantiate a Claim. Sub-clause 20.2 notes that:

> *"'contemporary records' means records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim."*

Appendix B of the Protocol lists record types relevant to delay and disruption. Further, Core Principle 1 of the Second Edition notes that:

> *"Contracting parties should reach a clear agreement on the type of records to be kept and allocate the necessary resources to meet that agreement."*

Under the new FIDIC Form, the Engineer may monitor the record keeping and/or instruct the Contractor to keep additional contemporary records. Here the Protocol provides guidelines on the keeping of records and advises that in order to avoid disputes, where practicable, records should be signed by representatives of the Employer and Contractor. The Protocol recognises that there is a cost here (the benefit being that better records mean, in theory, fewer disputes) and specifically notes that:

> *"Good record keeping requires an investment of time and cost, and the commitment of staff resources by all project participants. It is therefore recommended that, prior to preparing the tender documents, the Employer considers its requirements of the Contractor in relation to record keeping and includes these within the tender documents."*

Whether that becomes a standard feature, remains to be seen.

Conclusion

As noted above, the Second Edition of the Protocol has no legal effect unless it is specifically incorporated into a contract. It has also primarily been prepared from a common law perspective. Of course, its fundamental starting point, namely *"that transparency of information and methodology is central to both dispute prevention and dispute resolution"*, is universal. Where, however, the Protocol continues to have value and an increasing influence is by providing guidance as to good (and even best) practice.

Footnotes

1. For further details, please go to the SCL website: https://www.scl.org.uk/resources/delay-disruption-protocol

2. The example often given, and indeed given in the Protocol, is the commencement date, where, for example, the Employer fails to give access to the site, but the Contractor has no resources mobilised to carry out any work.

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FIDIC Second Edition

Proposed New Clause 17: Why are Contractors Concerned?

International Contractor Groups Raise Concerns

The presentation by FIDIC at the Users conference in London in December 2016 of its pre-release version of the Yellow Book Second Edition 2017 provoked a number of reactions. Many contractors and those bodies representing contractors were concerned about several issues, especially the new proposed clause 17.

In fact, so concerned were international contractor groups that a number of them (including, amongst others, the Confederation of International Contractors' Association, the European International Contractors, and the International Contractors Association of Korea) sent a joint letter to FIDIC highlighting their particular concerns.

Clause 17.7 – New Contractor Indemnity

So what was it about the pre-release version that concerned international contractors so much? The main controversy was in relation to the changes made to the Indemnities and Limitations on Liability wording. The contractor's indemnities under the new Yellow Book (in new clause 17.7) reflect the position previously included within clause 17.1 of the First Edition but with the following additional provision:

> *"The Contractor shall also indemnify and hold harmless the Employer against all error in the Contractor's design of the Works and other professional services which result in the Works not being fit for the purpose(s) intended in accordance with Sub-Clause 4.1 [Contractor's General Obligations] or result in any loss and/or damage for the Employer (including legal fees and expenses)."*

The wording introduces a new indemnity in relation to design breaches and breaches of fitness for purpose. Effectively this new indemnity wording potentially exposes the contractor to wider-ranging losses and increased limitation periods. As if this were not controversial enough, FIDIC's associated changes to the Limitation of Liability provisions (clause 17.6), as explained further below, have compounded the misery for contractors.

Clause 17.6 – Limitation of Liability Revised

The pre-release version of the Yellow Book introduces two key changes linked to the new contractor indemnity. The first relates to the following wording:

> *"Neither Party shall be liable to the other Party for loss of use of any Works, loss of profit, loss of any contract or for any indirect or consequential loss or damage which may be suffered by the other Party in connection with the Contract, other than under:*
>
> *. . .*
>
> *(d) Sub-Clause 17.7 [Indemnities by Contractor]. . ."*

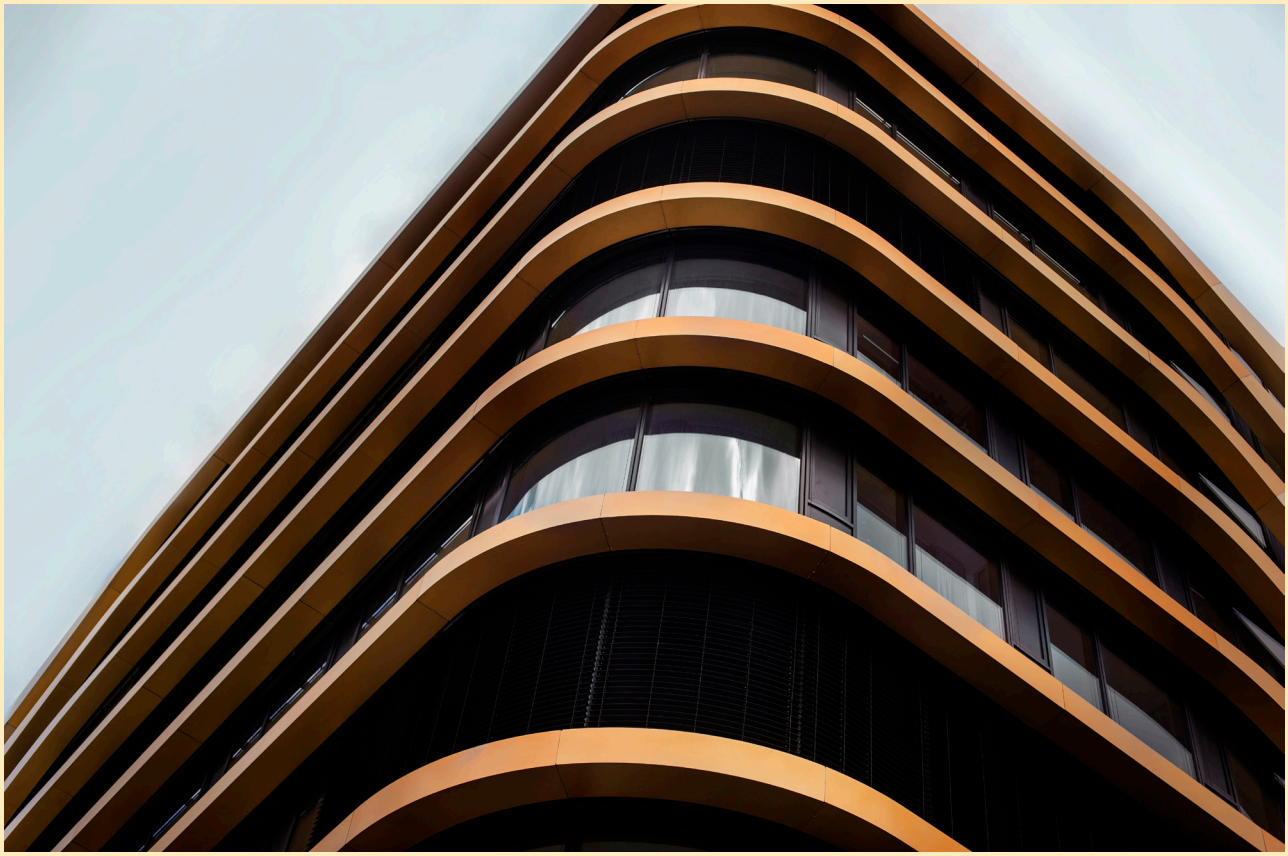
This is a new carve-out. The effect of this provision is that any fitness for purpose claims and some design breaches will expose contractors to increased liability by virtue of the fact that employers would now be entitled to claim for indirect and consequential losses.

To make matters worse, the contractor's liability under the new indemnity is unlimited as the following wording expressly carves out the indemnity under clause 17.6 from the overall cap on liability:

> *"The total liability of the Contractor to the Employer under or in connection with the Contract, other than:*
>
> *(i). . .*
>
> *(ii) under Sub-Clause 17.7 [Indemnities by Contractor], and*
>
> *. . .*
>
> *shall not exceed the sum stated in the Contract Data or (if a sum is not so stated) the Accepted Contract Amount."*

Rightly Concerned

Contractors are therefore, quite rightly, concerned about having to sign up to what would effectively be an unlimited liability for certain design breaches and fitness for purpose, not only unrestricted as to the type of losses that may be recoverable but also unlimited as to the overall liability for any such claims.



Rationale?

FIDIC have not offered any explanation or reasoning behind this proposed new provision. Some legal commentators have speculated that the wording may have been introduced to deal with what would otherwise be a contradiction with clause 11.4(d) of the pre-release edition (which is similar in content to clause 11.4(c) of the First Edition). Under this clause the Employer has the right to terminate the contract if the Contractor fails to remedy a defect or damage if such defect or damage deprives the Employer of substantially the whole benefit of the works. The Employer is then entitled to recover from the Contractor all sums paid for the Works plus finance charges and cost of dismantling.

Given how rarely employers exercise the right under this clause, the new indemnity provision would appear to be disproportionate. Surely there must be another way of dealing with such contradiction, if in fact this was FIDIC's reasoning behind the new indemnity wording.

Need for Caps on Liability

From a commercial perspective, a total cap on liability is the best way for a contractor to limit its total exposure. The level at which that cap is set is a matter of agreement between the parties, dependent upon the commercial risk profiles of the parties. Accordingly, having agreed a total cap on liability, contractors will want there to be as few "carve-outs" from this total cap as possible. There are obviously certain types of claims that cannot be excluded or limited by law; for example, under English law, claims in relation to death or personal injury cannot be limited. Then there are other carve-outs that are commonly acceptable on the basis that such losses are generally insurable, for example claims for damage to third party property.

However, it appears unreasonable to expect the consequences of design defects to fall outside the cap on liability. This is especially so when design defects are likely to form a substantial part of any claim by an Employer, but also because of the difficulties associated with obtaining insurance coverage for fitness for purpose design obligations.

What Next?

Having heard the concerns raised, FIDIC have agreed that it will look at the indemnity wording again. So it remains to be seen whether the new indemnity wording will survive in its current form when the Second Edition is finally issued later this year. Contractors will certainly be hoping not.

Contract Corner:
A review of typical contracts and clauses

Changes to the Role of the Engineer under Clause 3 in the Proposed New FIDIC Yellow Book

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In December 2016, at its International Users Conference in London, FIDIC issued a "pre-release" second edition of the Yellow Book (Conditions of Contract for Plant and Design-Build) and indicated that it would issue a final second edition during the course of 2017 as part of a wider update to its 1999 Rainbow Suite. We looked at some of the anticipated changes in Issue 21 of *International Quarterly*. This article focuses on the changes to the role of the Engineer under Clause 3 found in the proposed new Yellow Book.

One of the main intentions behind the new amendments, as FIDIC explained, is to facilitate better project management so that disputes between parties are less likely to escalate. The changes made to Clause 3 of the Yellow Book relating to the Engineer, such as an increased focus on his obligation to encourage the agreement of claims and the requirement that he act "neutrally", reflect this approach. The more notable amendments to Clause 3 are reviewed below.

Qualification Requirements

New Sub-Clause 3.1 introduces certain qualification requirements for anyone acting as the Engineer. Under the new Sub-Clause, the Engineer must be a professional engineer with suitable qualifications, experience and competence in the main engineering discipline applicable to the works (if there is more than one discipline, then in at least one of those). There is no equivalent requirement for the Engineer under the 1999 Yellow Book, although Sub-Clause 3.1 mandates that the Engineer's staff should include suitably qualified engineers and other professionals who are competent to carry out the duties assigned to the Engineer under the Contract.

Under new Sub-Clause 3.1, there is also a new requirement that the Engineer must be fluent in the language of the Contract as defined in Sub-Clause 1.4. The 1999 Yellow Book does not contain any specific language requirement.

If used in their unamended form, these new provisions may, for example, pose difficulties for employers who would ordinarily seek to appoint project managers in that role. The principle behind these new requirements is to ensure that the selection of firms for the role of Engineer by an Employer is made on the basis of qualifications and demonstrated competence, and is perhaps of particular relevance to public works contracts where the provisions may act as an exception to a government's approach of awarding contracts to the lowest bidder. Where the contract is tendered by a government or other public authority, FIDIC suggests that basing the selection of the Engineer on quality may have an impact on return of investment and project life cycle costs.

Introduction of an Engineer's Representative

Under new Sub-Clause 3.3 the Engineer can appoint an Engineer's Representative to whom he can delegate the authority necessary to act on his behalf on site. The Engineer's Representative must be a natural person and remain on site for the whole time that the works are being executed. There is no equivalent provision in the 1999 Yellow Book. This change reflects FIDIC's focus on increased project management to avoid disputes arising in the first place.

Variations

Under new Sub-Clause 3.5, which relates to the Engineer's instructions, a new provision is added to address circumstances where the Contractor believes an instruction constitutes a Variation but the Engineer has not expressly stated this in the relevant instruction. The new provision gives the Contractor a mechanism under which he can give a Notice to the Engineer that the instruction constitutes a Variation. If the Engineer does not respond within 7 days of receiving the Notice (by giving a Notice confirming, reversing or varying the instruction), then the Engineer is deemed to have revoked the instruction.

Sub-Clause 3.3 of the 1999 Yellow Book states that if an instruction constitutes a Variation then it shall be subject to the Variation procedure set out in Clause 13. Clause 13 of the 1999 Yellow Book does not expressly deal with a situation where the Contractor believes that an Engineer's instruction constitutes a Variation but where the Engineer has not stated that it is a Variation. In such circumstances, the Contractor could pursue a claim for additional payment under Sub-Clause 20.1.

The addition of this provision in new Sub-Clause 3.5, on the face of it, adds some welcome clarity from a Contractor's point of view. On the wording of the new provision, the Engineer has the power to confirm, reverse or vary such an instruction after the Contractor gives the appropriate Notice. The position however may be less clear where there is a genuine dispute between the parties as to whether that instruction amounts to a Variation. In those circumstances, the Engineer has the power to confirm his original instruction, which may mean that the Contractor finds himself in no better position than he was under the 1999 Yellow Book.

Engineer's Determinations under New Sub-Clause 3.7

Sub-Clause 3.5 in the 1999 Yellow Book has been replaced by a much longer new Sub-Clause 3.7 called *"Agreement or Determination"*. The amendments to the determination Sub-Clause are significant and, as the renaming suggests, are made in part to try and resolve disputes between the parties at an earlier stage, so as to avoid the need for a DAB decision and/or an arbitral award.

Obligation to consult and endeavour to reach agreement

Under Sub-Clause 3.5 of the 1999 Yellow Book, the Engineer is under an obligation to consult with the parties in an endeavour to reach agreement. This obligation is retained and expanded upon substantially in new Sub-Clause 3.7.

New Sub-Clause 3.7 imposes a more detailed procedure as well as additional time limits on the Engineer when agreeing or determining any matter or Claim. In relation to seeking early agreement under Sub-Clause 3.7.1, new requirements include:

- a positive obligation to consult with the parties jointly and/or separately;
- to encourage discussion between the parties in an endeavour to reach agreement;
- to commence any such consultation promptly so as to allow adequate time to comply with a new 42-day time limit for seeking agreement under new Sub-Clause 3.7.3; and
- to provide the parties with a record of the consultation (unless the Engineer proposes otherwise and the parties agree).

New Sub-Clause 3.7.3, as referred to above, imposes an initial 42-day time limit by which the Engineer must give a Notice of agreement to the parties, if agreement is reached. Under new Sub-Clause 3.7.1, this Notice must state that it is a "Notice of the Parties' Agreement" and must describe the agreement in detail, with supporting particulars.

This initial 42-day time limit can be amended if an alternative is proposed by the Engineer and accepted by the parties. It is worth noting that the changes to this time limit, as with changes to the provision of the Engineer's record of the consultation under Sub-Clause 3.7.1, on the face of it can only be agreed by the parties on the back of an Engineer's proposal.

If no agreement is reached in the initial 42-day period, the Engineer is given a further 42 days by which to make a fair determination of the matter or Claim. The practical effect of these changes is that the time in which the Engineer must make a determination has doubled to 84 days. Under the 1999 Yellow Book, the Engineer was obliged to both consult the parties and make his decision within a single 42-day period. The extension of this period may arguably be grounds for criticism if a party takes the view that ultimate resolution of its claims in practice could now take significantly longer than under the 1999 Yellow Book. However, such a view would ignore the fact that the aim of these changes is to increase the likelihood of a matter or Claim being resolved without recourse to the dispute resolution provisions under new Clause 21. Whether in fact these changes have FIDIC's desired effect remains to be seen.

Duty to act "neutrally"

New Sub-Clause 3.7 retains the wording of the 1999 Yellow Book in that the Engineer must still make a fair determination of the matter or Claim. Under Sub-Clause 3.1 of the 1999 Yellow Book the Engineer is deemed to act for the Employer. The equivalent provision found in new Sub-Clause 3.2 does not change this, only adding that the Engineer does not have to obtain the Employer's consent prior to making a determination.

However, the first sentence of new Sub-Clause 3.7 imposes an additional, separate obligation on the Engineer to act "neutrally between the Parties when carrying out his duties under this Sub-Clause", which applies both to the Engineer's attempts to agree the matter or Claim, and the process by which he comes to a determination. The term "neutrally" is not defined in the new Sub-Clause or in the new Yellow Book generally.

As a matter of English law, the generally accepted position is that in performing his contract administration duties, the Engineer must act in a fair and unbiased manner.[1] This view is not, however, commonly recognised in civil law jurisdictions and has been an issue for FIDIC in the past. It is worth noting that the edition of FIDIC's Yellow Book published in 1987, which preceded the 1999 version, incorporated an express duty of impartiality on the Engineer when carrying out certain functions, including when giving decisions.[2] This provision did not make it into the 1999 Yellow Book, which said only that the Engineer must make a fair determination under Sub-Clause 3.5.

FIDIC explained that the choice of the word "neutrally" for the upcoming 2017 edition, as opposed to independent or impartial, is a deliberate one which seeks to make clear that in the context of making a determination, the Engineer is non-partisan and does not act for the Employer. This is perhaps because the use of the word "neutrally" seeks to avoid the conceptual difficulties that lawyers in civil law jurisdictions have commonly encountered in reconciling independence or impartiality with the Engineer's role as the Employer's agent.

In addition to the above, parties should be aware that the fact that the position must be filled by a "professional engineer" under new Sub-Clause 3.1 means that a duty to act impartially in such circumstances could also be implied under the governing standards of a professional institution applicable to any appointed Engineer. This, and the specific inclusion of the requirement that the Engineer act "neutrally" in new Sub-Clause 3.7 could be said to be indicative of a move by FIDIC towards the common law position under which the Engineer, notwithstanding that he generally acts as the Employer's agent, must act fairly and without bias in his role as contract administrator.

It is, however, arguable that a duty to act fairly in the context of making a determination is analogous to one that compels the Engineer to act "neutrally". It is not yet certain whether such a change will, in practice, result in fewer claims being brought before the DAB and/or arbitration under new Sub-Clause 21.

What happens if the Engineer does nothing?

Under new Sub-Clause 3.7.3, if the Engineer fails to give a Notice of agreement or determination within the relevant time limit, this will amount to a rejection of the matter or Claim.

The addition of this provision is helpful, because it clarifies that an Engineer acting for an Employer cannot use a lack of response as a stalling tactic to delay resolution of a Contractor's otherwise valid claim. Contractors, however, may take the view that the changes do not go far enough, and that failure to respond by the Engineer should amount to an acceptance of a Claim. However, in circumstances where there is a question mark over the neutrality of the Engineer, conversely there is a risk that such an amendment may also work against a Contractor if the Engineer remains silent on matters or Claims brought by the Employer.

A new Notice of Dissatisfaction

As mentioned above, under new Sub-Clause 3.7.2, the Engineer must give a Notice to both Parties of his determination within a further 42 days if no agreement is reached within the first 42-day period. In addition to the supporting particulars previously required under Sub-Clause 3.5 of the 1999 Yellow Book, the Engineer must also expressly give reasons under new Sub-Clause 3.7.2.

If either party is dissatisfied with the Engineer's determination, under new Sub-Clause 3.7.4, it may, within 28 days of receiving the determination (or if the Engineer does nothing, within 28 days of the expiry of the relevant time limits), give the other party a "Notice of Dissatisfaction with the Engineer's Determination" (copied to the Engineer) which must set out its reasons for dissatisfaction. It is important for parties to note that failing to give this Notice within the 28-day period means that the Engineer's determination shall be deemed to have been accepted finally and conclusively by both parties. There is no equivalent provision in the 1999 Yellow Book. Under Sub-Clause 3.5 of the 1999 Yellow Book, the Engineer's determination is said to be valid unless and until revised under Sub-Clause 20 – there is no risk that a party may lose its right to make a claim further up the line.

Conclusion

In addition to the changes highlighted above, the parties and the Engineer are under a proactive duty to endeavour to advise the others of any known or probable future events or circumstances which may adversely affect the Contractor's work, increase the Contract Price or cause delay.[3] This advance warning mechanism, together with the updates to Clause 3 of the 1999 Yellow Book, is part of a broad approach to clarify and expand the role of the Engineer, and is made in keeping with FIDIC's expressed desire to increase project management and prevent disputes from escalating unnecessarily. Whether these changes meet that objective in practice remains to be seen, but the emphasis on the early resolution of potential disputes is certainly a step in the right direction.

Footnotes

1. See Sutcliffe v Thackrah [1974] AC 727, Costain Ltd v Bechtel Ltd [2005] EWHC 1018 (TCC) and Amec Civil Engineering Ltd v The Secretary of State for Transport [2005] CILL 2288.
2. Sub-Clause 2.4.
3. New Sub-Clause 8.4, Advance Warning.

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Commentary:
International dispute resolution & adjudication

The new FIDIC Yellow Book dispute resolution procedure:
Part 2 – are Dispute Adjudication Boards worthwhile? Benefits, problems and comments on FIDIC's security of payment regime

Introduction

In Part 1 of this paper we reviewed the dispute resolution procedure included in FIDIC's pre-release version of its second edition of Conditions of Contract for Plant and Design Build ("the Proposed 2017 Yellow Book"),[1] which affirms and expands the infamous Dispute Adjudication/Avoidance Board ("DAB") mechanism.

DABs are used widely in international construction contracts and they can be very effective. However, if either party refuses to comply with its obligations under the DAB provisions it can be difficult and at times impossible to enforce them. Defective drafting of the FIDIC Rainbow Suite, or 1999 Conditions of Contract, has led to a proliferation of disputes as to whether, as a matter of contract, it is possible to summarily enforce binding but not-final DAB decisions, notwithstanding that FIDIC has explicitly stated this was its intention. The problematic wording has been resolved in the Proposed 2017 Yellow Book; however, even where the contractual position is clear a further issue is whether not-final DAB decisions are able to be enforced as a matter of law in a number of jurisdictions. Many contractors have signed up to the FIDIC Conditions on the understanding that the DAB provides a security of payment regime, only to find it act as a barrier to payment instead. The reality is that DABs often do not provide the straightforward relief that FIDIC intended.

This paper considers the practical effect of FIDIC's DAB mechanism as a security of payment regime, and in doing so addresses the benefits, pitfalls, how not-final DAB decisions are treated in different jurisdictions, and potential solutions for a workable DAB mechanism, and by implication the proposed new binding Engineer's determinations, as a contractual precondition to arbitration.

The intended DAB security of payment regime

DABs, under the FIDIC form and as they are commonly understood, consist of a board of one or three people, appointed by parties to a contract to assist in the resolution of issues or disputes arising in relation to that contract, as a first step before any dispute can be referred to arbitration or court proceedings.

While DABs under the 2008 Gold Book and Proposed 2017 Yellow Book also provide a dispute avoidance role during the contract,[2] this paper focuses on the security of payment regime of binding decisions. The key features of FIDIC's security of payment regime are as follows:[3]

- when any dispute arises in relation to a contract, either party may refer the dispute to the DAB;[4]
- the DAB must issue a decision within 84 days of the dispute being referred to it;
- the decision *"shall be binding on both Parties, who shall promptly give effect to it;"* and
- obtaining a DAB decision is a condition precedent to referring that dispute to arbitration.

Either party may issue a "notice of dissatisfaction" ("NOD") with a DAB decision within 28 days of it being issued, which will preserve the parties' ability to refer the underlying dispute to be finally determined in arbitration. If neither party issues a valid NOD then the decision will become final, and the decision itself will be enforceable in arbitration without the merits of the underlying dispute being looked at any further.

FIDIC has repeatedly affirmed that its intention is that any DAB decision, whether subject to an NOD or not, be able to be enforced summarily in arbitration in the first instance; i.e.[5] *"pay now, argue later"*. This was explained by the Singapore courts in the Persero II proceedings[6] as creating:[7]

> *"a contractual security of payment regime, intended to be available to the parties even if no statutory regime exists under the applicable law ... [and under which w]hen a dispute over a payment obligation arises, the regime facilitates the contractor's cash flow by requiring the employer to pay now, but without disturbing the employer's entitlement (and indeed also the contractor's entitlement) to argue later about the underlying merits of that payment obligation."*

In addition, and as explained in Part 1 of this paper, the Proposed 2017 Yellow Book adds a further layer to this security of payment regime whereby, as a precondition to referring any dispute to the DAB, parties must first refer the dispute to the Engineer who will have 84 days to resolve the dispute or, failing that, must issue a binding Engineer's determination.

Benefits of the DAB mechanism

The benefits of this functioning DAB mechanism include:

1. If a DAB is set up early in the contract, it will be able to provide immediate assistance once a dispute arises, and should already have a good knowledge of the project.
2. Disputes must be referred to a DAB timeously, meaning the issues will still be fresh in the parties' minds and should be able to be resolved without unduly disturbing the carrying out of the project.
3. Decisions must be issued within 84 days, which is much faster than can be achieved in arbitration.[8]

Similar security of payment regimes have been implemented by legislation in a number of jurisdictions, such as the United Kingdom, Australia, New Zealand and Singapore.[9] In these jurisdictions the ability to receive fast and enforceable adjudication decisions, while not appropriate for every dispute, has dramatically decreased the number of construction disputes that proceed to substantive court or arbitration proceedings.

However, despite FIDIC's best intentions, there are a number of practical issues which have plagued its contractual security of payment regime and will continue to do so.

Problems with the DAB mechanism

The practical difficulties we have experienced with the FIDIC DAB mechanism can be broadly broken down into the following: (1) defective contract wording, (2) jurisdictional issues, and (3) a lack of will from employers and project-funders to adhere to the contractual DAB mechanism. These are addressed below.

1. Defective contract wording

Defective contract wording has been a major problem with the DAB mechanism under the 1999 Conditions of Contract. The issue is that although those Conditions provide for final DAB decisions to be directly enforced in arbitration, there is no express provision for not-final DAB decisions to be enforced. This has led to extensive debate and a multitude of competing options as to the correct way, if at all, to enforce a not-final DAB decision.

FIDIC sought to clarify the position through a Guidance Memorandum issued on 1 April 2013 which provided wording for an amended Sub-clause 20.7 that expressly provides for not-final decisions to be enforced in arbitration, and which can be incorporated into the 1999 Conditions of Contract. This same wording has been included in the 2008 Gold Book, whereas the Proposed 2017 Yellow Book uses similar, albeit further refined, wording to address the contractual issues with the DAB mechanism.

Parties using the FIDIC form therefore now have the tools to avoid the contractual issues set out above, provided they have the will to include them.

2. Not-final DAB decisions are not enforceable in some jurisdictions

A more critical issue with the FIDIC security of payment regime is that irrespective of how clear the contract is, not-final DAB decisions are simply not enforceable in a number of jurisdictions. In those cases parties will still be required to go through the mandatory DAB procedure but will then have no ability to enforce the resulting DAB decision in the event the losing party refuses to comply.

DABs are purely creations of contract and therefore, unlike adjudication decisions under statutory regimes,[10] DAB decisions are not recognised as an enforceable title in and of themselves. The two key issues we have experienced with this are whether an arbitral award enforcing a not-final DAB decision:

- will comply with the definition of an enforceable arbitral award in a jurisdiction's arbitration legislation, given that such an award (a) will not review the underlying merit of the dispute and (b) will be followed by a final substantive arbitral award on the underlying merits; and
- will be prevented by the principle of res judicata (that a matter which has already been decided cannot be decided again), because the final substantive arbitral award will need to decide the same matters that are subject to the enforced DAB decision.

Other practical issues include how the enforcement of a not-final award should be taken into account in the final substantive arbitral award.

A snapshot of how some jurisdictions have dealt with these issues is set out below.

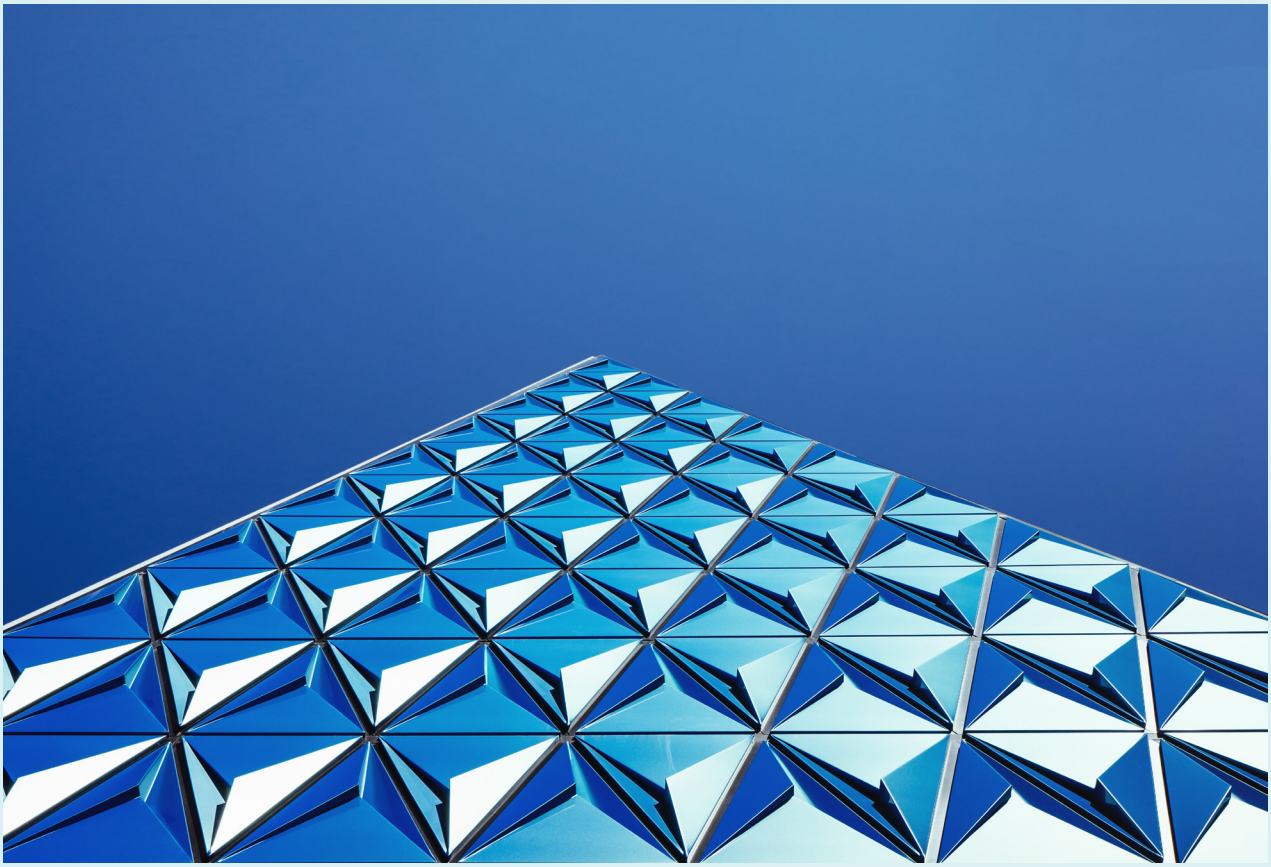
Romania

As of January 2017 the position in Romania appears to be that not-final DAB decisions cannot be enforced. The position has been unsettled for a number of years, and we are aware of not-final DAB decisions that have been enforced and commentators who support this.[11] However, the majority of reported arbitral awards have declined to enforce not-final DAB decisions. In the most definitive statement to date, a High Court decision issued in January 2017 found that not-final DAB decisions cannot be enforced under Romanian law.

The reasons for the Romanian position are as summarised above, namely that any arbitral award enforcing a not-final DAB decision will not comply with Romanian legislation,[12] and res judicata.

Singapore

Following the Persero series of cases,[13]



cases the claimant contractor was able to enforce a not-final DAB decision, albeit after going through two sets of arbitration, High Court and Court of Appeal proceedings, and over a period of six years. The difficulty with that case related to the defective contract wording of the 1999 Conditions of Contract, and if we assume that this defective wording has now been resolved it might be expected that a not-final DAB decision would be enforced promptly.

However this is not a certainty. The Singapore International Arbitration Act defines an "award" as a decision "on the substance of the dispute and includes any interim, interlocutory or partial award". While this is a wider definition than the Romanian legislation, the Minority of the Court of Appeal in Persero II considered that not-final DAB decisions amount to provisional relief only and therefore cannot be enforced under this definition. It is conceivable that a court might also reject such an award as not being on the "substance" of the dispute.

The position in Singapore today therefore is that not-final DAB decisions should be expected to be enforced, but there is no guarantee that they will.

South Africa

By contrast, the courts in South Africa have had no problem giving effect to the intention of the contract. The position is set out in the case of Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd (06757/2013) [2013] ZAGPJHC 155; 2014 (1) SA 244 (GSJ) (3 May 2013). In that case the court focused only on the question of the intention of the contract, from which basis it had no difficulty in giving effect to what it described as the "perfectly clear" intention that the parties are "obliged to promptly give effect to a decision by the DAB ... [and] that the issue of a notice of dissatisfaction does not in any way detract from this obligation".

United Arab Emirates

The position in the UAE, and which is representative of the Middle East generally, is untested (so far as we are aware) but is very unlikely to permit not-final DAB decisions to be enforced. While UAE law does recognise arbitral awards, the UAE Civil Procedures Law only recognises final awards and therefore any bifurcation would likely jeopardise the entire arbitration agreement,[14] whereas we would expect not-final awards would also be disputed on grounds of res judicata.

3. Lack of will from employers and project-funders to adhere to the contractual DAB mechanism

The biggest issue we have experienced with FIDIC's security of payment regime is recalcitrance from employers to adhere to DAB decisions, and a lack of will or ability from project-funders, such as development banks, to encourage compliance.

Solutions

There are a number of solutions and steps parties can take in response to the issues described above. Remedies to the defective contract wording have already been well canvassed. In addition, there are a number of contract amendments that could effectively ensure compliance or at least a release from the DAB mechanism in jurisdictions where enforcement will be difficult. These include making it a condition precedent to issuing a valid NOD that the issuing party has fully complied with the corresponding DAB decision, or allowing the DAB mechanism to be deleted upon non-compliance by the other party.

However, many of these amendments will not be acceptable to employers, and the extent to which concerns are able to be addressed will be a matter of negotiation. Consequently the most important thing parties can do is ensure that, prior to entering into any contract, they have discussed, understood and agreed their obligations under the dispute resolution mechanism. This should include discussions with any project-funder as to their position and role in enforcing the security of payment regime.

Conclusion

Our answer to the question "are DABs worthwhile?" is, perhaps unsurprisingly, "it depends".

FIDIC's promotion of dispute avoidance is a good thing and should be viewed positively, albeit carefully. The security of payment regime will not suit every contract. Where parties are confident that decisions by the DAB and/or Engineer will be complied with or will be enforceable in the applicable jurisdiction, then the DAB mechanism is likely to be worthwhile. Conversely, where DAB decisions are unlikely to be enforceable, serious questions will need to be asked about what other steps might be available to ensure the security of payment regime is workable. In some cases no satisfactory assurances will be available and the DAB mechanism may well be a waste of time, effort and money.

In summary, FIDIC's DAB mechanism is very good when it works, but is often a waste of time when it does not. Parties looking to enter into any FIDIC contract should consider very carefully whether this mechanism is suitable for their particular circumstances, what can be done to minimise the risk of the security of payment regime being ineffective, and whether this mechanism or parts of it should be deleted altogether. If appropriate steps cannot be taken, parties should at least understand the risks they are signing up to.

Footnotes

1. https://www.fenwickelliott.com/sites/default/files/issue_21_-_iq_2017.pdf

2. Parties should use caution in asking the DAB to act as a quasi-mediator, but the development should generally be viewed positively.

3. These are provided in Sub-clause 20.4 of the 1999 Conditions of Contract, Sub-clause 20.6 of the 2008 Gold Book, and Sub-clause 21.4 of the Proposed 2017 Yellow Book.

4. "Dispute Board" in the FIDIC Pink Book.

5. For instance in the FIDIC Guidance Memorandum of April 2013.

6. Which culminated in the Singapore Court of Appeal in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30.

7. PT Perusahaan Gas Negara (Persero) TBK ("PGN") v CRW Joint Operation (Indonesia) ("CRW") [2014] SGHC 146, at paragraphs 22 and 24.

8. With the exception of emergency arbitration procedures, which provide only urgent and temporary relief.

9. For instance, the Housing Grants, Construction and Regeneration Act 1998 in the UK, or in Singapore where the Building and Construction Industry Security of Payment Act 2006 goes as far as to state that an application for review of an adjudicator's decision can only be heard if that decision has actually been paid.

10. Housing Grants, Construction and Regeneration Act 1996.

11. C. Leaua, Arbitration in Romania: A Practitioner's Guide, Kluwer Law International, 2016.

12. Article 1.121(3) of the Romanian New Civil Procedure Code requires arbitral awards to be "final" in order to be enforceable.

13. Although the Persero series was decided under Indonesian law, the applicable arbitration law was based on the seat of arbitration: Singapore.

14. We are aware of one case that has endorsed the right of arbitral tribunals to issue partial awards where this is provided in the parties' arbitration agreement, Dubai Court of Cassation, Petition No. 274 of 2013, dated 19 January 2014, but as the UAE does not have a system of binding precedent, it is questionable whether this can be relied upon in light of the body of law against it.

Contract Corner:

Introducing NEC4

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The FIDIC Contract is not the only contract form begin amended this year. On 22 June 2017, the NEC4 Form was revealed.[1] We thought it might be helpful to explain some of the changes, and at the same time highlight some of the differences with the FIDIC Form.

The New Engineering Contract ("NEC") was first published in March 1993. Like, FIDIC, the NEC form was designed for international use with a choice of governing law and language. Unlike FIDIC, to date, the NEC Form is not used widely across the globe, although it is certainly its use is on the increase where it is used.

In the UK, NEC3 was the contract of choice of the Olympic Delivery Authority who were responsible for the planning, designing and building of the venues, facilities and accommodation and developing of the infrastructure to support these for the 2012 Olympic Games. NEC3 is also widely used in the decommissioning of nuclear power stations and is currently being used on Europe's largest construction project, the Crossrail project in London.[2]

More globally, in Hong Kong following a number of pilot projects including the HK$2billion community hospital at Tin Shui Wai, from April 2015 all Hong Kong Government works departments are required to tender new projects using the full suite of NEC3 contracts. The NEC3 has also been widely used on major projects in South Africa; and the South African Construction Industry Development Board currently recommends NEC3 contracts for public-sector use in South Africa. In South Africa the NEC3 Form, along with FIDIC is one of four contracts authorised for use under the Construction Industry Development Board (CIDB) Act.

The NEC clearly wants to expand their reach. Peter Higgins, the chair of the NEC4 Contract Board in the prefaced to the new contract said that one of the three key objectives of NEC4 was to:

> *"'inspire increased use of NEC in new markets and sectors".*

In summary, the NEC3's three core principles are:

(i) Flexibility:

The basic idea is that you construct your contract from the core clauses[3], main options and secondary options described below which will avoid the need for bespoke amendments. However, one typically finds that NEC contracts do come with a number of bespoke amendments or Z-clauses;

(ii) Simplicity and clarity:

The contract is written in the present tense, and avoids the use of mandatory words in plain English. This is in marked difference to other contract forms. The use of short direct clauses and the simplicity of language is intended to reduce the occurrence of disputes; and

(iii) Stimulus for good management:

The NEC3 focuses on real-time management. This can lead to high demands on management and administration time. As with any contract, both parties need to understand the process and ensure that it is properly resourced.

NEC4

The NEC announced at the beginning of March 2017, that they were releasing the new NEC4 on 22 June 2017. The three core drafting principles were:

- Stimulus to good management
- Support the changing requirements of users
- Improve clarity and simplicity

At the conference where the new form was released, the NEC made clear that their approach was *"improvement through collaboration"* or *"evolution not revolution"*. It is very much an update, the key features are the same and the contract unsurprisingly still adopts the same plain English style. As well as updating the existing NEC3, a new Design Build Operate contract has been introduced and the NEC are planning to introduce an NEC4 Alliance Contract.

The NEC form has adopted gender neutral drafting.

There are also some changes in terms, Employer becomes Client and Works Information is now Scope, format of programme to be stated in Scope. In keeping with the international emphasis on the need to eliminate bribery, the NEC has introduced "Corrupt Act" as a defined term under clause 18.

As with FIDIC, the NEC4 makes use of deeming provisions. A contractor's programme will be for deemed to be accepted if the project manager does not respond within the contract timescales. Again as with FIDIC, the NEC4 introduces a requirement for the contractor to prepare a quality management plan.

Just as with FIDIC there is an increased emphasis on collaboration. An option has been included to appoint a contractor at an early stage, to participate in the development of designs and proposals. The basic idea is that this enables the contractor to consider the design at an early stage when there is still scope to introduce improvements and/or costs savings.

Dispute Resolution and Dispute Adjudication Boards

Again, as with FIDIC, there is an increased emphasis on dispute avoidance. The "Dispute Resolution" part of NEC3 has been renamed "Resolving and Avoiding Disputes" in NEC4.

Under NEC3, there are two Dispute Resolution, options W1 and W2, one for use where the UK adjudication provisions, the Housing Grants, Construction and Regeneration Act 1996, apply, one for where they do not. Both provide for adjudication as a mandatory pre-condition to arbitration.

The NEC4 has introduced a new option of referral to senior representatives of the parties to the project. The idea is to provide for a four-week period for negotiation to see whether a more formal dispute can be avoided. This does not (and in the UK could not) affect the statutory right to refer a mater to adjudication at any time.

In addition, the NEC3 introduces a new option, W3 which provides for the use of Dispute Adjudication Boards ("DAB"). Only for use where the UK mandatory adjudication provisions do not apply, the proposed DAB is similar in form to the FIDIC DAB. Under Option W3, the NEC4:

- There is a standing DAB, nominated by the parties at the time the contract is formed;
- The DAB has one or two members;
- The DAB is encouraged to make site visits and so become familiar with the project at a time when there are no disputes;
- The DAB is able to provide assistance and non-binding recommendations when disputes do arise;

Early Warning

FIDC have included a new early warning clause (8.4) in the new 2017 Yellow Book. This follows the clause to be found in NEC3 and the FIDIC Gold Book. Under the NEC4 scheme, for clarity the risk register has been renamed as the early warning register and under clause 16[4], the Project Manager prepares a first early warning register within one week of the starting date. Regular early warning meetings are then to be held starting within two weeks of the starting date.

BIM

Previously the NEC had prepared a guide entitled *"how to use BIM with NEC3 Contracts"*. This is no longer a part of the NEC4 contract suite. The "how to" guide, had also explained how NEC3 could be used with the CIC BIM Protocol. All references to the CIC Protocol are now gone.

The new NEC4 contract instead includes a new secondary option, X10, specifically to support the use of BIM. This, the NEC have said, will provide *"the additional contract clauses required to support the production of information for BIM."* As well as dealing with issues such as the Model, ownership and liability, under the new BIM option, the Contractor will be required to providean Information Execution Plan (the more standard phrase in general use is the BIM Execution Plan) either for incorporation in the contract from the outset, or within a period defined by the Client.

Design Responsibility

Under the FIDIC Form, the Contractor will usually find itself subject to a fitness for purpose obligation in respect of anything they design. The NEC scheme is not always totally clear. Design is not mentioned in the core clauses, but the secondary options do deal with design liability.

Under, NEC3, X15.1 provides that *"The Contractor is not liable for Defects in the works due to his design so far as he proves that he used reasonable skill and care to ensure that his design complied with the Works Information."*

The requirement that the Contractor prove that it used reasonable skill and care has been amended slightly. Under NEC4: *"The Contractor is not liable for a Defect which arose from its design unless it failed to carry out that design using the skill and care normally used by professionals designing works similar to the works."*

However, regardless of whether or not the NEC contract includes X15.1, a Contractor should check to see whether the obligations in the Scope (formerly Works Information) actually impose a fitness for purpose obligation on any elements of design carried out by the contractor.

Insurance

Another of the changes introduced by the new draft FIDIC form was in relation to insurance. Under new clause 17.2, a Contractor's risks are stated to be all the risks other than those listed as Employer's risks. This follows the scheme set out in the NEC3 form where all those risks for which the employer is not expressly responsible under clause 80.1 are risks for which the contractor is liable.

However under NEC4, this has all changed and contrary to the new FIDIC and NEC3, the Contractor's liabilities are now set out in clause 81 , rather than by exception.

Good Faith

There is no good faith obligation in the FIDIC Form, although such an obligation is implied by most civil codes. However clause 10.1 of the NEC Form does include such an obligation. In the NEC 4 form this has been amended slightly and the good faith obligation now follows more closely typical requirements set out in civil codes. Under NEC4, clause 10.1 has been split into two separate parts, an obligation:

10.1 *The Parties, the Project Manager and the Supervisor shall* act as stated in this contract.

10.2 *The Parties, the Project Manager and the Supervisor* act in a spirit of mutual trust and co-operation.

It would be interesting to see how this clause is interpreted. In England and Wales the courts[5] have made it clear that by noting that there is no general doctrine of "good faith" in English contract law. If the parties wish to impose such a duty they must do so expressly. The content of a duty of good faith is heavily conditioned by its context. The obligation to cooperate in good faith was not a general one that qualified or reinforced all of the obligations on the parties in all situations where they interacted.

Conclusion

Whilst there are not as many changes to the NEC4 form as there are to the new FIDIC Form, it is interesting to review the changes and compare them with the FIDIC Form. For example, the addition of the Dispute Board option by the NEC is recognition of the importance of real time dispute avoidance as well as being a signal that the NEC is looking to widen its areas of operation.

Footnotes

1. The NEC adopted a different approach to FIDIC, simply revealing the updated contract rather than releasing a draft or review version.

2. Europe's largest construction project: building 42KM of new tunnels beneath London. Work started in May 2009 and there are currently over 10,000 people working on 40 construction sites.

3. The guidance notes say *"Additional conditions should be used only when necessary to accommodate special needs such as those peculiar to the country in which the work is to be done"*.

4. Formerly 15

5. See for example, *Compass Group UK and Ireland Ltd (trading as Medirest) v Mid Essex Hospital Services NHS Trust [2013] EWCA Civ 200*

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