



Fenwick Elliott

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

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Enforcement of DAB decisions in light of the Singapore case:

CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33

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Introduction

A number of arbitral awards have recently come to light confirming the enforceability of non-final DAB decisions by ordering the losing party to pay immediately to the winning party the amounts ordered by the DAB even though a notice of dissatisfaction had been given in respect of those DAB decisions. Recent decisions from the High Court and the Court of Appeal of Singapore seem to go against the tide and are sending a confusing message to contractors and

construction practitioners dealing with FIDIC Books.

In *PT Perusahaan Gas Negara (Persero) TBK ("PGN") v. CRW Joint Operation ("CRW")*, the High Court of Singapore set aside an ICC arbitral award on the basis that the tribunal had exceeded its powers in making a final award ordering PGN to make immediate payment to CRW of the sum which the DAB had decided was due to CRW.

Following an appeal by CRW, the Court of Appeal confirmed the lower court's decision to set aside that arbitral award in a judgment dated 13 July 2011². In its decision, the Court of Appeal concluded that what the Arbitral Tribunal did in that arbitration – viz, summarily enforcing a binding but non-final decision by way of a final award without a hearing on the merits – was *"unprecedented and more crucially, entirely unwarranted under the 1999 FIDIC Conditions of Contract"*.

Although some of the findings of the Singapore court are questionable, they have the merits of reminding those involved with FIDIC Contracts that the enforcement of DAB decisions is not a simple matter and that a number of jurisdictional pitfalls exist which may prevent a winning party from obtaining in arbitration the amounts awarded by the DAB.

The facts of the Singapore case

In 2006, PGN, an Indonesian State owned company, entered into a contract with CRW for the construction by CRW of a pipeline and optical fibre cable from Grissik to Pagardewa in Indonesia. The contract incorporated the General Conditions of the FIDIC Conditions of Contract of the 1999 Red Book. The law governing the contract was that of Indonesia.

A dispute arose between the Parties regarding certain variations in respect of which CRW sought additional payment. Following a referral of that dispute to the DAB, the DAB issued several decisions, all of which were accepted by PGN except for one dated 25 November 2008 ordering PGN to pay CRW a sum in excess of US\$ 17 million ("the DAB Decision"). The following day, on 26 November 2008, PGN gave notice of its dissatisfaction with the DAB Decision in accordance with Sub-Clause 20.4 of the Conditions of Contract.

PGN subsequently refused to comply with the DAB Decision. This led CRW to file a request for arbitration with the ICC International Court of Arbitration in February 2009 (ICC Case No. 16122) in respect of PGN's failure to comply with the DAB Decision. The dispute referred to arbitration, and a key point of this

1 PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation [2010] SGHC 202.
2 CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK [2011] SGCA 33.



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case was whether CRW was entitled to immediate payment by PGN of the sum awarded by the DAB in its Decision of 25 November 2008 (“the Dispute”).

CRW’s position was that, notwithstanding PGN’s notice of dissatisfaction, PGN still remained bound by the DAB Decision and was required to “promptly give effect” to that decision in accordance with Sub-Clause 20.4 of the Conditions of Contract. In its defence, PGN argued that the DAB Decision was not “final and binding” as it had served a notice of dissatisfaction and that a binding but not final decision could not be converted into a final arbitral award without first determining whether the DAB Decision was correct (or ought to be revised) on the merits by opening up and reviewing the DAB Decision. PGN in particular sought to argue that the powers of the Arbitral Tribunal set out in Sub-Clause 20.6³ did not include the power to direct a party to make immediate payment of the sum awarded by the DAB without a review confirming the correctness of the DAB Decision.

On 24 November 2009, a Final Award was rendered holding that the DAB Decision was binding and that PGN had an obligation to make immediate payment to CRW of the sum set out in the DAB Decision, namely US\$ 17,298,834.57. The Arbitral Tribunal also dismissed in its award PGN’s interpretation of Sub-Clause 20.6 and its argument that the Arbitral Tribunal should open up and review the DAB Decision, and noted that PGN still had the right to commence a separate arbitration to open up, review and revise the DAB

Decision.

CRW then proceeded to register the Final Award as a judgment in Singapore. In response, PGN applied to set aside the registration order and also sought an order from the High Court of Singapore to set aside the Final Award, on the basis *inter alia* that the Arbitral Tribunal had exceeded its jurisdiction by converting the DAB Decision into a Final Award without determining first whether the DAB was correct on the merits.



By its decision dated 20 July 2010 (“the High Court Decision”), the High Court of Singapore found in PGN’s favour and set aside the Final Award for lack of jurisdiction of the Arbitral Tribunal.

Dissatisfied with the High Court Decision, CRW filed an appeal, which was dismissed by the Court of Appeal of Singapore in its judgment dated 13 July 2011 (“the Court of Appeal Decision”).

The High Court Decision

In reaching its decision to set aside the Final Award, the High Court of Singapore examined the contractual framework set out in Clause 20 for the resolution of disputes between the Parties and in particular the requirement for a dispute to have gone through various steps, including a referral of the dispute

to the DAB, before it may be referred to arbitration. It also considered the distinction between the proceedings envisaged by Sub-Clauses 20.6 and 20.7 of the Condition of Contract.

The High Court held that the Arbitral Tribunal had acted outside its jurisdiction in two respects:

- (a) The Dispute that CRW referred to arbitration in ICC Case No. 16122 (namely PGN’s non-payment of the sum set out in the DAB Decision as opposed to the underlying dispute) had not been first referred to the DAB and was therefore “plainly outside the scope of sub-cl 20.6 of the Conditions of Contract”⁴, and
- (b) The arbitration proceedings commenced by CRW were made pursuant to Sub-Clause 20.6 of the Conditions of Contract, which, according to the Singapore court, requires “a review of the correctness of the DAB Decision”⁵ and must be distinguished from proceedings brought under Sub-Clause 20.7 which do not require the arbitral tribunal to consider the merits of the DAB decision. That distinction meant, according to the Singapore court, that the Arbitral Tribunal had acted outside its jurisdiction by making final a binding DAB decision without first hearing the merits of that DAB decision.

3 Sub-Clause 20.6 of the Conditions of Contract: “The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer, and any decision of the DAB, relevant to the dispute.”
 4 Judgment, paragraph 31.
 5 Judgment, paragraph 37.



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What should CRW have done, according to the Singapore Court, to enforce its binding but not final DAB decision? The Singapore court dismissed the simple option of a referral to arbitration of the losing party's failure to comply with the DAB decision. It held *obiter* that a winning party should do the following: (1) refer the underlying dispute covered by the DAB decision to arbitration and ask the Arbitral Tribunal to review and confirm the DAB decision; and (2) include a claim for an interim award in respect of the amount which the DAB ordered the losing party to pay.

The Court of Appeal Decision

Although the Court of Appeal ultimately confirmed the High Court Decision to set aside the Final Award, the basis on which it reached its decision is quite different.



The basis for the Court of Appeal Decision dated 13 July 2011 essentially lies with the matters which the Arbitral Tribunal was appointed to decide as set out in the Terms of Reference signed by the parties. The Court of Appeal explains the following:

"The TOR stated clearly that the Arbitration was commenced pursuant to sub-cl 20.6 of the 1999 FIDIC Conditions of Contract. Further, it is plain that under the TOR, the Arbitral Tribunal was, by the parties' consent, conferred an unfettered discretion to reopen and review each and every finding by the Adjudicator. In other words, the Arbitral Tribunal was appointed to decide not only whether CRW was entitled to immediate payment of the sum of S\$17,298,834.57 ...but also "any additional issues of fact or law which the Arbitral Tribunal, in its own discretion, [might] deem necessary to decide for the purpose of rendering its arbitral award"⁶.

With what the Court of Appeal describes as "this crucial backdrop in mind", it went on to consider whether the Final Award was issued in accordance with Sub-Clause 20.6. The Court of Appeal found that, by refusing to open up, review and revise the DAB Decision and proceeding instead to make a final award without reviewing the merits of that decision, the Arbitral Tribunal had ignored the clear language of Sub-Clause 20.6 to "finally [settle]" the dispute between the parties. The Court of Appeal considered that "What the Majority Members ought to have done, in accordance with the TOR [Terms of Reference] (and, in particular, sub-cl 20.6 of the 1999 FIDIC Conditions of Contract), was to make an interim award in favour of CRW for the amount assessed by the Adjudicator (or such other appropriate amount) and then proceed to hear the parties' substantive dispute afresh before making a final award."⁷

The Court of Appeal considered that the Final Award was therefore not issued in accordance with Sub-Clause 20.6, which in turn raised the question of whether the Arbitral Tribunal exceeded its jurisdiction in making the Final Award (Article 34(2)(a)(iii) of Model Law) and whether it breached the rules of natural justice (Section 24(b) of the Singapore International Arbitration Act). These were the two grounds relied upon by PGN for setting aside the Final Award and accepted by the Court of Appeal in this appeal⁸.

Implications of the Singapore case

The implications of these decisions from the High Court and the Court of Appeal of Singapore are difficult to predict. One thing is certain, the conclusion of the High Court is already being relied upon in other arbitration proceedings in support of defences to claims for immediate payment of amounts awarded by DABs as well as in enforcement proceedings. For this reason, the decisions of the High Court and the Court of Appeal of Singapore merit careful examination.

A thorough analysis of the High Court Decision shows that the Singapore Court seems to have been misguided in its interpretation of Sub-Clauses 20.6 and 20.7. There is nothing in the FIDIC Conditions of Contract which would prevent a winning party from referring to arbitration simply the issue of the other party's failure to comply with a DAB decision, as a second dispute, without having to refer also the underlying

6 Court of Appeal Decision, paragraph 43

7 Court of Appeal Decision, paragraph 79.

8 PGN did not dispute the decision of the High Court to reject its submissions on Article 34(2)(a)(iv) of the Model Law, namely that "the arbitral procedure was not in accordance with the agreement of the parties, which required the merits of the underlying dispute and/or the question of whether the DAB Decision was made in accordance with the Contract to be determined prior to making that decision a final award" (High Court Decision, paragraph 9).



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dispute. It should therefore be possible for a winning party to commence a relatively straightforward arbitration simply based on the other party's breach of Sub-Clause 20.4. Only one condition should not be overlooked by the winning party before doing so: that second dispute must have been first referred to the DAB and an adequate and timely notice of dissatisfaction must have been served in respect of that second DAB decision.

In that respect, the High Court of Singapore was correct when it concluded that since the Dispute which CRW referred to arbitration (namely PGN's non-payment of the sum set out in the DAB Decision) had not been first referred to the DAB, it was plainly outside the jurisdiction of the Arbitral Tribunal. This was the right conclusion given the current wording of Sub-Clause 20.7. Sub-Clause 20.7 makes clear that the only situation where a party may refer directly to arbitration the other party's failure to give effect to a DAB decision without having to comply first with the requirements of Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] is in the event that no party has expressed dissatisfaction with the DAB decision and that DAB decision becomes as a result final and binding. In ICC Case No. 16122, a notice of dissatisfaction had been given by PGN, making the DAB Decision binding but not final. Sub-Clause 20.7 was therefore not applicable.

It will be interesting to see how the problem of the enforcement of DAB decisions will be addressed in the second



edition of the 1999 FIDIC Books which are expected to be published next year. One approach which the FIDIC Contracts Committee might adopt will be to amend Clause 20 along the lines of the FIDIC Gold Book 2008 by adding in Sub-Clause 20.6 that the DAB decision is binding and the parties have to comply with it "notwithstanding that a Party gives a Notice of Dissatisfaction with such a decision" and by providing in Sub-Clause 20.7⁹ that in the event that a party fails to comply with a decision of the DAB, whether binding or final and binding, then the other party may refer the failure itself to arbitration without having to refer first that matter to the DAB and then to wait for the amicable settlement period to expire.

These amendments would bring more certainty to what is currently an

ambiguous section of the 1999 suite of FIDIC contracts and would no doubt give parties more faith in the DAB process and its outcome.

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9 Interestingly, the Court of Appeal makes no reference to this in its decision.



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The new ICC Arbitration Rules

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Introduction

The ICC International Court of Arbitration has revised its Arbitration Rules. The present Rules were published in 1998. The new Rules come into effect from 1 January 2012. Unless an existing ICC arbitration clause calls for the application of the ICC rules as at the date of the contract, the new rules will apply to any arbitration commenced after 1 January 2012.

The ICC International Court of Arbitration is now arguably the dominant source of administered arbitration, and a core business for the International Chamber of Commerce. The new Rules are an update, and in a number of respects set out the practice developed by the Court over the past 10 years, providing transparency and greater certainty, particularly in relation to multi party arbitration, consolidation and jurisdictional challenge.

A number of the changes are an update: the Chairman of the Tribunal is now the President, references to 'telex' have been replaced with e mail, and the rules are said to cover simply "disputes" rather than "business disputes" so that there is no suggestion that disputes involving States are somehow excluded. The early quantification of claims in the Request for Arbitration is now encouraged by Article 4(3)(d), and Article 11 now

requires arbitrators to be impartial, and to confirm their impartiality (it having been previously assumed that 'impartiality' was covered by the confirmation of 'independence'). Further by Article 13, where the Court does not accept the proposal of a National Committee, or one party is a State, or the President of the Court considers it necessary, then the Court now has the power to appoint as arbitrator any person it considers suitable.

The much debated topic of confidentiality has also been addressed. Contrary to the understanding of many users of international arbitration, it is not automatically confidential. The new ICC Rules do not change that for ICC administered arbitration, but expressly provide at Article 22 (3) that the Tribunal may, upon the request of the parties, make orders concerning the confidentiality of the arbitration.



The most significant changes are in three areas: case management (which the rules require and actively encourage), interim and conservatory measures (where the ICC has introduced an Emergency Arbitrator procedure) and multi party disputes (which are now provided for, the practice of the Court having been enshrined in the Rules).

Case management

The 1998 Rules called for the arbitration to be complete within 6 months, and the practice has been that the Court will approve extensions to that time frame as needed (and extensions have usually been needed). Under the new Rules, Article 22 now includes an express obligation on the parties (as well as the Tribunal) to make every effort to conduct the arbitration 'in an expeditious and cost effective manner', (Article 22(1)) and at 22(2) obliges the Tribunal to adopt measures to ensure effective case management (provided any such measures are not contrary to any agreement of the parties).

Article 24, and Appendix IV, are entirely new. Article 24 requires the Tribunal to call a case management conference, at the outset of the proceedings, when the Terms of Reference are drawn up (this being a particular feature of ICC arbitration: it is the first task of the Tribunal following receipt of the file from the Court), or immediately thereafter. The objective – and indeed obligation – is to consult with the parties on procedural measures that might be adopted pursuant to Article 22(2) 'to ensure effective case management'.

In order to further encourage case management, Article 24 calls on the Tribunal to hold subsequent case management conferences 'to ensure continued effective case management', and at 24(4) the Tribunal is empowered to



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request the attendance of a party representative at a case management conference, the intention being to secure the parties 'buy in' to effective case management procedures.

Appendix IV provides examples of case management techniques that might be adopted. None of the proposals in this appendix are in themselves radical, but the appendix provides a useful list of possible case management techniques. The list includes various proposals aimed at limiting disclosure, and looking for areas where the parties or their experts might agree, limiting the length of written submissions and evidence, and looking at bifurcation, the use of IT, and giving consideration to whether there are issues that might be decided on a documents only basis. It also includes encouragement to the parties to consider settlement.

The case management provisions conclude at Article 27, where a new obligation is placed upon the Tribunal: at the conclusion of the proceedings, when the Tribunal declares the proceedings closed, the Tribunal must now also inform the Secretariat and the parties of the date by which the Tribunal expects to submit its draft award to the Court for approval.

Emergency Arbitrator

Whilst the 1998 Rules made provision for the issue of interim or conservatory measures by the Tribunal once established, they did not provide a mechanism for urgent application pending the Tribunal being constituted. Consequently parties with an ICC arbitration clause would have to look

to local courts for any urgent interim or conservatory measures, or wait for the Tribunal to be constituted – a process that could take several months.

The new Rules however now provide, at Article 29 and Appendix 5, for the appointment of an Emergency Arbitrator to make orders for urgent interim or conservatory measures, a procedure that has been included in a number of other administered arbitral rules (the SIAC and Stockholm rules being examples).

Appointment of the Emergency Arbitrator is made upon request to the Secretariat (Article 29(1)). The request must be made before the transmission of the file to the Tribunal if a Request for Arbitration has already been lodged. The appointment is made by the President of the ICC Court, who also decides whether the emergency provisions apply. Further the fee (\$40,000) must be paid before the application will be notified to the Parties under Appendix IV Article 2, and the emergency procedure commenced.

The Emergency Arbitrator must act fairly and impartially, and allow each party reasonable opportunity to present its case (Appendix IV, Article 5 (2)). By Appendix IV, Article 6(4) the Emergency Arbitrator must send his order to the Parties within 15 days from the date the file is transmitted to him, and the date of transmission is expected to be on the emergency arbitrators appointment, which should be within two days of the request for the appointment having been made (2(1)).

If a Request for Arbitration has not already been made by the party

seeking the urgent interim relief, that Request must be made within 10 days of making application, failing which the President must terminate the emergency proceedings (Appendix IV, Article 1 (6)). It is important to note that by Article 29(2), the emergency arbitrator's decision takes the form of an order, and not an award, and by Article 29(3) does not bind the Tribunal ultimately established to resolve the dispute. It is not therefore in the nature of a final, binding decision of an arbitrator, with the result that it is unlikely to be enforceable as an arbitrator's award. Its "teeth" however, are found in the power given at Article 29(4) to the Tribunal appointed to determine the dispute, to decide upon any claims relating to the emergency arbitrator proceedings. Noncompliance with an emergency arbitrator's order could, therefore, result in a claim.

It is also important to note that the Parties are expressly given the option to opt-out of these provisions. As arbitration is a process born of contract, parties could, by agreement, say that any particular parts of the Rules do not apply, but if that included rules which the ICC Court considers fundamental to ICC arbitration, then the ICC Court would decline to administer the arbitration. Whether the emergency arbitrator procedure might be regarded as fundamental is not known, but the Parties have been given the express right to opt out should they so choose.

Further, by Article 29(6), these provisions will not apply to arbitration agreements entered onto before 1 January 2012, and by Article 29(7), it is not intended to prevent a party applying to local courts for interim or conservatory relief.



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Multi party disputes/multiple contracts

For the first time, the ICC Rules now include provision for multi party disputes and multiple contract arbitrations. These are found at Articles 7, 8 and 9, with Article 6 (Effect of the arbitration agreement) and Article 10 (Consolidation of Arbitrations) having been amended to take account of the new multi party provisions.

It is important to note that these provisions do not answer whether a Party might be joined and/or whether all disputes referred might be heard in a single arbitration. Rather they set out a framework for the resolution of these issues. The framework reflects the present practice of the ICC Court.

Article 6 now gives the Court the power to make a *prima facie* decision where a proposed Respondent raises an issue as to whether all of the claims made in an arbitration can be heard in a single arbitration. If the matter is referred to the Court by the Secretary General, to allow the arbitration to proceed the Court must be satisfied that, for multi Parties, there is *prima facie* arbitration agreement under the ICC rules that binds all of the Parties, and for multiple contracts, that there are *prima facie* compatible arbitration agreements and that all Parties have agreed that the claims can be determined together in a single arbitration.

Any decision of the Court remains subject to the decision of the Tribunal. For the joinder of additional Parties (Article 7), the Request for Arbitration against the additional Party must be made before the confirmation or appointment of any of

the arbitrators (unless the Parties agree otherwise), and the request must include information concerning the arbitration agreement relied upon, and, if there is more than one arbitration agreement, the arbitration agreement relied upon for each claim made.



A Party so joined files an Answer, and may bring a cross claim against any Party in the arbitration. By Article 8 however, like the Request that joined this Party, where it makes a cross claim its Answer must include information concerning the arbitration agreement relied upon, and if there is more than one arbitration agreement, the arbitration agreement relied upon for each claim made.

Through this procedure therefore, any Party that is joined is given opportunity to play a part in the constitution of the Tribunal, and to raise any jurisdictional objection from the outset. Further, and importantly, the Tribunal is provided with the basic information it will need where there is an issue as to jurisdiction.

Article 9 supplements these provisions, by confirming that subject to the Court allowing the arbitration to proceed under Article 6, claims arising from more than one contract can be brought in a single arbitration. This does not however

impinge on the Tribunal's authority to determine any jurisdictional issue that might be raised.

Finally, by Article 10, the Court is now empowered to consolidate arbitrations where claims are made under more than one arbitration agreement, and the disputes arise in connection with the same legal relationship, and where the Court finds that the arbitration agreements are compatible.

Conclusion

The new ICC Rules are to be welcomed. They bring the ICC Rules up to date, and into line with modern practice and expectations. There will inevitably be some uncertainty as to how some of the more complex provisions concerning emergency arbitrators and multi party disputes will work, but the new Rules have been carefully thought through and drafted, and appear fit for purpose.

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FIDIC Conditions of Subcontract

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Quietly, in fact so quietly you may not have noticed, FIDIC has recently published its Conditions of Subcontract for Construction for use with the 1999 FIDIC Red Book¹. The test edition came out in 2009 with the formal version being released in October 2011. There have only been very minor changes between the two. The subcontract formally replaces the FIDIC Conditions of Subcontract for Works of Civil Engineering Construction, 1st Edition 1994.

In short the subcontract is intended to operate in the usual back-to-back basis, and, unsurprisingly, the subcontract provides for a direct total pass down of risk, with the subcontractor assuming the duties and obligations of the contractor under the main contract.

This includes, at sub-cl.4.1, a fitness for purpose obligation in respect of any design work, something which is not in the 1994 version. This principle also applies to payment and one thing that will be of particular note to those familiar with operating in the UK market is inclusion of pay-when-paid conditions at sub-cl.14.6. These pay-when-paid provisions, of course, conflict with the payment requirements of the Housing Grants Act. FIDIC has included guidance notes and particular sample conditions to assist parties working in the UK and other jurisdictions with similar legislation.

This is part of the general recognition on the part of FIDIC that while most of the clauses will be generally applicable, there may be some clauses which must, of necessity be amended to take account of the circumstances and locality of the Subcontract Works.

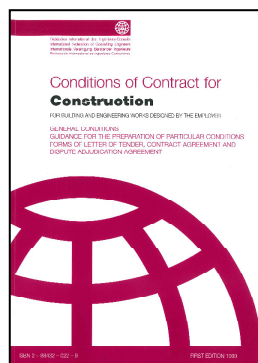
One of the sub-clauses which provided much comment under the test edition, and which has been retained here, are the programming obligations under sub-cl.8.3 and Annex F. Indeed, whilst the programming obligations of sub-cl.8.3 of the main contract are fairly extensive, they are much less detailed than the

logically linking all activities, identifying the critical path and all float, as well as including sufficient flexibility to interface the Subcontractor's activities with the Contractor. The Subcontract programme must be submitted to the Contractor within 14 days of receiving the Letter of Acceptance. Then the Contractor has 14 days to either approve or reject the programme. If the Contractor fails to respond then the initial programme becomes the Subcontract programme by default. The programme must be updated within seven days of the occurrence of one of six-listed events including the Subcontractor changing his methods or sequencing, there being any delay which impacts on the critical path or the Subcontractor receiving from the Contractor an instruction, pursuant to sub-cl.8.4 to accelerate where the Subcontractor's progress is too slow.

Employers under the FIDIC Red Book 1999, may well, if they are not already, start requiring a similar level of detail from the Contractor.

Subcontractor claims

As always, FIDIC has given considerable attention to the dispute resolution provisions. The subcontract contains its own dispute resolution procedures but as you would expect, the claims procedure for Subcontractors set out in the FIDIC Subcontract 2011 follows the scheme of the FIDIC Red Book 1999.



the programming obligations under the FIDIC Subcontract 2011. These requirements are considerably more detailed both than those to be found in the 1994 version. This is even though sub-cl.8.5 notes that the Subcontractor monthly progress reports need only be in the same detail and format as the Contractor Reports. Annex F of the FIDIC Subcontract 2011 alone lists some 17 separate requirements, a-q. These include

¹ It is also intended to be used in conjunction with the FIDIC Conditions of Contract for Construction, MDB Harmonised Edition or Pink Book. However if this is the case both parties must take care to ensure that the subcontract has been amended to mirror the differences between the Pink and Red Books.



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Indeed the Subcontract perfectly mirrors the Main Contract such that there is no condition precedent attached to the time in which a Contractor must bring a claim, but the equivalent requirements on a Subcontractor are expressed in this way, albeit that this is only done by cross-reference and so the Subcontractor would only know this by referring to sub-cl.20.1 of the FIDIC Red Book 1999. Therefore if the Subcontractor puts in his claim outside of the time limit, the right to bring the claim might be lost for good, however meritorious the claim might otherwise be. Any such notice must be given within 21 days, in order to give the Contractor the chance to give timely notice to the Employer, if appropriate. The remaining timescales are similarly shortened, such that the detailed claim must be submitted within 35 and not 42 days.

Then the Contractor is required to consult with the Subcontractor to try and reach agreement on the claim, failing which the Contractor must then, within 42 days after receipt of the detailed claim, go on to make a "fair determination" of the claim.

Sub-clause 20.3 of the FIDIC Subcontract 2011 notes that if by reason of any failure by the Subcontractor to follow the requirements set out in sub-cl.20.1 and 2, the Contractor is prevented from recovering any sum other than in respect of a Subcontractor claim then the Contractor, provided it follows the appropriate claims process itself, shall be entitled to deduct that sum from the Subcontract Price.

Subcontractor claims to the DAB

The general scheme under the 1999 Red book is this:

- (i) A dispute is referred to the DAB;
- (ii) The DAB then has 84 days to reach its decision;
- (iii) A party then has 28 days to serve a Notice of Dissatisfaction otherwise that Decision becomes binding;
- (iv) There is then a 56-day period for amicable settlement; and if there is no settlement then
- (v) A reference can be made to Arbitration.

The provisions of the FIDIC Subcontract 2011 take steps to try and ensure that disputes arising out of the Subcontract can be dealt with, without prejudicing the rights of either the Contractor (and therefore possibly the Subcontractor too) under the main Contract.

Sub-cl.20.4, provides that if the Contractor considers² that the dispute raised by the Subcontractor is a dispute which involves an issue related to a dispute between the Contractor and Employer under the main Contract then, the Parties shall (a) defer referral of the dispute to the Subcontract for 112 days and (b) if the dispute has not been previously referred under the main Contract, the Contractor must refer the new dispute within 28 days. This is a positive obligation on the Contractor. The Subcontractor is understandably obliged to give the Contractor in good time any assistance that may be required³ during the hearing process.

Under sub-cl. 20.4 of the FIDIC Subcontract 2011, the Subcontractor will not be bound by the DAB Decision under the main Contract, but this should be checked as the particular conditions give an alternative cl.20 to be used where the Subcontractor is to be bound by a determination. If no notice is given by the Contractor that the dispute is a Related Issue then either party is entitled to refer the dispute to the Subcontract DAB.

This new Subcontract is a further step along the FIDIC road to standardisation and as such it is a welcome addition as it has been specifically drafted to comply with the Red and Pink Books. Of course, to fully understand the risks and liabilities, as with every subcontract, the onus will be on all parties to read the subcontract together with the applicable main Contract.

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² This view can be challenged by the Subcontractor if he serves a notice in writing. The question would be decided by a pre-arbitral referee, using the ICC Rules for Pre-arbitral Referee Procedure.

³ And the Subcontractor is entitled to be involved, for example in any consultation with the Engineer.



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International focus on countries and sectors

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The controversial new FIDIC Particular Conditions of Contract for road works in Romania

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In March 2011, the Romanian government introduced new FIDIC conditions of contract applicable to road works, officially to address inconsistencies between the FIDIC forms of contract and Romanian legislation. Those new conditions of contract have quickly caused much controversy among those contractors which are tendering for road works in Romania and were even the subject of a joint statement issued by the European Construction Industry Federation (FIEC) and the European International Contractors (EIC) and addressed to the European Commission in May 2011.

Making standard and compulsory particular conditions of contract so as to meet local requirements and regulations is fairly common and obviously totally acceptable. However what is questionable is the attempt of the Romanian government to change the allocation of risks in the process.

The change in the allocation of risks has been particularly significant with the Yellow Book as the new conditions of contract have literally imported entire provisions from the Silver Book (applicable to turnkey projects) when FIDIC itself recognizes that this form is not a balanced form of contract and that it should not be used "if construction will involve substantial



underground work". Having Silver Book provisions relating to the Contractor's responsibility for unforeseen events and the Employer's Requirements applied to road projects is clearly worrying.

A quick review of some of the changes introduced by those new conditions of contract is sufficient to explain why international contractors are becoming increasingly cautious about the new invitations to tender launched this year under these new conditions of contract. In a nutshell: additional risks have been shifted to the Contractor and the Contractor's entitlement to claim under the Contract has been significantly restricted.

Contractor's • right of access to the Site (Sub-Clause 2.1) - The Contractor waives any right to claim in respect of the handing over of the Site in sections irrespective of the size of those sections, their location or the additional costs associated with a completion of the Works in sections.

Unforeseeable Physical Conditions (Sub-Clause 4.12) - Here the provisions of Sub-Clause 4.12 of the Silver Book [Unforeseen Difficulties] have been introduced, which means that the Contractor is deemed to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the Works. Unquantifiable risks such as risks for ground conditions, fossils, archaeological findings have now been transferred to the Contractor.

Responsibility for the accuracy of the Employer's Requirements (Sub-Clause 5.1 of the Yellow Book) - In the same vein, by adopting more or less the provisions of Sub-Clause 5.1 of the Silver Book, the Contractor is now responsible for the accuracy of the Employer's Requirements.

Delay damages - Delay damages can now be levied in the event that specific milestones are not met. However, if the final milestone is eventually met, those



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delay damages that have been paid shall be reimbursed.

Payments under the Contract shall not exceed 110% of the Accepted Contract Amount – regardless of the causes leading to the additional costs (except in the event of a price adjustments resulting from Sub-Clauses 13.7 [Changes in Legislation] and 13.8 [Changes in Costs]).

Delayed payment - The Contractor is deemed to have waived its right to interest on late payment if no invoice is issued within two months and the Employer is also given an additional 45 days (in addition to the 56 days from the Engineer's certificate) before having to pay the Contractor.

The Contractor's right to suspend work has been significantly restricted (Sub-Clause 16.1) – This can only be done after 183 days from the Employer's notification as opposed to 21 days.

Termination by Employer (Sub-Clause 15.2) and by Contractor (Sub-Clause 16.2) – Conscious that the exceptionally high number of termination cases clearly affected the completion of major road projects in Romania, a solution was found by the Ministry of Transport with the following amendment to Sub-Clause 16.2: termination will only take effect after having obtained a final and binding DAB (which is unlikely to happen as the Employer will undoubtedly issue a notice of dissatisfaction) or an arbitral award confirming the Contractor's entitlement to terminate and the effectiveness of such termination. This means that the Contractor is completely deprived in practice from its right to terminate the Contract as the Contractor will be required in the meantime, under the new conditions of contract, to comply with its obligations under the Contract irrespective of its notice of termination and the Employer's failures.

Arbitration (Sub-Clause 20.6) – An important, although not obvious, change as been introduced by the new conditions of contract in relation to the arbitration clause. Although Sub-Clause 20.6 has not been amended per se, Sub-Clause 1.4 has been amended to the effect that the language for communications under the Contract is now Romanian. In practice, this means that by virtue of paragraph (c) of Sub-Clause 20.6, the language to be used in any arbitration proceedings is also Romanian unless this paragraph is amended.

The above changes introduced by the new FIDIC conditions of contract have so drastically modified the original FIDIC conditions of contract that one can no longer describe them as either fair or balanced. The pressure exercised recently by European contractors and organizations representing them for a rapid change in legislation is a welcome move. Until then a number of experienced contractors now refrain from tendering for road projects in Romania. This is obviously not in the interest of Romania and certainly not of the EU which is financing a very large portion of these projects.

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News and Events

Trends, topics and breaking news from Fenwick Elliott

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International Quarterly first edition

We hope that you have found this first edition of International Quarterly both informative and useful. We aim to keep you updated regarding legal and commercial developments in construction and energy sectors around the world. Fenwick Elliott's team of specialist lawyers have advised on numerous major construction and energy projects worldwide, nurturing schemes to completion with a combination of careful planning, project support and risk assessment. From document preparation to dispute resolution, our services span every stage of the development process.

We also offer bespoke training to our clients on various legal topics affecting their business – for example, earlier this year we hosted a very successful half day seminar and workshop in Bucharest, on the use of the FIDIC Yellow Book for infrastructure projects in Romania. If you are interested in receiving bespoke in-house training please contact Susan Kirby skirby@fenwickelliott.com for a list of topics.

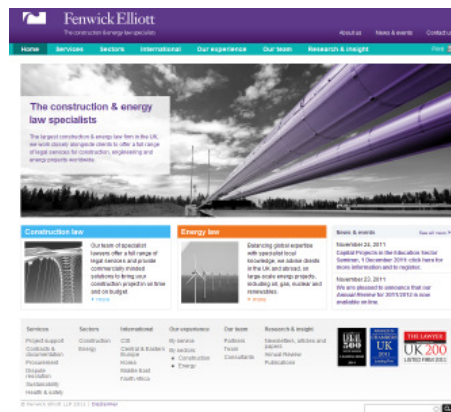
Our international work

Our firm continues to secure instructions on projects outside the UK. In recent months we have received instructions relating to power and desalination plants in the Middle East and road projects and a land fill site in Eastern Europe.

Launch of new Fenwick Elliott website

We are delighted to announce that we have launched our new website www.fenwickelliott.com. The new look website provides examples of our work and features a comprehensive "Research and insight" section hosting articles and papers written by Fenwick Elliott

colleagues on various construction and energy law topics.



Annual Review 2011/2012

Our annual publication which contains a round up of the key developments in the construction, engineering and energy arena is now available to download from our website. If you would like to receive a hard copy of this Review please contact Susan Kirby skirby@fenwickelliott.com

About the editor, Jeremy Glover

Jeremy has specialised in construction energy and engineering law and related matters for most of his career. He advises on all aspects of projects both in the UK and abroad, from initial procurement to where necessary dispute avoidance and resolution. Typical issues dealt with include EU public procurement rules, contract formation, defects, certification and payment issues, disruption, loss and/or expense, prolongation, determination or repudiation and insolvency.

He has advised clients in international arbitrations under ICC, UNCITRAL and ad hoc rules as well as in relation to all sizes of domestic disputes. He is an accredited adjudicator and regularly advises on both the conduct of adjudication and the enforcement of adjudicator's decisions.

Jeremy is also increasingly involved in the dispute resolution opportunities offered by mediation, expert determination and other forms of ADR.

Jeremy is the co-author of Understanding The New FIDIC Red Book: A Clause by Clause Commentary. He also works with Robert Fenwick Elliott preparing annual updates of Building Contract Disputes: Practice and Precedents. Jeremy is a member of the Board of Examiners on the Centre of Construction Law MSc programme at King's College, London where he also teaches on adjudication and FIDIC issues. Jeremy organises and regularly addresses Fenwick Elliott hosted seminars and provides bespoke in-house training to clients. He also edits Fenwick Elliott's monthly legal bulletin, *Dispatch*.

International Quarterly is produced quarterly by Fenwick Elliott LLP, the leading specialist construction law firm in the UK, working with clients in the building, engineering and energy sectors throughout the world.

International Quarterly is a newsletter and does not provide legal advice.

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