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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:

- Arbitration in the UAE
- Changes to the Claims provisions in the 2017 FIDIC Red Book
- The 2017 FIDIC dispute resolution procedure: Part 1 - the dispute resolution mechanism
- The 2017 FIDIC dispute resolution procedure: Part 2 - are Dispute Adjudication Boards worthwhile: benefits, problems, and advice on FIDICs security-of-payment
- FIDIC, force majeure, exceptional events and the "but for" test
- AI & Construction law: an essential and inevitable partnership

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Welcome to Issue 25

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Welcome to the latest issue of International Quarterly.

This issue of IQ reflects the continuing developments in arbitration in the UAE. In our previous issue, Ahmed Ibrahim considered the new DIAC Arbitration rules. Here, Ahmed and I review the new Federal Arbitration Act which came into effect in the UAE on 16 June 2018. The act had been long-anticipated and it undoubtedly serves to bring arbitration in the UAE in line with modern global arbitral practice. Ahmed is particularly well placed to comment having won a bronze arbitration award from DIAC a few weeks ago.

The 2017 FIDIC contracts have now been out for over a year. The new contracts continue to generate much comment, even if they do not appear to have been used as yet. Here, Thomas Young and Robbie McCrea consider some of the changes made to clauses 20 and 21 and what this means for the bringing of claims and the resolution of disputes under the new forms. Under the 2017 edition of the FIDIC Rainbow suite, clause 19 which was headed "force majeure" has been replaced by clause 18, "exceptional events". I take a look at what the changes mean.

Finally, and no less importantly, Stacy Sinclair takes a look at the rise of Artificial Intelligence (AI) and the potential value it can add to your project. Stacy asks whether robots and machines will be taking over. A slightly scary, but good question. Good because of the use of the term "robot" which tends these days to be replaced by AI, a more friendly term. As Stacy explains, the use of AI, can provide valuable advantages for us all, but it is right to keep in mind to some degree, that the pace and scope of technological advance is such that no-one knows quite where it will lead.

With best wishes for a happy and successful 2019.

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. Ahmed Ibrahim, Partner in our Dubai office contributes as a trainer to the Dubai International Arbitration Centre's practical and interative training workshop. Last month the DIAC honoured Ahmed with a prize for his contributions to international arbitration.

FIDIC experts Nicholas Gould, Partner and Jeremy Glover, Partner, both regularly speak and deliver training at events around the world. In September, along with Robbie McCrea, Senior Associate, they travelled to Vienna to deliver a half day FIDIC seminar to members of the EIC.

Most recently, Nicholas and Jeremy presented at the DRBF's Regional Conference and Workshops in Geneva. Their presentations focused on dispute boards, dispute avoidance and FIDIC.

Also in November, Nicholas Gould presented at the IBA "New Frontiers of ADR-From Commercial and Investment Matters to Regulatory Violations" conference in Montreal, Canada.

Publications

Our *Annual Review* 2018/2019 was published as a supplement in the November issue of *Building Magazine*.

This year's *Review* features a wide range of articles, reflecting the typically diverse range of issues we have found ourselves looking at over the past year.

The *Review* reproduced an article from our sister publication *Insight* which focused on the Bribery Act. It has been said that addressing bribery is a good thing because it creates the conditions for free markets to flourish, something which may be of some significance with Brexit apparently just around the corner. To download your copy of the *Review* click here.

Events

Throughout the year Fenwick Elliott host a range of construction law focused seminars and conferences in London and Dubai. We also are happy to organise events and internal workshops elsewhere.

A number of our expert lawyers are also regularly invited to speak to external audiences about industry specific topics including FIDIC and BIM. If you would like to enquire about organising a seminar with some of our team of specialist lawyers, please contact nshaw@fenwickelliott.com. We are always happy to tailor an event to suit your needs.

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.

Arbitration in the UAE

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There were two significant developments in arbitration in the UAE in 2018, both of which will have a positive impact on arbitration throughout the UAE.

We have previously written in Issue 21 about Article 257 of the Penal Code, and the possibility that arbitrators might be exposed to criminal liability. This change, introduced in October 2016, head lead many arbitrators and experts to decide that they are not prepared to accept appointments. On 27 November 2018, an amendment was published excluding arbitrators from the scope of application. We will provide further details in our second IQ of 2019.

In addition, on 16 June 2018, the Federal Arbitration Acct ("FAA") came into effect in the UAE. The FAA had been long-anticipated and it undoubtedly serves to bring arbitration in the UAE in line with modern global arbitral practice. Indeed, the FAA is broadly based upon the UNCITRAL Model Law and therefore confirms the application of well-established arbitration procedures that are now adopted into law in more than 111 jurisdictions worldwide.

Applying to ongoing as well as new arbitrations, the FAA sets out the procedural law for arbitrations in the UAE. In doing so, it replaces Articles 203–218 of the UAE Civil Procedure Code ("CPC"). By Article 2, it applies to:

- Any arbitration seated in the UAE, unless the Parties have agreed that another law apply, provided there is no conflict with the public order and morality of the State.
- Any international commercial arbitration seated outside the UAE, provided the Parties have chosen the FAA to apply.
- Any arbitration arising from a dispute governed by UAE law.

It therefore does not apply to the DIFC and ADGM, financial free zones in Dubai and Abu Dhabi which have their own rules governing arbitrations which are based in those jurisdictions.

Formalities of the arbitration agreement

By Article 7 of the FAA, an arbitration agreement must be in writing. This can include where the agreement is part of a document signed by the parties or where the agreement is contained in an exchange of correspondence, which can include an exchange by way of email. Article 5(3) permits incorporation of the arbitration agreement by reference to any other document containing an arbitration clause; this will constitute an agreement to arbitrate provided that reference is clear both in its meaning and in stating that it forms part of the agreement.

By Article 4(1), when the arbitration agreement relates to a company, it can only be concluded by an authorised representative who has authority to arbitrate. This is important because one of the grounds for challenging an arbitral award, set out in Article 53(c), is that the party to the arbitration does not have the legal capacity to enter into the arbitration. For a UAE LLC, this usually means being either the General Manager or a person having the authority to act on behalf of the General Manager.

There has been a long debate as to whether this authority should be express or "apparent" authority should suffice. The position in light of the old law was the same in terms of requiring the arbitration agreement be executed by the General Manager something confirmed in numerous decisions by the court of cassation. Until 2014, UAE courts did not recognize the apparent authority concept in concluding an arbitration agreement. However in 2014, the Dubai Court of Cassation in case number stated:

> *"The manager may vest in any person all or part of his powers unless the same is prevented under the Company's memorandum of Association. In such case the second agent shall be the representative of the company and his acts shall be valid towards the company. It is also established that in legal precedence of this Court that if the name of a certain company is mentioned in an agreement and another person signed such agreement, this shall constitute a legal presumption affirming*

> *that the person who signed it did so for and on behalf of the company. Hence the effects of such agreement shall be added to the company's rights and obligations, as the person who is delegated in such case shall be considered to be the company's representative."* [emphasis added]

In that judgment[1], the following two-pronged test establishes the authority of an individual to enter into an agreement (which includes an arbitration clause) on behalf of a company as a matter of UAE law:

- The company is required to be named as a contracting party in the agreement; and
- The individual signing the agreement does so in their capacity as representative of the company.

In our view, the new FAA does not change the position of apparent authority as developed by Dubai Courts.

For companies not incorporated in the UAE, the wording of Article 53(c) suggests that when deciding whether the signatory has the necessary authority, what matters is whether that signatory has the legal capacity or authority "to dispose of the disputed right". This suggests that, where a company is incorporated in England and Wales, any dispute as to whether or not the party had that authority will be determined under English law.

Arbitrators

The default number of arbitrators is three. By Article 10, when approached a potential arbitrator must disclose in writing anything which relates to their possible independence and/or impartiality. This is entirely in keeping with international practice and, for example, Article 9 .1 of the DIAC rules.[2]

The Tribunal does have power to rule on its own jurisdiction.[3] If a party wishes to object to any ruling, by Article 19, it must do so within 15 days. The court must then issue a decision on the matter within 30 days.

The arbitration process

As noted above, the FAA applies to all ongoing arbitrations. That said, it is not thought that the FAA will have a significant impact on the procedures of any arbitrations that are already under way. For example, the FAA does not change the Tribunal's general powers to determine the procedure of the arbitration or would not impact upon, say, the parties' choice of the DIAC Rules as the applicable procedural rules or any agreement to follow the IBA Rules for the giving of evidence. Article 23(1) provides that parties may agree on the procedures to be followed by the Arbitral Tribunal, including making these procedures subject to the effective rules in any arbitration institution. Further, the FAA confirms the continued applicability of certain provisions from the now superseded Civil Procedure Code, including that the law must not conflict with notions of public order or morals (Article 2(1)).

By Article 33 of the FAA, the Tribunal is empowered to decide the procedures and methods of putting forward evidence. This is provided that, in compliance with Article 26, each party is given an equal opportunity to present its case. Article 33 includes specifying time limits or the method for exchanging evidence. Giving this type of authority to the Tribunal is entirely in keeping with the current international drive to ensure that arbitration provides for a proportionate and efficient means of dispute resolution. Articles 28, 33(3) and 35 make it clear that hearings can be held through what are termed "modern means of communication" without the need for "the physical presence" of the parties, thereby confirming that the use of video-conferencing or maybe telephone hearings is permitted, a potentially cost-saving measure when Tribunals, parties and witnesses are often spread across the globe. Article 28 seems to go further and enables the Tribunal to hold arbitration hearings in any venue that the Tribunal considers appropriate, taking into account the circumstances of the case. As there is no restriction on the venue selection, this in theory means that the Tribunal may decide to hold hearings outside of the UAE. However, until this is tested by UAE courts, it would be safer to select the venue within the UAE, or to obtain the parties' consent to hold the hearing outside the UAE.
Article 33(3) also confirms that the hearing, unless agreed otherwise, is to be held in private, a reminder of the confidentiality of the arbitration process. Parties should, however, be aware that the FAA does not provide that the ratification process in the local courts must be kept confidential.

The Tribunal, by Article 32(3), may choose to proceed with the arbitration where one party fails to comply with any agreed or ordered procedure and to draw such conclusions from that failure as it deems appropriate. This is entirely in keeping with Article 32.4 of the DIAC Rules.

However, if something does go wrong during the arbitration, watch out for Article 25 which says that if a party does not object to a breach of the arbitration rules and procedures within seven days of becoming aware of the issue, they may find that they have lost the right to object later on.

The CPC made no reference to the ability of the Tribunal to award interim measures. This has been addressed in the FAA. The Tribunal may issue temporary or preservative measures in the instances set out in Article 21, including to maintain evidence that may be deemed essential to resolving the dispute, to prevent damage or prejudice to the arbitration process, or ordering either party to abstain from doing anything that can damage or prejudice the arbitration. If either party disagrees with an order made by the Tribunal then it may choose to seek direction from the court, although any such court application will not require the suspension of the arbitration.

Further, Article 39 confirms that the Tribunal may issue temporary judgments before the issue of the final award. These temporary judgments are enforceable before the courts. Again, this provides certainty in an area not previously covered by the CPC.

The parties' ability to enforce interim measures or temporary awards is a very helpful development. This is particularly important in construction cases where there might be a need to preserve evidence, compel a

contractor to leave a site or to stop calling the bank guarantees. Further, it encourages Tribunals to bifurcate the proceedings to deal with jurisdictional and admissibility questions as a preliminary issue. These are also common questions in construction disputes given the common use of standard forms that usually provide for notification periods, and multi-tier dispute resolution process, the non-compliance with which might give rise to admissibility and jurisdictional questions. The parties will be able to challenge or enforce Tribunal's decisions in this respect.

The award

The award must be in writing and signed by the arbitrators. By Article 41 (6), the award can be signed electronically and outside the place of the arbitration, so arbitrators no longer have to be physically present in the UAE when they sign the award.

By Article 42(1), the Tribunal shall issue the award by the date agreed upon by the parties and if no date is agreed upon the award shall be issued within six months from the date of the first arbitration hearing. The six-month time limit to issue the award can be extended with the agreement of the parties or by making a request to the court to extend the period. This is similar to the wording of Article 210 of the CPC which required tribunals to render awards within six months from the first arbitration hearing unless otherwise agreed.

The FAA also introduces a slip rule, with Article 50 empowering the Tribunal, either on its own initiative or upon the request of one of the parties, to correct clerical or mathematical errors in its award. Article 51 goes further and gives the parties the right to ask the Tribunal to deal with issues they believe have been omitted from the award. The slip rule is not designed to enable the parties to have a second chance and seek to persuade the Tribunal to change its mind about the substantive decision. Any request and/or correction must be made within
30 days.[4]

Enforcement of arbitration awards

There has been no change to the requirement that arbitration awards must be ratified. Article 52 confirms that to be enforced a decision confirming the award must first be obtained. The documents that need to be submitted have not changed, namely the original award (or a certified copy), a copy of the arbitration agreement, an Arabic translation of the award if needed,[5] and a copy of the minutes of deposit of the award at court. However, the identity of the court has changed, with applications being made to the Court of Appeal. This is a positive step which should improve the speed of ratification and help ensure that arbitration matters are heard before those with specialist knowledge. The Court of Appeal then has 60 days to respond to the request for ratification.

Under Article 54(2), if a party wishes to challenge an award, it must do so within 30 days of the date of notification of the award. However, presumably that would not stop a party from opposing an application to ratify the award, made after the 30-day period had expired.
The grounds for refusing ratification include that the arbitration agreement was not valid, that the award was not made within the time limit and if there were procedural "irregularities", the same phrase as used in the CPC. It is very difficult to make a successful challenge on the grounds of serious procedural irregularity in England and Wales under section 68 of the Arbitration Act 1999 and the courts have made it clear that applications to set aside for misconduct should not become a backdoor means of appeal on questions of fact or law.

A step in the right direction

Whilst with any law, it may take some time, by which we mean judicial interpretation, before its full extent is known, the FAA stands as an expression of intent to modernise and bring the arbitration law in line with international best practice. As such it should help increase confidence in the arbitration process within the UAE, something to be welcomed.

Footnotes

1. Following this judgement, the Dubai Court of Cassation adopted a more relaxed approach in requiring a special power of attorney – see for example Dubai Court of Cassation decisions 386/2015 (Real Estate), and 17 of 2016 (Real Estate).

2. The FAA does not address Article 257 of the Penal Code., which provides that any arbitrator or expert witness may be subject to criminal prosecution if either party alleges that they have acted unfairly, or not independently.

3. Thereby incorporating the principle of kompetenz-kompetenz.

4. Although the Tribunal can extend this by a further15 days, presumably to cater for requests which come in at the end of the 30-day period.

5. By Article 29, the language of the arbitration shall be Arabic unless agreed otherwise.

6. 4125-7653-0712, v. 3-7653-0712, v. 2

Changes to the Claims provisions in the 2017 FIDIC Red Book

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In December 2017 at the FIDIC Users Conference held in London, FIDIC released the second editions of its Red, Yellow and Silver books. The first editions of these contracts were released in 1999.

This article addresses the changes, in relation to the Claims provisions, between the first edition of Conditions of Contract for Construction ("the 1999 Red Book") and the second edition of the same contract ("the 2017 Red Book"). Similar changes are evident in both the Yellow and Silver book updates.

The main changes to the Claims provisions in the 2017 Red Book are as follows:

1. The procedure for Employer and Contractor Claims is now addressed in one place under Clause 20, with both Parties being subject to the same procedure and obligations.
2. Clause 20 now deals solely with Claims, with dispute resolution being addressed in a new Clause 21.
3. Clause 20 categorises Claims, and the procedures are different depending on the type of Claim.
4. Clause 20 contains two obligations that may result in a claiming Party losing its right to claim in the event of non-compliance. The first being the obligation to provide an initial Notice of Claim within 28 days, and the second being the obligation to provide a fully detailed Claim which includes a statement of the contractual and/or other legal basis of the claim within 84 days (or such other time as might be agreed). However, before any rights are lost there is a positive obligation on the Engineer to serve additional notices, absent which the claiming party's Notice of Claim is deemed to be valid. If the Engineer does serve these further notices the claiming party is permitted to disagree with them and/or explain why the late compliance was justified.

Employer and Contractor Claims addressed in one place

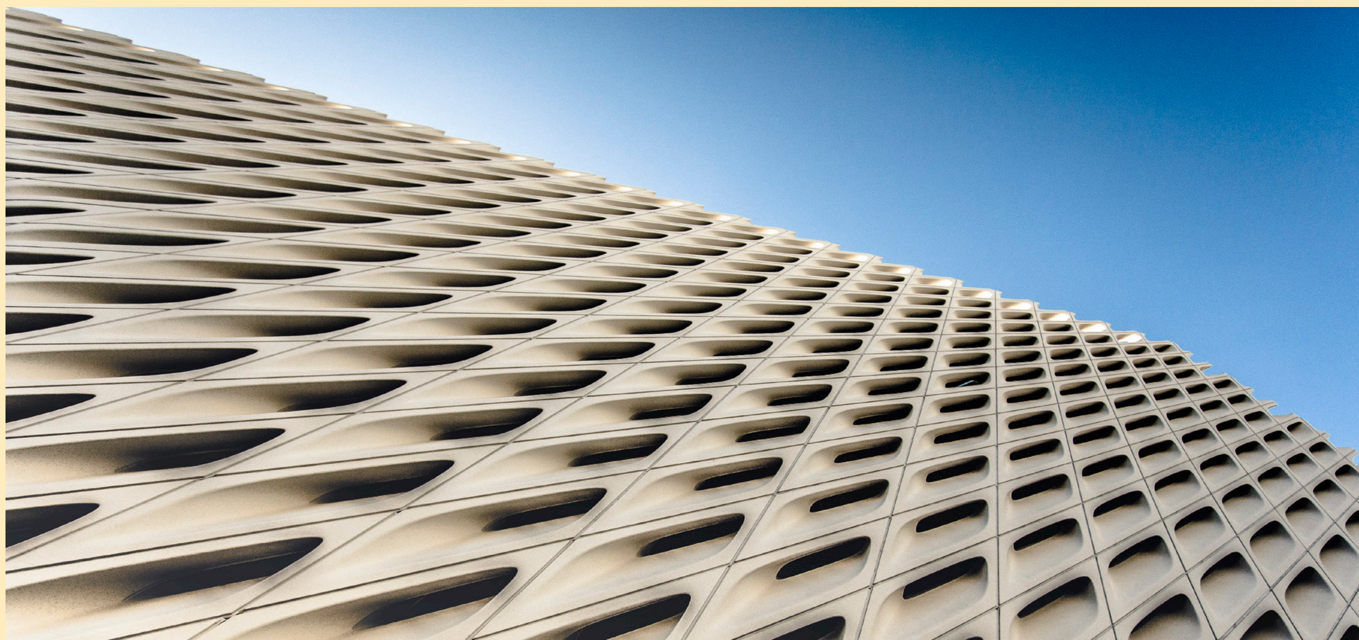
In the 1999 Red Book the procedure for Employer Claims is governed by Sub-Clause 2.5, whereas the procedure for Contractor Claims is governed by Sub-Clause 20.1. In the 2017 Red Book both Employer and Contractor Claims are governed by a single clause.

However, this is more than cosmetic change because under the 1999 Red Book it is not only the case that Employer and Contractor Claims are governed by different Sub-Clauses but also that the procedure and obligations in respect of those Claims are different.

The most striking difference between the Parties' respective obligations concerns the obligation to give notice of their Claims and the consequences of not complying with that obligation. In the 1999 Red Book the Contractor is under an obligation to give notice of its Claim as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance giving rise to the Claim. In the event the Contractor failed to comply with this notice obligation then the Employer would be discharged from all liability in connection with the Claim. In many jurisdictions the Contractor's notice obligation has been treated as a strict condition precedent such that non-compliance means that the Contractor loses its right to claim.

In contrast in the 1999 Red Book the Employer is under an obligation to give notice of its Claim as soon as practicable after the Employer became aware of the event or circumstances giving rise to the Claim, i.e. there is no equivalent 28-day time limit. There is also no equivalent express provision to the effect that the Contractor would be discharged from all liability in connection with the Claim if the Employer did not comply with its notice obligation. Because the obligations are expressed differently there has been uncertainty as to whether non-compliance by the Employer with its notice obligations would mean the Employer loses his right to claim.

The obligations and consequences of not complying with those



obligations under the 1999 Red Book are considered by many practitioners to be unbalanced in favour of the Employer. The 2017 Red Book redresses this balance and sets out the same procedure and obligations for both the Employer and the Contractor within the same Clause.

Different procedures depending on the type of claim

The next feature of the revised Clause 20 is that it categorises Claims into different types and provides for different procedures depending on this categorisation.

The first category is where a Party has a Claim for additional payment or extension of time[1]. These Claims therefore include Contractor Claims for additional payment and extension of the Time for Completion of the Works and Employer Claims for additional payment (or a reduction of the Contract Price) and extension of the Defects Notification Period.

The second category is for Claims for any other entitlement or relief not falling into the first category[2]. An example of a Claim falling into the second category might be one for specific performance (i.e. to compel one Party to comply with its obligations).

The procedure for Claims falling into the second category is less prescriptive than that for the first category and we address this first. For this second category of Claims, the Engineer or the other Party must first have disagreed with the claiming Party's requested entitlement or relief. If there is no response within a reasonable time to the claiming Party's requested entitlement or relief then there is a deemed disagreement. The claiming Party may then give a Notice referring the Claim to the Engineer for agreement or determination in accordance with Sub-Clause 3.7. This Notice needs to include details of the claiming Party's case and the other party's or the Engineer's disagreement and be given as soon as practicable after the claiming Party becomes aware of the disagreement.

The 2017 Red Book does not expressly set out the consequences if the claiming Party fails to give Notice as soon as practicable after becoming aware of the other Party's disagreement. This contrasts with the procedure for Claims for additional payment or extension of time, which we discuss below, where the consequences are made clear.

Whilst the application of Sub-Clause 3.7 is outside the scope of this article, suffice to say if following referral no agreement is reached, and following this a Party disagrees with the Engineer's determination of the Claim, then provided the required notices are served the Claim will become a Dispute that shall be decided in accordance with the dispute resolution provisions set out at Clause 21

Procedure for Claims for additional payment or extension of time

The 2017 Red Book procedure for Employer and Contractor Claims for additional payment or extension of time is more prescriptive than that in the 1999 Red Book and is a development of the Contractor's Claim procedure which was set out at Sub-Clause 20.1 of that Book. Further, it is a procedure that includes more time limits which the claiming Party needs to comply with in order to avoid losing its right to claim. However, this is tempered somewhat with an obligation on the Engineer to point out these failures through the issue of further notices and some increased flexibility for the claiming Party to avoid the severe consequences of not complying with the time limits by explaining why the late submission was justified or explaining why it disagrees with the Engineer.

Obligation to give a Notice of Claim within 28 days

The first step in the 2017 Red Book is for the claiming Party to give a Notice of Claim as soon as practicable and no later than 28 days after the claiming Party became aware, or should have become aware, of the event or circumstance giving rise to the Claim.[3] This is essentially the same step as for Contractor Claims under the 1999 Red Book. However, it does represent a change for Employer Claims as the 1999 Red Book did not impose a 28-day notice period on the Employer.

The consequences of not giving notice, for the claiming Party, are potentially severe as the Conditions provide that if there is such a failure then the other Party will be discharged from any liability in connection with the event or circumstances giving rise to the Claim. Again this is the same scheme for Contractor Claims as is in the 1999 Red Book.[4] These severe consequences attached to non-compliance with the initial Claim notification obligations are arguably a change from the scheme for Employer Claims under the 1999 Red Book as this new edition does now make those consequences of non-compliance expressly clear.[5]

However, there are some further new provisions in the 2017 Red Book which provide some balance against these severe consequences.[6] Firstly, there is a new positive obligation on the Engineer to give notice to the claiming Party within 14 days after receiving a Notice of Claim if he considers that the Notice of Claim has been served late, and this notice must include reasons. Importantly, if the Engineer fails to serve such a notice within this 14 day period then the Notice of Claim shall be deemed to be a valid notice. This places a significant degree of further responsibility on the Engineer that was not present in the 1999 Red Book. To balance the position if the other party disagrees with a deemed valid Notice of Claim it is permitted to give Notice of this to the Engineer, and this disagreement is then reviewed as part of the agreement or determination of the Claim.

In addition, in circumstances where the Engineer does serve a notice within the 14 day period, the claiming Party is permitted to explain why he disagrees with the Engineer or why the late submission is justified as part of the submission of the claiming Party's fully detailed Claim.

Obligation to keep contemporary records

Following the giving of a Notice of Claim there is an obligation on the claiming Party to keep such contemporary records as may be necessary to substantiate the Claim.[7]

This basic obligation to keep contemporary records has not changed since the 1999 Red Book. However, in the 2017 Red Book FIDIC has sought to explain what it means by "contemporary records". The definition of "contemporary records" is given as "records that are prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim".

Where the Contractor is the claiming Party the Engineer is given the right to monitor this record keeping and/or instruct the Contractor to keep additional records. Further, the Engineer is permitted to inspect these records. These rights and obligations are essentially the same as in the 1999 Red Book; however, the 2017 Red Book does go on to make clear that if the Engineer chooses to monitor, inspect or instruct, this shall not imply acceptance of the accuracy or completeness of the Contractor's contemporary records.

Obligation to submit a fully detailed Claim within 84 days or another agreed period

Under the 2017 Red Book within 84 days after the claiming Party became aware, or should have become aware, of the event or circumstances giving rise to the Claim (or such other time period as the claiming Party might agree with the Engineer), the claiming Party has an obligation to submit a fully detailed Claim.[8]

While the basic obligation to submit a fully detailed Claim has not changed since the 1999 Red Book, the time period for doing so has been extended from 42 to 84 days. In addition in the 2017 Red Book FIDIC has sought to explain what it means by a "fully detailed claim". The definition of a "fully detailed claim" is given as follows:

"(a) a detailed description of the event or circumstance giving rise to the Claim;

(b) a statement of the contractual and/or other legal basis of the Claim

(c) all contemporary records on which the claiming Party relies; and

(d) detailed supporting particulars of the amount of additional payment claimed (or amount of reduction of the Contract Price in the case of the Employer as the claiming Party), and/or EOT claimed (in the case of the Contractor) or extension of the [Defects Notification Period] claimed (in the case of the Employer)."

This definition provides some further clarity as to what a Party is expected to provide as part of a fully detailed Claim. However, it is unlikely that this additional definition will increase the scope of what should have been provided under the 1999 Red Book.[9]

As with the submission of the initial Notice of Claim, the consequences of not complying with the time period for submission of the fully detailed Claim are potentially severe. However, here FIDIC focuses on sub-paragraph (b), being the obligation to provide "a statement of the contractual and/or other legal basis of the Claim", and the Conditions state that if this

statement of contractual or other legal basis is not provided within the relevant time period then the Notice of Claim shall be deemed to have lapsed, and it shall no longer be considered as a valid Notice. In these circumstances the Engineer shall give a notice to this effect within 14 days after this time limit has expired.

Pausing here, it is apparent that the consequences of not complying with the time limit for submitting a fully detailed Claim in the 2017 Red Book are markedly different from those in the 1999 Red Book. Whilst the 1999 Red Book also contains a time limit for the submission of a fully detailed Claim, a failure to comply with this obligation does not result in the Notice of Claim lapsing.

However, as with the initial 28 day time limit the 2017 Red Book provides further provisions which balance the severe consequences of the Claiming party not providing a statement of its contractual or other legal basis within the relevant time limit. Firstly, if the Engineer fails to give a notice within 14 days pointing out the claiming Party's failure then the Notice of Claim shall be deemed to be a valid Notice. There is again scope for the other party to disagree with the deemed valid Notice of Claim and for this disagreement to be considered as part of the agreement or determination of the Claim.

Once again in circumstances where the Engineer does serve a notice within the 14 day period, the claiming Party is permitted to explain why he disagrees with the Engineer or why the late submission is justified as part of the submission of the claiming Party's fully detailed Claim.

Obligations if a Claim is of continuing effect

The 2017 Red Book, in a similar manner to the 1999 Red Book, provides for the possibility that Claims may be of continuing effect and as such there is a procedure for submission of an interim fully detailed Claim, followed by further monthly interim updates and a final fully detailed Claim within 28 days of the end of the effects or circumstances of the Claim.[10]

Where a Claim with continuing effect is made the Engineer is nevertheless still obliged to consider the first interim fully detailed Claim and give his response on the contractual or other legal basis of the Claim by giving a Notice to the claiming Party within 42 days (or such other date as might be proposed by the Engineer and agreed by the Parties) of receipt of the interim fully detailed Claim. On receipt of the final fully detailed Claim the Engineer is obliged to proceed with the agreement or determination of the Claim in accordance with Sub-Clause 3.7.

The payment position pending agreement or determination of the Claim

The 2017 Red Book provides for the possibility that the claiming Party is able to receive payment in each Payment Certificate in the period between the initial Notice of Claim and the agreement or determination of that Claim. In this regard the Engineer is obliged to include the amounts that have been "reasonably substantiated as due to the claiming Party".[11] That is also the position in the 1999 Red Book.

As regards Claims by the Employer, the 2017 Red Book makes clear that the Employer will only be entitled to claim any payment from the Contractor, and/or to extend the Defects Notification Period, or set off/deduct from any amount due to the Contractor by complying with the Clause 20 claims procedure. This is consistent with the more balanced approach between the Contractor and the Employer in the 2017 Red

Book that provides for both Parties to comply with the same Clause 20 procedures.

Agreement or determination of the Claim

The 2017 Red Book has a specific provision within Clause 20 which is headed "Agreement or determination of the Claim";[12] however, this is not the provision that deals with the procedure by which the Engineer is to agree or determine a Claim.

That procedure is set out in Sub-Clause 3.7 of the 2017 Red Book.[13] A detailed discussion of Sub-Clause 3.7 is outside the scope of this article but in summary it provides for consultation to take place in a period in which the Claim might be agreed, followed by a further period in which the Engineer must determine the Claim if not agreed, together with prescribed time limits for these actions.[14]

So far as Clause 20 is concerned the sub-clause headed "Agreement or determination of the Claim" contains the basic obligation for the Engineer to proceed to agree or determine the Claim in accordance with Sub-Clause 3.7.

In addition it goes on to address the situation where the Engineer has given a Notice to the effect that the claiming Party was late submitting its initial Notice of Claim or was late in submitting a fully detailed Claim which included a statement of the contractual or other legal basis of the Claim. In this regard the 2017 Red Book makes clear that the Claim is still to be agreed to determined, but the agreement or determination shall include whether the Notice of Claim was a valid notice taking into account the details (if any) included in the fully detailed claim of the Claiming party's disagreement with those notices or why late submission is justified.

In relation to late submission the 2017 Red Book provides a non-exhaustive and non-binding list of some circumstances that may be taken into account and those circumstance include:

1. The extent to which the other Party would be prejudiced by acceptance of a late submission.

2. In the case of the late submission of the initial Notice of Claim, evidence of the other Party's prior knowledge of the event or circumstances giving rise to the Claim.

3. In the case of the late submission of the statement of the contractual or other legal basis of the Claim as part of the fully detailed Claim, evidence of the other Party's prior knowledge of that contractual or other legal basis.

The claiming Party should be mindful of these stated circumstances and the need to provide details of any such circumstances within the supporting particulars to its fully detailed Claim. However, it is also important to note that the claiming Party is not limited by the stated circumstances and it will be prudent for the claiming Party to provide particulars of as many circumstances as it reasonably can to justify its late submission.

Finally the 2017 Red Book, like the 1999 Red Book, gives the Engineer the option to ask for additional particulars concerning the Claim before it is obliged to agree or determine the Claim, but makes clear that in these circumstances where the Engineer is awaiting those additional particulars, it is obliged to make its response on the contractual or other legal basis of the Claim.

Concluding remarks

In our view the main change in the 2017 Red Book which users of this form should be mindful of are the two time limit obligations. If a claiming Party does not comply with them and the Engineer issues the appropriate notices, then this may result in the claiming Party losing its entitlement to claim. It is important to ensure that users have in place robust contract administration processes to ensure that they comply with both of these time limit obligations as the consequences of non-compliance are potentially severe.

Further, while there is an opportunity in the 2017 Red Book for a claiming Party to disagree with the Engineer's notices concerning late submission and the opportunity to seek to justify why there has been late compliance, it may be difficult to provide an adequate justification to avoid the severe consequence. In short the only way to remove the risks completely is to be careful to comply these both these time limits.

Footnotes

1. See Sub-Clause 20.1(a) and (b) of the 2017 Red Book
2. See Sub-Clause 20.1(c) of the 2017 Red Book
3. Sub-Clause 20.2.1 of the 2017 Red Book
4. Employer Claims are addressed pursuant to Sub-Clause 2.5 of the 1999 Red Book.
5. However, Sub-Clause 20.1 of the 1999 Red Book states that "If the Contractor fails to give notice of a claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim."
6. Sub-Clause 20.2.2 of the 2017 Red Book
7. Sub-Clause 20.2.3 of the 2017 Red Book.
8. Sub-Clause 20.2.4 of the 2017 Red Book.
9. In relation to the Contractor's Claims under the 1999 Red Book there was an obligation to provide a "fully detailed claim" which includes full supporting particulars of the basis of the Claim and of the extension of time and/or additional payment claimed. In relation to the Employer's Claims under the 1999 Red Book the language used was different, in that the obligation was to provide "particulars" which shall specify the Clause or other basis of the claim, and shall include substantiation of the amount and/or extension to which the Employer himself is entitled.
10. Sub-Clause 20.2.6 of the 2017 Red Book.
11. Sub-Clause 20.2.7 of the 2017 Red Book
12. Sub-Clause 20.2.5 of the 2017 Red Book.
13. Sub-Clause 3.7 of the 2017 Red Book is the amended form of what was Sub-Clause 3.5 of the 1999 Red Book.
14. The relevant time periods are set out at Sub-Clause 3.7.3 of the 2017 Red book.

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The 2017 FIDIC dispute resolution procedure

Part 1 - the dispute resolution mechanism

Introduction

In December 2017 FIDIC released its second edition of the Conditions of Contracts for Plant and Design Build ("the 2017 Yellow Book"), the Conditions of Contract for Construction (the "2017 Red Book") and the Conditions of Contract for EPC/Turnkey (the "Silver Book"), together the "2017 Contracts". As expected, FIDIC has made substantial amendments to the dispute resolution provisions from the 1999 Red, Yellow, and Silver Books (together the "1999 Contracts"), and it has addressed the provisions relating to "binding but not-final" Dispute Adjudication Board ("DAB") decisions which have been the cause of persistent dispute since the 1999 Contracts were released.

However, rather than scale back following the controversy caused by the binding but not-final DAB decision, and the severe consequences to contractors that have in many instances resulted, FIDIC has chosen to affirm this direction. The 2017 Contracts therefore retain the same core structure of the DAB as a mandatory pre-condition to arbitration (albeit it is now a "Dispute Avoidance / Adjudication Board", or "DAAB"), including that non-final DAAB decisions must be promptly complied with, and it has expanded this concept through the inclusion of a similar mandatory procedure of binding but not-final Engineer determinations.

The 2017 Contracts offer a refurbished dispute resolution mechanism, which includes some helpful and much needed revisions to its predecessor, and introduces some useful new provisions. It is an ambitious dispute platform and will without question be subject to dispute and debate. At its best, it offers both parties the ability to obtain fast and inexpensive relief, with three tiers of binding determinations designed to prevent the need for arbitration. At its worst, it places two-tiers of mandatory determinations in the way before a party can begin to obtain a final binding decision in arbitration.

Parties will need to think carefully about whether a three-tiered system of determinations is suitable for their needs. Key issues are whether or not these provisions do in fact offer the system of relief promised, including how non-final determinations of the Engineer and DAAB are likely to be treated in the jurisdiction that the contract is based as well as under the governing law of the contract, and attempting so far as possible to agree in advance between the Parties and Engineer as to how this mechanism will work.

This paper will address the dispute resolution provisions in the 2017 Contracts in two parts, as follows:

- Part 1 sets out the key provisions of the new dispute resolution mechanism in the 2017 Contracts and assesses these against the 1999 Contracts.
- Part 2 addresses the merits of including a DAAB, and Engineer's determinations (the "other Party" under the Silver Book) in their new form, as a pre-condition to arbitration in international context. That said, the increased emphasis on dispute avoidance, adopted by both FIDIC and the NEC is of considerable importance and something that needs to be adopted throughout the construction industry.

Part 1 – the new dispute resolution mechanism

Background

The dispute mechanism in the 2017 Contracts follows on from a worldwide trend of promoting dispute avoidance over arbitration.

The 1999 Contracts introduced the now infamous Dispute Adjudication Board into its contracts for the first

time, which replaced the Engineer's binding decision in the 1987 FIDIC Conditions of Contract as a pre-condition to arbitration. The 1999 Contracts still require the Engineer to make a determination as the first step in the claims process, albeit under a reduced timescale.

In the 2008 Gold Book FIDIC expanded the role of the DAB further by defining it as a Dispute Avoidance / Adjudication Board, and including a new clause 20.4 "Avoidance of Disputes" which permits the parties to agree to request that the DAB provide informal assistance with any issue or disagreement between the parties, which shall not bind either party should they proceed to obtain a formal determination.

The 2017 Contracts go further again. Like the 2008 Gold Book, the DAB is defined as a "Dispute Avoidance / Adjudication Board", and it is empowered to provide informal assistance. In addition, the role of the Engineer has been increased to play a facilitative role and to issue binding determinations that will become final unless an NOD is issued.

The dispute resolution mechanism compared

As described above, the 2017 Contracts follow the same core structure as the 1999 Contracts, which can be broadly divided into the following constituent parts:

- Making a claim;
- The role of the Engineer (not the Silver Book);
- Avoidance of disputes (new);
- The DAB;
- Amicable settlement; and
- Arbitration.

These are each discussed and assessed against the 1999 Contract provisions below.

Making a claim

The 1999 Contracts include separate provisions for the Employer and Contractor to make a claim, with a notable difference being that Contractors must make their claim within 28 days of becoming aware of the event giving rise to the claim, and provide a fully detailed claim within 42 days (Sub-clause 20.1), whereas Employers need only provide notice "as soon as reasonably practicable (Sub-clause 2.5)."

The 2017 Contracts include one consolidated clause for claims, Sub-clause 20.2, under which both parties must progress their claims within the 28 and 42 day periods under Sub-clause 20.1 of the 1999 Conditions. It also includes a new procedure enabling a waiver of these time-limits in certain instances[1], which is clearly designed to provide some clarity and a mechanism for determining when a claim will be time-barred.

The role of the Engineer

The Silver Book does not include any role for the Engineer, although the procedure outlined below for the Red and Yellow Books is more or less identical albeit the steps are carried out by each of the Parties rather than an Engineer.

The role of the Engineer has been expanded under the 2017 Contracts, including new functions and obligations. In relation to claims, the Engineer must[2]:

- Consult with the parties to attempt to reach agreement, and if no agreement is reach within 42 days;
- Make a "fair determination" within a further 42 days.

Under the 1999 Contracts[3] the Engineer was required to consult and ultimately make a fair determination within just one 42 day period. Under both the 2017 Contracts and the 1999 Contracts the Engineer may request that further information be provided before making a determination.

The 2017 Contracts also include an express requirement that the Engineer act "neutrally" in discharging the above duties[4]. Although many would consider that neutrality is already encompassed as a matter of common sense in the obligation to issue a "fair determination," and this has been confirmed to be the case as a matter of English law,[5] the position is not so clear in all jurisdictions and the addition of an explicit obligation of neutrality is a helpful addition.

Furthermore, whether both the 2017 Contracts and 1999 Contracts provide that the Engineer's determinations shall be binding on the parties unless and until revised by the DAB or in arbitration[6], the 2017 Contracts go further to state that unless either party issues an NOD with the agreement or determination issued by the Engineer within 28 days, that agreement or any part of that decision not expressly included in an NOD shall become final and conclusive,[7] and immediately enforceable in arbitration. Parties will therefore need to be conscious of these time limits.

The 2017 Contracts have therefore extended the Engineer's role in claim resolution from a minimum 42 days to 84 days, with the prospect of its determination becoming final if neither party issues a valid NOD. The new provisions do not state how a non-final Engineer's determination is to be enforced, although we expect the intention is that a party would obtain a DAB decision on the failure to comply followed by an arbitral award pursuant to Sub-clause 21.7 (discussed further below).

Avoidance of Disputes

A new "Avoidance of Disputes" provision has been added which permits the parties to jointly ask the DAB to informally discuss and/or provide assistance with any issue or disagreement[8]. The parties will not be bound to act on any advice given in this process. This provision is taken from the 2008 Gold Book[9], and it is in keeping with FIDIC's promotion of dispute avoidance, but its practical effect is questionable.

The issue is that the DAB is by this clause being asked to act as a kind of mediator, whereas in the following clause it must act as adjudicator, and these functions are not usually compatible. A mediator will often become privy to confidential and other commercial considerations of the parties, and is there to facilitate settlement, and this is plainly not compatible with the role of adjudicator who must decide the parties' legal rights and obligations. This dual role scenario has already been met with some concern in the UK[10].

The DAB

The DAB procedure under the 2017 Contracts retains its core aspects, namely that a DAB must issue its decision within 84 days of a dispute being referred to it, and that decision shall be immediately binding upon the parties who shall promptly give effect to it. However, the new provision includes a number of revisions designed to clarify and assist in enforcing these obligations, including[11]:

1. DAB decisions are now expressly binding on the Engineer;
2. The Parties and Engineer must comply with the DAB's decision "whether or not a Party gives a NOD with respect to such decision under this Sub-clause"; and
3. If the DAB awards payment of a sum of money, that amount shall be immediately due and payable after the payer receives an invoice, without any requirement for certification or notice. In addition, the DAB may require an appropriate security to be issued for payment of the sum awarded.

Furthermore, Sub-clause 21.7 provides that if either party fails to comply with a DAB decision, whether final or not-final, the other party may refer the failure itself directly to arbitration pursuant to Sub-clause 21.6.

The above provisions were intended by FIDIC to have already been provided for in the 1999 procedure, but which as many contractors have painfully found out, the 1999 wording was not so clear and has been the subject of fervent debate since those conditions were released. This debate is captured in the Persero series of cases in Singapore, which ran for a eight years on the issue of whether a non-final DAB decision issued under Sub-clause 20.4 could be enforced summarily by an arbitral award.

Under both the 1999 and 2017 Contracts either party can prevent a DAB decision from becoming final by issuing an NOD within 28 days. However, the 2017 Contracts wording adds that if no arbitration is commenced within 182 days after the NOD is issued then that NOD shall be deemed to have lapsed and be no longer valid. This will allow DAB decisions to become final where arbitration is not pursued,

and that is helpful, however where finality is relevant to enforcement this provision may also be subject to dispute. For instance, if a party commences arbitration but then allows it to lapse, will a new 182 day period commence or does that prevent a non-final DAB from ever becoming final?

Finally, the new wording includes a revised provision for when no DAB is in place, which now permits the parties to proceed directly to arbitration if a dispute arises and there is no DAB in place[12]. This is a potentially important revision compared to its equivalent in the 1999 Yellow Book, Sub-clause 20.8, which is headed "Expiry of Dispute Adjudication Board's appointment[13]."

The 1999 Contract wording was subject to debate before the Swiss Supreme Court[14] and the UK Technology and Construction Court,[15] and both courts found that the DAB was a mandatory pre-condition to arbitration, and that Sub-clause 20.8 would only apply in the exceptional situation where the mission of a standing DAB has expired before a dispute arises between the parties, or other limited circumstances such as the inability to constitute a DAB due to the intransigence of one of the parties. Although the Swiss Case ultimately permitted the DAB to be avoided after the Contractor had spent over 18 months attempting to have it constituted, the English case refused to allow the litigation to proceed until the DAB procedure was completed.

Under the 2017 Contracts parties will be able to skip the DAB procedure if it is not in place when the dispute arises, although once the DAB has been set up or once the parties begin the process of setting up a DAB, no matter how frustrating that process may be, the DAB will become mandatory and the process will not be able to be abandoned.

Amicable settlement

The mandatory amicable settlement period has been reduced from 56 days to 28 days under the 2017 Contracts[16]. Furthermore, where either party fails to comply with a DAB decision, that failure may be referred directly to arbitration and the amicable settlement period will not apply[17]. This clarifies that the parties' obligation to "promptly" comply with a DAB decision means in less than 28 days.

Arbitration

The arbitration provisions for non-final DAB decisions are effectively the same under both contracts, namely that where an NOD has been issued either party may refer the dispute to be finally decided in international arbitration[18]. The 2017 Contracts also expressly permit an arbitral tribunal to take account of any non-cooperation in constituting the DAB in its awarding of costs.

As noted above, the new wording includes an expanded Sub-clause 21.7 (Sub-clause 20.7 of the 1999 Yellow Book), which permits any failure to comply with a DAB decision, whether final or not-final, to be referred directly to arbitration. In relation to non-final DAB decisions, the right to enforcement by interim relief or award is subject to the fact that the merits of the dispute are reserved until resolved in a final arbitral award. Although this revised contractual clarification/position will be welcomed by contractors, there are still likely to be challenges in many jurisdictions as to whether the enforcement of non-final DAB decisions via an arbitral award is supported by the local or governing laws of the contract.

Conclusion

The new dispute procedure provides some useful revisions which address fairly well some of the problem areas of the 1999 Yellow Book, and which are aimed at promoting compliance with the pre-arbitration steps. These include better defined responsibilities and accountability for the Engineer, and revisions to the DAB and arbitration provisions which should avoid the perpetual 1999 Yellow Book disputes as to whether an NOD cancels the binding effect of a DAB decision, and whether a non-final DAB decision can be summarily enforced in arbitration.

The new procedure also expands the pre-arbitral steps, including a mandatory additional 42 day period in the Engineer's determination, plus a further 28 days to issue an NOD. To the extent that non-final determinations by the Engineer and DAB are able to be enforced, including under the governing law of the contract, then the new wording will be welcomed by contractors as providing for quick relief and something like the security of payment regime that were intended by FIDIC in the 1999 Yellow Book[19].

However to the extent these non-final determinations are not able to be enforced then, except in limited circumstances for instance where no DAB is in place at the time of dispute, parties may be required to go through an even longer mandatory claims procedure than under the 1999 Yellow Book before they are able to commence an arbitration that will give them final and enforceable relief. Parties should therefore think carefully as to whether this mechanism, in whole or part, is suitable for their particular needs.

In Part II of this paper, I discuss the merits of including these mandatory pre-arbitral procedures.

Footnotes

1. Sub-clause 20.3 of the 2017 Yellow Book.
2. Sub-clause 3.7 of the 2017 Yellow Book.
3. Sub-clauses 3.5 and 20.1 of the 1999 Yellow Book.
4. Sub-clause 3.7 of the 2017 Yellow Book.
5. Per the Court of Appeal in Amec Civil Engineering Limited v Secretary of State for Transport [2005] CILL 2288.
6. Sub-clauses 3.7.4 and 3.5, respectively.
7. Sub-clause 3.7.5 of the 2017 Yellow Book.
8. Sub-clause 21.3 of the 2017 Yellow Book.
9. The FIDIC Guide to the Gold Book states that: "Prevention is better than cure, and the DAB is entrusted also with the role of providing informal assistance to the Parties at any time in an attempt to resolve any agreement."
10. For instance, in Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd , HHJ LLoyd QC commented that the conduct of the adjudicator meant that this was a case of "apparent bias" in that he appeared to lack impartiality, having been privy to a number of without prejudice offers and some rather heated discussions in his capacity as mediator.
11. Sub-clause 21.4 of the 2017 Yellow Book.
12. Sub-clause 20.8 of the 2017 Yellow Book.
13. Sub-clause 20.8 of the 1999 Yellow Book.
14. Decision 4A_124/2014
15. Peterborough City Council v Enterprice Managed Services Limited [2014] EWHC 3193 (TCC).
16. Sub-clause 21.5 of the 2017 Yellow Book.
17. Sub-clause 21.7 of the 2017 Yellow Book.
18. In Sub-clause 20.6 of the 1999 Yellow Book and Sub-clause 21.6 of the 2017 Yellow Book.
19. See for instance, PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30 at paragraphs 70 and 71.

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The 2017 FIDIC dispute resolution procedure:

Part 2 - are Dispute Adjudication Boards worthwhile: benefits, problems, and advice on FIDICs security-of-payment regime

Introduction

In Part 1 of this paper we reviewed the dispute resolution procedure included in FIDIC's second edition of Conditions of Contract for Plant and Design Build (Yellow Book), Construction (Red Book), and EPC/Turnkey (Silver Book) (together the "2017 Contracts") 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 2017 Contracts, 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 pre-condition to arbitration

The intended DAB "security of payment" regime

"DABs," under the FIDIC form and as they are commonly understood, refer to: a board consisting 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.

Whereas DABs under the 2008 Gold Book and the 2017 Contracts also provide a dispute avoidance role during the contract[1], this paper focusses on the "security of payment" regime of binding decisions. The key features of FIDIC's security of payment regime are as follows[2]:

- when any dispute arises in relation to a contract either party may refer the dispute to the DAB;[3]
- 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;[4] i.e. *"pay now, argue later."* This was explained by the Singapore

courts in the Persero II proceedings[5] as creating[6]:

> *"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] When 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 2017 Contracts add a further layer to this security of payment regime whereby as a pre-condition to referring any dispute to the DAB, parties must first refer the dispute to the Engineer (or the other Party under the Silver Book) who will have 84 days to resolve the dispute or failing that to issue a binding Engineer's determination.

Benefits of the DAB mechanism

The benefits of this functioning DAB mechanism include that:

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.

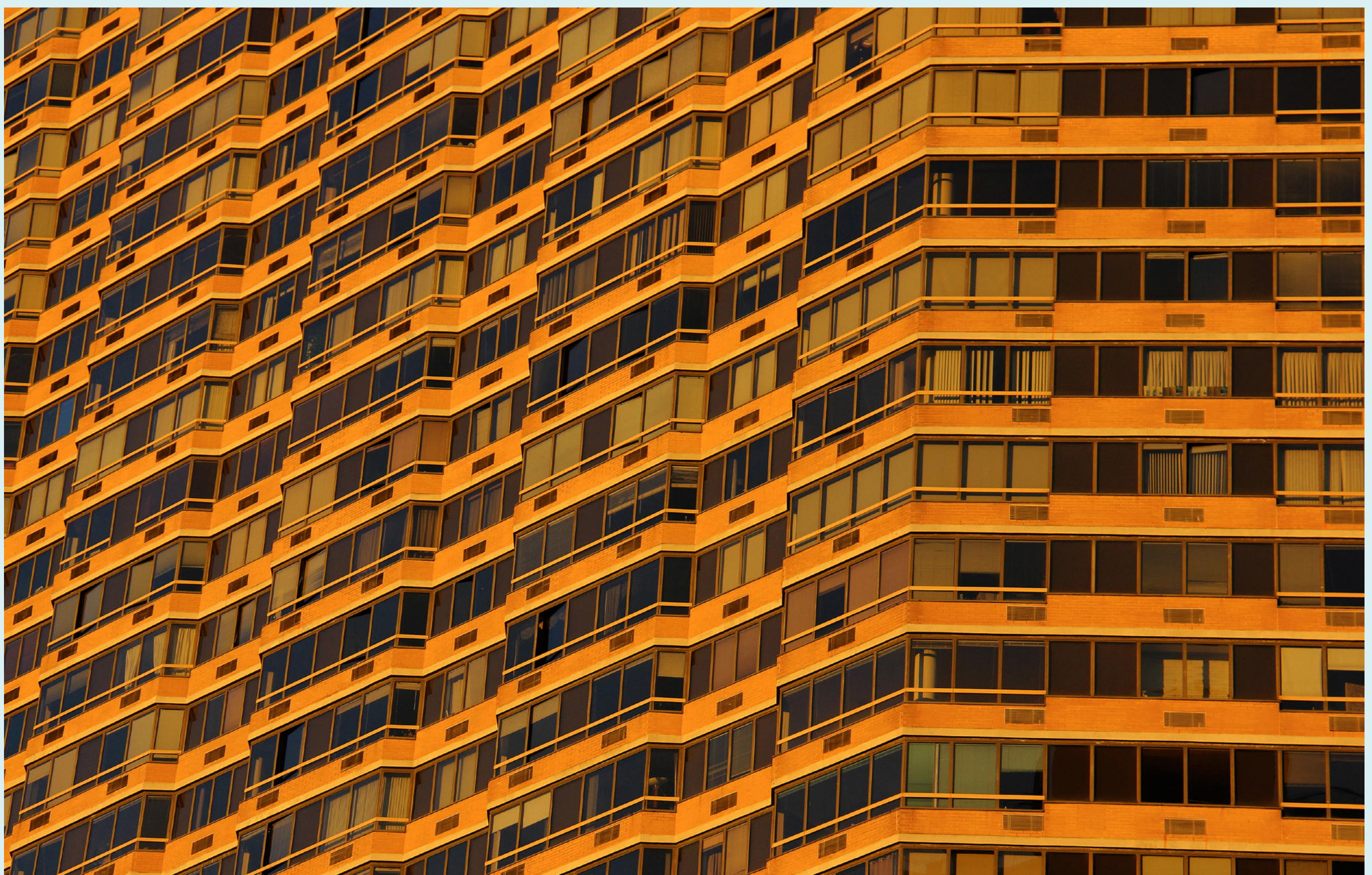
3. Decisions must be issued within 84 days, which is much, much faster than can be achieved in arbitration[7].

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[8]. 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 done and will continue to plague its contractual security of payment regime.

Problems with the DAB mechanism

The practical difficulties we have



experienced with the FIDIC DAB mechanism can be broadly broken down into following; (1) defective contract wording, (2) jurisdictional issues, (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 2017 Contracts use 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 be 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[9], 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 including 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

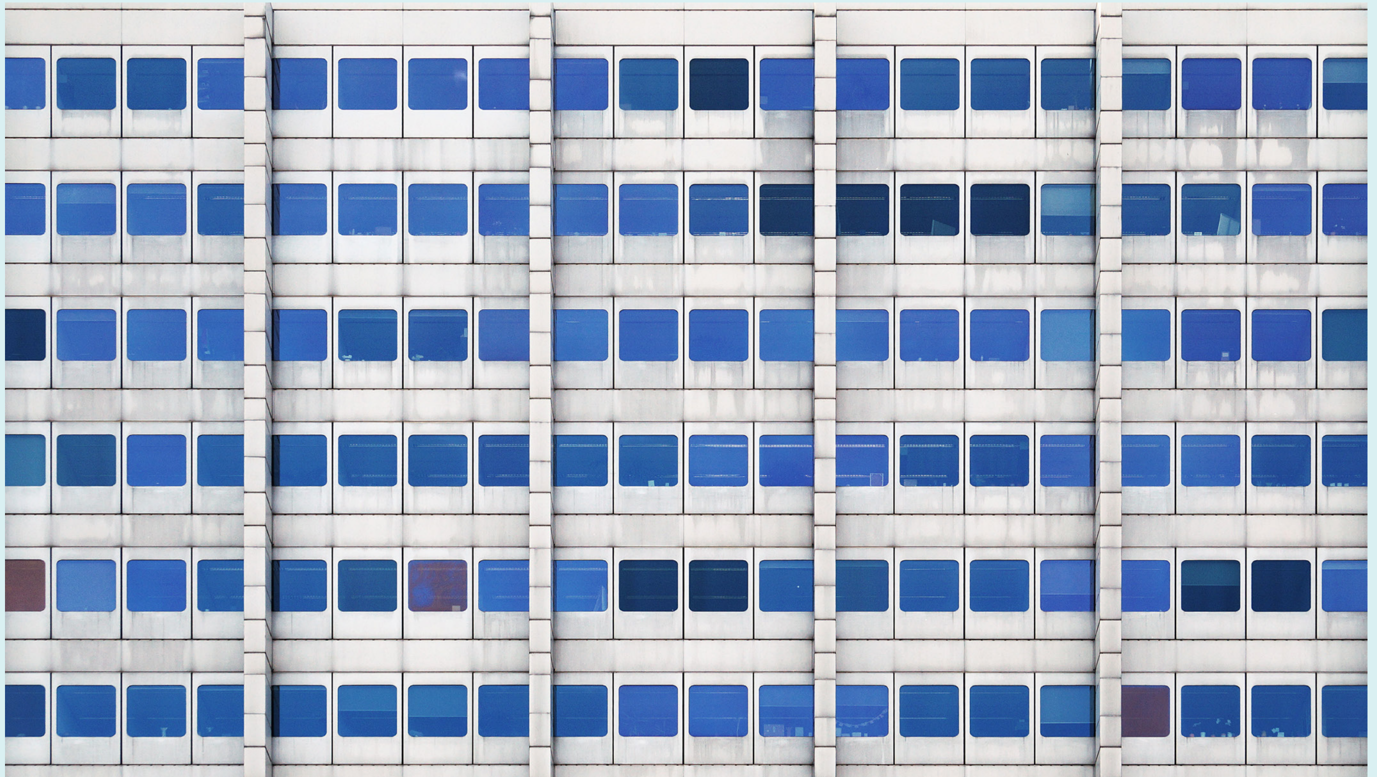
As of January 2017 the position in Romania appears to be that not-final DAB decisions cannot be enforced. The position has been unsettled for a number of years, and we are aware of not-final DAB decisions that have been enforced and commentators who support this,[10] however, the majority of reported 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,[11] and *res judicata*.

Singapore

Following the *Persero* series of cases[12] the Singaporean position is perhaps the best known in the world. In those 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 to the positions above, in South Africa the courts have had no problems 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 focussed 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[13], 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?", perhaps unsurprisingly, is "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 on to.

Footnotes

1. Parties should use caution in asking the DAB to act as a quasi-mediator, but the development should generally be viewed positively.
2. Which 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 2017 Yellow Book.
3. "Dispute Board" in the FIDIC Pink Book.
4. For instance in the FIDIC Guidance Memorandum of April 2013.
5. Which culminated in subsequently the Singapore Court of Appeal in PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30.
6. PT Perusahaan Gas Negara (Persero) TBK ("PGN") v CRW Joint Operation (Indonesia) ("CRW") [2014] SGHC 146, at paragraphs 22 and 24.
7. With the exception of emergency arbitration procedures, which provide only urgent and temporary relief.
8. 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.
9. Housing Grants, Construction, and Regeneration Act 1996.
10. C. Leaua, Arbitration in Romania: A Practitioner's Guide, Kluwer Law International, 2016.
11. Article 1.121(3) of the Romanian New Civil Procedure Code requires arbitral awards to be "final" in order to be enforceable.
12. Although the Persero series were decided under Indonesian law, the applicable arbitration law was based on the seat of arbitration; Singapore.
13. 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.

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FIDIC, force majeure, exceptional events and the "but for" test

Under the 2017 edition of the FIDIC Rainbow Suite, clause 19 which was headed "force majeure" has been replaced by clause 18, "exceptional events". This is an interesting change; the term "force majeure" is typically provided for within most civil codes, whereas it is not a term of art under the common law.

The essential scheme of the FIDIC Form has remained unchanged, namely for something to amount to an exceptional event, there must be an event which is beyond the control of the party affected and which the party affected could neither have foreseen or provided against before entering into the contract nor avoided once it had arisen. The event must also not be the fault of the other party. Under sub-clause 18.2 of the new second edition, the Contractor must give a Notice, in the proper form, within 14 days of becoming aware, or of the date when it should have become aware, of the exceptional event. Subject to this, under sub-cause 18.3, the Contractor may be entitled to an extension of time and/or recovery of costs incurred as a result. If the exceptional event is prolonged, the option of termination may arise.

A question that might arise is whether a Contractor can only rely on this type of clause in circumstances where it can show that it would have been able to perform the contract "but for" the exceptional event, or whether it is enough to show that the event in question prevented the Contractor from performing its obligations under the Contract.. This question was considered by Mr Justice Teare in the case of Classic Maritime Inc. v Limbungan Makmur SDN BHD & Anr.

On 5 November 2015, the Fundao dam, in the industrial complex of Germano in Brazil where iron ore is mined, burst. Iron ore production immediately stopped and shipments were suspended. Classic had entered into a long-term contract of affreightment (the "COA") for the carriage of iron ore pellets from Brazil to Malaysia. Limbungan was the charterer under the COA. Limbungan relied upon the dam burst as a force majeure event excusing it from liability for failing to provide cargoes of iron ore pellets for shipment from Brazil to Malaysia. Classic disagreed and claimed damages for breach of contract.

Clause 32 of the COA provided as follows:

> *"Exceptions*
>
> *Neither the vessel, her master or Owners, nor the Charterers, Shippers or Receivers shall be Responsible for loss of or damage to, or failure to supply, load, discharge or deliver the cargo resulting from: Act of God . . . floods . . . accidents at the mine or Production facility . . . or any other causes beyond the Owners' Charterers' Shippers' or Receivers' control; always provided that such events directly affect the performance of either party under this Charter Party . . ."*

Mr Justice Teare noted that the clause was described as "a force majeure clause" though as with the new FIDIC Contract, that phrase is not used in it. The Judge thought it was better described as an "exceptions clause". There was no dispute that the dam burst was an "accident at the mine". Limbungan said that as a result of the dam burst, it found itself unable to supply cargoes for shipment under the COA. Classic said that the collapse of the dam had no causative effect on the charterer because the shipments would not have been performed even if there had not been a dam burst.

Classic submitted that the effect of clause 32 was to impose a "but for" test of causation. Since the clause required Limbungan's failure to supply a cargo to "result from" the force majeure event (in this case the dam burst), and also for that event to "directly affect" the performance of Limbungan's obligation, Limbungan was required to prove that, but for the dam burst, it could and would have performed the COA in accordance with its terms.

Limbungan disagreed, saying that whilst clause 32 imposed a causation requirement in the sense that it had

to be shown that the dam burst rendered performance of Limbungan's obligations impossible, it was not necessary for Limbungan to show that but for the dam burst it would have performed its obligations.

The Judge summarised the position in this way. Does the "but for" test have to be satisfied in a force majeure or exceptions clause which does not cancel the contract for the future, like a frustration clause, but provides a defence to a claim in damages for breach of the contract? The Judge felt that there was "an important difference" between a contractual frustration clause and what he had termed an exceptions clause. There was a difference between clauses which result in the discharge of a contract and the COA here:

> *"A contractual frustration clause, like the doctrine of frustration, is concerned with the effect of an event upon a contract for the future. It operates to bring the contract, or what remains of it, to an end so that thereafter the parties have no obligations to perform. An exceptions clause is concerned with whether or not a party is exempted from liability for a breach of contract at a time when the contract remained in existence and was the source of contractual obligations. It is understandable that a contractual frustration clause should be construed as not requiring satisfaction of the 'but for' test because that is not required in a case of frustration."*

However, the "exceptions" in the contract here were different. It is not concerned with writing into a contract what is to happen in the event of a frustrating event. It is concerned with excusing a party from liability for a breach that has occurred. As the Judge said, in these circumstances, it would be a "surprise" that a party could be excused from liability where, although an event within the clause had occurred which made performance impossible, the party would not have performed in any event for different reasons. Therefore clause 32 required Limbungan to show that but for the dam burst the cargo would have been supplied.

Therefore the court went on to consider whether, but for the dam burst, Limbungan would have supplied cargo for the voyages which were the subject of the present claim. This was a factual issue. On the facts, the Judge doubted whether, but for the dam burst, Limbungan would have been able and willing to supply cargoes for shipment pursuant to the COA with Classic. Limbungan were unable to demonstrate that their inability to fulfil the COA was "resulting from" or "directly affected by" the dam burst. This was because Limbungan had not fulfilled the two shipments prior to the dam burst, and at the time of the dam burst it appeared unable and/or unwilling to supply cargoes for shipment pursuant to the COA.

Quantum

When it came to assessing quantum, Limbungan said substantial damages were not recoverable because, even if Limbungan had been able and willing to ship the cargoes but for the dam burst, Classic would not have been entitled to substantial damages because the dam burst would in fact have prevented Limbungan from shipping any iron ore pellets. Classic described this as "an impermissible sleight of hand", from not being ready to perform the COA when liability was being assessed to being ready to perform when damages were being assessed. The Judge disagreed with Classic's approach noting that the recoverability of substantial damages depended upon the compensatory principle and therefore upon a comparison between the position of Classic as a result of the breach and the position it would have been in had Limbungan performed its obligations. Here, if, but for the dam burst, Limbungan had been able and willing to ship the five cargoes, no cargoes would in fact have been shipped because of the dam burst and the dam burst would, in that event, have excused Limbungan from its failure to make the required shipments.

So, contrary to the approach on liability, clause 32 of the COA worked in Limbungan's favour as far as quantum was concerned.

Conclusion

The dispute between Classic and Limbungan related to the performance of the COA. Did clause 32 set out circumstances which might excuse Limbungan from their breach of contract? In coming to the decision he did, Mr Justice Teare seemed to accept that there was a difference between clauses which result in the discharge of a contract (which did not apply the "but for" test) and the COA here, which exempted a party from liability for non-performance. Therefore it is likely that the "but for" test will apply, under English Law, to other similar "force majeure-type" clauses which merely exempt parties from liability for non-performance.

However, as noted above, whilst clause 18 of the FIDIC Form primarily deals with the effect on performance of an exceptional event, it does also potentially provide for termination. Mr Justice Teare's approach did not deal with this type of contract, so under common law there still may be a conflict about whether or not the "but for" approach to liability adopted in the Classic case would apply. However, parties alleging force majeure will no doubt be called upon to show that they would have been able to perform had the force majeure event not occurred.

AI & Construction law: an essential and inevitable partnership

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Part 1: Risk and contract management

"Risk and contract management" may sound boring and tedious to some. However, when it comes to keeping on top of your construction contracts, nothing could be more important. Any tool which assists in this respect and increases the chances for a project's success is therefore essential. When we consider how artificial intelligence (AI) and machine learning may play a part in all of this, we see that the use of these tools is inevitable. It is only a matter of time before they become part and parcel of daily contract and project management routines. If risk and contract management become more reliable, more robust, easier and more efficient through the use of intelligent and automated processes, perhaps they may even become a bit more exciting to some.[1]

Assuming for the moment risk and obligation management is paramount: do you review all contracts before signing, regardless of the value? Do you have an efficient and automated means of monitoring all obligations within all of your contracts and an understanding the differences or anomalies between each one? Is there a system in place which highlights and organises the contractual risks across your contracts and/or automatically alerts you when deadlines are fast approaching? When it comes to disputes, are you able to predict the likely outcome, from a Judge or Adjudicator's point of view, so that you can take an informed decision on how to proceed?

Whilst there is not (and I would suggest there is unlikely to be anytime soon) any one piece of software which will solve all of your problems, there certainly are platforms and technologies available now which utilise AI and machine learning to assist with solutions to some of the questions posed above.

A lot of discussion, and indeed hype, exists at the moment around AI: for example, will robots and machines take over the role and/or services of the lawyer? Rather than continuing this debate, efforts are best placed on focusing on and developing the practical applications of the technologies currently available.

This article looks generally at some of the current technologies available[2] and begins to consider how they may assist in a construction context.

Artificial Intelligence (AI): the jargon

Before jumping feet first into what technologies available and which one(s) you should choose, it is essential to understand first what is AI and what issue are you trying to solve or what efficiency do you want it to improve upon.

To start with, what is AI? Perhaps Deloitte's simple definition is most helpful. AI is:

> *"the theory and development of computer systems able to perform tasks that normally require human intelligence".*[3]

As journalist and author Joanna Goodman summarises:

> *"Basically, artificial intelligence is about machines (computer software) doing things that are normally done by people."*[4]

My personal favourite is the definition provided by Radiant Law[5]:-

> *"A term for when a computer system does magic. "General" artificial intelligence refers to thinking computers, a concept that for the foreseeable future exists only in science fiction and LawTech talks. "Narrow" artificial intelligence refers to a limited capability (albeit one that may be very useful) such as classifying text or pictures, or expert systems. Discussions of AI that blur general and narrow AI are a good indication that you are dealing with bullshit."*

That sounds relatively straightforward. So what about all of the other terms out there: for example, machine learning, deep learning and natural language processing? First, it may be useful to know that people often use the

term AI generally, to cover a whole range of processes, when in fact they mean only a small subset of AI or perhaps even a technology that does not employ AI at all. Michael Mills, co-founder and chief strategy officer of Neota Logic, defines the field of AI as having seven branches: machine learning, natural language processing, expert systems, vision, speech, planning, and robotics.[6]

Others consider that much of the discussion about AI is actually a discussion about pattern recognition within text and the automation of extracting this text. Therefore, it is not necessarily AI in its purest form. As such, terminology and discussions you come across in the context of legal technology simply may be reference to a particular subset of AI or indeed not AI whatsoever.

Accordingly, rather than starting with the specific AI process, terminology or technology you want to use, identify what it is you want it to do: what is the desired outcome?

Step 1: Identify what you want

What do you want your technology to do? What is the outcome you want?

First, recognise and identify the issue you want to solve, the work stream you want to make more efficient and/or the risk you want to manage. In other words, identify the "use case". Focus on the outcome or the product of AI.

Having first done this, you can then set off shopping for and implementing the appropriate technologies. Only once we identify the outcome required or the problem to be solved, can we harness the various platforms/technologies to realise these objectives.

AI can assist with a number of objectives: contract review, document automation, billing and time analysis, research, collaboration platforms, etc. It is also starting to be used to predict the outcome of disputes.[7] The following considers in closer detail contract review/analysis and document automation in the context of construction law.

Contract Review/Analysis

There are a number of technologies that go some way to assist with contract review and analysis. For example, technologies which read documents for the analysis and extraction of data, each with their own selling points.

One such technology is an artificial intelligence platform for document review, which provides insight into data and contracts. It utilises pattern recognition algorithms to understand text by context and content, not just by key word searches.

Another example goes beyond simple contract clause searching and extraction and generates a detailed party-specific summary of obligations, liabilities and other meta-data from the contracts analysed. Each agreement, and its component issues, is assigned a risk rating based on the organisations' specific risk policies. This automates a degree of the risk analysis and decision making during a contract review process, highlighting those parts of the contract which need to be manually considered and why.

A further technology, amongst other things, provides text analytics solutions and smart search solutions which index unstructured data, inspect and extract data from documents and uncover the connections between them, no matter where the information is stored.

In the context of construction, infrastructure and energy projects it is relatively easy to see how these types of technologies can be instrumental in contract review and analysis. The possibilities are endless, for example:

- a review of a vast number of contracts, appointments and/or warranties to highlight and categorise possible clauses/issues which require a lawyer then to analyse. This perhaps could be helpful in the situations where the majority of the agreements are nearly similar (but not quite as amendments may have been introduced) or where the agreements normally would not have been reviewed at all given their perceived risk or value position;
- an extraction of key data and obligations from contracts, appointment and/or warranties across the project(s), or indeed the company, into spreadsheets, reports or other software to manage and monitor risk and liability. Perhaps if needed, these obligations/data can then even be linked to programming software to monitor key dates and milestones; and
- a search through a company's database (servers/emails/cloud-based storage) to find and extract data/information/clauses from most types of documents/drawings which could be used for research, contract review, decision making and collaboration/innovation.

With greater collaboration between lawyers and their clients and the use of technology such as those listed above, greater efficiency and efficacy is possible for the review and management of contract risks and obligations. An off the shelf product may or may solve the desired objective, but through greater collaboration and innovation, development of tailored solutions and services will, I suggest, minimise risks and improve the management of contract obligations, at a lower cost.

Document Automation

Document automation is also known as "contracting platforms" and are technologies that aim to speed up the generation, negotiation and completion of contract documents between contracting parties.

One such platform automates the generation of the contract and provides live-negotiation and analytics tools. It enables the user to create contract drafts (or contract templates in the first instance) which then can be negotiated with the other contracting party in real-time. Contracts can also be analysed during the negotiation process to see how they have evolved, as compared to the templated precedent. A further platform also offers a contract automation and contract management platform: contract creation, negotiation, e-signing and analytic tools.

Again, collaboration between lawyers and their clients to establish contract templates and workflows for contract negotiations and completion, with the use of AI-enabled technologies, will minimise risks during the contracting process where possible and enhance efficiencies. In the construction industry where standard forms and standard terms and conditions are regularly used, and in an era of the rise of the Smart Contract, it is only a matter time before document automation and the automation of workflows which follow thereafter to achieve a completed contract will become the norm.

Conclusion

This article, Part 1, considered briefly AI and construction law in the context of risk and contract management and just a few of the technologies which are available now to assist in this respect. With greater collaboration between lawyers and clients I suggest AI (to use the general, though not perhaps technically correct, term) can bring greater efficiencies and efficacies to the contract generation, review, analysis and management processes. This is but one use for AI in the context of construction law. Part 2 will consider the use of AI in predicting the outcome of disputes.

Whilst there indeed is a significant amount of hype around AI, I am of the view that AI and construction law are an essential and inevitable partnership: if you are not implementing it now, you certainly will be, to some degree, in the very near future – either by choice or by obligation. In 1996 Richard Susskind was deemed "dangerous" and "insane" for suggesting that email would become the principal means by which clients and lawyers would communicate.[8] The suggestion here that AI soon will be used throughout the legal industry in the context of construction law is not as far-fetched: it is already here.

Footnotes

1. I appreciate this may well only be the view of author.
2. Please note, Fenwick Elliott LLP does not endorse or recommend any of the specific companies/technologies identified in this article. They are referenced by way of example only.
3. David Schatsky, Craig Muraskin and Ragu Gurumurthy (2014), "Demystifying artificial intelligence", https://dupress.deloitte.com/dup-usen/focus/cognitive-technologies/ what-is-cognitive-technology.html
4. Joanna Goodman (2016), Robots in Law: How Artificial Intelligence is Transforming Legal Services, ARK Group.
5. https://www.linkedin.com/pulse/lawtech-glossary-alex-hamilton/ and https://github.com/AlexHamilton/LawTech-Glossary
6. Michael Mills (2016), "Artificial Intelligence in Law: The State of Play 2016" https://www.neotalogic.com/ wp-content/uploads/2016/04/ Artificial-Intelligence-in-Law-TheState-of-Play-2016.pdf
7. For example, in October 2017 software developed by a Cambridge start-up company CaseCrunch predicted the outcomes of 775 cases with an accuracy of 86%, while the 112 lawyers' average was 62.3% https://www.lawgazette.co.uk/practice/robot-beats-human-lawyers-in-outcomes-challenge/5063471.article.
8. Susskind R., "Legal informatics - a personal appraisal of context and progress", in European Journal of Law and Technology, Vol. 1, Issue 1, 2010. http://ejlt.org/article/view/18/7#_edn2

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