

International Quarterly

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

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Welcome to Issue 21 FIDIC, NEC and the UAE

As we indicated in Issue 20 of *IQ*, Issue 21 provides more detail about the proposed new 2nd edition of the FIDIC Rainbow Suite. We also comment on two recent developments in the UAE which may affect the way in which arbitration is conducted.

FIDIC

In Issue 21 we include two articles which look at the proposed changes to clause 20 which deals with claims and clause 21 which deals with disputes. We understand that publication of the finalised new editions of the Rainbow Suite will not be until the Autumn. FIDIC did not introduce any further changes or amendments at the Middle East Contract Users' Conference held in Abu Dhabi on 14-15 February 2017. But FIDIC did, at the Abu Dhabi Conference, publish the fifth edition of its Client/Consultant Model Services Agreement (the White Book 2017).

At the same time FIDIC also published second editions of the:

- Sub-Consultancy Agreement, which is intended to be used where a consultant appointed under the White Book wants to sub-contract part of the services; and
- Model Joint Venture (Consortium) Agreement, which is intended to be used where an unincorporated joint venture acts as the consultant under the White Book.

The White Book retains at paragraph 3.1.1 a clause noting that the consultant shall be required to exercise reasonable skill care and diligence¹, a different standard to the contractor who, when exercising design obligations under the Rainbow

Suite must ensure that the design is fit for its purpose.

Two new provisions have been introduced; clause 5 dealing with Variation to Services and clause 6 which deals with Suspension and Termination.

It will be interesting to see if the chances lead to an uptake in use of the agreement.

The new White Book 2017 also requires both the client and the consultant to "*act in good faith and in a spirit of mutual trust*". This is a fairly similar obligation to be found at Clause 10.1 of the NEC3 form, albeit it is not one which can be found in the Rainbow Suite.

NEC

Indeed, it is not just FIDIC who are introducing new contracts. The NEC has recently announced that the next generation of NEC contracts – the NEC4 suite – is due to be launched on 22 June 2017. The NEC have prepared a paper entitled "*The next generation; an explanation of changes and benefits*"², which provides some details about the changes.

The NEC is introducing two new contracts, the NEC4 Design, Build and Operate Contract ("*DBO*") and the NEC4 Alliance Contract ("*ALC*"). The ALC will be introduced by way of consultation initially. The ALC is a multi-party contract, which has been prepared for clients who want to

have a fully integrated delivery team and who want to enter into a single collaborative contract with a number of participants in order to deliver a project.

Like FIDIC, there is an increased emphasis on dispute resolution. NEC4 will introduce a four week period for escalation and negotiation of a dispute. For projects where the UK Housing, Grants, Construction and Regeneration Act 1996 ("*HGCRA*") does not apply, this is a mandatory requirement before any formal proceedings are commenced. It is a consensual option where the HGCRA does apply.

The NEC4 also introduces a new secondary option for BIM and this is discussed in more detail in my article in this edition of *IQ* entitled "FIDIC and BIM". Very like FIDIC, the NEC4 will also introduce a new dispute avoidance option W3 (for use when the HGCRA does not apply) namely Dispute Avoidance Boards (DAB) which are intended to be established at the outset of the project. The idea is that the DAB visits the site and tries to find a solution to disputes. If it cannot, then the DAB will be able to provide a recommendation. This recommendation is a pre-condition to going to litigation or arbitration.

We will of course provide a full update when the NEC4 suite of Contracts is released in a few weeks' time.

The UAE

There have been two very important recent developments in arbitration practise in the UAE.

At the end of October last year Article 257 of the UAE Federal Penal Code No. 3 of 1987 was amended by Federal Decree Law No. 7 of 2016. This amendment potentially opens up arbitrators and experts to prosecution if they act *“in contravention of the requirements of the duty of neutrality and integrity.”* We discuss the impact this amendment is already having on arbitration practice here in this issue.

Second in Issue 21 we also look at the

impact of the *“Judicial Tribunal for the Dubai Courts and the DIFC Courts”* created by Decree No.19/2016.

There has already been one decision by the Judicial Tribunal which may suggest that it will act to frustrate DIFC’s jurisdiction to enforce an award made within its jurisdiction.

These are both what newsreaders would term *“developing stories”* and we will keep a close eye on how events unfold.

Arbitration

Finally in Issue 21, we look at the revised Rules of Arbitration of the

International Chamber of Commerce (ICC) which came into force on 1 March 2017. The revisions include the introduction of the Expedited Procedure which is an extremely welcome addition to the ICC Rules, and one that many potential users will welcome and seek to benefit from.

Footnotes

1. As always on international projects, you should check to see if the local legal requirements alter this.
2. A copy can be downloaded here: <https://www.neccontract.com/NEC4-Products/NEC4-Contracts/NEC4-Free-resources> [Accessed 16 March 2017]

News and events

Trends, topics and news
from Fenwick Elliott

This edition

Our international arbitration credentials

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

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

Events

Fenwick Elliott sponsored the FIDIC Middle East Contract Users 2017 Conference in February. The annual conference, hosted in Abu Dhabi, is the largest event for FIDIC contract users’ in the Middle East. The second day of the event saw Fenwick Elliott Partners Jeremy Glover and Nicholas Gould discuss how to manage claims under FIDIC.

In March Fenwick Elliott partnered with the London Chamber of Commerce and Industry (LCCI) on their stand at MIPIM 2017, the world’s leading property event. The week-

long real estate exhibition and conference was attended by some of the most influential players from the international property sector.

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.



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Contract Corner:

A review of typical contracts and clauses

FIDIC and BIM

One of the reasons FIDIC are amending the 1999 Rainbow Suite is to help ensure that the contracts meet current international best practise. This was no doubt one of the reasons why FIDIC was the primary organiser of the recent Regional Conference: the Road to Smart Infrastructure in Belgrade.¹ Indeed, one of the key themes of the conference was the use of Building Information Modelling, better known as BIM.

How is FIDIC likely to address BIM?

Now, there is no mention of BIM in the pre-released second edition of the 2017 Yellow Book. That is not to say that FIDIC has neglected BIM. Far from it: at least three of FIDIC's committees² have been asked to consider how best to deal with BIM. One particular difficulty for FIDIC is that it is an international form of contract. It is designed for use throughout the many different jurisdictions and cultures that the engineering and construction industry operate. There is far from being any uniform or standard approach. This is why any particular amendment to the Rainbow Suite itself is not expected. FIDIC's approach is more likely to be in the form of a Guidance Note or perhaps a Protocol for use with the FIDIC form.

This would be valuable, not least given FIDIC's engineering background. It would also be of assistance because BIM means so many different things to different people

and organisations. Not only was this clear from the Belgrade Conference, but it is also something which has been highlighted by King's College, London, who have prepared an excellent BIM Research Report which was published online on 1 July 2016.³

These differences in understanding and the application and use of BIM need to be understood by anyone putting together a project. The definition of terms, something which is also important on a cross-border project, becomes ever more important with something as new as BIM. Who is the BIM Information Manager? The BIM Co-ordinator? Are they, in fact, one and the same? What do they do?

Remember that BIM is more than simply digital working. The NBS in the UK has said this:

"BIM is an acronym for Building Information Modelling. It describes the means by which everyone can understand a building through the use of a digital model. Modelling an asset in digital form enables those who interact with the building to optimise their actions, resulting in a greater whole life value for the asset ... BIM is a way of working..."⁴

This is a helpful definition because it brings together the two main features of BIM. Yes, it is a form of digital tool which will help optimise output, both in terms of working practices as well as the whole life value of the building or asset, but it is

also a project management tool. And it is very likely that BIM, alongside other technical advances, will change the way projects are run. It may change the risk profile of a project. But it will not change what you need to bear in mind when considering that risk profile.

Contract Risk Management

Contract risk management never changes, whether using BIM or not:

- No matter what contracts, protocols, guidance notes or otherwise are required on a particular project, it is important to understand your obligations, liabilities and limitations within each document;
- If the contract documents do not align with each other and/or are not considered sufficiently in detail, this can lead to ambiguity and uncertainty;
- Make sure you understand what you are being asked to do as, depending on the terms of your contract, these could be binding documents with obligations contained therein which you need to understand and be alert to.

The use of BIM may well add some additional levels of responsibility, so check the detail.

BIM has many advantages as a project management tool. The graphics or animation enable the project participants to understand and visualise the scope of the project,

right at the outset. This may negate the need for costly changes or variations halfway through as an employer realises they actually wanted something slightly different, or the engineer or contractor comes to understand that there is a more efficient way to design and/or construct the building. This is an example of one of the likely changes in the way we work: early contractor (and supplier) engagement. It might also be an example of collaboration, parties working together to make the construction process more efficient and so rewarding.

It is important that your contract as a whole contains a clear set of obligations as to how the engineer or contractor will be expected to implement BIM. These obligations do not require any amendment by FIDIC to the main contract form, but it is important to be clear as to when these obligations start. Ideally, this would be with the project procurement process, but does it also continue into post-completion operations? In the UK, we have the Government Soft Landings Policy or GSL. The essential principle behind the government's GSL philosophy is that the ongoing maintenance and operational cost of a building during its lifecycle far outweighs the original capital cost. If this is recognised through early engagement in the design process, then there is greater scope to achieve both savings and increased functionality.

What might FIDIC be thinking about?

Certainly, it is already clear from the pre-released second edition 2017 Yellow Book that FIDIC is looking to embrace collaborative principles. Dispute avoidance is a clear priority. The introduction across the Rainbow Suite at sub-clause 8.3 of early warning is another such example. The use of BIM may assist with this, as it may result in parties realising, at an earlier stage in the process, that there might be a problem.

This increased access through BIM to the design of others might affect the common law duty to warn of errors or problems, and parties will need to bear in mind the extent of their potential legal duty to consider those designs.

There are two key related documents that FIDIC will be considering: the use of a Protocol and the BIM Execution Plan. They may also be considering the role of the BIM Information Manager.

The BIM Protocol

Effectively, the BIM Protocol explains who does what, when and how? A protocol should take the following into account:

- Definitions;
- Establish priority of the contract documents;
- Set out the obligations of the Employer;
- Put a Protocol in place for everyone?
- Appoint the Information Manager?
- Clearly define the duties of the BIM Information Manager
- Establish the obligations of project team members;
- Produce the specified models as agreed;
- Provide a framework for collaborative working practice;
- Electronic Data Exchange: interoperability: making sure the data can talk to each other
- Mandate use of Information Management standards;
- Use of models;
 - Who by?
 - Copyright
 - Licences related to permitted purposes
 - Limitations on liability associated with models.

The UK CIC Protocol

In the UK, there is the CIC Protocol. The purpose of the Protocol is to integrate BIM Level 2 with standard form contracts. Essentially, the way it works is to provide a series of supplementary contract documents to be signed by the employer, engineer, contractor, and (ideally) subcontractors, suppliers and anyone else who will be making design contributions. Of course, if using a protocol (or any other bespoke document which attempts to provide

a similar role), it is important to understand what the protocol attempts to do in terms of each party's contractual obligations, liabilities and associated limitations.

The CIC Protocol is designed to take precedence in the event of conflict or discrepancy with any contract (clause 2.2). A FIDIC BIM Protocol ought to do the same. Care must, however, be taken, as there remains a risk that interpreting the wording of the Protocol alongside the contract provisions, in particular standard form contracts which are not amended, will be problematic. Clients/employers should note that clause 3 of the CIC Protocol makes it an absolute obligation on them to secure protocols in substantially the same form from all project team members.

The UK JCT Form of Contract currently tries to deal with this issue in this way in the JCTDB 2016. The contract provides a new entry for the identification of a BIM Protocol, and the BIM Protocol is included within the definition of a Contract Document. Clause 1.3 states that the Conditions shall override any other Contract Document (i.e., the BIM Protocol) and clause 1.4.6 incorporates the BIM Protocol's information (in a form or medium conforming to that protocol) where 'documents' are referred to throughout the contract. The JCTDB 2016 then integrates this defined term, BIM Protocol, throughout the contract.⁵

The CIC Protocol includes limitations on a project team member's liability. Clause 5 provides that the project team member does not warrant the integrity of electronic data transmission, and clause 6.4 provides the right for a project team member to revoke or suspend a licence to use their models in the event of non-payment. Furthermore, clause 4.1.2 provides that the obligation on project team members to deliver models and comply with Information Requirements is limited to "reasonable endeavours". This duty of care is lower than the more typically accepted "reasonable skill and care". Under the FIDIC form, design obligations are subject to a fitness for purpose obligation.

Indeed, parties to the project should ensure that they understand what effect the use of BIM will have on their specific duties in respect of not just the design, but costing, programming and construction too. Also, given the current widespread variance in knowledge and experience, does everyone understand what level of BIM experience and expertise everyone has, and the level that everyone has agreed to provide?

However, regardless of whether the CIC Protocol or your own bespoke protocol is used, all parties need to understand where obligations and duties of care are either heightened or diluted from the industry norm. In addition, with numerous documents setting out the BIM procedures and standards for the project, parties need to ensure they are aware of their obligations within each document and understand how they all fit together, both in terms of priority as well as process. For example, time and deadlines in terms of model production and otherwise are not dealt with in the CIC Protocol, but are left to the BIM Execution Plans.

BIM Execution Plan

The BIM Execution Plan should provide the detail of who does what and when. This will set out the programme and confirm the applicable standards. It should always be a project specific document. It should be prepared by lead designer and should, if this detail is not provided for elsewhere, deal with:

- Model origin, purpose and orientation;
- File naming convention – make sure everyone uses the same terms and abbreviations;
- Templates;
- Authorisation and information approval process;
- Software versions, file and exchange formats;
- Electronic Document Management Systems;
- Who does what, when?

The BIM Execution Plan would not be a part of the sub-clause 8.3 FIDIC programme, but is best viewed as being in addition to but aligned with

the Construction Programme and the Design Programme. It was suggested at the Belgrade Conference⁶ that FIDIC could consider making the agreement of a BIM Execution Plan a pre-condition to commencement under sub-clause 8.1. An interesting idea, which rightly highlights the importance of this document, but one which for the time being is perhaps best left to the parties as a particular condition.

BIM Information Manager

Finally, there is the role of the role of the BIM Information Manager. Essentially, the BIM Information Manager is there to co-ordinate the use of BIM on a project. They will be:

- Responsible for preparing and implementing the BIM Execution Plan;
- Responsible for the model management;
- Responsible for integration of individual designs (populating the model);
- Responsible for user access to the BIM Model;
- Data security;
- Maintain a data archive

Usually, the BIM Information Manager has no design responsibility. They are responsible for the management of information, information processes and compliance with agreed procedures, not the coordination of design. If the BIM Information Manager is to have design responsibility then this must be dealt with in the BIM Protocol – otherwise a potential conflict arises as regards to design and design coordination roles.

What is the NEC doing?

The NEC announced at the beginning of March 2017, that they were releasing the new NEC4 on 22 June 2017. This deals with BIM in another way. Their new contract will include a new secondary option specifically to support the use of BIM. This, the NEC have said will provide “*the additional contract clauses required to support the production of information for BIM.*” As well as dealing with issues such as the Model, ownership and liability, under the new BIM option, the Contractor will be required to an Information Execution Plan either for incorporation in the contract from the outset, or within a period defined by the Client.

Conclusion

There are other issues which FIDIC and others may need to consider, but the key is establishing how the use of BIM can sit alongside the FIDIC form of contract. As noted at the outset, FIDIC’s approach is more likely to be in the form of a Guidance Note or perhaps a Protocol for use with the FIDIC form. This would have the advantage of being capable of adaption to suit the environment of the particular project in question.

But whatever FIDIC do, it is important not to be seduced by the technological advances BIM is capable of. BIM is only as good as the people who use it. BIM can certainly offer successful design, procurement delivery and operation of projects, but this is only provided the project team work together. This is why it was once said by Dale Sinclair⁷ that BIM should actually be known as BIM(M): BIM(M) Building Information Modelling and Management. There is considerable sense in that.

Footnotes

1. Organised jointly by FIDIC, ACES and EFCA, 9-10 March 2017.
2. Contracts, Capacity Building and Business Practice
3. This is a valuable source of information for anyone interested in reading more about the adoption of BIM. <http://www.kcl.ac.uk/law/research/centres/construction/about.aspx>
4. www.nbs.com. The NBS website is an excellent research tool.
5. In terms of any discrepancies, the JCTDB 2016 Guide states that the “JCT considers that its contracts give sufficient latitude to BIM Protocols so that a conflict should not arise; in any event, it also considers that unqualified overriding provisions of this type are not appropriate in such protocols”. Time will tell if this is an issue.
6. By Roger Ribeiro
7. Introduction to the RIBA BIM Overlay: <http://www.ribabookshops.com/uploads/b1e09aa7-c021-e684-a548-b3091db16d03.pdf> [Accessed 16 March 2017]



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Universal view: International issues around the globe

ICC revised Rules of Arbitration

The revised Rules of Arbitration of the International Chamber of Commerce (ICC) came into force on 1 March 2017. The ICC Rules are well developed, well established and widely used internationally. Great care is taken by the ICC in considering any amendment in order to avoid upsetting the careful and well-established balance that has been achieved internationally with the ICC's Rules of Arbitration. The amendments are therefore mostly minor and subtle, simply improving and updating some areas of the Rules. However, the most interesting and perhaps innovative change is the addition of an Expedited Procedure.

A trend for many years in international arbitration, and dispute resolution generally, has been the drive towards increased efficiency in the final resolution of a dispute. This is of course measured in terms of how long it takes to deliver the award. Steps have been taken with the ICC Rules in order to provide a tribunal with the power to drive the proceedings forward towards the final resolution. In addition, the Rules require submissions to be made within a limited period of time, and also the award to be issued within a limited period of time.

In this most recent revision, the terms of reference are now required to be submitted to the ICC Court within 30 days of the date on which the file was transmitted to the tribunal. The

terms of reference need to be signed by the tribunal and by the parties. This time limit was two months, so the time available has been halved. The ICC Court can extend time if a reasonable request is made by the tribunal or the parties. However, from the outset the message of this revision is very clear: namely, complete the terms of reference, execute them and deliver them to the Court as soon as possible.

Expedited Procedure

New article 30 deals with the new "Expedited Procedure". The detail of the new procedure is set out in Appendix B1 to the Rules, and applies if the amount in dispute does not exceed a limit set out in Article 1(2) of that Appendix. The date for working out the amount is also set out in the Appendix at Article 1(3) and relates to the Request and any Answer received. Alternatively, the parties can simply agree to use the Expedited Procedure regardless.

The Expedited Procedure will not apply if the arbitration agreement was concluded before 1 March 2017, or if the parties agree to opt out. The ICC Court can also determine, on an application, whether it is inappropriate for the expedited procedure to apply.

The Statutes of the International Court of Arbitration have also been amended in light of the Expedited Procedure. The Committee of the Court would normally consist of a President and at least two other members. For the purposes of

dealing with Expedited Procedures the Court may exceptionally establish a committee consisting of just one member. This is in order to deal with matters more quickly.

The detail then for the Expedited Procedure is set out at new Appendix VI. Disputes that involve less than US\$2 million may be subject to this procedure. A request for arbitration is issued in the usual way, but once the Answer to the Request for Arbitration has been received (or the deadline of 30 days for its receipt has passed) the Secretariat of the ICC may inform the parties that the Expedited Procedure will apply to the case.

Equally, the Court can decide that the Expedited Procedure no longer applies to the case. The ICC Court is therefore able to decide that the procedure applies, but also to release the tribunal and parties from the Expedited Procedure requirements if the case becomes more complicated, of higher value, or there is some other good reason why the Expedited Procedure is no longer appropriate.

The parties may nominate a sole arbitrator, but in the absence of any nomination a sole arbitrator is to be appointed by the Court under Article 2.2 "within as short a time as possible". In addition, the Court has the power to appoint a sole arbitrator as the arbitral tribunal notwithstanding any contrary provisions in the arbitration agreement.



Terms of reference are not required. Once the sole arbitrator is in place, no new claims may be issued unless the tribunal authorises the claim. A case management conference must be convened no later than 15 days after the date on which the file has been transmitted to the sole arbitrator. The ICC can extend this time limit, but once again the emphasis is on progressing the dispute as quickly as possible.

In order to help progress matters quickly the sole arbitrator has wide discretion to adopt such procedural measures as he or she considers appropriate. After consultation with the parties the tribunal might decide not to allow a request for document production or to limit the number, length and scope of written submissions and, indeed, witness evidence. That includes witnesses of fact and expert witnesses.

The tribunal may, after consulting with the parties, decide to deal with the dispute solely on the basis of the documents submitted. In other words, dispensing with the hearing and any examination of the witnesses or experts. The tribunal may, therefore, conduct a documents only arbitration. Alternatively, the sole arbitrator may conduct a hearing by video conference, telephone or

similar means of communication in order to deal efficiently and quickly with the dispute.

The award should be rendered in its final form within six months from the date of the case management conference. The ICC Court can of course extend this deadline, but the emphasis is very much on a quick resolution of the dispute. As a general rule, the tribunal and the ICC Court shall act in the spirit of the Rules and the procedural appendix. Only time will tell how this is interpreted, but no doubt it will include dealing with matters efficiently, and trying to avoid extending deadlines unless there is no practical alternative.

ICC and tribunal fees

Finally, the administrative ICC fees and the fees of the tribunal can be fixed. The scales of the administrative and arbitration fees are set out in Appendix III to the revised Rules. In effect, the fee range and administrative expenses for disputes of less than £2 million have been revised. There is now a greater range, but with an overall reduced administrative expenses scale. This will no doubt be welcomed by many potential users of this service. For example, a claim between US\$500,000 and US\$1 million attracts

an administrative expense of 1.62% and the sole arbitrator's fee would be from 0.7632% to a maximum of 3.2224%. At the top end a claim between US\$1 million and US\$2 million attracts an administrative fee of 0.788% and for the tribunal a fee in the range of 0.5512% to 2.8832%. A claim for US\$150,000 would be subject to an administrative fee of 2.72% and the sole arbitrator's fee would be between 1.1448% and 6.1480%. So a claim of US\$150,000 might attract a fee of US\$4,050 and tribunal fee of between US\$1,717 and US\$9,222.

The complete fee scale is set out in the revised Rules, including for disputes with a value in excess of US\$2 million for those parties who elect to use the procedure for higher value disputes. There may, of course, be circumstances where the fees could stray outside of this range, but that would relate to particular and perhaps unusual circumstances regarding the dispute.

Overall, the introduction of the Expedited Procedure is an extremely welcome addition to the ICC Rules, and one that many potential users will welcome and seek to benefit from.



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Contract Corner:

A review of typical contracts and clauses

Changes to the Claims provision in the proposed second edition of the Yellow Book

In December 2016 at the FIDIC Users Conference held in London, FIDIC presented a pre-release version of its second edition of Conditions of Contracts for Plant and Design Build (*"the Proposed 2017 Yellow Book"*) which is due to be published during the course of 2017.¹ This article addresses the changes, in relation to the Claims provisions, between the first edition of Conditions of Contracts for Plant and Design Build (*"the 1999 Yellow Book"*) and the Proposed 2017 Yellow Book.

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

- 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.
- Clause 20 now deals solely with Claims, with dispute resolution being addressed in a new Clause 21.
- Clause 20 categorises Claims, and the procedures are different depending on the type of Claim.
- 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 within 42 days.

- Clause 20 provides the opportunity for a claiming Party who has not complied with the time limit obligations noted above to obtain a ruling from the Dispute Adjudication/Avoidance Board for a waiver of the obligation to comply with these time limits.

Employer and Contractor Claims addressed in one place

In the 1999 Yellow 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 Proposed 2017 Yellow Book both Employer and Contractor Claims are governed by a single clause.

However, this is more than cosmetic change because under the 1999 Yellow 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 Yellow 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 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 Yellow Book are considered by many practitioners to be unbalanced in favour of the Employer. The Proposed 2017 Yellow 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. 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 relief not falling into the first category. 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. The claiming Party simply gives notice referring the Claim to the Engineer as soon as practicable after the claiming Party becomes aware of the other Party's disagreement with the requested entitlement. If the other Party does not respond within a reasonable time there is deemed a disagreement. The notice needs to include details of the claiming Party's case and the other Party's disagreement (or deemed disagreement). The Engineer then proceeds in accordance with Sub-Clause 3.7 to agree or determine the Claim. If no agreement is reached, and following this a Party disagrees with the 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.³

The Proposed 2017 Yellow 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.

Procedure for Claims for additional payment or extension of time

The Proposed 2017 Yellow Book procedure for Employer and Contractor Claims for additional payment or extension of time is more prescriptive than that in the 1999 Yellow 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 some increased flexibility to avoid these severe consequences through the ability to seek a waiver of these time limits.

Obligation to give a Notice of Claim within 28 days

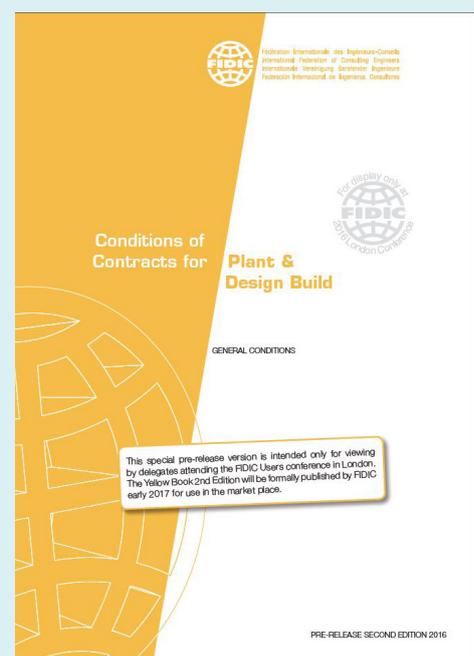
The first step in the Proposed 2017 Yellow Book is for the claiming Party to give a Notice of Claim as soon as practicable and not later than 28 days after the claiming Party became aware, of the event or circumstance giving rise to the Claim. This is essentially the same step as for Contractor Claims under the 1999 Yellow Book.⁴ However, it does represent a change for Employer Claims as the 1999 Yellow Book did not impose a 28-day notice period on the Employer.⁵

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 Yellow Book. 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

Yellow Book as this new edition does not make those consequences of non-compliance clear.⁶

At this point the Proposed 2017 Yellow Book introduces a new procedure. The new procedure provides for the Engineer to give a preliminary response in the form of a notice within 14 days of receiving a Party's Notice of Claim if it considers that the claiming Party has not complied with its 28-day notice requirement. In the event that the claiming Party considers that there are circumstances which justify late notice it has 14 days to make an application to the Dispute Avoidance/Adjudication Board for a waiver of the 28-day time limit for notice. This ability to apply for a waiver is an entirely new concept and we set out the factors the Dispute Avoidance/Adjudication Board might take into account in deciding whether to grant such a waiver below.

If a party wishes to apply for such a waiver it needs to make sure it complies with this 14-day time limit for the application to the Dispute Avoidance/Adjudication Board, otherwise the claiming Party will be deemed to have accepted finally and conclusively that its Notice of Claim is not valid.



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.

This basic obligation to keep contemporary records has not changed since the 1999 Yellow Book. However, in the Proposed 2017 Yellow 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 contemporary records are to be kept on site unless otherwise agreed with the Engineer. 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 Yellow Book; however, the Proposed 2017 Yellow 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 42 days or another agreed period

Within 42 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.

Once again this basic obligation to submit a fully detailed Claim has not changed since the 1999 Yellow Book. However, in the Proposed 2017 Yellow

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

(b) particulars of the contractual and/or other basis of the Claim;

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

(d) detailed 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 Yellow Book.⁷

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 “particulars of the contractual and/or other basis of the Claim”, and the Conditions state that if these particulars are 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 Proposed 2017 Yellow Book are markedly different from those in the 1999 Yellow Book.

Whilst the 1999 Yellow Book contains the same 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, once again the Proposed 2017 Yellow Book provides a process for a claiming Party to seek a waiver of the time limit through an application to the Dispute Avoidance/Adjudication Board. The procedure is the same as that for seeking a waiver of the 28-day time limit which we discuss in more detail below.

Obligations if a Claim is of continuing effect

The Proposed 2017 Yellow Book, in a similar manner to the 1999 Yellow 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.

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 basis of the 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 Proposed 2017 Yellow 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”. That is also the position in the 1999 Yellow Book.

As regards Claims by the Employer, the Proposed 2017 Yellow Book makes clear that the Employer will only be entitled to claim any payment from the Contractor, or set off/deduct from any Payment Certificate, by complying with the Clause 20 claims procedure. This is consistent with the more balanced approach between the Contractor and the Employer in the Proposed 2017 Yellow Book that provides for both Parties to comply with the same Clause 20 procedures.

Agreement or determination of the Claim

31The Proposed 2017 Yellow Book has a specific provision within Clause 20 which is headed “*Agreement or determination of the Claim*”; 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 Proposed 2017 Yellow Book.⁸ 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.⁹

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.

It also provides that where the Engineer has given a notice to the effect that the claiming Party is late in submitting either its Notice of Claim or particulars then the obligation to proceed is subject to the provisions dealing with waivers of time limits. As discussed further below, it is possible that the result might be that the Engineer does not have to agree or determine the Claim because the claiming Party does not challenge the Engineer’s notice that it has been late.

The Proposed 2017 Yellow Book, like the 1999 Yellow 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 basis of the Claim.

DAB procedure regarding waiver of time limits

As discussed above, there are two

circumstances where a claiming Party may be barred from making what might otherwise be a genuine Claim. The first is if the claiming Party does not serve its initial Notice of Claim within the prescribed 28- day time limit.¹⁰ The second is if the claiming Party does not provide particulars of the contractual and/or other basis of the Claim as part of its fully detailed Claim within the prescribed 42-day time limit (or such other time as might be agreed).¹¹ In both of these instances the Engineer is obliged to give a Notice to this effect within 14 days after the relevant time limit has expired.

Thereafter the Proposed 2017 Yellow Book introduces a wholly new procedure whereby the claiming Party has the opportunity to seek a waiver of these time limits, and avoid the contractual consequences of not complying with them which are potentially severe.¹²

The new procedure is as follows:

- The claiming Party must make an application to the Dispute Adjudication/Avoidance Board within 14 days of receiving the Engineer’s Notice setting out particulars of why late submission of a Notice of Claim or particulars is justified.
- The other Party may make a



response within 7 days of receiving the application.

- The Dispute Adjudication/Avoidance Board must give its ruling with reasons as to whether the time limit is waived within 28 days of receiving the application.

It is therefore important that the claiming Party complies with this initial 14-day time period, because if he does not he is deemed to have accepted finally and conclusively that the Notice of Claim is not valid and the Engineer shall have no obligation to proceed to agree or determine the Claim.

In the event that the claiming Party has made an application for waiver, the Proposed 2017 Yellow Book provides a non-exhaustive list of some circumstances that may be taken into account in deciding whether it is fair and reasonable that a late submission of a Notice of Claim or particulars should be accepted. Those circumstances include:

- The extent to which the other Party would be prejudiced by acceptance of a late submission.
- In the case of the late submission of a Notice of Claim, evidence of the other Party's prior knowledge of the event or circumstances giving rise to the Claim.
- In the case of the late submission of particulars of the contractual or other basis of the Claim as part of the fully detailed Claim, evidence of the other Party's prior knowledge of that basis.
- The extent to which the Engineer may have already proceeded with the agreement or determination of the Claim.

The claiming Party should be mindful of these stated circumstances when making its initial application. 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.

Upon receipt of the Dispute Adjudication/Avoidance Board ruling the Engineer shall proceed with the agreement or determination of the Claim, taking due regard of it.

Concluding remarks

In our view the main change in the Proposed 2017 Yellow Book which users of this form should be mindful of are the two time limit obligations which, if a claiming Party does not comply with them, may result in it 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 may mean that a claiming Party loses its right to make a Claim.

Further, while there is an opportunity for a claiming Party to seek a waiver of both of these time limit obligations from the Dispute Adjudication/Avoidance Board, it may be difficult to persuade the Board that such a waiver is justified. In addition the period for making such an application is short and so the claiming Party needs to be alert.

It may be that the second edition of the Yellow Book that is eventually published contains some differences compared with the Proposed 2017 Yellow Book discussed in this article and so this article should be read with this possibility in mind.

Footnotes

1. It may be that the second edition of the Yellow Book that is eventually published contains some differences compared with the Proposed 2017 Yellow Book discussed in this article and so this article should be read with this possibility in mind.
2. Consideration of the application of Sub-Clause 3.7 of the 2017 Proposed Yellow Book is outside the scope of this article.
3. Clause 21 of the Proposed 2017 Yellow Book is the provision which addresses dispute resolution. Under the 1999 Yellow Book the dispute resolutions are incorporated into Clause 20.
4. Employer Claims are addressed pursuant to Sub-Clause 2.5 of the 1999 Yellow Book.
5. Pursuant to Sub-Clause 2.5 of the 1999 Yellow

Book the Employer is obliged to give notice "as soon as practicable after the Employer became aware of the event or circumstances giving rise to the claim".

6. However, Sub-Clause 20.1 of the 1999 Yellow 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."

7. In relation to the Contractor's Claims under the 1999 Yellow 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 Yellow 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.

8. Sub-Clause 3.7 of the Proposed 2017 Yellow Book is the amended form of what was Sub-Clause 3.5 of the 1999 Yellow Book.

9. The relevant time periods are set out at Sub-Clause .7.3 of the Proposed 2017 Yellow Book.

10. Sub-Clause 20.2.1 of the Proposed 2017 Yellow Book.

11. Sub-Clause 20.2.4 of the Proposed 2017 Yellow Book.

12. Sub-Clause 20.3 of the Proposed 2017 Yellow Book.



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Commentary: International dispute resolution & adjudication

The new FIDIC Yellow Book dispute resolution procedure:

Part 1 - the proposed new dispute resolution mechanism

Introduction

In December 2016, FIDIC presented a pre-release version of its second edition of Conditions of Contracts for Plant and Design Build (“the Proposed 2017 Yellow Book”) which is due to be published during the course of 2017.¹ As expected, FIDIC has made substantial amendments to the dispute resolution provisions in the 1999 Yellow Book, 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 Yellow Book was 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 Proposed 2017 Yellow Book therefore retains the same core structure of the DAB as a mandatory pre-condition to arbitration, including that non-final DAB 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 Proposed 2017 Yellow Book offers 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 DAB 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 Proposed 2017 Yellow Book dispute resolution provisions in two parts, with Part 1 included in this edition of International Quarterly, and Part 2 to be published in the next edition. The parts are as follows:

- Part 1 will set out the key provisions of the proposed new dispute resolution mechanism in the 2017 Yellow Book, and assess

these against the 1999 Yellow Book provisions.

- Part 2 will address the merits of including a DAB, and Engineer’s determinations in their proposed new form, as a pre-condition to arbitration.

Part 1 – the proposed new dispute resolution mechanism

Background

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

The 1999 Yellow Book 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 Yellow Book still requires 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 Proposed 2017 Yellow Book goes 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

The dispute resolution mechanism compared

As described above, the Proposed 2017 Yellow Book follows the same core structure as the 1999 Yellow Book, which can be broadly divided into the following constituent parts:

- Making a claim;
- The role of the Engineer;
- Avoidance of disputes (new);
- The DAB;
- Amicable settlement; and
- Arbitration.

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

Making a claim

The 1999 Yellow Book includes 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 Proposed 2017 Yellow Book includes 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 Yellow Book. It also includes a new procedure enabling a waiver of these time-limits in certain instances², 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 role of the Engineer has been expanded under the Proposed 2017 Yellow Book, including new functions and obligations. In relation to claims, the Engineer must³:

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

Under the 1999 Yellow Book⁴, the Engineer was required to consult and ultimately make a fair determination within just one 42 day period. Under both the Proposed 2017 Yellow Book and the 1999 Yellow Book, the Engineer may request that further information be provided before making a determination.

The Proposed 2017 Yellow Book also includes an express requirement that the Engineer act “neutrally” in discharging the above duties⁵. 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 law⁶, 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 Proposed 2017 and 1999 Yellow Books provide that the Engineer’s determinations shall be binding on the parties unless and until revised by the DAB or in arbitration⁷, the Proposed 2017 Yellow Book goes 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 decision shall become final and conclusive⁸. Parties will therefore need to be conscious of these time limits.

The Proposed 2017 Yellow Book has

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 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 disagreement⁹. The parties will not be bound to act on any advice given in this process. This provision is taken from the 2008 Gold Book¹⁰, 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 UK¹¹.

The DAB

The DAB procedure under the Proposed 2017 Yellow Book 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, including¹²:



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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 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 award¹⁵.

Under both the 1999 and Proposed 2017 wording, either party can prevent a DAB decision from becoming final by issuing an NOD within 28 days. However, the Proposed 2017 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 place¹⁴. 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"¹⁵.

The 1999 Yellow Book wording was subject to debate before the Swiss Supreme Court¹⁶ and the UK Technology and Construction Court¹⁷, and both courts found that the DAB was a mandatory pre-condition to arbitration, and that Sub-clause 20.8 would only be used 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 Proposed 2017 Yellow Book, 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 Proposed 2017 Yellow Book¹⁸. 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 apply¹⁹. 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 arbitration²⁰. The Proposed 2017 Yellow Book also expressly permits 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 proposed 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 Book²¹.

However, to the extent that 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, which will be presented in the next edition of International Quarterly, we will discuss the merits of including these mandatory pre-arbitral procedures.

Footnotes

1. It may be that the second edition of the Yellow Book that is eventually published contains some differences compared with the Proposed 2017 Yellow Book discussed in this article and so this article should be read with this possibility in mind.
2. Sub-clause 20.3 of the Proposed 2017 Yellow Book.
3. Sub-clause 3.7 of the Proposed 2017 Yellow Book.
4. Sub-clauses 3.5 and 20.1 of the 1999 Yellow Book.
5. Sub-clause 3.7 of the Proposed 2017 Yellow Book.
6. Per the Court of Appeal in *Amec Civil Engineering Limited v Secretary of State for Transport* [2005] CILL 2288.
7. Sub-clauses 3.7.4 and 3.5, respectively.
8. Sub-clause 3.7.5 of the Proposed 2017 Yellow Book.
9. Sub-clause 21.3 of the Proposed 2017 Yellow Book.
10. 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.”
11. 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.
12. Sub-clause 21.4 of the Proposed 2017 Yellow Book.
13. A summary of the Persero series is set out here: <https://www.fenwickelliott.com/research-insight/annual-review/2015/persero-II-dispute-board-decisions>
14. Sub-clause 20.8 of the Proposed 2017 Yellow Book.
15. Sub-clause 20.8 of the 1999 Yellow Book.
16. Decision 4A_124/2014
17. *Peterborough City Council v Enterprise Managed Services Limited* [2014] EWHC 3193 (TCC)
18. Sub-clause 21.5 of the Proposed 2017 Yellow Book
19. Sub-clause 21.7 of the Proposed 2017 Yellow Book
20. In Sub-clause 20.6 of the 1999 Yellow Book and Sub-clause 21.6 of the Proposed 2017 Yellow Book
21. 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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Universal view: International issues around the globe

DIFC: Severe Restriction for DIFC Enforcement

The Dubai International Financial Centre

Jurisdiction in Dubai comprises the local United Arab Emirates (UAE) or “local” courts and the Dubai International Financial Centre (DIFC) court or the “offshore” court. One of the principal differences between the two jurisdictions is the legal system. The local UAE courts use the civil law and its main arbitral institutions are the Dubai International Arbitration Centre (DIAC) and the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC). In contrast, DIFC has a common law system, and the DIFC–LCIA Arbitration Centre. The DIFC Arbitration Law 2008 is based on the UNCITRAL Model on International Commercial Arbitration and has been referred to as a “Common Law island floating in a Civil Law sea”.¹

The DIFC was launched under the United Arab Emirates (UAE) Federal Decree No. 35 of 2004 as part of Dubai’s strategic vision to diversify its economic resources and attract capital and investment in the region. The Federal Law No. 8 of 2004 authorised the creation of financial free zones within each Emirate, which are entirely free from, and independent of, the civil and commercial federal law of the UAE. Hence each Emirate has the ability to

organise its financial free zone or several financial free zones empowered with its own legal and regulatory framework.

There are three independent bodies that have been established at the DIFC to enable and support the growth and development of businesses in the Centre: the DIFC Authority, the Dubai Financial Services Authority (“DFSA”) and the Dispute Resolution Authority (“DRA”).

a) The DIFC Authority was established by virtue of Dubai Law No. 9 of 2004, as amended. The DIFC Authority is responsible for overseeing the strategic development, operational management and planning of the DIFC and for the development and administration of laws and regulations other than those related to the financial services firms.

b) The DFSA was created under Dubai Law No. 9 of 2004. It is an independent regulator of financial and related services conducted in or from the Centre. The DFSA also supervises regulated companies and monitors their compliance with the applicable laws and regulations. The DFSA’s powers as a regulator are granted to it under the provisions of the Regulatory Law, DIFC Law No. 1 of 2004. The DFSA is authorised to make rules that enable it to respond swiftly to market developments and business needs.

c) Originally formed under Dubai Law No. 9 of 2004, the DIFC Court act as an independent administration of justice for resolving all civil and commercial legal matters. A new Dubai Law No. 7 of 2014 replaced the DIFC Judicial Authority with a new body known as the DRA. The DRA is comprised of three authorities: DIFC Court, which were established under Dubai Law No. 12 of 2004, the Arbitration Institute, and any other tribunals or ancillary bodies established in accordance with Article 8(5)(b) of this Law. The DRA’s mission is to be “a platform for delivering legal excellence in the Middle East and the gateway to a suite of services available to businesses operating in Dubai and beyond”.² Interestingly, the DRA is helping to support the Dubai Plan 2021, Expo 2020 and UAE Vision 2021.

Conduit for DIFC Arbitral Awards

Between January and June 2016 the total number of enforcement cases before the DIFC courts grew by 194 per cent, from 17 to 50. The average claim value of enforcement cases also grew significantly from AED6 million in the first half of 2015 to AED31 million in 2016.

This substantial growth can be attributed to recent DIFC courts’ decisions where the DIFC Court

to be used as a so-called “conduit” jurisdiction for the enforcement of both foreign and domestic arbitral awards in local UAE courts, even in circumstances where the award debtor has no presence or assets in the DIFC itself.

While local UAE courts are slowly evolving into a more arbitration-friendly jurisdiction, the DIFC court still provide a more predictable and straightforward jurisdiction in which to recognise and enforce both foreign and domestic arbitral awards.

Under Article 5(A)(1)(e) of the Judicial Authority Law and Article 42(1) of the DIFC Arbitration Law, the DIFC Court has to recognise any foreign or domestic arbitration award. It is subject to the procedural requirements of Article 43 and the limited defences of Article 44 of the DIFC Arbitration Law. In addition, the DIFC Court is required under Article 42(1) of the DIFC Arbitration Law and Article 7 of the Judicial Authority Law to enforce any foreign or domestic arbitration award within the DIFC, subject again to Articles 43 and 44 of the DIFC Arbitration Law.

Also, when enforcing against award debtors based in mainland Dubai, domestic award creditors are now unlikely to be able to take advantage of the significantly more efficient and reliable enforcement regime available in the DIFC until the award has been finally ratified by the local UAE court (which is generally a time-consuming process).

The New York Convention and the UAE Civil Procedure Code

In some cases arbitral awards were enforced under the UAE Civil Procedure Code (“CPC”) using rules similar to the New York Convention. Since the UAE ratified the New York Convention by a federal decree on 13 June 2006, the provisions in the Convention for recognition of foreign awards have become mandatory laws in the UAE and override the provisions in the UAE CPC relating to enforcement of arbitral awards (Articles 235 and 236).

Nevertheless in the majority of cases foreign awards have been successfully enforced under the New York Convention. In a ruling of 18 August 2013 (Case No. 156/2013, ruling of the Dubai Court of Cassation), the Dubai Court of Cassation affirmed that both the Court of First Instance and the Court of Appeal (Case No. 40/2013, ruling of the Dubai Court of Appeal of 31st March 2013) were essentially correct in their refusal of enforcement where a foreign award was denied recognition on the basis of Article 235 of the UAE CPC (as the court considered it lacked jurisdiction as the Respondent was not domiciled or resident in the UAE – not a recognised challenge under the Convention). Therefore, some uncertainty remained as to the UAE’s application of the Convention.

The UAE’s CPC Article 216(1) sets out a variety of grounds for annulment of an arbitration award. The UAE may annul an arbitral award if:

- a) it is given without an agreement to arbitrate or is based on an invalid agreement to arbitrate;
- b) it is void because a time limit has been exceeded;
- c) the arbitral tribunal has exceeded the limits of the agreement to arbitrate (i.e. they had no jurisdiction in respect of all or some of the matter decided);
- d) it has been given by arbitrators not appointed according to the law;
- e) it is given by some member of the arbitral tribunal without them being so empowered in the absence of the others;
- f) it is purportedly given under an agreement to arbitrate in which the subject of the dispute is not stated;

- g) the agreement is made by someone not competent to agree to arbitration (this point frequently gives rise to issues concerning the terms of a power of attorney used to sign documents, or the authority of a signatory to the agreement to arbitrate or terms of reference);
- h) it is given by an arbitrator who does not fill the legal requirement of the role; or
- i) there is some breach in the procedures leading to the award.

Some of the issues above have been dealt with in subsequent judgments, but the approach adopted still lacks consistency. The Dubai Court of Cassation made it clear that a review of the merits of the award is not permitted, and the domestic UAE Court should resist interfering with any assessment of the substance of the award (Dubai Cassation No.486/2008, 30 October 2008).

Back to the procedure adopted by the DIFC, the international community welcomed the DIFC court procedure as it provides consistency or, at least, that is what many thought.

The Decree

There has been much discussion about the use of the DIFC Court as a conduit jurisdiction following the line of decisions in *Banyan Tree v Meydan Group LLC*, *DNB Bank ASA v Gulf Eyadah*, and *Oger Dubai LLC v Daman Real Estate Capital Partners Ltd* after the formation of the “Judicial Tribunal for the Dubai Courts and the DIFC Courts” created by Decree No.19/2016 (the “Decree”).

Article 1 of the Decree provides for the establishment of a Judicial Committee (“the Committee”) comprised of seven members: three judges from the DIFC Courts, three judges from the Dubai Courts and the Secretary General of Dubai’s Judicial Council, with the President of the Dubai Court of Cassation (one of



the three Dubai Court judges). All of them have a casting vote. The main role of the Committee is to consider conflicts of jurisdiction between the DIFC Court and the local Arabic language Dubai Court.

The Judicial Committee hands down its first decision

The power of the DIFC Court to act as a “conduit” jurisdiction may have been severely restricted by the first decision in *Daman Real Partners LLC v Oger Dubai LLC*, Courts of Cassation No. 1/2016 (JT). Under DIFC law, the grounds on which the DIFC Court can refuse to recognise and enforce either a foreign or domestic arbitral award are more limited than is the case in local Arabic courts.

It seems it is no longer possible to rely on an objectively assessed enforcement of arbitral awards by virtue of the conduit of the DIFC simply enforcing within the DIFC and subject to their own jurisdiction. In the *Daman* case there were already related proceedings taking place in the local court. As a result the Judicial Tribunal held that there was a conflict of jurisdiction, and that only one of the courts should determine to annul or recognise the arbitral award. The majority of the Judicial Tribunal ordered that the case be remitted to the Dubai Court. This was despite the fact that all

three of the DIFC court judges sitting on the Judicial Tribunal objected.

In a dissenting opinion published by the Tribunal, the judges stated that while the DIFC Court respects the fact that the court with competence to annul an arbitration award rendered onshore in Dubai is the Dubai Court, the DIFC Courts hold exclusive jurisdiction to hear applications to enforce those arbitral awards within the offshore DIFC.

Practical implication

On the one hand, perhaps the Judicial Committee will only intervene where there are pre-existing proceedings already in the local court. On the other hand, it was suggested that this approach simply speaks to frustrate the DIFC’s jurisdiction to enforce an award made within its jurisdiction. Surely, the DIFC should be able to enforce the arbitral award while the local court then deals with and concludes the local court proceedings. In the case of *Daman*, jurisdiction has now simply passed entirely to the local court. Time alone will tell if this is going to be the trend for the future. In the meantime the ability to be confident of enforcements from the DIFC has been severely curtailed. Clearly any local court issue could be commenced by a responding party in order to frustrate an otherwise

straightforward enforcement.

Originally, the introduction of the Decree was supposed to help to regulate the position between the DIFC Court and the Dubai Courts. Whilst the main purpose is still the same, practitioners are now concerned about the decision in *Daman* as it encourages other award debtors to employ similar tactics to thwart enforcement of arbitral awards in the DIFC Court.

Given the potential implication for the DIFC’s much expressed position as a conduit jurisdiction, practitioners and parties alike will monitor closely further decisions of the Judicial Tribunal.

This article was co-written with Tatyana Tall, Paralegal, Fenwick Elliott

Footnotes

1. “The Courts of the Dubai International Finance Centre — A Common Law island in a Civil Law ocean”, 01/11/2008, Judges’ Addresses (<http://difccourts.ae/the-courts-of-the-dubai-international-finance-centre-a-common-law-island-in-a-civil-law-ocean/>)
2. <http://www.dra.ae/>



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Commentary: International dispute resolution & adjudication

What might changes to the UAE penal code mean for arbitrators and expert witnesses?

There is no doubt that the UAE has been steadily establishing itself as a global arbitration centre by developing the Dubai International Arbitration Centre (“DIAC”), Dubai International Financial Centre–London Court of International Arbitration (“DIFC–LCIA”) and the Abu Dhabi Commercial Conciliation and Arbitration Centre amongst others. As we set out in this 21st issue of IQ, there have been a number of recent developments which have served at least to raise questions about how that development might continue.

At the end of October last year Article 257 of the UAE Federal Penal Code No. 3 of 1987 was amended by Federal Decree Law No. 7 of 2016. The UAE Federal Penal Code applies in the DIFC and ADGM just as it does elsewhere throughout the UAE. The amended article reads as follows:

“Anyone who issues a decision, expresses an opinion, submits a report, presents a case or proves an incident in favour of or against a person, in contravention of the requirements of the duty of neutrality and integrity, while acting in his capacity as an arbitrator, expert, translator or fact finder appointed by an administrative or judicial authority or selected by the parties, shall be punished by temporary imprisonment.

The aforesaid categories of

persons shall be barred assuming once again the responsibilities with which they were tasked in the first instance, and shall be subject to the provisions of Article 255 of this Law.”

The essential change to Article 257 was to extend provisions that have been in existence for many years in relation to court-appointed experts and translators, to party-appointed experts and arbitrators.

Considerable concern has been expressed at the impact of this amendment. At Fenwick Elliott, we have experienced one expert resigning from their role in an ongoing arbitration, as a consequence of the change. We are aware of other experts and also arbitrators who have resigned from ongoing disputes. We have also noticed when contacting potential arbitrators and experts that some have indicated that they are currently not prepared to accept appointments where the arbitration is based in the UAE. Suggestions have been made that the seat of the arbitration should be moved away from the UAE.

The obvious reason for this is that the new provisions might possibly be misused in order to disrupt arbitration proceedings, and certainly it is easy to see how the new legislation could be used to put what would be illegitimate pressure on experts and arbitrators. There is no doubt that arbitrators and experts are concerned at the prospect of threats or actual vexatious criminal complaints being made if they are sitting in the UAE.

Everyone accepts, and more importantly expects, that arbitrators and experts will act fairly and without bias. Arbitrators are typically subject to requirements of independence and impartiality. For example, under the DIAC Rules, Article 9.1 provides that:

“All arbitrators conducting an arbitration under these Rules shall be and remain impartial and independent of the parties; and shall not act as advocates for any party in the arbitration.”

Under Article 9.8, arbitrators have a continuing duty to disclose to the DIAC, other members of the Tribunal and the parties any circumstances that may arise during the course of the arbitration that are likely, in the eyes of the parties, to give rise to justifiable doubts as to their independence or impartiality.

Article 23 of the Abu Dhabi Global Market (“ADGM”) Arbitration Regulations provides that:

“No arbitrator, arbitral institution or appointing authority, or any employee, agent or officer of the foregoing shall be liable to any person for any act or omission in connection with an arbitration unless they are shown to have caused damage by conscious and deliberate wrongdoing.”

That said, although a new arbitration law is said to be in draft, the UAE does not have a modern arbitration statute at present. The current arbitration provisions, which can be



found in Articles 203 to 218 of the Civil Procedure Code, expect arbitrators to be, and remain, free of any conflict of interests. Article 207(4) of the said Code states that:

“a request for disqualification must be based on the same grounds on which a judge may be dismissed or deemed unfit for passing judgment.”

The grounds for challenging a judge mainly relate to the existence of circumstances that might affect their impartiality and independence. Therefore arbitrators can be challenged and removed for the same reason. However, as noted, Article 257 will apply, notwithstanding what the appropriate arbitration rules or regulations provide. There is no definition of the words “neutrality” and “integrity” under UAE criminal law. In theory it is possible to argue that anyone subjectively could be viewed as violating these requirements. It would be preferable for there to be a clear description and definitions of actions and inactions

such that if an arbitrator or expert commits them, he or she will be deemed to have failed to maintain the requirements of integrity and impartiality.

This lack of a definition might widen the scope of the article. It might also increase the chances of an arbitration being derailed (or suspended) whilst an accusation is investigated. This could take many months. For arbitrators and experts, they also risk having their passports confiscated whilst the criminal investigations are carried out. This risk is what is leading to many arbitrators and experts deciding that they are not prepared to accept appointments.

This risk is not resulting in every expert and arbitrator declining to act. As we said previously, not everyone has responded to our enquiries by indicating that they are currently not prepared to accept appointments where the arbitration is based in the UAE. Other have indicated that, for now at least, they are prepared to continue to consider

accepting appointments. However, that sentiment should not be seen in any way to lessen the concern that is being felt across the board. It remains to be seen how the new provisions will be applied. No doubt, if there is a well-publicised attempt to make use of the new law, that concern will increase. And it is likely that any attempt to make use of the new law would be well publicised, thereby also bringing what was a confidential arbitration process out into the open. Such a step would also serve to increase the viewpoint that the UAE is currently not somewhere where individuals and companies feel comfortable conducting arbitrations.

We understand that representations are being made at the highest level to amend or repeal the amendments to Article 257 and we hope that the outcome of those representations will lead to a change; otherwise it is quite possible that the efforts that have been made over the past years to promote the UAE as an arbitration centre will be seriously undermined.

