

Global Arbitration Review

The Guide to Construction Arbitration

General Editors

Stavros Brekoulakis and David Brynmor Thomas QC

Third Edition

The Guide to Construction Arbitration

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Editors

Stavros Brekoulakis and David Brynmor Thomas QC

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Introduction

Stavros Brekoulakis and David Brynmor Thomas QC¹

It is a pleasure to introduce the third edition of *The Guide to Construction Arbitration*. The *Guide* has evolved since its first edition to form, we hope, a valuable resource for clients, in-house counsel, experts and external counsel involved in construction arbitration, whether they are dealing with construction arbitration for the first time or have extensive experience in it.

The construction industry is a major contributor to economic growth worldwide. In the United Kingdom it has been estimated that every £1 investment in construction output generates £2.84 in total economic activity.² In India, the BJP, which now forms the government, proposed infrastructure spending of 100 lakh crore rupees (over US\$1,300 billion) over the next five years in its 2019 manifesto.

The industry covers a wide range of different types of projects, from building offices, factories and warehouses, shopping malls, hotels and homes to major infrastructure projects that involve more complex civil engineering works such as the construction of harbours, railroads, mines, highways and bridges. Other construction projects involve specialist engineering works such as shipbuilding; bespoke plant and machinery such as turbines, generators and aircraft engines; or works that aim to support energy projects such as upstream oil and gas projects or renewables (wind, wave, solar) and nuclear plants.

These complex construction projects are rarely completed without encountering risks that lead to changes to the time and cost required for their execution. Those changes in turn give rise to disputes, the majority of which (possibly the vast majority) are submitted to alternative dispute resolution (ADR) processes and eventually arbitration. The reasons that lead construction parties to choose ADR and arbitration owe as much to the (perceived or

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2 Report of Economic Consultants LEK for the UK Contractors Group.

real) inefficiencies of national courts as to the (perceived or real) advantages of out-of-court dispute resolution. For example, with a few notable exceptions such as the Technology and Construction Court in England and Wales, most national courts lack construction specialist departments or judges with construction expertise and experience. Arbitration, on the other hand, allows construction parties to appoint arbitrators with the necessary specialised knowledge and understanding of complex construction projects. Importantly, arbitration allows construction parties to ‘design and build’ (to stay in tune with the theme of *The Guide to Construction Arbitration*) the dispute resolution procedure in a way that addresses a number of procedural challenges in construction arbitrations, including the typically large volume of documentary evidence, the most effective use of experts to address delay and quantum, as well as complex technical issues, and programme analysis. While the use of some ADR methods such as dispute adjudication boards has spread relatively recently,³ arbitration has traditionally been included as the default dispute resolution mechanism for disputes arising out of international construction contracts.⁴

A question that often arises is: what is special about international construction disputes that they require specialist arbitration knowledge? In the first place, construction projects are associated with considerably more risk than any other typical commercial transaction, both in terms of the amount of risk allocated under them and the complexity of that risk. Their nature and typically long duration lead to risks including unexpected ground and climate conditions, industrial accidents, fluctuation in the price of materials and in the value of currency, political risks (such as political riots, governmental interventions and strikes) and legal risks (such as amendments in law or failure to secure legal permits and licences).

Further, time is very often critical in construction projects. An Olympic Games stadium must be delivered before the hard deadline that is the date of the games. If a shopping mall is not ready for the commercially busy Christmas period, significant amounts may be lost in seasonal retail trade. The late delivery of a power station can disrupt the project financing used to fund it.

Moreover, arguments as to causation, especially of delay, in construction projects are typically complex. Many phases of a construction project can run concurrently, which often makes it difficult to identify the origins and causes of delay. Legal concepts such as concurrent delay, critical paths and global claims are unique to construction disputes.

Equally, the involvement of a wide number of parties with different capacities and divergent interests adds to the complexity of construction disputes. A typical construction project may involve not only an employer and a contractor, but several subcontractors, a project manager, an engineer and architect, specialist professionals such as civil or structural engineers and designers, mechanical engineers, consultants such as acoustic and energy consultants, lenders and other funders, insurers and suppliers. A seemingly limited dispute arising on one subcontract may lead to disputes under other subcontracts and the main construction contract, and may have financial and legal consequences for many of the above parties, triggering disputes under much wider documentation such as shareholder agreements, joint operating agreements, funding documents and concessions. That often

3 Dispute adjudication boards were first introduced in FIDIC contracts (in the Orange Book) in 1995 and in ICE contracts as recently as in 2005.

4 Arbitration has been included in FIDIC contracts since the publication of the first FIDIC contract in 1957.

gives rise to issues about multiparty arbitration proceedings and third-party participation in arbitration proceedings.

Another important feature of construction disputes is the widespread use of standard forms, such as the FIDIC or the ICE conditions of construction contracts. Efficient dispute resolution requires familiarity and understanding of the, often nuanced, risk allocation arrangements in these standard forms. Good knowledge of construction-specific legislation is necessary too. While the resolution of most construction disputes will depend on the factual circumstances and the provisions of the contractual agreement of the parties, legal issues may often arise in relation to statutory (frequently mandatory) warranty and limitation periods for construction claims, statutory direct claims by subcontractors against the employers,⁵ statutory prohibition of the pay-when-paid and pay-if-paid provisions⁶ and, of course, mandatory legislation on public procurement.⁷

Finally, as already mentioned, construction disputes are technically complex, requiring efficient management of challenging evidentiary processes, including document management, expert evidence, programme analysis and quantification of damages. The evidentiary challenges in construction disputes have given rise to the use of tools, such as Scott Schedules (used to present fact intensive disputes in a more user friendly format), that are unique in construction arbitrations.⁸

It is for all these reasons that alternative dispute resolution and arbitration of construction disputes require special focus and attention, which is what *The Guide to Construction Arbitration* aims to provide.

The Guide to Construction Arbitration is designed to appeal to different audiences. The authors of the various chapters are themselves market-leading experts, so it can provide a ready resource for specialist construction arbitration practitioners who already have a view of the information they seek. Beyond that, it has been compiled and written to offer practical information to practitioners who are inexperienced in international construction contracts or dispute resolution in construction disputes. For example, in-house lawyers who may be experienced in negotiating and drafting construction contracts but not in running disputes arising from them, or construction professionals who may have experience in managing construction projects but may lack experience in the conduct of construction arbitration, will find *The Guide to Construction Arbitration* useful. Lawyers in private practice who are familiar with arbitration, but lack experience in construction will also benefit. Last but not least, students who study construction arbitration will find it to be a helpful source of information.

While the main focus of *The Guide to Construction Arbitration* is the resolution, by arbitration, of disputes arising out of construction projects, Part I is devoted to important substantive aspects of international construction contracts. To understand how construction disputes are resolved in international arbitration, one has to understand how disputes arise out of a typical construction contract in the first place, and what are the substantive rights, obligations and remedies of the parties to a construction contract.

5 For example, in France, Law No. 75-1334 of 31 December 1975 on Subcontracting.

6 For example, in the United Kingdom with the UK Housing Grants Construction and Regeneration Act 1996.

7 For example, EU Directive 2014/24.

8 J. Jenkins and K. Rosenberg, 'Engineering and Construction Arbitration', in Lew et al. (editors) *Arbitration in England*, Kluwer (2013).

Thus, this book is broadly divided in four parts. Part I examines a wide range of substantive issues in construction contracts, such as *The Contract: the Foundation of Construction Projects*, *Bonds and Guarantees*, *An Introduction to the FIDIC Suite of Contracts*, *Allocation of Risk in Construction Contracts*, *Contractors' and Employers' Claims, Remedies and Reliefs*. Chapters valuably address the quantification of delays, the role of programmes and the various methods used for the computation of costs and damages in construction arbitrations, while an entire chapter is devoted to an examination, from a comparative law perspective, of the practically critical topic of concurrent delay.

Part II then focuses on dispute resolution processes in construction disputes. The aim of this Part is to look into special features of construction arbitration, and the following chapters are included: *Suitability of Arbitration Rules for Construction Disputes*, *Subcontracts and Multiparty Arbitration in Construction Disputes*, *Interim Relief, including Emergency Arbitrators in Construction Arbitration*, *Organisation of the Proceedings in Construction Arbitrations*, *Documents in Construction Disputes and Awards*, and the role and management of expert evidence.

Part III examines a number of select topics in international construction arbitration by reference to some key industry sectors and contract structures, including the nuclear sector, energy sector, concession contracts and turnkey projects. Part IV examines construction arbitration in specific jurisdictions of particular interest and with very active construction industries

We have taken the opportunity to add to the chapters in this third edition, to address matters identified by users of the first two editions. These include chapters examining dispute boards, ADR in construction contracts, agreements to arbitrate and interim relief in detail. There are chapters on pricing and payment, investment treaty arbitration in the construction sector, a discussion of the typical parties to a construction contract, further discussion of the organisation of expert testimony and a chapter on construction arbitration in Brazil.

Overall, the third edition of *The Guide to Construction Arbitration* builds upon the success of the first two editions and has been further expanded. The structure and organisation of *The Guide to Construction Arbitration* is broadly based on the LLM course on International Construction Contracts and Arbitration that we teach at Queen Mary University of London. The course was first introduced by HH Humphrey Lloyd in 1987 and was taught by him for more than 20 years. Humphrey has been an exceptional source of inspiration for hundreds of students who followed his classes, and we are personally indebted to him for having conceived the course originally and for his generous assistance when he passed the course on some years ago.

We want to thank all the authors for contributing to *The Guide to Construction Arbitration*. We are extremely fortunate that a group of distinguished practitioners and construction arbitration specialists from a wide range of jurisdictions have agreed to participate in this project. We further want to thank Gemma Chalk, Bevan Woodhouse and Hannah Higgins for all their hard work in the commission, editing and production of this book. They have made our work easy. Special thanks are due to David Samuels and GAR for asking us to conceive, design and edit this book. We thoroughly enjoyed the task, and hope that the readers will find the result to be useful and informative.

Part II

Dispute Resolution for Construction Disputes

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Claims Resolution Procedures in Construction Contracts

Philip Norman and Leanie van de Merwe¹

Introduction

Large-scale construction and engineering projects rarely run according to plan or budget. Contractors commonly assert claims for additional time and money for delays, disruption, variations, force majeure or other events that have caused them to suffer loss. Likewise, employers often claim for contractor delays, defective works or back charges for works they have performed for the contractor.

This chapter outlines the most common types of contractual claims procedures by reference to the FIDIC Red Books 1999 and 2017.² It considers the FIDIC procedures and how they have evolved from the 1999 to 2017 versions. It then considers how such procedures are understood and applied differently under common law and civil law systems.

Why and what types of claims arise, and are they the same as disputes?

Construction projects are complex, unique endeavours that are developed through the interaction of a multitude of participants, including, among others, designers, financiers, engineers, civils contractors, as well as those providing materials, equipment and manpower.

Throughout the construction process, both employers and contractors have to manage the interface between all of these participants, as well as government authorities and stakeholders. They have to plan their works in a logical manner to ensure that the different resources and expertise needed for construction are coordinated and provided on time and within budget.

¹ Philip Norman is a partner and Leanie van de Merwe is an associate at Covington & Burling LLP.

² 'Conditions of Contract for Construction to Building and Engineering Works Designed by the Employer', first edition, 1999 and 'Conditions of Contract for Construction', second edition, 2017.

With so many moving parts, there are nearly always deviations from the original construction plan. Therefore, construction contracts (and parties), acknowledging that deviations occur, make provisions for dealing with those deviations through defined claims procedures.

The FIDIC forms of contracts anticipate the most likely scenarios in which contractors or employers make claims. Examples of contractor claims are (using FIDIC definitions and clauses):

- late access or possession of site (Sub-Clause 2.1);
- adverse unforeseeable physical conditions (Sub-Clause 4.12);
- extensions of time for completion (Sub-Clause 8.4/8.5);
- variations to the contractor's scope of work (Sub-Clause 13.3); and
- the contractor's entitlement to suspend work (Sub-Clause 16.1).

Examples of employer claims are:

- rejection and retesting of works (Sub-Clause 7.5);
- delay or liquidated damages (Sub-Clause 8.7/8.8); and
- a contractor's failure to remedy work within a reasonable additional time (Sub-Clause 11.5).³

Given the frequency of these types of claims, the contractual claims procedures are set up to try to resolve them expediently, in the hope that formal dispute resolution processes, such as litigation in national courts or arbitration, are avoided.

Claims procedures are not intended to be adversarial (though in reality this is how they are viewed), but are aimed at resolving claims efficiently. FIDIC contracts, for example, provide for an intermediary (the engineer) to assist the parties to resolve claims and to be the first instance arbiter of those claims where the parties cannot agree upon a solution.

FIDIC 2017 makes a distinction between a 'claim' and a 'dispute'.⁴ A 'claim' is a 'request or assertion by one Party to the other Party for an entitlement to relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works'.⁵

A 'dispute'⁶ is where a claim has initially been made, but eventually rejected by the other party or the engineer (or is not determined in the required time). If a claim is rejected, the claiming party must, within 28 days from the date of determination or deemed rejection,⁷ serve a notice of dissatisfaction, which then allows the parties to commence the formal 'disputes and arbitration' process defined in Clause 21 of FIDIC 2017. If no notice of dissatisfaction is served, then the engineer's determination or deemed rejection becomes final and binding.

3 'Sub-Clause' refers to the provision of the FIDIC Red Books 1999 and 2017 (showing deviations in numbering in the different editions).

4 There was no definition in FIDIC 1999.

5 See Sub-Clause 1.1.6 of the General Conditions.

6 See Sub-Clause 1.1.29 of the General Conditions.

7 See Sub-Clause 3.7.3 of the General Conditions, which states that if the engineer does not respond within the prescribed time to issue a final determination (or confirm the parties' agreement), the claim is deemed to be rejected.

The claims procedures also require the prompt notification and description of the claim event, so it can be tracked in real time and decisions on how to resolve or mitigate it can be made contemporaneously.

The claims procedure

FIDIC 1999 has two separate processes for making claims: the employer's procedure is under Sub-Clause 2.5; and the contractor's procedure is under Sub-Clause 20.1. FIDIC 2017 combines the procedures for both employer and contractor claims under Clause 20. This section describes the steps in those claims processes.

Contractor claims in FIDIC 1999

To comply with Sub-Clause 20.1, once a claim event arises for which a contractor seeks a remedy, the contractor must give notice of the claim event to the engineer 'as soon as practicable' and not later than 28 days after the contractor became aware, or should have become aware, of the claim event or circumstance. If the contractor fails to give notice in time, it will preclude itself contractually of any remedy, whether that be for an extension of time or additional payment and the 'Employer shall be discharged from all liability in connection with the claim'.

For example, if a contractor asserts it was delayed from getting on to the site to start works on the agreed date, it may argue that delayed access will delay completion of the works. If it serves its claim notice 'as soon as practicable' and within 28 days from the date it should have been given access, then it can pursue its entitlement for time, money or both. If it does not, then it may lose its right to claim for a remedy (though, as described below, principles of law may mitigate against such a consequence).

Following the timely submission of a claim notice, the contractor must submit a fully detailed claim within 42 days after it became aware, or should have become aware, of the event or circumstance giving rise to the claim.⁸ The fully detailed claim must include supporting particulars. This 42-day time period is not stated to be a time bar, but if the failure to provide a fully detailed claim in time has prevented a proper investigation (and potentially mitigation) of the claim, that delay can be factored into a determination of the contractor's entitlement to additional time, money or both.

The engineer must determine the claim in accordance with Sub-Clause 3.5, which requires him or her to consult with the parties to see if a resolution can be agreed, or absent agreement for the engineer to make a fair and reasonable determination of the claim with detailed comments and reasons within 42 days or such other period as may be agreed.

If the contractor is satisfied with the engineer's determination, that is the end of the matter. If it is not, then the claim is escalated to the status of a dispute, but the contractor is bound by, and must give effect to, the engineer's determination until the claim (now a dispute) is finally resolved in accordance with Clause 20.

⁸ Where the claim has a continuing effect, the fully detailed claim still has to be served within 42 days but will be considered as interim and the contractor is required to send further interim claims on a monthly basis providing further details and a final claim within 28 days after the effects of the event have ended.

Throughout this process, the contractor is required to keep contemporary records to substantiate its claim. The engineer may monitor the contractor's records and the contractor must give the engineer access to them.

Employer claims in FIDIC 1999

Employer's claims are dealt with differently under FIDIC 1999.⁹ Sub-Clause 2.5, requires the employer or the engineer to give notice and particulars 'as soon as practicable' after it became aware of the event or circumstance giving rise to the claim. This notice must contain the particulars of the clause or basis of the claim and substantiation of the amount being claimed.¹⁰ An employer's claim does not have to be notified within a fixed number of days and there is no waiver of remedy if the employer's notice is given after it was 'practicable' to notify it.

However, once an employer notifies its claim, the same process is followed as for contractor's claims (see above, *mutatis mutandis*).

Claims procedure in FIDIC 2017

FIDIC 2017 introduced a number of significant changes from FIDIC 1999. Employer and contractor claims are now addressed in the same provision and are subject to the same procedure. The changes also highlight the engineer's increased role in the process, particularly where it concerns the engineer's administration of claims notices.

The claims procedure is more rigorous and includes fixed time limits within which the claiming party must issue its notice of claim and its fully detailed claim. The 28-day time limit for giving a claim notice is maintained, but the time limit for submitting a fully detailed claim has been increased from 42 days (FIDIC 1999) to 84 days (FIDIC 2017). Non-compliance with these time limits (for both the initial claim notice and the fully detailed claim) may result in the invalidation of these notices, and in effect possibly bar any remedy for the claim.

Sub-Clause 20.1 splits claims into three categories and prescribes different procedures for their resolution. The categories are:

- employer's claims for additional payment from the contractor (or a reduction in the contract price) or an extension of the defects notification period;
- contractor's claims for an extension of time or additional payment from the employer; and
- other relief that is not covered in the previous two categories.

The procedure for the third category is marginally different to that applied to the first two. It requires the claiming party to assert its application for a remedy, and if that remedy is rejected by the engineer or other party (or not dealt with in a reasonable time), the claiming party must then serve a notice of claim, which will be resolved in accordance with

⁹ This has changed in FIDIC 2017.

¹⁰ Though a notice for an extension of the defects notification period shall be given before the expiry of such period.

Sub-Clause 3.7 (agreement or engineer's determination). The time limits and requirements for detailed submissions that apply to the first two categories of claim are not specified for this third category.

For the first two categories of claim, Sub-Clause 20.2.1 requires the claiming party to give notice of its claim 'as soon as practicable' and no later than 28 days after it became aware, or should have become aware, of the event or circumstance giving rise to the claim. Failure to comply with this time limit means that the claiming party shall not be entitled to the relief claimed and the other party 'shall be discharged from all liability in connection with the event or circumstance giving rise to the Claim'.

If the engineer considers that the claiming party has failed to comply with the 28-day time period, the engineer is required by Sub-Clause 20.2.2 to give notice within 14 days from the date he or she received the notice of claim, stating that the claim is out of time.¹¹ This places a positive obligation on the engineer to act promptly and state with reasons when a claiming party has, in the engineer's opinion, failed to provide timely notice.

If the engineer does not issue such a notice, the original notice of claim shall be deemed valid. The other party can still object to its deemed validity by giving notice to the engineer of its disagreement together with reasons. The engineer must consider this and make findings on the disagreement in the engineer's determination.

Where the claiming party receives a notice from the engineer indicating that it has failed to comply with the time limit for giving notice, the claiming party will be required to include details of its disagreement or justification for the late submission in its fully detailed claim.

Whether the initial notice is valid or its invalidity is being challenged, the claiming party is required to submit a fully detailed claim within 84 days. This time period can be amended by agreement between the engineer and the claiming party. If the claiming party fails to submit its fully detailed claim within this time limit, its notice of claim shall be deemed to have lapsed (assuming it was originally served in time) and the notice shall be treated as invalid. The engineer is (again) required by Sub-Clause 20.2.4, to give notice to the claiming party that the claim is no longer valid. This further notice must be given within 14 days after the time limit for submission of the detailed claim has expired.

It is always open to the claiming party to disagree with the engineer's further notice. Such disagreement or justification of the late submission shall be included in the claiming party's fully detailed claim.

In the event that the engineer does not give notice within the 14-day period, this further notice is deemed valid. Where the other party disagrees with the validity of the further notice, it shall give notice to the engineer of such disagreement. The same process as above applies, and while no time limit is stipulated for the submission of such a notice of disagreement, the engineer's determination must include findings on such a disagreement, implying that the notice of disagreement has to be given prior to the engineer's determination.

Where the claiming party receives a notice from the engineer indicating that the notice of claim is deemed to have lapsed and is no longer valid, the claiming party will be required to include details of its disagreement with the engineer's notice, or justification for the late submission in its fully detailed claim.

¹¹ Sub-Clause 20.2.2 of the General Conditions.

In circumstances where the engineer has given a notice under Sub-Clause 20.2.2 (failure to give notice within the time period) or Sub-Clause 20.2.4 (lapsing of claim notice), the engineer is still required to agree or determine the claim in accordance with the procedure under Sub-Clause 3.7. In this instance, the engineer's determination must consider the claiming party's disagreement.

Once the engineer receives the fully detailed claim (final or interim where the claim has or had a continuing effect), Sub-Clause 20.2.5 requires him or her to agree or determine the claim in accordance with the procedure outlined in Sub-Clause 3.7.

Where there is an interim claim, the engineer must issue a response setting out the contractual or other legal basis of the first interim fully detailed claim within the time limit prescribed in Sub-Clause 3.7.3. The claiming party shall continue to submit further interim detailed claims on a monthly basis and shall submit a final fully detailed claim within 28 days after the end of the effects resulting from the event giving rise to the claim.

Sub-Clause 3.7.5 provides that if either party is dissatisfied with the engineer's determination, such party may, within 28 days after receiving the engineer's determination, give a notice of dissatisfaction (the notice must state it is a notice of dissatisfaction and contain reasons). After giving a notice of dissatisfaction, either party may then proceed to obtain a decision of the dispute from the dispute avoidance or adjudication board, but must comply with the engineer's determination in the interim, until it is replaced by a final determination obtained under the dispute procedure contained in Clause 21. If no notice is given, the engineer's determination becomes final and binding.

As with FIDIC 1999, the claiming party has to keep contemporary records to substantiate its claim (Sub-Clause 20.2.3). The engineer may monitor the contractor's records and the contractor must give access to these records. In relation to the engineer's audit or information rights, the difference between FIDIC 1999 and 2017 is that the new Sub-Clause 20.2.3 provides that if the engineer monitors or inspects such records it shall not imply the engineer's acceptance of the accuracy or completeness of the records.

Challenges to the operation of the claims procedures and time bars

In theory, whether the FIDIC form or other form of contract is used, the contractual procedures for asserting claims should be clear. When parties follow those procedures, then it is unlikely that complaints will arise on the implementation of those procedures (albeit the outcome may still be challenged on substantive grounds).

It may be argued that the FIDIC claim provisions operate as conditions precedent, because they specify the precise time within which a claim notice is to be served and expressly state the consequences of failing to serve notice within that time (here, that the contractor will lose its right to obtain remedy for the claim event). However, these provisions are often still challenged as to their meaning and effect, because of the draconian consequences.

Therefore, complexity or challenge can arise where one party alleges that the contractual procedure has not been followed and consequently that the claiming party is precluded from pursuing its claim further or is debarred from obtaining any remedy. In this case, the contractual claims procedure has to be investigated to understand what the parties intended and particularly what the effects of non-compliance would be.

Challenges to meaning

The method used for contractual interpretation should shed light on whether, by the use of the words chosen by the parties, they intended to debar claims made out of time, or whether the provision was aimed at ensuring that problems on the project were identified and communicated as soon as possible, so that decisions on resolving or mitigating them could be made contemporaneously.

Jurisprudential principles of contractual interpretation are not subject to a single, uniform theory that applies around the world. Parties will be guided to the appropriate set of rules for contract interpretation by the applicable governing law.

Different contractual interpretation outcomes can arise depending on the governing law that applies to the contract. Not only are there conceptual and methodological differences in rules for contract interpretation between common law and civil law jurisprudence, but even within those broad descriptions of legal systems, the law of different countries will have their own idiosyncrasies in approach.

That said, most systems of law start with the proposition that contractual interpretation must be loyal to the text used by the parties.¹² Words will be given their ordinary meaning and the text of the entire agreement must be considered to give the proper context to describe the parties' intentions. If needed, interpretation will consider the language of the trade for which the contract is executed and the trade or commercial context.

It is when the text in question is open to two or more alternative interpretations that an interpretation exercise needs to be carried out and this is where different systems of law depart in their approach.

Where there are two alternative interpretations of a provision, both being equally valid, deciding which interpretation should apply depends on the method of interpretation prescribed by the governing law. In this situation, English law will likely determine the meaning by applying *contra proferentem*, which operates to interpret the intention against the draftsman of the provision, whereas in the United Arab Emirates the contractual provision will be interpreted in favour of the obligor, irrespective of who drafted that part of the contract.¹³

Where there are more than two potential interpretations of a provision, then a more detailed enquiry as to the meaning needs to be conducted. Subject to the governing law, this may result in different emphases being placed on the contextual or historical information, such as whether information surrounding the time of the negotiation of the contract is relevant or not.

12 For example, under English law: 'The primary source for understanding what the parties meant is their language interpreted in accordance with conventional usage.' (*Bank of Credit and Commerce International S.A (in compulsory liquidation) v. Ali* [2001] UKHL 8, Lord Hoffmann at paragraph 39.) Article 265 of the UAE Civil Code (Federal Law (5) of 1985, as amended) provides: 'If the wording of a contract is clear, it may not be departed from by way of interpretation to ascertain the intention of the parties.' This is a similar context to Article 169 of the Qatar Civil Code (Law (22) of 2004), which provides: 'If the terms of a contract are clear, it will not be permitted to deviate from them by interpreting them in order to ascertain the will of the parties.'

13 The approach common law takes is to penalise the person drafting the contract, as they could have been clearer in the manner they expressed themselves and thus could have avoided the ambiguity, whereas the civil law approach is one of minimising the burden on the party who is required to perform the obligation in question.

Thus, depending on the governing law, a failure to give notice in time under FIDIC 1999 does not necessarily debar the claiming party from a remedy or absolve the other from liability.

Common types of ambiguity that are found in the interpretation of construction contracts include:

- When does time actually start running? In the case of *Obrascon Huarte Lain SA v HM Attorney General for Gibraltar*,¹⁴ Akenhead J held that the provisions of Clause 20 of FIDIC 1999 should be construed together with Sub-Clause 8.4 in relation to a claim for an extension of time, and that in interpreting Sub-Clause 8.4 it allowed for the notice period under Clause 20 to commence running where the project completion ‘is or will be delayed’, thereby allowing the contractor to notify a delay at later point in time than when the delay event occurred.
- If the claim is based on a failure by the employer to provide site access on the expressly stated date and the contractor is thus aware of the claim event on that date, but waits 14 days before submitting the notice of claim – is it out of time for not providing the notice as ‘soon as practicable’, or can the contractor argue that the notice is within time, relying on the 28-day long-stop period?
- If a contractor is engaged to undertake superstructure works on foundations laid by others, but six months into its works discovers that those foundations were defective and had to be repaired, thereby causing a delay to the completion of the superstructure works – is the contractor’s claim notice served on that date out of time in circumstances where it might have been able to discover those defects six months earlier, had it inspected the foundations prior to starting its works?
- What about the method in which notice is given? If notice is not set out in a document headed ‘Notice’ is there notice at all? FIDIC 1999 only requires notice to be made in writing. It then begs the question of whether contractors can rely on any type of statement recorded in writing that identifies a claim and its circumstances, such as in minutes of meetings or progress reports.¹⁵

These examples are a few of the contractual interpretation issues that arise where different governing laws may produce different answers.

Challenges based on principles of the governing law

Even if the contractual claims procedure is clear and its operation is unequivocal, the governing law of the contract can still provide relief to a party that has not strictly complied with the defined procedure and thus save it from being debarred from its remedy. The governing law may view non-compliance with a ‘technical’ procedure for asserting a claim that results in a full bar to recovery as being an excessive or unfair.

14 [2014] EWCH 1028 (TCC).

15 Sub-Clause 4.20 of FIDIC 2017 appears to prevent such an argument being made, as it states in its provisions relating to progress reports that: ‘nothing stated in any progress report shall constitute the notice under the Sub-Clause of these Conditions.’ In essence, this is likely to operate against assertions of constructive notice.

In common law jurisdictions, legal arguments have been deployed to avoid against the serious consequences of non-compliance. For example, in Australia, the prevention principle has been applied to preclude an employer benefitting from its own breach (causing the delay event), by relying on the contractor's technical failure to issue a claim notice in accordance with the contract and where the contract debarred late claims.¹⁶

Other common law principles have provided relief to non-compliant claim notices, such as the principles of waiver and estoppel, where (assuming the facts support it) an employer may be fully aware of the claim event and has engaged in communications on the claim event, but where the contractor has not issued a notice at the correct time and in the correct format. By its conduct, that employer may be prevented from relying on the contractor's technical failure of not providing a notice in the correct form and, therefore, cannot rely on that failure to absolve itself of liability.

Civil law jurisdictions also have principles that mitigate against non-compliance with notice provisions. For example, a claiming party who has submitted its notice of claim late under the contract might make an alternative claim based on principles of unjust enrichment (where it would be inequitable to deprive the contractor of its remedy), or that an employer's reliance on the strict requirements of the claims procedure would constitute a breach of the obligations of good faith. This is similar to the concept that contractual provisions should not be used excessively to bring about an unfair outcome.

There are some systems of law, for example, those in the Arab world where principles of shariah inform how the laws are made. These shariah principles include the concept that 'a just claim never expires' and the concept that a contractor should not be precluded from receiving fair and just compensation for its works in cases where there has been an unforeseen occurrence impacting those works (for example, a delay event). An example of this is under the Qatar Civil Code, where in some cases there is a statutory prohibition on any agreement to reduce time periods for asserting claims to periods shorter than the statutory limitation period.¹⁷

Of course, relying on these principles to avoid strict compliance with a contractually agreed claim's procedure may not always be an optimal strategy. In particular, different legal systems treat such matters differently and, more often than not, deploying such principles are highly fact-specific (often each case is *sui generis*) and previously decided cases may not provide sufficient authority to reassure a party that its non-compliance with the contractual procedural failures will be absolved.

16 See *Gaymark Investments v. Walter Construction Group* (1999) NTSC 143, though English courts have taken a different view by preserving the strength of conditions precedent and not detracting from them on the basis of the prevention principle, in circumstances where a contractor could avail itself of an extension of time provision, but failed to do so in time.

17 For example, Article 418 of the Qatar Civil Code (Law No. 22 of 2004). This is not a universal principle in the Arab world, as there is no equivalent in UAE law, demonstrating that even neighbouring countries whose civil code comes from the same genesis retain national idiosyncrasies.

Conclusions

The trend in contractual claims procedures has moved towards a more balanced process, where time periods and adverse consequences of failing to comply with the scheme apply equally to both contracting parties.

It requires more proactive contract management from the parties and a concerted effort by them and the engineer towards dispute avoidance. For example, the enhanced contractual notice regime in FIDIC 2017 causes parties to identify issues as soon as possible, allowing both, with assistance from the engineer, to find solutions and make better informed contemporaneous decisions. This is a worthy aim and the penalty for not complying with notices is significant.

The process also ensures that claims are less likely to be bundled together, which means that they are more likely to be properly managed in a cost-effective dispute avoidance or dispute resolution process.

Nevertheless this trend towards greater contract management means that parties will have to factor in additional or greater costs to support these processes. This will impact both the employer, who will want to keep construction costs down, and the contractor who wants to keep prices down to win work, in a highly competitive market.

Finally, the increased time for contractual resolution or determination of claims from 42 to 84 days in FIDIC 2017 will inevitably put pressure on cash flow and how decisions to mitigate adverse time impacts are made. However, it may be that the increased time will result in more detailed investigations of claims and better considered engineer's determinations, which are less likely to be challenged.

Appendix 1

About the Authors

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Philip Norman has been in practice for nearly 25 years, first as a barrister in independent practice and then as a partner in a firm specialising in international arbitration and dispute resolution. He has significant experience in mediation, expert determination and adjudication and extensive experience advising on matters in the construction, engineering, infrastructure, project finance, energy, oil and gas, and power sectors, as well as TMT infrastructure. Mr Norman also sits as an arbitrator.

Mr Norman's practice extends across many jurisdictions, including Saudi Arabia, United Arab Emirates, Egypt, Turkey, Iraq, Qatar, UK, Ireland, Italy, Greece, Spain, France, Romania, Russia, Nigeria, Kenya, Uganda, South Africa, Japan, Hong Kong, Vietnam and Singapore. In addition, he has spent time in-house with Black & Veatch in the UK, acting as general counsel for the EMEA region.

Chambers Global has described Philip Norman as 'very well established in the region [Middle East] and a very confident litigator ... he is excellent and possesses good client awareness' and acknowledges his extensive experience in a wide range of disputes, servicing clients in sectors such as finance, energy and infrastructure. He is also ranked in *The Legal 500* and has received a number of other accolades.

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Leanie van de Merwe specialises in international arbitrations and transnational litigation with a particular focus on construction, engineering and energy matters.

Ms van de Merwe qualified as an attorney in South Africa in February 2011 and started her career as legal counsel and analyst for the Competition Commission of South Africa, where she was responsible for investigating and prosecuting anti-competitive business practices. In 2014, Ms van de Merwe moved to the Middle East to take on a lecturing position

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Edited by the academics who run a course on construction contracts and arbitration at the School of International Arbitration, Global Arbitration Review's *The Guide to Construction Arbitration* brings together both substantive and procedural sides of the subject in one volume. Across four parts, it moves from explaining the mechanics of FIDIC contracts and particular procedural questions that arise at the disputes stage, to how to organise an effective arbitration, before ending with a section on the specifics of certain contracts and of key countries and regions. It has been written by leaders in the field from both the civil and common law worlds and other relevant professions.

This third edition is fully up to date with the new FIDIC suites, and has new chapters on parties, pricing, expert witnesses, claims resolution, dispute boards, ADR, agreements to arbitrate, investment treaty arbitration, and Brazil. It is a must-have for anyone seeking to improve their understanding of construction disputes or construction law.

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