



YConstruction

Young International Construction Practitioners

Tri-City Event Summary

The new FIDIC Rainbow: What does it mean for construction arbitration?

18 October 2018 - Singapore, Dubai and London



Dubai

Time (local): 6PM - 7:30PM

Venue: CMS, Level 15
Burj Daman, DIFC

Discussion leaders:

Dietrich Berner (Associate Director at HKA)
Slava Kiryushin (Legal Director at CMS)
Jodie Reindorf (Associate at Dentons)

Summary prepared by the discussion leaders: Jodie Reindorf, Slava Kiryushin, and Dietrich Berner

The Dubai event brought together a group of approximately 30 construction practitioners to discuss the impact of the new FIDIC 2017 Rainbow on the Middle Eastern construction market.

After a presentation from Dietrich Berner from HKA, the floor was open to discuss the New Rainbow, with a particular focus on the new notice and claims provisions, as well as the new DAAB procedure.

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Tri-City Event Summary - Dubai (cont'd)

The consensus was that the impact of the New Rainbow was likely to be limited in a market that still prefers to use the FIDIC 1987 contracts over the 1999 provisions. As a result, it was thought that it may be a significant amount of time before the Middle Eastern market feels the need to move to the New Rainbow.

Notification of Claims

Practitioners who worked on the contractor side of the industry welcomed the 28-day time limit for the notification of claims, which now applies to both the Contractor and the Employer, as this was thought to reduce Employers' opportunity to make deductions from payments to the Contractor. Unsurprisingly, the time-bar was less well-received by those on the Employer side of the industry.

Notice provisions

It was noted that one of the biggest changes to the New Rainbow was the extensive notice provisions. The discussion group was sceptical about how effective these more onerous notice provisions would be in the Middle East, where many practitioners found that less attention is paid to the detailed mechanics of contractual provisions. In this regard, many thought that the market would not choose the New Rainbow, and may opt for one of its predecessors with less complex procedures.

Role of the Engineer

In light of the tighter contractual provisions of the New Rainbow, the discussion touched upon the more involved role of the Engineer in the administration of the contract, as compared to the 1999 provisions. While the group queried whether the Engineer would be willing to take on such an involved role, it was noted that in the 1987 provisions, the Engineer had a similar role in project administration.

DAAB

Participants recognised the aims of the DAAB procedures were to minimise disputes. However, it was thought that in the Middle East market, the inclination is more often to pursue disputes than look for options for early settlement. Therefore it was concluded that the DAAB procedure would be struck out if the 2017 provisions were adopted, in the same way that it is often struck out where the 1999 provisions are used.

Conclusion

Overall, the group thought that the New Rainbow may be better suited to other markets, but would be unlikely to have a great impact in the Middle East.

Tri-City Event Summary - Singapore



Singapore

Time (local): 6PM - 7:30PM

Venue: Rajah & Tann
21st floor, 9 Battery Road

Discussion leaders:

Adrian Wong (Partner at CMS)

Wong Tjen Wee (Assoc. Principal at Baker & McKenzie)

Mahesh Rai (Director at Drew & Napier)

Summary prepared by YConstruction Co-Chair Thea Sonya Raman

The Singapore event kicked off with a presentation from Adrian Wong of CMS on the new FIDIC 2017 Rainbow and some of the key changes that have been effected.

Discussions followed on the suitability of the different FIDIC forms for different types of contracts and the different distribution of risks across the various forms of contract. There was particular focus in the discussion on the concept of the “employer’s representative” in the Silver Book instead of the usual engineer and how impartiality on the part of the “employer’s representative” can be ensured, in the absence of a governing body prescribing a code and standard of practice as is the case for engineers. There was also discussion on how this might affect a contractor’s pricing strategy when tendering for a Silver Book contract.

There was further discussion on the “Five Golden Principles” and whether this new “directive” from FIDIC will have any practical effect in reducing the extent to which contracting parties might try to amend the standard terms to change the balance of risk allocation.

The second part of the forum saw an involved discussion on the differences between the FIDIC DAAB procedure and the construction adjudication regime in Singapore under the Security of Payments Act (also known as the “SOPA” regime).

We had the benefit of Wong Tjen Wee of Baker & Mackenzie giving a short presentation highlighting not only the differences in the procedure and timelines between the two regimes, but also the differences in purpose between the two regimes. It was highlighted during the discussion that it is important to appreciate that while both regimes provide for interim dispute resolution mechanisms during the course of a project, the objectives of the DAAB regime is to avoid any and all kinds of disputes as far as possible, while the SOP regime is focussed on ensuring contractor’s cash flow. In the same way, the SOP regime can only be taken advantage of by a contractor carrying out work (only contractors have the right to lodge a claim) while the DAAB regime is open to contractors and employers alike.

Tri-City Event Summary - Singapore (cont'd) and London

Notwithstanding the differences in objective, the considerably shorter timelines under the SOPA regime and the comparative ease of enforcement of SOPA decisions may mean that contractors may prefer to utilise the SOPA regime at the expense of leaving the DAAB idle and ineffective in resolving key payment disputes (under Singapore law, the SOPA regime is a statutory regime that cannot be contracted out of and which operates alongside the contractual mechanisms as a dual track).

It was also highlighted during the discussion that a contractor could easily place a spanner in the works of an employer-referred dispute in the DAAB by separately commencing SOPA proceedings and obtaining a decision there before the DAAB manages to render its determination. In a way, this would be a legitimate way of short circuiting the entire DAAB process, while undermining its effectiveness. Doubt was expressed over the usefulness of the DAAB in the Singaporean context, especially as regards payment disputes.



London

Time (local): 6PM - 7:30PM
Venue: 4 Pump Court Chambers
4 Pump Ct, Temple

Discussion leaders:
James Bowling (Barrister at 4 Pump Court)
Rebecca Major (Associate at White & Case)
China Irwin (Associate at Lalive)

Summary prepared by YConstruction Co-Chair Jay Randhawa

The London event was very well attended, with a mix of construction legal practitioners, expert consultants and contractor representatives coming together to share their experiences in using the FIDIC suite of contracts, as well as their opinions on the 2017 revision to the suite.

Following a general introduction by YConstruction Co-Chairs Sam Moss and Jay Randhawa, the discussion leaders each delivered an introduction to a particular topic relating to the new FIDIC suite, with each topic introduction being followed by a 'team discussion' where attendees broke into small discussion groups to share their thoughts on each particular issue. This resulted in an enthusiastic exchange of ideas and the attendees previous experiences.

Tri-City Event Summary - London (cont'd)

Claims

During this discussion, attendees were asked to consider whether the increased notice requirements under the 2017 FIDIC suite were likely promote inter-party communication or litigious behaviour? In addition, there was consideration as to whether the new suite sets out a clearer and simpler claims procedure, or whether there is simply more opportunity for conflicts and/or disputes?

Attendees were generally of the view that increased notice requirements favour Employers who may have larger and more sophisticated contract administration teams. There was a concern that additional notice requirements only add to the administrative burden of delivering the contract, and that many smaller contractors (particularly further down the supply chain) will lack the resources to stay on top of the notice requirements to preserve their entitlements.

In addition, it was noted that in certain regions the issuing of notices is not often practiced, as a matter of cultural business etiquette. In these cases, contractors could face difficulty in choosing between risking a loss of rights and entitlement, or issuing a notice and perhaps catalysing the risk of a dispute.

Disputes and the DAAB

The attendees were asked to discuss the new DAAB procedure and whether this process was likely to lead to the avoidance of significant disputes. It was observed that the new procedure for appointing a standing DAAB were helpful in avoiding Employers seeking to frustrate the appointment process by failing to nominate a DAAB member. In addition, it was generally agreed that the idea of a standing DAAB should lead to the avoidance of significant disputes, but that this was largely contingent upon the pool of DAAB members being increased and regulated to ensure quality and consistency in the decisions being issued by DAABs. There was also some doubt as to whether DAABs could successfully perform their dispute avoidance and determinations functions concurrently.

In relation to enforcement of DAAB decisions, it was generally observed that the amendments have successfully improved clarity around the enforceability of DAAB decisions, although some attendees were sceptical as to whether parties are any more incentivised to comply with DAAB decisions and whether arbitration will still often be required to enforce these decisions. To some extent, the feeling amongst attendees was that additional tiers of dispute resolution do not always increase the prospects of resolution (i.e. these simply provide more hurdles to jump over to reach arbitration, which in some cases is the only dispute procure likely to resolve a dispute).

Tri-City Event Summary - London (cont'd)

Engineers & Contract Administration

The final topic to be considered was the role of the Engineer under the 2017 FIDIC suite, and the impact of the new obligations for the Engineer to act with neutrality. Many attendees found that the scope of this obligation could differ depending on the governing law of the contract and that Engineers would need to be aware that their obligations may change on a contract by contract basis – for example, under English law this obligation may mean acting ‘fairly and independently’, requiring the Engineer to take into account all relevant considerations. Conversely, under some Gulf civil codes, this obligation may import an obligation to act in ‘good faith’. It was agreed that this is a provision likely to be subject to judicial interpretation in the near future.

Overall, the consensus appeared to be that whilst the 2017 FIDIC suite has improved upon the previous edition, some gaps remain. Whilst FIDIC aspires to a more collaborative approach towards contract administration, and a renewed emphasis on the avoidance of disputes – the new suite may not deliver this to the extent that FIDIC were hoping.
