

Where Do FIDIC Cases Go?

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FIDIC is arguably the most widely used standard form of international construction contract but reported FIDIC cases are rare. Is it time for an increased publication of FIDIC cases?

There are three categories of decisions arising out of FIDIC dispute resolution provisions:

- **Decisions of the Engineer or the Dispute Adjudication Board (DAB), which will generally not be published or reported to anyone other than the parties involved in the dispute.**
- **Decisions of arbitral tribunals, which are not usually made public although this is subject to certain exceptions.**
- **Decisions of national courts, which are a relatively rare occurrence for the reasons discussed below.**

FIDIC-related arbitral awards

Although there are some publicly available FIDIC-related arbitral awards, FIDIC itself does not maintain a public library of them. The International Chamber of Commerce (“ICC”) is perhaps the most prolific publisher of FIDIC cases, which is not that surprising given that most FIDIC disputes will be finally settled by ICC arbitration. Over the years, extracts, anonymous summaries and translations of various ICC decisions and awards dealing with FIDIC contracts have been published by the ICC and in legal journals. The extracts published by the ICC are always confidential. There is no published guidance from the ICC about how or why it decides to publish extracts in certain cases and not others. Instead, it seems that the ICC considers the extracts that it publishes to be informative examples. The extracts cover different substantive areas including construction as well as procedural topics including interim measures, jurisdiction and multi-tiered dispute resolution. In 2015, the ICC published

extracts from a further 17 decisions or awards issued by ICC arbitral tribunals relating to the multi-tiered disputes resolution provisions in FIDIC contracts and, in particular the DAB process, with commentary from Christopher Seppälä, in its inaugural “Dispute Resolution Bulletin”. Awards dating from as recently as 2014 were included. This is a marked shift away from the ICC’s previous position not to publish awards until three years after the case has been closed.

Although the ICC has for many years published extracts from FIDIC-related arbitral awards, Christopher Seppälä applauded this most recent publication describing it as *“an event of considerable importance, for two main reasons. First, DABs have become the preferred method for resolving international construction disputes under such contracts (rather than having them settled by the Engineer or international arbitration). Second, the awards are relatively recent – they were all issued between 2008 and 2014 – and all but two relate to the latest suite of FIDIC construction contracts for major works published in 1999 [the Red and Yellow 1999 Books].”*¹

The extracts from FIDIC cases published by the ICC are important for a number of reasons:

- Generally, they show the sorts of disputes being addressed by ICC arbitral tribunals, and the questions they are deciding, be they procedural, substantive, legal or factual.
- The extracts can give guidance to parties facing similar issues, showing the reasoning of previous arbitral tribunals, what issues of fact, contract, law or procedure were considered, and how the arbitral tribunal decided particular questions.
- The extracts reveal the arguments raised by the parties to the dispute which may be a source of inspiration for other parties.

- The extracts may inform the decisions of future arbitral tribunals deciding similar questions. Arbitral tribunals may find reassurance or inspiration in the reasoning of previous arbitral tribunals faced with similar questions. However, they will not be bound by these previous decisions.

The extent to which the ICC's extracts contribute to a body of FIDIC case law is necessarily limited, however, because:

- They are only extracts. It has been pointed out that “[w]hen extracts, digests or summaries are published, there is usually no way to ascertain their accuracy. If they have been translated into another language as well, this may only enhance the risk of error.”²
- They are anonymous. Parties seeking guidance from them do not always know the governing or procedural law and therefore the extent to which, if at all, the legal framework of the decided dispute is similar to their own. They do not always know all the procedural or factual issues, some of which may have been key to the decision-making process. They do not know the identity of the arbitral tribunal or its experience and legal background which may have influenced each individual arbitrator's position or thinking on certain issues.
- In sum, it is not always possible to get a feel for the “correctness” of the award.

National court decisions

Very few FIDIC cases are considered by national courts. This is because FIDIC contracts usually contain an arbitration clause and the majority of arbitral awards are complied with voluntarily. National courts hear such cases in limited circumstances, such as if one party wants to remove an arbitrator or set aside or enforce an award. The paucity of decisions by national courts on FIDIC contracts means that, when a national court does decide a FIDIC related issue, there is great

interest. This has been seen recently with, for example, the decisions of the Singapore High Court and Court of Appeal in the “Persero” cases relating to the enforcement of DAB decisions³ and in *Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar* relating to issues arising under the FIDIC 1999 Yellow Book (Corbett & Co is acting for the Government of Gibraltar).⁴ This interest does not, however, necessarily equate to a requirement that arbitral tribunals or even other national courts follow the decisions.

Corbett & Co research into published FIDIC cases

Research by Corbett & Co has identified approximately 130 reported or published court decisions and published extracts of decisions or awards by arbitral tribunals concerning or mentioning FIDIC contract disputes in the period 1974 to 2015. In addition to these cases, there are other arbitral awards relating to FIDIC contracts that are referred to, anonymously, in textbooks and articles in legal journals and elsewhere. Of the approximately 130 decisions we have identified, 61 are ICC arbitral awards or decisions (we have not found any published non-ICC arbitral decisions or awards) and 66 are court decisions. The majority of the court decisions come from England and Wales. Others come from India, South Africa, Trinidad and Tobago, Singapore and Australia as well as several other jurisdictions.⁵ Corbett & Co is publishing its list with this newsletter.

It is safe to assume that there are many unreported FIDIC-related arbitral awards in existence. By way of example, Corbett & Co has been involved in a significant number of international arbitrations relating to FIDIC contracts which resulted in decisions or awards that have not been published and remain confidential. Almost all of these were ICC arbitrations. The ICC deals with many construction and engineering arbitrations each year (in 2014, 21% of the ICC Court's total case load came from construction and engineering

disputes⁶). A fair percentage of these are likely to relate to FIDIC contracts.

The pros and cons of publishing more FIDIC-related arbitral awards

So, should more FIDIC-related arbitral awards be published and, if so, how? We want your views.

The benefits of having a body of published, accessible, full arbitral awards (not extracts, not anonymous) dealing with FIDIC-related disputes would include:

- Transparency in the final settlement of FIDIC related disputes.
- The development of a body of case law relating to FIDIC contracts, even if arbitral awards in commercial arbitration do not constitute binding precedent, and even if some awards are better reasoned than others.
- Such case law would assist with the development of consistent rules for recurring issues. In turn, this would assist with predictability in the administration of FIDIC contracts and the equal treatment of parties to those contracts.
- The better understanding by FIDIC users of the arbitral process.
- The assessment by FIDIC users of potential arbitrators through access to their published awards.
- The improvement of the quality of awards because of increased exposure and competition.

On the other hand:

- As noted by English judges in respect of the impact on the common law system of a huge volume of unreported cases deriving from the growing number of computerised databases: “... *there is no pre-selection. Large number of decisions, good and bad, reserved and unreserved, can be accessed. Lawyers frequently feel that they have an obligation to search this material.*

*Anything which supports their client’s case must be drawn to the attention of the court ...*⁷. In other words, without any selection, there may be a torrent of published cases, and the usefulness of previous decisions might be neutralised as lawyers would eventually find support in previous decisions for any argument they care to run!

- Full publication would come at the price of confidentiality which, according to recent surveys,⁸ remains important to many users.
- How could an increased publication of FIDIC-related decisions come about? Suggestions include amending national arbitration laws, amending the rules of arbitral institutions, amending FIDIC contracts to permit publication of arbitral awards and encouraging parties to FIDIC contracts and arbitration to agree to publication of awards.
- Who would publish the complete awards? If it was FIDIC, parties would have to send them to FIDIC for publication. If it was the arbitral institutions, they may have to amend their rules. If it was an independent body, for example a FIDIC users’ committee, it would have to rely on parties sending awards for publication.

Conclusion

- **National court decisions relating to FIDIC projects will continue to appear sporadically and may give guidance but will not necessarily be binding on other courts or arbitral tribunals.**
- **The routine publication of complete, un-redacted arbitral awards on FIDIC disputes is unlikely. This is because parties would have to forgo confidentiality which, on the basis of recent surveys, they are unwilling to do.**

- **It is unclear who would be in charge of this publication exercise and how, practically, it would come about.**
- **Although such publication would be welcome for the sake of transparency, it may simply leave parties and arbitral tribunals swamped with a large volume of contradictory arguments and decisions.**
- **Publication by the ICC of anonymous extracts of FIDIC-related arbitral awards is valuable because the ICC has sifted and analysed the awards and the extracts comprise the only constant source of information on FIDIC awards. However, the extracts can do no more than what has already been described by the ICC, which is to inform, enlighten and contribute to greater transparency in the dispute resolution process.**

We hope that the Corbett & Co list of published FIDIC decisions from arbitral tribunals and national courts – which we will update regularly – will contribute to the body of information available to FIDIC users.

¹ See the “ICC Dispute Resolution Bulletin 2015 No 1” available from the ICC Dispute Resolution Library at www.iccdrl.com. See also the FIDIC commentary on this development at <http://fidic.org/node/8818>.

² Christopher Seppälä “The development of a case law in construction disputes relating to FIDIC contracts”, ICLR [2009] 105.

³ The series of cases involving PT Perusahaan Gas Negara (Persero) TBK and CRW Joint Operation.

⁴*Obrascon Huarte Lain SA v Her Majesty’s Attorney General for Gibraltar* [2014] EWHC 1028 (TCC) and [2015] EWCA Civ 712 (Court of Appeal).

⁵ Including Northern Ireland, Tanzania, the Falkland Islands, Jamaica, Papua New Guinea, New Zealand, Botswana, the Philippines, Malaysia, Nairobi and Switzerland.

⁶Source: “2014 ICC Disputes Resolution Statistics” available at <http://www.iccdrl.com>.

⁷Per Laddie J in *Michaels v Taylor Woodrow* [2001] Ch 493 and quoted by Lord Carnworth of Notting Hill JSC in his address for the NMLR Annual Lecture Series in 2012 “Judicial Precedent – Taming the Common Law”.

⁸Such as the 2010 and 2015 International Arbitration Surveys by White & Case LLP and Queen Mary, University of London.



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