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- Decisions of the Engineer or the Dispute Adjudication Board (DAB), which will generally not be published or reported to anyone other than the parties involved in the dispute.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].”

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.”

- 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 decisions 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). 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. 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...
WhereDoFIDICasesGo/JC/2015(12)/2/CLAL

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 ...
”. 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.


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.


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