

A nighttime photograph of a city skyline, likely New York City, viewed from across a body of water. The sky is a deep blue, and the city lights are visible. A prominent bridge with blue lighting spans the water in the foreground. The buildings are illuminated, with some showing red and white lights. The overall scene is a vibrant urban nightscape.

# INTERNATIONAL CONSTRUCTION CONTRACTS

A HANDBOOK

William Godwin

 WILEY-BLACKWELL

# **International Construction Contracts** *A Handbook*

with commentary on the FIDIC  
design-build forms

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*For Jane*

# Contents

<i>Preface</i>	xiii
<i>Foreword by Vivian Ramsey</i>	xv
<i>Acknowledgements</i>	xvii
<i>About the Author</i>	xix
<b>Part I</b>	<b>1</b>
<b>1 Contract</b>	<b>3</b>
1.1 What is a contract?	3
1.2 Agreement	4
1.3 Do contracts need to be in writing?	5
1.4 Other elements of a contract	5
1.5 Capacity and authority	6
1.6 Importance of a written contract	8
1.6.1 Clarity and certainty	8
1.6.2 Procedures	9
1.6.3 Risk allocation	9
1.7 What should a properly written construction contract cover?	10
1.7.1 FIDIC contracts	11
1.7.2 Programme	12
1.7.3 Delays and extensions of time	12
1.7.4 Delay damages	13
1.8 Tailoring the contract	14
<b>2 Risk</b>	<b>15</b>
2.1 How risk may be allocated	15
2.2 The 'traditional' approach to risk	16
2.3 EPC/turnkey projects	18
2.4 BOT-type projects	18
2.4.1 Parties to a BOT-type project	18
2.4.2 Contracts involved in a BOT-type project	20
2.5 The FIDIC Silver Book	22
2.6 Particular risks: The unforeseen and design	24
2.6.1 Unforeseeable physical conditions	24
2.6.2 Design responsibility	24
<b>3 Types of Construction Contract</b>	<b>27</b>
3.1 Lump sum contracts	27
3.2 Prime cost or reimbursable contracts	28

3.3	Unit price contracts	28
3.4	Target contracts	29
3.5	Which contract?	29

**Part II** **31**

<b>4</b>	<b>The FIDIC Design-Build Contracts</b>	<b>33</b>
4.1	Some key general provisions	34
4.1.1	Communications: Clause 1.3	34
4.1.2	The law and the language of the contract: Clause 1.4	35
4.1.3	The priority of documents: Clause 1.5	35
4.1.4	Compliance with laws: Clause 1.13	36
4.2	The Employer	37
4.2.1	The right of access to, and possession of, the site: Clause 2.1	37
4.2.2	Evidence of the Employer's financial arrangements: Clause 2.4	37
4.2.3	Employer's claims against the Contractor: Clause 2.5	38
4.3	Contract administration: Clause 3	39
4.3.1	The role of the Engineer	39
4.3.2	'Determinations' in the Yellow and Silver Books	40
4.3.3	Employer's Representative in the Silver Book	41
4.3.4	The giving of instructions	41
4.4	The Contractor	41
4.4.1	The Contractor's general obligation: Clause 4.1	41
4.4.2	'The works' which must fit the intended purpose: Clause 4.1	43
4.4.3	Securing performance: Clause 4.2	43
4.4.4	Contractor's Representative: Clause 4.3	44
4.4.5	Subcontracting: Clauses 4.4 and 4.5	44
4.4.6	Setting out: Clause 4.7	44
4.4.7	Sufficiency of the Contract Price (Silver Book) or Accepted Contract Amount (Yellow Book): Clause 4.11	45
4.4.8	Unforeseeable difficulties/physical conditions: Clause 4.12	45
4.4.9	Progress reports: Clause 4.21	45
4.5	Design	46
4.5.1	The Contractor's general design obligations (Yellow and Silver Books): Clause 5.1	46
4.5.2	Contractor's documents: Clause 5.2	46
4.5.3	Contractor's undertaking: Clause 5.3	47
4.6	Staff and labour: Clause 6	47
4.7	Plant, materials and workmanship	48
4.7.1	Executing the works: Clause 7.1	48

---

4.7.2	Samples: Clause 7.2	48
4.7.3	Inspections: Clause 7.3	48
4.7.4	Testing: Clause 7.4	49
4.7.5	Rejection and remedial work: Clauses 7.5 and 7.6	49
4.7.6	Ownership: Clause 7.7	50
4.8	Time: commencement, delays and suspension of the works	50
4.8.1	Commencement and time for completion of the works: Clauses 8.1 and 8.2	50
4.8.2	Programme: Clause 8.3	50
4.8.3	Delays and extensions of time: Clause 8.4	52
4.8.4	Suspension of the works: Clauses 8.8 to 8.10	52
4.8.5	Prolonged suspension: Clause 8.11	53
4.9	Tests on completion	53
4.9.1	Contractor's obligations: Clause 9.1	53
4.9.2	Delayed tests: Clause 9.2	54
4.9.3	Re-testing: Clauses 9.3 and 9.4	54
4.10	Employer's taking over	54
4.10.1	Taking over of the works: Clause 10.1	54
4.10.2	Taking over of part of the works: Clause 10.2	55
4.11	Defects liability	56
4.11.1	The Defects Notification Period: Clauses 11.1 to 11.3	56
4.11.2	Failure to remedy defects: Clause 11.4	56
4.11.3	Extending the DNP: Clause 11.3	57
4.11.4	Further tests: Clause 11.6	57
4.11.5	The Performance Certificate: Clause 11.9	57
4.11.6	Unfulfilled obligations: Clause 11.10	58
4.12	Tests after completion	58
4.13	Variations and adjustments to the contract price	58
4.13.1	Right to vary: Clause 13.1	58
4.13.2	Variation procedure and value engineering: Clauses 13.2 and 13.3	59
4.13.3	Changes in legislation: Clause 13.7	59
4.13.4	Cost fluctuations: Clause 13.8	60
4.14	Payment	60
4.14.1	Interim payments: Clause 14.3	60
4.14.2	Timing of interim payments: Clause 14.7	61
4.14.3	Advance payment: Clause 14.2	61
4.14.4	Retention money: Clauses 14.3 and 14.9	61
4.14.5	Delayed payment and the right to financing charges: Clause 14.8	62
4.14.6	Financial steps after Taking Over: Clauses 14.10 to 14.13	63
4.14.7	Cessation of Employer's liability: Clause 14.14	64
4.15	Termination by the Employer	64
4.15.1	Termination for Contractor default: Clause 15.2	65

4.15.2	Valuation for works executed at date of termination: Clause 15.3	66
4.15.3	Payments after termination: Clause 15.4	66
4.15.4	Termination for convenience: Clause 15.5	66
4.16	Suspension and termination by the Contractor	66
4.16.1	Suspension: Clause 16.1	66
4.16.2	Termination: Clause 16.2	67
4.16.3	Events after termination: Clause 16.3	67
4.16.4	Payment on termination: Clause 16.4	67
4.17	Risk and responsibility	68
4.17.1	Indemnities: Clause 17.1	68
4.17.2	Contractor's care of the works: Clause 17.2	69
4.17.3	Specific Employer's risks: Clauses 17.3 and 17.4	69
4.17.4	Limitation of liability: Clause 17.6	70
4.18	Insurance	71
4.19	Force majeure	71
4.19.1	Meaning of 'force majeure': Clause 19.1	71
4.19.2	Notice: Clause 19.2	72
4.19.3	Minimising delay and the consequences of force majeure: Clauses 19.3 and 19.4	72
4.19.4	Prolonged force majeure: Clause 19.6	73
4.19.5	Release from performance under the law: Clause 19.7	73
4.20	Contractor's claims, disputes and arbitration	74
4.20.1	Contractor's claims: Clause 20.1	74
<b>Part III</b>		<b>77</b>
<b>5</b>	<b>Disputes and How to Resolve Them</b>	<b>79</b>
5.1	Introduction	79
5.2	Legal aspects of a construction project	79
5.2.1	The terms of the construction contract	80
5.2.2	The law which governs the construction contract	80
5.2.3	The terms of the construction contract relating to the resolution of disputes between the parties	80
5.2.4	The law of the process for resolving a dispute	81
5.2.5	Rights and liabilities that might arise independently of any contract	81
5.2.6	The law which applies to a project by virtue of its location	82
5.3	Kinds of claim	82
5.3.1	Claims for which the contract specifically provides	82
5.3.2	Claims for which the contract does not specifically provide	83



---

5.4	Making a claim	84
5.4.1	Do I have a claim?	84
5.4.2	If I have a claim, when do I make it?	85
5.4.3	How do I make my claim?	85
5.4.4	Summary	86
5.5	Who decides whether to accept a claim?	86
5.6	The FIDIC Dispute Adjudication Board	87
5.6.1	Scope	88
5.6.2	Appointment of the DAB	88
5.6.3	Referring a dispute	89
5.6.4	Reaching a decision	89
5.6.5	Informal opinion?	89
5.6.6	Arbitration?	90
5.7	Methods of dispute resolution	90
5.7.1	Final methods of dispute resolution	90
5.7.2	Informal methods of dispute resolution	92
5.7.3	Arbitration or litigation?	93
5.8	Arbitration	94
5.8.1	The arbitration agreement	95
5.8.2	The place of arbitration	95
5.8.3	Arbitration institutions	95
5.8.4	Commencement of an arbitration	96
5.8.5	Conduct of the arbitration	96
5.8.6	The arbitration award and challenges to the award	97
5.8.7	Enforcement of arbitral awards	98
5.9	How are international arbitrations conducted?	99
5.9.1	The traditional arbitration centres	99
5.9.2	ICC arbitration	101
<i>Appendix I</i>	<i>Yugo Design Company v Sino Industries Corporation:</i> An International Chamber of Commerce Arbitration	105
<i>Appendix IIA</i>	Rules of Arbitration of the International Chamber of Commerce	137
<i>Appendix IIB</i>	Rules of Arbitration of the Singapore International Arbitration Centre	177
<i>Index</i>		197

# Preface

The aim of this Handbook is to provide concise and practical guidance on the contractual aspects of international construction and engineering projects to all those involved in negotiating and managing them.

The aim is not to present an academic textbook but to set out clearly and in straightforward language the main features of construction contracts of which anyone involved in an international project should be aware.

We illustrate many of these features by reference to the current, well-known international standard form FIDIC contracts: the contract forms published since 1999 by the Fédération Internationale Des Ingénieurs-Conseils (the International Federation of Consulting Engineers). Among these FIDIC contracts are two design-build forms, the Yellow and the Silver Books, and we examine these systematically in the second part of this Handbook. We focus on them because design-build contracting, in which the contractor takes responsibility for all or most of the design, is increasingly the norm in international projects.

This Handbook covers such basic questions as: What is a contract? How is a contract to be distinguished from the various negotiations taking place between the parties before the contract is formed? How are the risks of construction typically allocated between the parties to a construction contract? And what do features of the FIDIC Red and Silver Books, for example, tell us about risk allocation in different types of project structure? One important type of structure we look at are concession-type projects.

Disputes and how to resolve them are important features of the management of any project. If the project goes badly and one or other party suffers some detriment, how can that party pursue a claim? How might such a claim be resolved? We examine mediation, conciliation, litigation and arbitration as well as 'intermediate' processes such as dispute review boards in answering these questions.

Arbitration requires special attention as the principal formal means by which international construction disputes are finally resolved. We look at the different international arbitration bodies, and recent developments in international arbitration such as the growth of regional centres in the Middle East and Asia Pacific.

In order to illustrate how an international arbitration might actually work, we provide a fully worked-out example of a fictitious London-sited International Chamber of Commerce arbitration from start to finish. This includes example 'pleadings', a detailed case narrative and commentary on events, and an example arbitration award.

# Foreword

Construction is an international activity. Tower cranes can be seen against the skyline of any country. Many large projects are tendered on the basis of an international tender. Those involved in such projects need some guidance on issues which arise in negotiating and managing them. In this Handbook William Godwin provides simple, practical guidance on those issues.

The handbook has chapters which cover four main topics: contract, risk, forms of contract and dispute resolution. Those chapters approach the issues from a practical viewpoint and assume little or no basic legal knowledge. For instance, the chapter of contract explains what a contract is and deals with particular features of contracts, emphasising that much depends on the system of law which applies to the contract. It refers to features of a contract such as consideration, capacity and authority as well as the topics to be covered in a construction contract. The chapter on risk looks at design and procurement risks and the chapter on forms of contract deals with the pricing mechanisms in different forms of procurement. After explaining the traditional form of contract where the design is carried out by a consultant engaged by the employer, risks are considered in engineer, procure and construct or turnkey contracts and also build, operate and transfers and build, operate, own and transfer contracts, explaining the salient features of each of those procurement methods.

The dispute resolution chapter provides a practical view of the topic, dealing with the process from claim initiation through to resolution by ADR or arbitration. William has then introduced a practical example in the form of a mock International Chamber of Commerce arbitration between a Chinese party and a Serbian party, illustrating the various steps in the process of arbitration under the ICC Rules. For those who have no practical experience of how international construction arbitrations work, this gives a useful insight into the process.

Throughout the book reference is made to the standard suite of FIDIC forms of contract and a substantial part of the book is then taken up with a commentary on various obligations by reference to the FIDIC Silver and Yellow Books. Internationally, the FIDIC forms are commonly used and are well recognised as providing balanced forms of contract. Whilst the commentary is based on these forms, the principles are applicable to similar clauses commonly found in other contracts.

This book achieves its intended purpose as a practical guide. As stated in the preface it is not an academic textbook. It cites no cases and deals with general aspects of international construction contracts rather than contracts

under a particular system of law. It is aimed at those who become involved in negotiating, drafting or dealing with international construction contracts and need assistance in understanding the process. It certainly fulfils that aim and provides a useful checklist for non-lawyers and for non-specialist lawyers who become involved in this field. It is written in an easy style whilst covering topics which involve some complexity. William is to be congratulated for providing a practical handbook which will be of great assistance in this specialist area.

Vivian Ramsey  
Royal Courts of Justice, London  
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# About the Author

William Godwin is a practising lawyer (barrister) based in London who specialises in construction, engineering, energy and infrastructure projects. He has over 20 years' experience of international construction, and advises and acts for contractors, employers, developers and consultants in projects of all kinds. He is a regular speaker at the FIDIC international users' conferences and conducts accredited training in FIDIC through Matrix Seminars.

William is a visiting lecturer in law at the School of Oriental and African Studies, London University and at City University London, and is an arbitration panel member of the China International Economic and Trade Arbitration Commission and the Dubai International Arbitration Centre. He is an approved adjudicator of the English Technology and Construction Bar Association.

# Part I

# 1 Contract

## 1.1 What is a contract?

We can say that a contract is an *agreement between two or more parties which gives rise to rights and obligations which will be enforced according to the system of law applying to the contract.*<sup>1</sup>

A simple example is where A and B agree that A shall build a house for B for a fixed price according to plans prepared by B's architect. Under this contract, A will have both an obligation to build the house according to the plans and a right to payment of the price when the work is done. B will correspondingly have both the obligation to pay A and the right to have the house built according to the plans.

Depending on which system of law applies to their contract, if A does not fulfill his obligation to build the house according to the plans then B might be able to obtain compensation for this 'breach' or breaking of the contract. The system of law applying to the contract might say, for example, that B is entitled to obtain a sum of money sufficient to put him in the position in which he would have been had the contract been properly performed, that is, had A in fact built the house in accordance with the plans; this sum of money could be the cost to B of rectifying A's deficient work.

The way in which B would actually go about obtaining the compensation to which he would be entitled according to the system of law applying to the contract depends upon a number of circumstances, and could be quite

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<sup>1</sup> Often the system of law applying to a contract, also called the governing law of the contract, will be stated in the contract itself. For example, the parties may include a clause in their contract which provides for Chinese law to apply to their contract, or for English law to apply. See page 80 for an explanation of what is meant by the system of law 'applying to' or governing a contract.



complicated. In a simple case where A and B both reside in the same country and have their assets there, B will typically go to the local court to obtain an order against A for the relevant compensation. If A does not pay, then B may be able to 'execute' his order by obtaining other orders against A to force him to pay; for example, an order for the sale of A's assets. In a more complicated case, where A and B live in different countries, or A's assets are in a different country, the procedures for executing his order for compensation against A could be more complicated for B.<sup>2</sup>

Let us look more closely now at what is meant by an agreement between two or more parties giving rise to a contract between them.

## 1.2 Agreement

When we say that a contract is an agreement, that does not mean that the parties need to have reached agreement on all the details that concern their project. Many systems of law will give effect to contracts in which only certain matters, regarded as essential to the contract, are agreed.<sup>3</sup>

Nor does 'agreement' necessarily mean actual agreement or a meeting of minds, in a psychological or subjective sense. Many systems of law will find that the parties have made a contract containing certain terms, even though one or other party might not actually have assented to those terms. As long as the parties have acted towards each other in such a way as to lead a reasonable third person observing them to conclude that they had agreed certain terms, then they will be held to have done so and be bound accordingly.<sup>4</sup>

Many systems of law also distinguish between the agreement or contract itself and the sometimes lengthy negotiations leading up to the agreement. Once the contract is formed, the terms of the contract are what bind the parties and create the obligations and rights which may be enforced. The discussions or negotiations taking place beforehand will not be taken to form part of the contract. In some legal systems they may not even be used in order to interpret the terms of the contract, although some systems may permit the factual background to the parties' transaction to be used to interpret the words of the contract where they are ambiguous or uncertain.

This distinction between the agreement itself and the negotiations leading up to it highlights the importance for each party to the contract to identify

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<sup>2</sup> Those steps could, for example, involve first obtaining an order against A in the courts of the country in which the work was carried out or sited and then applying, relying on that order, to the court in the country where A's assets are situated.

<sup>3</sup> For example, in some systems of law it is essential that the parties identify with certainty what works are to be performed but not the price to be paid. In such a case the relevant court might order that a 'reasonable' price be paid.

<sup>4</sup> Such a criterion for determining whether parties have 'agreed', in the sense of a contract, to particular terms is common to many legal systems and is sometimes called an 'objective' test of contractual agreement.

clearly what are the terms agreed between them which will bind each of them, and to make sure that various other matters, which might have been discussed but had been abandoned or modified in the course of the negotiations, are clearly distinguished from the terms of the contract itself.

### 1.3 Do contracts need to be in writing?

It is sometimes thought that you cannot have a contract if there is nothing in writing; that there has to be a document, signed by both parties, with perhaps other formalities as well.

But this is not always the case. Whether a contract needs to be in writing depends on the system of law that applies to the parties' transaction. Sometimes, a legal system will require a written document; for example, in contracts concerning the sale of land many legal systems require a written contract. In other cases, the contract could be contained entirely in oral or word-of-mouth exchanges, without the need for any writing. These contracts could be just as binding as written ones.

It is true that in a construction project of any size you will normally have a written contract; this will not only be written, but will typically be a very detailed contract setting out the parties' rights and liabilities. However, the possibility of oral or non-written contracts should still be borne in mind. In some systems of law, such contracts might even be found to exist alongside written contracts in certain cases. Parties who wish to avoid uncertainty and ensure that there are only written terms of their contract will need to obtain legal assistance in drafting their agreements. It is also important to note that in some legal systems you might have a contract which arises from a mixture of oral agreements and agreements recorded in informal exchanges between the parties, such as faxes, letters, e-mails or minutes of meetings.

### 1.4 Other elements of a contract

We have seen that a contract involves an agreement between two or more parties, but what more is needed before the parties are bound by a contract? This question arises because, in many systems of law, it is not enough for the parties to reach agreement in order for a contract to exist between them; other conditions need to be met.

In English law, for example, which applies to many projects with no particular connection with England, the contract is seen fundamentally as a kind of bargain, where one party confers, or promises to confer, some benefit on the other party in return for some benefit or promise of benefit to himself. This conferring, or promising to confer, a benefit in return for another benefit or promise is called *consideration*; it is what you get in return for your promise to the other party and, except in certain limited cases, it is necessary before a

binding contract comes into existence in English law. Thus, in our earlier example of the simple contract where A agrees to build a house for B according to B's plans for a fixed price, B's promise of payment of the price is consideration for A's promise to build the house according to the plans, and makes the agreement a binding contract.

If the system of law applying to the contract requires consideration, this will seldom be in issue where you have a construction contract; in such cases, it is normally obvious what the consideration is.

Other requirements for a contract could include certain formalities; in contracts involving certain subject matters the system of law applying to the transaction might require the contract to be set out in a formal document, with the seal or stamp of the parties to the contract. Specialist legal advice will be needed in order to ensure that the parties' agreement complies with any formalities necessary before it becomes a binding contract.

## 1.5 Capacity and authority

Let us imagine that you have been negotiating with representatives of a party to a project for the design and construction of a chemical plant in the Gulf; you are the French design-build contractor, and the other party is a Korean joint-venture owner. You and the owner's representatives have recorded in detail the terms of the intended contract between you in a formal document. After much discussion, the details of every aspect of your agreement have been reduced to writing, and everything appears ready now for the signing, or 'execution', of the contract. The other side's senior representative and you then both duly sign the contract in each other's presence.

Now you think that you have a binding contract. However, you might not have a binding contract if the person who signed the contract for the other party was not authorised to do so.

One very important, but sometimes overlooked, feature of contracts in general concerns the authority of the person signing or executing the contract on behalf of the named party. Does that person truly have power or authority to bind the named party by signing the contract, apparently on its behalf?

This question arises most commonly in connection with companies or corporations rather than with individual people. Most legal systems contain rules for the formation, constitution and regulation of companies or corporations; they are treated as legal persons, just like real people, having legal rights and obligations themselves and being able in particular to enter into contracts in their own names. So 'A Ltd.', or 'A Corporation', or 'A Incorporated' might be names of a distinct legal person, the company or corporation named.

Construction projects of any size will almost invariably involve contracts between companies rather than real people. But because companies are only abstract legal persons, they cannot act except by real people with authority, or

power, to act for them; these authorised people are the agents of the company. So in dealings with third parties, including entering into contracts with them, companies will act by or through their agents.

A company's agents will include a whole range of people, with different levels of authority. Some people may have authority, given by the company, to enter into contracts on the company's behalf but only up to a certain financial limit; others may be able to enter into contracts of any size, but only in certain geographical areas, or where the contract concerns a particular subject matter. Whether, and if so what, contracts a person is authorised to enter into on behalf of a company will depend on the constitution and internal organisation of the company and, more generally, upon the system of law that applies to that company.

If a person is authorised to enter into contracts of a certain size or type, then he may be said to have actual authority to bind the company by executing contracts of that size or type. However, many legal systems also have a concept of *apparent* or *ostensible* authority, whereby a company could still be bound by the acts of a person who does not have actual authority. If a company, by its words or conduct, represents or holds out to the other party that a particular individual has authority to contract with it then it may be open to the other party to argue that the company is bound by the individual who signs the contract, even if that individual lacked actual authority to do so.<sup>5</sup>

This concept of ostensible authority is very important because it is often not possible to tell, without making detailed inquiries of a kind which are not always made, whether the particular person signing the contract is actually authorised to do so. If he has apparent or ostensible authority then, as described above, the company could still be bound.

We have highlighted the distinction between these two kinds of authority because it is surprisingly common in international projects for questions of authority to arise if there is later a dispute. One party might argue that the contract was not validly concluded because the person signing it did not have authority or power to do so on the company's behalf, and in this way seek to avoid a payment or liability. In order to protect yourself from such an argument it is very important to obtain legal advice. Your legal adviser should satisfy himself that the person purporting to execute a contract on behalf of the named party has authority to do so.<sup>6</sup>

Another, related matter of great practical importance is the *capacity* of the company named as the other party to the contract. In some legal systems there is a doctrine or rule to the effect that a contract entered into with a company which, by virtue of its constitution, is unable or lacks the capacity to enter into

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<sup>5</sup> Many (although not all) legal systems have a concept of apparent or ostensible authority. The details of this doctrine will vary from system to system.

<sup>6</sup> This could involve examining whether the relevant person has actual authority according to the laws of the country of incorporation of the named party to the contract.

contracts of that kind is null and void and cannot be enforced.<sup>7</sup> Your legal adviser should take steps to ensure that no problems of capacity arise should the project later encounter difficulties.

We shall be looking shortly at BOT or concession-type projects, in which there is a contract or contracts between a government or government agency and another party or parties. In any contract with such a body it is essential to ensure that it has the legal capacity to enter into the contract; special rules could apply to such bodies that do not apply to private entities. In addition, it is important to ensure that the individual or individuals signing on behalf of the official body have authority to do so.<sup>8</sup>

## 1.6 Importance of a written contract

We have so far been looking at some of the most important features of contracts, and have seen that contracts may vary widely in type, from a very simple oral contract to a highly complex written document. We should say something now about the importance of using a written contract when engaged on a construction project of any size or complexity.

In many cases, parties will take one of the standard forms of contract as a starting point; such contracts will usually set out in some detail the work to be done under the contract, the price to be paid or basis for calculating sums due and generally the rights and responsibilities of the parties to the project.

### 1.6.1 Clarity and certainty

Perhaps the most important reason for having such a contract is to try as far as possible to ensure clarity and certainty in the parties' respective rights and obligations. As well as the main responsibilities for design, fabrication and the like, these will include such other obligations as provision of performance guarantees and insurance against damage to the works and injury to persons.

The contract should also provide for as many of the circumstances which might arise during a project as possible. These will typically include variations to the works; delay due to unforeseeable physical conditions on site; delay due to adverse weather conditions; testing of the works; and termination of the contract in the event of the default or insolvency of a party, including the financial and other consequences of such a termination.

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<sup>7</sup> This doctrine may be refined in some legal systems to prevent injustice to an innocent third party without knowledge of any lack of capacity; but a prudent party will take steps to ensure that the contract he envisages is one which the corporate party has capacity to enter into.

<sup>8</sup> Also relevant, when dealing with a government or government agency, is whether it can claim sovereign immunity in respect of its activities, including participation in any legal proceedings.

## 1.6.2 Procedures

As well as setting out the parties' rights and obligations, the construction contract should also provide the parties with procedures to be followed in certain cases or to obtain a certain result. One important aspect of the procedural side of contracts such as FIDIC is that they set out rules for the notification and processing of claims. Thus clause 20.1 of the FIDIC contracts provides that a contractor must notify a claim within 28 days of the time when he became aware or ought to have become aware of the facts giving rise to the claim.<sup>9</sup> This enables the employer to become aware of the claim at an early stage. The FIDIC forms provide a rather less rigorous procedure for employers' claims.<sup>10</sup>

## 1.6.3 Risk allocation

A properly written construction contract will allocate the risk of loss or damage occurring to the project clearly and completely, so that each party knows precisely which risks he bears and what the consequences are should a risk eventuate.

When two or more parties engage in a construction project, there are many different kinds of risk of which each will need to be aware. These include the following:

- There are *design-related* risks. Does the design for critical parts of the plant or structure, for example, achieve the performance expected? Is it efficient and workable?
- There are risks associated with *site investigations*: geotechnical investigations, for example, where tunnelling or extensive excavation work is required.
- There are risks associated with the *construction process*: the availability of resources and materials, on time, in the right quantities and of the right quality; encountering unexpectedly poor ground conditions even where adequate site investigations have been carried out; the occurrence of unforeseeable events such as bad weather, flooding, and the risk of injury to persons and damage to property; and industrial and political risks, of labour disputes, war, or other civil disturbance.
- There are *financial* risks. Will the employer or owner or developer pay when the work-stages are achieved? What happens if the contractor becomes insolvent before the work is completed?

Only if risk is clearly and completely allocated will each party be able to manage risk efficiently, taking steps to protect against the consequences

<sup>9</sup> See pp. 74–75 for a fuller account of the claims procedure under the FIDIC forms.

<sup>10</sup> See clause 2.5, but here again the employer is required to notify a claim (such as for an extension of a contractual defects notification period) at an earlier stage. The contractor is then in a better position to investigate the claim.

should the risk eventuate. Risk allocation is therefore an essential element of the efficient management of the project itself.

## 1.7 What should a properly written construction contract cover?

We will look shortly at how risk may be allocated in more detail. But let us look now at the main areas or topics which any properly written construction contract for a project of any size should cover. This will enable us to put much of what we have discussed so far in context.

The terms of a construction contract should at least deal clearly with the following areas:

- Identification of the *parties* to the contract: who (or what legal entity) exactly is the contractor, and who (or what) the employer?
- Identification of the *work or services* to be provided: in which documents or sets of documents are these defined? What *priority* of contract documents should be agreed upon in the event of inconsistencies between the contract documents (often highly complex and various)?
- How is the employer to ensure that what is provided *complies* with the contract? Clear provision has to be made for *inspection* of the works, before they are covered up and generally throughout the project; for the *rectification* of defects, both during the works and after they are taken over. Crucially, provision needs to be made for suitable *testing* of the works, to ensure that the performance and other requirements for the structure are satisfied; and a clear procedure and timetable for *taking over* and *acceptance* of the work by the employer must be spelled out.
- Whatever the contract, the *time or times* at which the contractor is expected to complete must be defined. This will include the date of *commencement* of the works or services; the requirements for the *programme* (what it should show and how it is to be revised and updated); provision for *progress reports* and monitoring of progress throughout the project; the contract *completion date* for the work or sections and the *consequences of delay* beyond that date for which no extension of time is granted.
- *Price and payment*: the price and, more generally, the basis of payment of the contractor (fixed price, remeasurement or other basis) must be defined. The amount and timing of payments (on achieving milestones in a payment schedule, for example, or monthly or other periodic payments), and the procedures for applying for and obtaining payments (employer to pay on engineer's certificate, for example) have to be defined; also the remedies available to the contractor for delayed payment and his entitlement to advance payments.
- Responsibility for *damage* to the works and *injury* to persons needs to be defined, including obligations to insure; as does *intellectual property* rights and *ownership* of plant, equipment and materials used or intended for the works.

- *Environmental* and *social* matters need to be covered, such as labour protection and compliance with local anti-pollution regulations.
- The consequences of any *failure to perform* a party's obligations need to be spelled out. These include delay damages but cover other defaults. The parties' rights to *suspend the works* or *terminate the contract* in the event of default by the other (and also the availability of termination or suspension by the employer for 'convenience', or otherwise than for contractor default) need to be specified.
- *Security* for performance of the parties' obligations, including retention and performance guarantees and bonds, needs to be defined.
- The effect of '*force majeure*' or exceptional and overwhelming events preventing performance for which neither party is responsible should be defined. When can a party be *excused* performance in such an event, for how long and with what effect?
- So-called '*boilerplate*' or standard clauses need to be completed. These cover such matters as the governing law of the contract, the agreed language of the contract and the notice provisions of the contract (whether all notices need to be in writing, for example, or whether they can be given by e-mail).
- Also important are procedures for one or the other party to make a *claim* against the other, and how claims may be determined when made. How are *disputes* to be resolved; what steps, if any, need to be taken before a formal and binding process, such as court or arbitration, is resorted to?

### 1.7.1 FIDIC contracts

The FIDIC construction contracts cover all the above topics and do so largely under the same clause numbers. It will be helpful to see how they deal with the important areas of *programme*, *delays* and *extensions of time*.

The three main FIDIC construction forms<sup>11</sup> deal with these topics in largely the same way, but with notable differences when it comes to the grounds on which a contractor might obtain an extension of time.

<sup>11</sup> These are the 'Red', 'Yellow' and 'Silver' Books. The FIDIC contracts have short-form or nicknames, taken from the colour of their respective covers. The 'Red Book' (with its red cover) is the *Conditions of Contract for Construction (for Building and Engineering Works Designed by the Employer)*, first edition 1999. This, as we will see shortly, is the most traditional of the FIDIC forms in having the employer responsible for all or most of the design and an important role for an administering engineer. The other two main FIDIC forms, although very different in important respects, are both design-build contracts, in which the contractor takes responsibility for all or most of the design. These are the 'Yellow Book', or *Conditions of Contract for Plant and Design-Build (for Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor)*, first edition 1999, and the 'Silver Book', the *Conditions of Contract for EPC/Turnkey Projects*, first edition 1999. See pp. 22–26 for a fuller description of these contract forms and how their main features compare and contrast. In Part Two of this Handbook we will consider these two design-build forms more systematically.



## 1.7.2 Programme

Clause 8 of the contracts provides that the commencement date for the works must be notified to the contractor at least seven days beforehand unless otherwise stated in the contract. After receiving the instruction the contractor must proceed without delay and must complete the whole of the works and any section within the time for completion of the works or that section (Clauses 8.1, 8.2).

The contractor must submit to the contract engineer (or, in the case of the Silver Book, the employer or his representative) a programme within 28 days after receiving the instruction to commence.

The programme is important in any construction project for at least these two reasons:

- it is the basis for monitoring the contractor's progress and planning project activities; and
- it becomes a base reference for the relevant decision-maker (engineer or employer) to determine the contractor's claims for extensions of time for completion arising from delaying events.

Broadly speaking, in FIDIC contracts the programme has to show:

- the order of execution of the works, including the anticipated timing of each major stage of the works;
- the sequencing of the works;
- the periods for review of contractor's documents;
- the sequence and timing of inspections and tests.

Whatever the specific contract, generally the programme should show that the works will be completed within the time for completion and should identify the critical path. In the FIDIC contracts, the programme should also be accompanied by a supporting report (or method statement) setting out how the contractor intends to execute the works and the resources he intends to use. This is a matter of good practice which should probably apply whatever the contract.

An important feature of FIDIC contracts is that the contractor is required to give advance notice or early warning to the engineer or employer of potential events which might adversely affect or delay the works. This requirement has a far wider application than just in relation to the programme. The purpose is to enable the contractor and engineer or employer to work together to minimise the effects of the potential delaying event. The notice gives the engineer or employer the opportunity to take action to overcome the problem before the contractor incurs delay or additional cost.

## 1.7.3 Delays and extensions of time

The FIDIC contracts list a number of events or circumstances which, if they delay the completion of the works, will entitle the contractor to an extension to the contract completion date. If any of these delaying events or circumstances

occurs, the contractor is entitled to an extension of the time for completion provided he claims it in accordance with the time limits and other requirements of clause 20.1.<sup>12</sup>

The circumstances listed in clause 8.4 of the Yellow and Red Books are:

- variations or in the Red Book other substantial changes in the quantity of an item of work;
- causes of delay giving rise to an entitlement under another sub-clause of the contract;
- exceptionally adverse climatic conditions;
- unforeseeable shortages of personnel or goods caused by epidemic or governmental actions;
- any delay, impediment or prevention caused by or attributable to the employer, the employer's personnel or the employer's other contractors on the site.

In the other main FIDIC construction form, the Silver Book, only the first, second and last of these grounds apply (variations, express mention in another clause of the contract or delays attributable to the employer). This reflects the different approach to contractor risk in the Silver Book, as we will see in some detail shortly.<sup>13</sup>

The FIDIC contracts enable the engineer or employer to take steps to counteract slow progress by the contractor. If he fails to maintain sufficient progress to complete the works by the completion date, or has fallen (or will fall) behind the current programme, other than by reason of one of the causes entitling him to an extension of time, then the engineer or employer can instruct the contractor to submit a revised programme and supporting report describing the revised methods he proposes to adopt, at his risk and cost, to expedite progress and complete on time.

#### 1.7.4 Delay damages

If the contractor fails to complete within the time for completion (after taking account of any entitlement to extensions of time) then he must pay 'delay damages' to the employer. These are to be paid at a rate stated in the contract, and are meant to compensate the employer for being kept out of his plant or other facility for longer than he should have been, by reason of the contractor's default in not completing on time.

To claim the delay damages the employer must give a notice of his claim to the contractor,<sup>14</sup> and the engineer or employer should then make a determination or decision about the claim (unless the contractor agrees it).

<sup>12</sup> See pp. 74–75 for the clause 20.1 (contractor's claims) procedure.

<sup>13</sup> See pp. 22–26. As we shall also see, in the Silver Book no additional time is permitted for unforeseeable physical conditions (whereas it is under clause 4.12 of the Yellow and Red Books) or, except in limited circumstances, for errors or omissions in the data or information provided by the employer.

<sup>14</sup> Clause 2.5; see pp. 38–39.

The rate of delay damages needs to be agreed with some care. In some legal systems, a distinction is drawn between 'liquidated damages' (an agreed daily rate to compensate the employer for the loss which is likely to result to him from delay to the works) and 'penalties'. 'Penalties' are not enforceable whereas liquidated damages are regarded as valid compensation for delay.

If the governing law of the contract draws such a distinction then an excessive rate of delay damages in the FIDIC (or other) contract may not be valid. In that event, the employer would have to prove to the satisfaction of the relevant court or arbitration tribunal what actual loss or damage he incurred as a result of the delay; something which might be both difficult to establish on the evidence and certainly time-consuming and expensive.

## 1.8 Tailoring the contract

Before we turn in more detail to risk, we should note one important point about drafting construction contracts using a standard form like FIDIC.

The 'normal' or standard terms in FIDIC contracts are called *general conditions*. They make up the bulk of the printed FIDIC form but, as with any contract, it will be necessary for the parties to be able to alter or amend these to suit their particular project. Wherever the parties use a standard form contract, they will need to be able to make such changes or amendments (either by deletion or addition). The construction contract should therefore provide a means by which this can be done.

In the FIDIC contracts this provision is made by use of *particular conditions*. The particular conditions:

- enable the parties to complete certain clauses in the general conditions (the 'boilerplate' clauses) by adding project-specific details, such as we have just considered (governing law; the commencement date; the ruling language; and a host of other details relevant to the specific project); and
- enable the parties to change the terms of the general conditions to reflect their particular bargain or agreements about the project.

At the back of each of the FIDIC Books guidance is provided on the preparation of particular conditions, including model wording for various different options and project needs.<sup>15</sup>

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<sup>15</sup> The standard, or general, conditions cannot be directly amended in a FIDIC contract without first obtaining a licence from FIDIC to do so.

# 2 Risk

## 2.1 How risk may be allocated

The standard form contracts common in international projects contain detailed terms allocating risk. The FIDIC forms provide instructive examples of this. In what follows we shall try to bring out how differently risk might be allocated in different types of project by comparing and contrasting the Red and Yellow FIDIC Books with the Silver Book. This comparison is helped by the fact that, as noted above, the Books largely cover the same topics under the same clauses or sub-clauses.<sup>1</sup>

The Red and Yellow Books are recommended where there is a basically conventional project structure of employer, contractor and engineer; the differences between the two Books arise mainly from the fact that, with the Yellow Book, the contractor undertakes most of the design. In such an arrangement, risk is allocated to strike a balance between employer and contractor, taking into account the extent to which each is responsible for design and other activities, and also each party's ability to control or prevent particular risks.

The FIDIC Silver Book, on the other hand, is recommended for projects of a very different type from the conventional. These are 'turnkey' projects in which there is no engineer; where the contractor undertakes substantially all the design, procurement and construction; and where the overriding need is to ensure completion on time and to budget.<sup>2</sup> The traditional balanced approach to risk does not sit well with such projects, where the contractor is

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<sup>1</sup> The FIDIC contracts all contain 20 clauses whose sub-clauses often deal with the same topics, so that it is relatively easy to compare (and contrast) how the different Books deal with the same topic.

<sup>2</sup> Here, the contractor provides a complete package, so that the employer or project promoter has a structure 'at the turn of a key'. Such projects are often privately financed, although governments or government agencies also undertake projects on this basis.

expected to (and prices for) undertaking a much wider range of risks. With turnkey structures increasingly the norm for major projects internationally, it is particularly important to understand how the construction contract at the heart of such projects typically reallocates risk to the parties.

Let us begin, then, by looking more closely at the 'traditional' approach to risk allocation.

## 2.2 The 'traditional' approach to risk

Probably the most traditional or conventional project structure involves an employer who instructs a consultant to design certain work and to administer the contract. The contractor tenders against the designs and specifications prepared by the employer's consultant. If his tender is successful, he enters into a contract by which he undertakes to carry out the works in accordance with those designs and specifications. The engineer or architect acts as the employer's agent and certifies milestone stages and payments in accordance with the terms of the contract, as well as deciding such matters as the contractor's entitlement to extensions of time or additional payment should there be variations, delays or disruption to the work. The contract price will typically be on a firm basis, normally a lump sum, or on the basis of unit prices with provision for re-measurement; provisional sums for items of work which cannot be fixed or defined at the outset might also be included. There will be provision also for assessing the value of any variations duly instructed in accordance with the contract.

The FIDIC Red Book has closely matched this traditional form of project.

The Red Book is recommended for building or engineering works designed by the employer or by his representative, the engineer. The contractor is to construct the works in accordance with a design provided by the employer, although the works could include some elements of contractor-design. The engineer is appointed to carry out traditional roles of administration and certification of the contract, acting as the employer's agent.

The Yellow Book differs from the Red primarily in that the Yellow Book is intended for use where the contractor is responsible for the design of the work. Reviewing earlier editions of the two Books, FIDIC took the view that the decision whether to use the Red or Yellow Book should rest upon which of the parties was mainly responsible for design, rather than the type of work to be carried out. The Red Book, published in its present form in 1999, was developed to be suitable for building and civil and other engineering works designed by the employer or the engineer, and the Yellow Book was to be suitable for plant and for building and engineering work designed by or on behalf of the contractor. In both cases, the engineer was to perform traditional administration and certifying roles.

In the Red and Yellow Books, the contractor usually bears the risk of delay and additional cost, if he is able to control the relevant events. For example,

where physical conditions cause delay or additional cost, the contractor will bear the risk of both if the conditions were reasonably foreseeable; however, if the physical conditions (including ground conditions) were not reasonably foreseeable then the contractor will be entitled (subject to complying with the requirements for making a contractor's claim under clause 20.1) to additional time and cost resulting from the unforeseeable conditions (clause 4.12).

Where damage or delay to the works results from war or civil commotion, on the other hand, under the Red and Yellow Books the employer bears the risk of delay to the contract and additional costs to the contractor, by clause 17.3/4. The contractor is entitled to recover his costs incurred in rectifying damage resulting from war or civil disorder, and to an extension of time if delay has resulted to the contract works. He will not, however, be entitled to any profit on the costs incurred. The balance struck between contractor and employer in this case is that the employer should bear most of the risk, but the contractor should bear some of it by being disallowed any profit on actual costs incurred. By contrast, if the employer uses or occupies any part of the permanent works, except as may be specified in the contract, then by clause 17.3 (f) the contractor is entitled to reasonable profit on actual costs incurred where he has suffered cost consequences as a result of the employer's use or occupation of the permanent works, and to an extension of time to the extent that he has suffered a delay.

Many people regard the Red and Yellow Books as seeking to strike a fair balance of risk between employer and contractor. The contractor benefits because he need not price for risks which are hard to evaluate at the outset of the project; while the employer enjoys a lower contract price, and incurs extra cost only where certain defined risk-events actually occur. This even-handed approach to risk was followed in earlier editions of the Red and Yellow Books, and maintained in the current (1999) edition.<sup>3</sup>

However, with the increasing importance of privately-financed turnkey projects driven by the need to satisfy the demands of financing institutions, such as banks, for certainty of cost, the more balanced approach of the traditional forms was no longer suitable. Before the introduction of the Silver Book it was not unusual for the parties to a turnkey project who wished to use or adapt a FIDIC form simply to modify the terms of the Yellow Book by placing on the contractor all the risks which had been divided between contractor and employer. This was felt to be unsatisfactory, and the FIDIC Silver Book was the result.

We shall shortly be looking in more detail at the Silver Book, but first we should describe the kinds of project for which it was intended.

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<sup>3</sup> In May 2005, FIDIC issued a new version of the Red Book, following consultation with development banks to ensure harmonisation of bidding documents in projects financed by them. The FIDIC *Conditions of Contract for Construction (for Building and Engineering Works Designed by the Employer), Multilateral Development Banks Harmonised Edition* is for use under licence by participating banks and (though an important contract form) is therefore not in general use. It was revised in 2006 and 2010.

## 2.3 EPC/turnkey projects

The Silver Book is intended to provide conditions of contract for 'EPC/turnkey projects'. 'EPC' stands for 'Engineer-Procure-Construct', and indicates the range of services the EPC contractor is meant to perform. The contractor in such a project is responsible for the engineering design work to meet certain performance requirements, for the full range of procurement for the project, and for the construction work. EPC contracts are 'turnkey' contracts in that the contractor provides a complete package, so that the employer or project promoter has a structure 'at the turn of a key'.

## 2.4 BOT-type projects

EPC contracts are often at the heart of a type of project structure called 'Build-Operate-Transfer' (BOT), or similar titles such as 'Build-Own-Operate-Transfer'. These kinds of project typically involve the private sector designing some piece of infrastructure, financing its construction and then operating and maintaining it over a period of time, perhaps as long as 20 or 30 years. This period is called the 'concession period', because it is the period during which the private sector promoters will be able to operate the structure at a profit, before handing it over or legally transferring it to the government or official agency from whom the concession was obtained.

The essential idea behind a BOT-type project is that the government or an official agency in a country wishes to have a plant or other structure built and operating, but does not wish to or cannot finance such a project itself. It therefore agrees with private sector parties that, in return for being able to operate the plant, including the right to sell outputs from it (such as power) at a certain price and volume over a certain period, the private sector will build and render the plant operational. After the end of the period of operation, the government will finally obtain ownership or control of the plant. The government therefore has its plant at no direct cost to itself, while the private sector has had the profitable use of the plant for a sufficiently long period to justify the cost and risk of building and setting it up.

### 2.4.1 Parties to a BOT-type project

BOT is therefore a type of financing for heavy construction projects, particularly infrastructure projects. The parties to such a project will normally include the following entities.

- A *government or government agency*. This party will grant the concession, or rights to construct, own and operate the plant or facility; it will grant the necessary lease or other right to occupy and use the land on which the plant is to be constructed; and often it will purchase all or some of the services or output provided by the plant, by entering into a separate

agreement called an 'offtake' agreement. The government agency will be the party which usually invites tenders from interested parties for the project, and will then assess the tenders received against performance and other requirements. Since the government or official agency is to be a (primary) party to the project it is essential that every other party to the project is certain that the agency or official body has the legal capacity to enter into the relevant contracts and other transactions involved in establishing the project. This will require specialist legal advice and guidance.

- The *project company* set up by the promoters (or 'sponsors') of the project as the vehicle for implementing the project, including entering into the offtake agreement and construction contract. The promoters will prepare the tender for the project detailing proposals for the design, construction, operation and financing of the project. They will typically be a consortium or grouping, consisting of a financing institution or syndicate of such institutions (typically a bank or syndicate of banks); an operator (to run the facility when it is built); a construction contractor (often a construction group); and sometimes various other interests.
- The *construction contractor* is the party responsible for designing, constructing and, often, commissioning the plant. It has to complete the project to budget, on time and to specification. The design provided by the construction contractor may be based upon a fairly general performance requirement and other requirements of the promoters; for example, the promoters may say that they require a coke calcination plant with a capacity of 500,000 MTPA to satisfy such-and-such specified requirements and national regulations and controls. There will therefore have to be effective communication between the promoters' technical team and that of the construction contractor. Moreover, the contractor will need to price for the work to take into account the fact that it will be expected to keep within the lump sum fixed price that is nearly always expected. The promoters will be working to strict budgetary constraints and will expect near-absolute certainty as to cost and time, or programme.
- The *operator* will be a company or group which begins its work after the plant has been commissioned and is up and running. The operator bears relatively little risk, and will normally sign an operation contract to run and maintain the plant for a substantial period of time. Operators may themselves be investors in the project.<sup>4</sup>

<sup>4</sup> In 2008 FIDIC published a new addition to the suite, the *Conditions of Contract for Design, Build and Operate Projects*, called the Gold Book (or 'DBO contract'). The form combines in a single contract both a design and build obligation and a long-term operation commitment. In response to demand, FIDIC's aim has been to increase co-ordination and performance by enabling a single contract to be awarded to a single contracting entity, rather than having separate contracts for design-build and operation. The general conditions are based on a design-build-operate project sequence and assume a 20 year operation period. The Gold Book assumes a new build (as opposed to refurbishment of existing plant) and a maintenance period of 20 years. In its allocation of risk to the contractor it is, broadly speaking, closer to the Yellow Book than the Silver.



- *Financial institutions* are a key party or parties to a typical BOT project. They will usually be groups of banks or lending institutions rather than individual banks or institutions, in order to spread the financial risk. The banks will have very considerable weight in the negotiations leading up to the project agreements and may be in a position to dictate many of the terms of the other contracts involved, including the construction contract. All aspects of the project will need to be acceptable to them before they will put up the necessary funds. The banks will typically secure their lending against the plant itself.
- *Other parties* could be investors in the project, putting up finance towards it in return for a share of the profits of the plant once it is operating; there will also be lawyers, insurers, suppliers, consultants and others involved in the project at various stages and in various ways, most usually advising or assisting one or other of the parties in the many complex issues that will inevitably arise.

## 2.4.2 Contracts involved in a BOT-type project

The various complicated arrangements that go to make up a BOT-type project are reflected in the no less complicated range of contracts involved.

### **The construction contract**

Of particular interest to us is the *construction contract* between the project company and the construction contractor. There will typically be a detailed construction contract, such as the FIDIC Silver Book, setting out the responsibilities of each party, including the risks which each will be expected to bear.

One very important type of risk for the construction contractor is that of delay to the project and, in particular, delay resulting from matters over which he has no control. Because BOT projects typically involve complex heavy engineering construction work over a long period of time, a delay will almost always have a significant cost consequence. But unlike the more traditional contracts, the construction contractor in a BOT project will typically bear many of the risks for delay in construction even when he cannot control such risks. Some construction contracts, such as the FIDIC Silver Book, give the contractor a right to an extension of time for certain specified events, such as war or civil commotion, over which he has no control; but the range of these events is very limited.

Although risk allocation in any contract is a matter for individual negotiation, and it is always possible for the parties to negotiate their own particular allocation of risk, the huge constraints of time and budget that apply in a BOT project will usually severely limit the extent to which the construction contractor will be able to obtain more time and/or money for delays.

Another type of risk is that of *underperformance* of the plant or other facility. This will nearly always have serious costs consequences.

In any negotiation, whether over risk allocation or otherwise, it will be essential for the terms of the construction contract to be related to the terms of the contract between the government agency and the project company. The promoters will normally try to ensure that the construction contract is, as far as possible, 'back-to-back' with the offtake contract so that if, for example, certain construction risks are to be borne by the project company under the construction contract then those risks will also be borne by the government agency under the offtake agreement.

Another feature of BOT construction contracts is that the contractor's liability may be limited: for otherwise the contractor could find itself liable for sums exceeding by many times the value of the contract itself. In the FIDIC Silver Book, the contractor's liability is, subject to certain exceptions, limited to 100% of the contract price.<sup>5</sup> Such a limitation seems in principle to be sensible, since otherwise prudent contractors would be heavily discouraged from tendering for BOT projects.

The following are other important features of the construction contract in a BOT-type project:

- There will need to be detailed provision for what is to happen if, for any specified reason, the contractor's employment under the contract is terminated or the contractor becomes insolvent and incapable of continuing; or if for any other reason the contractor is required to be replaced. Such provision will often include procedures for another contractor to 'step into' the project, and the terms of the offtake and operation agreements will need to allow for this accordingly.
- Changes or variations to the work or the scope of the work will normally be provided for specifically in the construction contract. These will normally originate in the government or official agency, whose requirements might change: for example, the agency might wish to increase the output capacity of a particular part of the plant, so necessitating additional and varied design work.

### **The offtake agreement**

The other contract of particular interest to us in a BOT project is the offtake agreement between the government or official agency and the project company by which the government agency agrees to purchase the outputs or services of the plant or structure at a certain price and volume over a certain period.

This agreement will contain performance obligations; the company will warrant, or undertake, that the outputs will be of a specified quantity and quality and be delivered at certain required intervals. There will normally be penalties for failure to comply with the warranted performance, which might include a fixed financial penalty; this could be in addition to other rights to seek compensation.

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<sup>5</sup> See clause 17.6; there is similar provision in the Red and Yellow Books.

## 2.5 The FIDIC Silver Book

Although we have mentioned it mainly in connection with BOT-type projects, the FIDIC Silver Book is a free-standing EPC/tumkey contract which can be used in other situations as well. In whatever type of project it is used, however, its terms will need to be adjusted to take into account the terms of the other contracts involved in the project; just as we saw how the EPC contract in a BOT project had to be made back-to-back with the project company's obligations to the government agency under the offtake agreement.

The following are important features of the Silver Book:

- As with other EPC contracts, there is no engineer in the Silver Book, although the employer can (and often does) appoint a representative in order to facilitate communications with the contractor. All claims, whether contractor's or employer's claims, are submitted to the employer, not to the engineer, for agreement or determination in accordance with the terms of the contract. If the contractor is dissatisfied with the employer's decision he can challenge it by referring it to the Dispute Adjudication Board constituted under the contract.<sup>6</sup> In practice, the employer will appoint an engineer to consider any claims and advise the employer, although he is answerable to the employer only.
- The contractor has full responsibility for all features of the work. The employer will state its requirements for the completed project in terms of expected performance and prepare a document (the 'Employer's Requirements') against which the contractor will tender.<sup>7</sup> Although the Employer's Requirements may contain detailed technical information and data, these will (with certain very limited exceptions<sup>8</sup>) be a matter for the contractor to verify as part of its design responsibilities. In a BOT project, the Employer's Requirements will usually include any technical requirements contained in the contract between the employer and the government agency.
- The FIDIC guidance advises that the Silver Book should not be used where there is insufficient time or insufficient information for the contractor to examine thoroughly the Employer's Requirements or for it to carry out its design, risk assessment studies and estimating. Further, if the project will involve substantial underground works or works where the contractor is unable to inspect or assess the ground conditions then the risks of encountering unforeseen conditions (borne by the contractor) might be so great that the contractor should consider using another form of contract. However, in a BOT project the issue may at least to some extent be resolved by ensuring that there are suitable back-to-back arrangements with the

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<sup>6</sup> See further pp. 87–90 below.

<sup>7</sup> In the Yellow Book, also a design-build contract, the employer sets out its requirements including performance in Employer's Requirements.

<sup>8</sup> See pp. 24–26 below.

government agency. The agency may be willing to negotiate some relief in certain cases if to do so seems necessary in order to ensure that the best qualified contractor is engaged on the project.

- As with the Red and Yellow Books, the contractor's risks under the Silver Book are limited in that the contractor will not be liable to compensate the employer for any loss of use resulting from a defect in the works, even if that defect arises during the defects liability period under the contract; moreover, the defects liability period may not be extended for more than two years. The contractor's liability is also limited to 100% of the contract price, subject to certain exceptions (see clause 17.6).
- In the Silver Book, the employer is required to make decisions or determinations on various matters if they cannot be agreed with the contractor. If the contractor is dissatisfied with any such decision or determination then he can give a notice to the employer stating his dissatisfaction within 14 days of receiving it. If he does so, the contractor need not comply with the determination, but either party can then refer their dispute about it to the Dispute Adjudication Board under clause 20.4 of the contract conditions.<sup>9</sup>
- The Silver Book, as with the other FIDIC Books, goes some way to mitigating the financial risks of the project by requiring the contractor to provide a performance security<sup>10</sup> and the employer an indemnity in respect of any claim under the performance security which the employer was not entitled to make. There are detailed provisions relating to the provision of such security. All the FIDIC Books provide drafts of a range of securities. For his part, the employer under all the FIDIC forms is required to provide, on request, evidence to the contractor that he has in place appropriate financial arrangements to enable him to discharge his payment obligations under the contract (clause 2.4).
- The FIDIC Books all provide for a regime of testing at key stages of the works and for a more general right (clause 7) to inspect and test as the works proceed. The principal provision in the Red, Yellow and Silver Books is clause 9, which sets out a scheme of testing on substantial completion of the works and prior to the employer taking over; the contract will normally contain more detailed and specific test requirements in the particular conditions.
- Payment of the contractor under the Silver Book is based upon the submission by the contractor of a monthly or other periodic statement, with supporting documents, including a progress report as required under

<sup>9</sup> See clause 3.5. This differs from the position under the Red and Yellow Books, where the contractor and employer are obliged to comply with the determination of the engineer unless and until it is revised under clause 20 of the contract conditions.

<sup>10</sup> In outline, a performance security is an undertaking by a bank or insurance company to the employer at the request of the contractor to pay the employer up to a certain amount in respect of breaches of the contractor's obligations under the contract. Normally, the bank or insurance company must pay up to the specified amount on the employer's written demand, within the period of validity of the security without proof of the breach or loss suffered. Each performance security should, however, be examined for its own particular terms, and suitable legal advice obtained concerning such securities.

clause 4.21. Payments are normally made according to a schedule of payments based on certain milestones being achieved.

- Other clauses of the contract cover termination by employer or contractor (clauses 15 and 16); specific risks and responsibilities, in particular obligations to indemnify one party by the other in respect of claims for personal injury or damage to property and in relation to care of the works (clause 17); intellectual property and industrial rights (clause 17); and the parties' obligations to insure (clause 18).

## 2.6 Particular risks: The unforeseen and design

We can illustrate the contrast in risk allocation between the Silver and the other FIDIC Books by looking in more detail at some specific and important risk areas: *unforeseeable physical (often ground) conditions*, and *design responsibility*, including errors or deficiencies in details and data.

### 2.6.1 Unforeseeable physical conditions

In the Silver Book, the contractor bears the risk of unforeseen difficulties unless this is otherwise stated in the contract. By clause 4.12, unless the contract states otherwise:

- the contractor is to be taken to have obtained all necessary information as to risks, contingencies and other circumstances which may influence or affect the works;
- by signing the contract the contractor accepts total responsibility for having foreseen all difficulties and costs of successfully completing the works; and
- the contract price is not to be adjusted to take account of any unforeseen difficulties or costs.

The risk borne by the contractor here is therefore total, unless the contract (by the particular conditions) expressly permits an additional payment. Equally, the contractor is not permitted an extension to the contract completion date if he encounters physical difficulties (clause 8.4). By contrast, under clause 4.12 of the Yellow and Red Books, the contractor could obtain an extension of time and additional payment (cost but not profit) if he encounters physical conditions which were unforeseeable in the sense that no experienced contractor at the date of tender could reasonably be expected to have foreseen them. He is also permitted an extension of time by clause 8.4.

### 2.6.2 Design responsibility

The design-build forms impose on the Contractor the obligation to 'design, execute and complete the works in accordance with the Contract' so that, when complete, the Works will be 'fit for the purposes for which [they] are intended as

defined in the Contract' (clause 4.1). We will look in more detail at what is meant by 'fit for purpose', and some of the difficulties that can arise in practice, in Part II.

The contractor gives the same undertaking as to compliance with the contract documents (and applicable laws – clause 5.3).

Under the Silver Book, however, the contractor is responsible even where the Employer's Requirements contain errors and even where the contractor could not reasonably have been expected to detect them, with certain very limited exceptions.

We see this from clause 5.1 of the Silver Book, by which the contractor is deemed to have scrutinised, prior to the Base Date,<sup>11</sup> the Employer's Requirements and to be responsible for the design of the works and for the accuracy of the Employer's Requirements (including design criteria and calculations) with certain limited exceptions.

Clause 5.1 provides that the employer:

- is not to be responsible for any error, inaccuracy or omission of any kind in the Employer's Requirements (as originally included in the contract); and
- is not to be taken to have given any representation of accuracy or completeness of any data or information,
- except as stated in four specific situations listed in clause 5.1 (which we will look at very shortly).

Further, any data or information received by the contractor, from the employer or otherwise, will not relieve the contractor of his responsibility for the design and execution of the works.

Thus, even if the employer provides the contractor with data or other information, and the contractor reasonably relies on it in designing the works, the contractor remains responsible for any error or inaccuracy in that information or those data.

The exceptions to the contractor's otherwise comprehensive responsibility are stated in clause 5.1 sub-paragraphs (a) to (d). They are:

- (a) portions, data and information stated to be the employer's responsibility in the contract;
- (b) definitions of intended purposes of the works or any part of the works;
- (c) criteria for testing and performance of the completed works;
- (d) portions, data or information which cannot be verified by the contractor, except as otherwise stated in the contract.

The interpretation of these exceptions could be problematic: for example, it might be difficult to say for sure whether some data or information could not be verified by the contractor. But it is clear that the contract intends the range of exceptions to the contractor's comprehensive design responsibility to be very limited.

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<sup>11</sup> That is, 28 days before the latest date for submission of tender.

The corresponding provisions of the Yellow Book (clause 5.1) do not contain a similar responsibility for the accuracy of the Employer's Requirements. If any errors should exist which an experienced contractor exercising due care would not have discovered when scrutinising the Employer's Requirements before commencing the works then the contractor is entitled to additional time and payment (including profit) in the event of any resulting delay or additional cost. This covers a potentially wide range of cases; against the Silver Book's greater certainty, the Yellow Book inclines to a more even-handed approach to risk.

We set out in Table 2.1 below a summary of the main differences between the Silver Book and the Yellow Book on contractor risk in relation to design and to unforeseen physical conditions.<sup>12</sup>

**Table 2.1 The FIDIC Silver and Yellow Books: Contractor risk**

Risk	Silver Book	Yellow Book
Unforeseeable difficulties/ physical conditions	No extension of time or additional payment for Contractor unless otherwise stated in contract (cl 4.12).	Extension of time and additional payment (but not profit) if conditions were 'Unforeseeable' (in that not reasonably foreseeable by an experienced by the date of tender – cl 1.1.6.8) (cl 4.12).
'Operations of the forces of Nature'	Not a defined Employer's Risk under cl 17.3: no extension of time or additional payment unless specifically provided for.	A defined Employer's Risk under cl 17.3 (h). Additional time and payment (but not profit) if the event was Unforeseeable (in the above sense) or was one against which an experienced contractor could not reasonably have been expected to have taken adequate precautions. Yes (cl 4.1)
Design Responsibility: Must the design, execute and complete the works in accordance with the contract so that when completed the works will be fit for the purposes for which they were intended as defined in the Contract?	Yes (cl 4.1)	Yes (cl 4.1)
Errors in Employer's Requirements	No additional time or payment for unless an exception within cl 5.1 (a)–(d) applies	Additional time and payment (plus reasonable profit) if the error was such that an experienced contractor exercising due care would have discovered the error when scrutinising the ER (cl 1.9).

<sup>12</sup> We have included in this table how the two Books deal with a related head of risk, 'Operations of the forces of Nature'. These are defined in clause 17 of the Yellow Book as 'any operation of the forces of nature which is Unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions'.

# 3

## Types of Construction Contract

We have been looking so far at the different ways in which risk is allocated in traditional and in turnkey projects and contrasting in particular the ‘balanced’ approach to risk in the FIDIC Red and Yellow Books with the ‘one-sided’ risk profile of the Silver Book. We suggested that these different risk allocations are a consequence of the very different dynamics applying to turnkey-type projects, in which the financial pressures involved operate to make achieving performance on time and to budget paramount.

### 3.1 Lump sum contracts

In keeping with these priorities, the construction contract in an EPC/turnkey project is typically a lump sum, fixed price contract: that is, a contract in which the price is fixed at the outset and stated as a single sum, albeit that it may be, and usually is, payable in instalments as the work progresses. There may, as we have seen with the Silver Book, be provisions in the contract for payment of additional sums in certain defined circumstances, but the contract price will be a fixed lump sum.

Fixed-price lump sum contracts are not confined to EPC or turnkey projects. They can be used where the works are designed by or on behalf of an employer, or where the contractor designs all or most of the work without being an EPC contractor. Fixed-price lump sum contracts tend to be used where the employer or owner wishes to have maximum certainty of cost at the outset and where the contractor is prepared to agree a fixed price because the works have been defined, either by himself or others, with sufficient certainty at tender stage and he has been able to investigate (and allow in his pricing for) relevant risk factors.

As well as fixed-price lump sum contracts, there may be contracts that specify a lump sum which is not fixed in advance but is to be determined only



after the work has been measured on completion. In many projects in which the contractor is asked to tender on the basis of specifications, drawings and a bill of quantities the actual price will be determined when the work has been measured after completion. The main advantage of this for the employer is that it enables work to begin at an earlier stage than the detailed construction stage, and allows for considerable room for variations in the quantities actually required (as against those estimated in the bill of quantities). In such a project, the unit prices for the quantities are typically fixed and stated in the contractor's tender.

The main disadvantage of such a remeasurement type of contract from the employer's point of view is that there is less certainty of eventual project cost. On the other hand, the contractor will have less need to inflate his price by building into it excessive contingencies. In this type of contract, the employer trades off an earlier start to the work with perhaps a lower initial price against the risk of greater actual cost when the project is completed.

Lump sum contracts are, therefore, of different kinds. They might be fixed-price contracts or subject to remeasurement; they might be used where the contractor is responsible for design; and also where he tenders against designs prepared by others. Each case represents a different combination of risk and advantage to the employer and the contractor.

### **3.2 Prime cost or reimbursable contracts**

In a prime cost, or reimbursable, contract there is no price at all stated in the contract. Instead, the contractor is reimbursed the expenditure he actually incurs on materials, plant and labour and gets a further sum to cover his overheads and profit. This further sum can be a percentage of the costs incurred or a fixed fee. The employer in this kind of contract obviously runs a substantial risk of incurring higher than budgeted project costs; the main advantage or trade-off from his point of view is that the contractor can start work without delay.

In practice, therefore, the employer will only enter into a reimbursable contract where the time available is so short, but the profit potential so great, that the financial risk is worth taking. From the contractor's point of view, there is no risk of underpricing at the outset but there is a risk that the project could become unprofitable for him if, perhaps for reasons beyond the contractor's control, it continues for too long or involves diverting resources from other, more profitable projects.

### **3.3 Unit price contracts**

A variant of the prime cost or reimbursable type of contract is the unit price contract. Here, there is some control over cost because the parties agree on the rates which will apply to the work even though there is no contract sum.

This type of contract might be contemplated where there is enough definition about the work to enable schedules to be prepared relating to the materials, plant and labour required for the project but, for reasons of time or otherwise, there are no specifications, drawings or bills of quantities.

The advantages of reimbursable and unit price contracts from the employer's point of view are that: the work can begin without delay; there is considerable flexibility in making changes in the work; and the employer can exercise a high degree of control over it. The disadvantages are mainly the risk of cost overrun and the related risks of lack of incentive from the contractor to complete on time or in general to control costs.

### 3.4 Target contracts

Under target contracts, the contractor is set certain targets of cost and time and paid an incentive for achieving them; and sometimes also a bonus for exceeding them. Quite often, a target contract arises when a contractor starts out on a reimbursable basis but, as the work progresses, it becomes possible for the parties to agree targets and rewards for achieving them. In this way, the employer gives the contractor a real incentive to keep the costs down and to keep to programme. He also retains a large measure of control over the works, and has the same opportunity for an early start as he would have had with a reimbursable contract.

Where the targets are not met, however, there is a risk of disputes over who was responsible, and it might be difficult to define sufficiently clearly in advance what events or circumstances are to affect the contractor's entitlements. Related to this, the scope for implementing changes to the work once the targets have been agreed upon could be limited.

### 3.5 Which contract?

In negotiating a construction contract, the parties will often take as a starting point one or other of the standard form contracts intended for projects of the type on which they are engaged. We have already seen how the FIDIC Silver Book was introduced in order to accommodate privately-funded, fixed-budget turnkey projects; and parties engaged on projects of that broad type will often be inclined to use that form as the starting point for the negotiation of contract terms. In other kinds of project, adaptations of other forms might be used; where the employer's consultant is to do all or most of the design in a civil engineering project, for example, a form such as the FIDIC Red Book might be used as the starting point.

Whatever the standard form used, it will nearly always need to be tailored or adapted to the circumstances of the particular project. Executed contracts in projects of any size nearly always contain schedules providing for the

deletion or modification of standard terms or for additional terms covering particular aspects of the project. Some standard forms try to simplify this process by providing alternative clauses, to be selected in light of the particular choices or agreements reached between the parties; and even provide guidance as to their use. Again, FIDIC provides a useful example of this. The FIDIC Books provide for the parties to write particular conditions for their contract depending on whether, for example, they wish to have a lump sum basis of payment apply or a remeasurement basis, and give guidance on these alternatives.

## Part II

# 4

## The FIDIC Design-Build Contracts

In Chapter 1 of this Handbook we considered (in Section 1.1.7) the main areas or topics which any properly-written construction contract needs to cover, and we saw how the FIDIC contracts dealt with programme, delays and extensions of time. These contracts also illustrate how differently risk might be allocated between employer and contractor in international projects.

The FIDIC forms provide a useful illustration of many other features of international construction contracts and they are probably the most widely used of the available standard forms.

So let us now look more systematically at some of the other topics dealt with by the FIDIC contracts, and in particular the two main FIDIC design-build forms, the Yellow and Silver Books. They will be our focus because design-build contracting, in which the contractor takes responsibility for all or most of the design, is increasingly the norm in international projects.<sup>1</sup>

We will now discuss the following:

- some key general or 'boilerplate' provisions in the two Books;
- the responsibilities of the Employer and how he can make a claim against the Contractor;
- administration of the contract, including (in the Yellow Book) the Engineer, his role and duties;
- the Contractor's key obligations; how the Contractor can make a claim – and how he cannot afford to delay his initial notice of claim;
- the Contractor's design responsibility in the two Books;
- provision for staff and labour;

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<sup>1</sup> The contracts we refer to in this chapter, unless otherwise indicated, are the Yellow and Silver Books. In fact, however, many of the terms of the Yellow and Silver Books are common to all the FIDIC forms. All the FIDIC construction contracts can be obtained from the FIDIC online bookshop at [www.fidic.org](http://www.fidic.org), either as downloads or in hard copy.

- key provisions about plant, materials and workmanship;
- the main time-related provisions: commencement, delays and suspension;
- the requirements as to testing: the Employer's right to test throughout the project; the Tests on (and after) Completion;
- the Employer's Taking Over of the works and the Defects Notification Period;
- variations to the works and adjustments to the Contract price;
- the key payment provisions – and what happens if payment is delayed;
- termination and suspension of the works by the Employer, and by the Contractor;
- the allocation of specific risks – and the obligation to indemnify; a word on insurance;
- 'force majeure' – what does it mean? And what is the effect of a (genuine) force majeure event?
- disputes and (in outline) the FIDIC roadmap towards resolving them.<sup>2</sup>

## 4.1 Some key general provisions

Clause 1 in the Yellow and Silver Books, as with the other FIDIC forms, contains many important standard or 'boilerplate' provisions. Some of these are described below.

### 4.1.1 Communications: Clause 1.3

This clause sets out rules for contractually important communications such as approvals, notices and determinations. Care will be needed when fixing these details in the Particular Conditions (see Section 1.1.8).

But tucked away in clause 1.3 is a very important provision that should really be more prominent: this is that approvals, certificates, consents and determinations are not to be *unreasonably withheld or delayed*. (In the Yellow Book there are additional requirements about providing copies of certificates and notices.)

This provision has a very wide application, covering each of the many occasions when, under the contracts, some entitlement is certified or claim determined, or notice given, and creates an express contractual right in the recipient of the decision, approval, determination, etc (typically the Contractor) to have that decision made or approval given both (a) without being unreasonably withheld and (b) without unreasonable delay.

Thus there have to be reasonable, objective grounds (valid under the contract) for withholding a decision, approval, etc, which must be given without any unreasonable delay.

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<sup>2</sup> This topic is covered in detail in Part III.

If the Engineer (under the Yellow Book) or the Employer (under the Silver) unreasonably withholds a certificate, or an approval or consent, say, or delays unreasonably in providing it then that will place the Employer in breach of contract and could entitle the Contractor to compensation in addition to any other remedies he might have under the contract.

#### 4.1.2 The law and the language of the contract: Clause 1.4

We will see in Part III the importance of the *governing law* of the contract. But briefly, the governing (or sometimes the ‘proper’ law) of the contract is the body of law according to which the rights and liabilities of the parties are to be determined.

In determining these rights and liabilities the words of the contract must of course be interpreted, and this interpretation depends on the law governing the contract. So the words in clause 4.1 of the FIDIC contracts, for example, requiring the Contractor to design, execute and complete the works so that when completed they are ‘*fit for the purposes for which the Works are intended as defined in the Contract*’, need to be understood or interpreted in accordance with the governing law of the contract.

Clause 1.4 provides for the contract to be governed by the law of the country stated in the Appendix to Tender (Yellow Book) or the Particular Conditions (Silver Book). For example, the contract might be governed by English law, or French law.

Also of great practical importance is the *ruling language* of the contract.

The parties might be using versions of the contract or parts of it in more than one language, but the ruling or prevailing language will (again depending on the Book) be that stated in the Appendix to Tender or Particular Conditions.

The language for day-to-day communications might be different from the ruling language but it is probably a good idea to avoid this. If none is stated then it is to be the same as the ruling language.

#### 4.1.3 The priority of documents: Clause 1.5

The priority of documents is another very important topic. A contract in a project of any size or complexity will typically consist of a great many different documents, ranging from the contract general conditions to the detailed specifications for the performance of the plant or other facility and will include a whole range of Contractor’s documents.

Clause 1.5 provides for these various documents forming the contract to be taken as ‘mutually explanatory of one another’.

This means, in part, that the contract must be read as a whole, with each document taken together with all the others. But where there are inconsistencies between the various documents then the Yellow and Silver Books, in similar ways, provide for which documents are to prevail – that is, for a *hierarchy* of documents.

In the Silver Book, clause 1.5 says that, for the purposes of interpretation, the priority of the documents is to be in accordance with the following sequence:

- (a) the Contract Agreement;
- (b) the Particular Conditions;
- (c) the general conditions;
- (d) the Employer's Requirements;
- (e) the Tender and any other documents forming part of the contract,

The list is similar in clause 1.5 of the Yellow Book, but includes other contract documents (in particular, the Letter of Acceptance, Letter of Tender and Schedules). Broadly speaking, the order of priority is intended to make the more specific documents have priority over the less specific.

But we should emphasise one important practical point. There is a potential trap in (e), above. The words '*... any other documents forming part of the contract*' in this lowest category of documents highlights the need to ensure that any documents that the parties intend to have as high priority but which are not specifically mentioned in any of the other categories (that is, (a)–(d)), are explicitly assigned an appropriate category, by use of suitably worded Particular Conditions. Otherwise, those documents will by default have the lowest priority.

#### 4.1.4 Compliance with laws: Clause 1.13

This very important, and potentially onerous, clause places on the Contractor the obligation, in performing the contract, to comply with all laws, regulations and the like applying to the project.

Unless otherwise stated in the Particular Conditions, the Contractor is to give all notices, pay all taxes, duties and fees, and obtain all permits, licences and approvals, as required by such laws in relation to the design, execution and completion of the works and the remedying of any defects. If he fails to do so then he must indemnify the Employer in respect of any claims the Employer might face from third parties resulting from that failure.

This can in many cases place a heavy burden on the Contractor. It is to some extent mitigated by the requirement, in clause 2.2 of the Books, that if the Contractor so requests the Employer must, if he can, provide reasonable assistance to the Contractor in obtaining copies of relevant local laws and regulations and assisting the Contractor in applying for the necessary permissions, permits, approvals and the like.

As for the Employer, he has the responsibility of having obtained (or, in due course, obtaining) the necessary planning, zoning or similar permissions for the permanent works, and any other permissions which might be described in the Employer's Requirements as having been (or being) obtained by the Employer; and, again, if he fails to do so then the Employer is to indemnify the



Contractor against the consequences. Thus, for example, the Employer must ensure that carrying out the works on the particular site will not be a breach of local planning rules, but it will be for the Contractor to obtain all the necessary licences, permits and approvals for carrying out the works to the site.

## 4.2 The Employer

The Employer's responsibilities (and the steps he must take if he wishes to make a claim against the Contractor) are set out in clause 2.

### 4.2.1 The right of access to, and possession of, the site: Clause 2.1

One of the most important of these responsibilities is to provide the right of access to, and possession of, the site.

The *site* means the places where the permanent works are to be executed and any other places specified in the contract as forming part of the site. Access and possession must be given within the times stated in the contract documents. If no times are stated, they must be given so as to allow the Contractor to proceed without disruption.

The right of *access* which the Employer must give is the legal right to enter and leave the site; that is, it is the Employer's job to make sure the Contractor can come and go at the stated times (if any), or so as to enable him to proceed without disruption.

The right of *possession*, which the Employer must also give, is the legal right to occupy and control the site to the extent necessary for the execution of the works.

It is important to note that neither the right of access nor the right of possession is (unless otherwise provided for under the contract) exclusive to the Contractor: that is, he might have to share these rights with other contractors.

If those other contractors interfere with the works while also accessing and using the site or parts of it, then the Contractor might have the basis for a claim against the Employer under clause 2.3. Under that clause, the Employer is responsible for ensuring that his other contractors on site cooperate with the Contractor to permit him to carry out the relevant works (and the contractor has a similar duty to cooperate under Clause 4.6).

### 4.2.2 Evidence of the Employer's financial arrangements: Clause 2.4

Another important obligation of the Employer is to provide evidence of his financial arrangements.

The Employer must provide reasonable evidence that financial arrangements have been made and are being maintained to enable him to pay the Contractor punctually. He must do so within 28 days after receiving any request from the Contractor. Before making any material change to his arrangements, he must notify the Contractor and give detailed particulars.

It is easy to see why this clause exists. In FIDIC contracts, the Employer is protected against the Contractor's default by performance and other guarantees (as we saw in Section 2.5), but the Contractor does not normally have such protections available in the event of the Employer failing to pay sums due under the contract.

The duty to provide the Contractor with reasonable evidence that the Employer has arrangements in place to enable him to discharge his payment obligations gives the Contractor a measure of protection; and the contract treats this obligation seriously. It is a ground of suspension or termination of the contract by the Contractor if the Employer fails to provide the required evidence (under clauses 16.1 and 16.2: see section 4.16 below).

### 4.2.3 Employer's claims against the Contractor: Clause 2.5

One naturally thinks of the Contractor as making claims, for an additional payment, say, or more time to complete the contract works. But the Employer too can claim; and under the contract these claims will be either for a payment of some kind (damages for delay, for example, or sums due pursuant to a right of indemnity, such as we saw in connection with clause 1.13 above) or for an extension to the defects notification period under the contract (see Section 4.11 below).

If the Employer wishes to make a claim of either type, then he (or, in the Yellow Book, either the Engineer or the Employer) must give notice and particulars to the Contractor of the claim '*as soon as practicable*' after the Employer becomes aware of the event or circumstances giving rise to the claim.

The notice must specify the basis for the claim and substantiate the amount and/or extension claimed. An important proviso is that any claim for an extension of the defects notification period must be made before the expiry of that period.

There are three important points to note here.

- First, it may be difficult in a particular case to say whether an Employer did or did not give his notice '*as soon as [was] practicable*' after he became aware of the event or circumstances giving rise to the claim. Unlike the Contractor's claims, no specific time limit is placed on when the notice has to be given.
- Second (and related to the first point), the contract does not bar the Employer from pursuing a claim even if he gives his notice later than '*as soon as [was] practicable*'. Again, this contrasts with contractors' claims, as the Contractor is barred if he gives his initial notice of claim later than the 28-day period provided for in clause 20.1 (see Section 4.20.1 below).
- Third, the time from which one is to assess whether the Employer has given his notice as soon as was practicable is the time at which he became aware of the event or circumstances giving rise to the claim. This contrasts

with the position of the Contractor, who must give his initial notice 28 days from the time at which he ‘became aware, or should have become aware’ of the event or circumstance. For the Employer, the question to be asked is simply, ‘When did he become aware of the relevant event or circumstance?’, whereas for the Contractor it is, at bottom, when he *ought* (objectively) to have become aware of that event or circumstance.<sup>3</sup>

### 4.3 Contract administration: Clause 3

Clause 3 in both Books deals with the administration of the contract.

#### 4.3.1 The role of the Engineer

Perhaps the most striking difference between the two Books in relation to contract administration is that, under the Yellow Book, the Employer must appoint an *Engineer*, a non-party to the contract, to administer the contract. Under the Silver Book, the Employer himself is, strictly speaking, the contract administrator, although he may (and in practice often does) appoint a Representative to act for him.

The role of the Engineer has a long history in common law countries and the use of the Engineer as non-party contract administrator in the Yellow, and Red Books is a feature of the common law roots of the FIDIC forms.<sup>4</sup> The Engineer traditionally had a dual role: he was at once the agent of the Employer, who retained him, and the impartial administrator.<sup>5</sup> The scope of his functions extended beyond certifying payments and other entitlements to making decisions about matters in contention between Employer and Contractor prior to any reference to arbitration. An important quasi-judicial as well as administrative role was therefore characteristic of the traditional Engineer.

<sup>3</sup> Contractors understandably view this disparity in the treatment of claims dimly. FIDIC has justified it by reference to the fact that the Contractor is nearly always in a better position to identify a claim-event or circumstance, and therefore to notify it in good time. The barring sanction is an appropriate stick to encourage the early notification of claims, which can then be properly investigated by the Employer.

It is noteworthy that in the Gold Book (2008) the absolute time bar found in the others is dropped, and instead the Dispute Adjudication Board (which we look at in detail in Part III) can, in a suitably justified case, override the 28-day bar and permit the claim to go forward.

<sup>4</sup> The first FIDIC construction contract was the Red Book, the 1973 version of which closely followed the 4th edition of the UK Institution of Civil Engineers (or ICE) form of contract. An impartial Engineer exercising powers of adjudication as well as certifying functions was a characteristic of this form of contract.

<sup>5</sup> The 4th edition of the FIDIC Red Book, published in 1987, introduced an express obligation on the Engineer to act impartially, with a similar requirement in the 3rd edition of the Yellow Book, also published in 1987. The basis of this obligation was the Engineer’s perceived professional duty to act impartially.

In the current FIDIC Yellow and Red Books, the Engineer is no longer expressly required to act ‘impartially’, but he is required, in making ‘determinations’ (see below) to make ‘fair’ ones ‘*in accordance with the Contract, taking due regard of all relevant circumstances*’ (clause 3.5).

Thus while no longer expected to act impartially between Employer and Contractor, he is still to be ‘fair’ in the decisions he makes concerning, for example, a claim for an extension of time; and thus the duality of the traditional Engineer’s role is to some extent preserved.

Another important departure from the traditional role is that the Engineer in the current FIDIC forms is no longer the pre-arbitration decision-maker between the parties. Although the Engineer’s determinations in the Yellow and Red Books take effect until revised by a Dispute Adjudication Board (or DAB), it is from the decision of the DAB that a dissatisfied party refers a dispute to the final decision of an arbitration tribunal and not directly from the decision or determination of the Engineer.

The introduction of the DAB as an intermediate stage between Engineer’s determination and arbitral award has an important practical effect both on the scope and impact of the Engineer’s decisions and on the likelihood of resolving a dispute before formal and final proceedings are resorted to (as we shall see further in Part III).

#### 4.3.2 ‘Determinations’ in the Yellow and Silver Books

In the Yellow Book, the Engineer makes his determinations pursuant to clauses in the contract that provide for the Engineer to ‘*agree or determine any matter*’. Before he does so, the Engineer is to consult the parties (Employer and Contractor) to try if possible to reach agreement; it is only where agreement cannot be reached that he is to make his decision, a decision which (as we saw above) must be:

- fair;
- in accordance with the terms of the contract; and
- have due regard to all relevant circumstances.

Once he makes his determination, the Engineer is to give notice to the interested parties with supporting details.

The position here is much the same in the Silver Book, clause 3.5, except that the Employer himself makes the decision. Although in many cases he will in a sense judge his own cause, he is still meant to make decisions fairly, in accordance with the contract and taking into account all relevant circumstances.

One significant difference, however, as we have noted already, is that whereas in the Yellow (and Red) Book the parties are to give effect to the determination unless and until it is revised by a DAB, under clause 3.5 of the Silver Book the Contractor can hold off from giving immediate effect to

the Employer's determination by giving notice of his dissatisfaction with it 14 days after receiving it; in which case the matter is referred to a DAB. This difference is probably attributable to the fact that in the Silver Book there is no non-party decision-maker such as the Engineer.

### 4.3.3 Employer's Representative in the Silver Book

Since, strictly speaking, the Employer is himself the contract administrator, his Representative is to be taken to act as the Employer. The Representative can be replaced at any time subject only to the Employer notifying the Contractor of the replacement's details. Indeed, the Employer can at any time decide to do without a Representative altogether. By clause 3.1, unless and until the Employer notifies the Contractor otherwise, the Employer's Representative is deemed to have the full authority of the Employer under the Contract, except in respect of clause 15 (that is, termination of the contract by the Employer).

In the Yellow Book, the Engineer can exercise any authority attributable to him as specified in the contract or as necessarily to be implied from the contract, such as from his functions of giving instructions or approving variations, or valuing and certifying sums due. He has no authority to amend the contract, however, or to relieve any party of any duties or obligations under the contract (clause 3.1).

### 4.3.4 The giving of instructions

One specific function of the Engineer under the Yellow Book (or those to whom he has delegated the power to do so) is the general right to give instructions (which are to be in writing) to the Contractor, at any time, which are necessary either for the execution of the works or for the remedying of any defects in them (clause 3.3). Instructions amounting to a variation to the works are to be treated as such under clause 13 (see Section 4.13 below).

In the Silver Book, clause 3.4, there is a similar right in the Employer to give instructions, expressed as the right to issue instructions (in writing) to the Contractor which may be necessary for the Contractor to perform his obligations under the contract.

## 4.4 The Contractor

### 4.4.1 The Contractor's general obligation: Clause 4.1

In both Books, the Contractor is to:

- design, execute and complete the works in accordance with the contract, and
- remedy any defects in the works, so that
- when completed, the works shall be fit for the purposes for which the works are intended as defined in the contract.

An important feature of this general obligation is the requirement to complete the works so that they are '*fit for the purposes*' for which they are intended '*as defined in the contract*'. The Contractor under such a fitness for purpose obligation is in principle liable even if he took reasonable care in, for example, the design of the facility if the end product does not achieve the purposes for which it was intended.

But how are these intended purposes to be assessed? In the FIDIC Books this is by reference to the terms of the contract: the works are to achieve the purposes *defined in the contract*; these definitions are to anchor the intended purposes which the end product must achieve. This places a lot of weight, therefore, on the contract documents specifying the intended purposes sufficiently clearly and adequately; but care needs to be taken to avoid doing so too narrowly or too broadly for the design-build contractor to do his job and be responsible for the end result.

Note also that 'defined' is not the same as *express*: an intended purpose for some part of the plant or facility (light fittings, for example) could be implied or to be inferred from the descriptions of the items used rather than expressly stipulated.

Whether the works or some part of them is 'fit for the intended purpose' may not always be clear. Take, for example, a contractor who is to design and constructs a spa hotel in a seaside resort. The site directly faces the open sea. The Employer's Requirements specify '*steel frame windows*' of certain dimensions '*for all sea-facing windows*'.

Within the fixed price the contractor supplies and installs carbon steel frames with a much lower corrosion resistance than inox or chromium-alloy steel. However, following installation the employer requires that the windows be replaced with inox frames, on the basis that carbon steel frames are not fit for the purpose. The employer contends that, in the sea-facing position, they will corrode at more than three times the rate of chromium-alloy steel of median grade.

We can sympathise with the employer, but is he right? The contractor, after all, might reply that the Employer's Requirements did not include any particular type or grade of steel and no service life was (let us assume) ever specified. He could say he was entitled to design for the less expensive carbon steel solution and was not in breach of any contract terms. In a case like this there are arguments which could be adduced on either side. Can the contractor be required, he might ask, to install more expensive materials within the lump-sum fixed price even if they were never specified? Or any performance standard in terms of service life ever stated?

The words of clause 4.1 are '*... for which the Works are intended as defined in the Contract*'. But what was the intended purpose as defined in the contract? Could one say that the contract at least implicitly defined the intended purpose as 'use of frames to windows directly facing the sea', as the plans and site details showed the location? Or could one argue persuasively that in the absence of any express service life requirement the need to replace the carbon

steel frames more frequently than chromium-alloy frames is at bottom a maintenance issue and not one about fitness for purpose?

Again arguments could be adduced on both sides. The employer here would certainly be helped by the fact that an intended purpose might be implied or implicit; but to avoid arguments of this kind the Employer's Requirements, or other contract documents, should have been more explicit on the point if (as it evidently was) it was an important one.

#### 4.4.2 'The works' which must fit the intended purpose: Clause 4.1

'The works' are widely defined to include any work which is necessary to satisfy the Employer's Requirements, or is implied by the contract, and all works which (although not mentioned in the contract) are necessary for stability or for the completion, or safe and proper operation, of the works.

Also under clause 4.1: the Contractor must provide the plant and Contractor's documents specified in the contract, and all the Contractor's personnel, goods, consumables and other things and services, whether of a temporary or permanent nature, required in and for the design, execution, completion of the works and remedying of defects.

#### 4.4.3 Securing performance: Clause 4.2

Under clause 4.2 of both Books the Contractor has an obligation to provide security for his proper performance of the contract. Such security typically takes the form of an on-demand bond or guarantee, payable by an issuing bank or insurance company up to a certain amount on presentation of a written demand of the Employer without proof of actual default by the Contractor (see Section 2.5 above).

The Contractor is to obtain the security (at his cost) in the amount and currencies stated in the Appendix to Tender (Yellow Book) or Particular Conditions (Silver). If an amount is not stated then the obligation to provide the security does not apply.

In the Silver Book, the Contractor is to deliver the performance security to the Employer within 28 days after both parties have signed the Contract Agreement, and in the Yellow within 28 days of receiving the Letter of Acceptance. The security is to be issued by an entity and from within a country (or other jurisdiction) approved by the Employer, and to be in the form annexed to the Particular Conditions or in another form approved by the Employer.

In both Books, the Employer is not to make a claim under the performance security except for amounts to which the Employer is entitled under the contract in the event of:

- failure by the Contractor to extend the validity of the security (in which event the Employer may claim the full amount of the security);

- failure by the Contractor to pay the Employer an amount due within a period of 42 days;
- failure by the Contractor to remedy a default within 42 days after receiving the Employer's notice requiring the default to be remedied; or
- circumstances which entitle the Employer to termination under the contract (clause 15.2), whether or not notice of termination has been given.

A performance security could be open to abuse by an Employer. The FIDIC contracts all provide that in the event that the Employer makes a call under the security which he was not entitled to make then he must indemnify the Contractor against all damage, loss and cost resulting from the improper call (clause 4.2).

#### 4.4.4 Contractor's Representative: Clause 4.3

Under clause 4.3 of both Books, the Contractor must appoint a Contractor's Representative and give him all the authority necessary to act on the Contractor's behalf under the contract.

Unless the Contractor's Representative is named in the contract, the Contractor must, prior to the contract commencement date, submit to the Employer for consent the name and details of the person the Contractor proposes to appoint as Contractor's Representative. If consent is withheld, or later revoked, or if the appointed person fails to act as Contractor's Representative, then the Contractor must similarly submit the name and details of another suitable person for the role.

#### 4.4.5 Subcontracting: Clauses 4.4 and 4.5

The Contractor may use subcontractors but in all the FIDIC Books he must not subcontract the whole of the works (clause 4.4). Moreover, the Contractor is responsible for the acts or defaults of any subcontractor, his agents or employees, as if they were the acts or defaults of the Contractor himself. Contractually, he remains responsible.

Clause 4.5 of the Silver and Yellow Books deals with '*nominated subcontractors*', which means a subcontractor whom the Employer, under clause 13 (see below), instructs the Contractor to employ as a subcontractor. The Contractor is not under any obligation to employ a nominated subcontractor against whom he has a reasonable objection, but the Contractor must as soon as practicable raise this objection by written notice to the Employer with supporting details.

#### 4.4.6 Setting out: Clause 4.7

Setting out the works is clearly of the utmost importance and the Contractor has an obligation to do so to original points, lines and levels of reference specified in the Contract. He is responsible for the correct positioning of all parts



of the works, and must rectify any error in their positions, levels, dimensions or alignment.

#### 4.4.7 Sufficiency of the Contract Price (Silver Book) or Accepted Contract Amount (Yellow Book): Clause 4.11

In both Books the fixed-price lump sum is intended to be sufficient for the works to be designed and executed as required by the contract and the Contractor is meant to have taken steps to satisfy himself that this is so. The Contractor in each Book is deemed to have satisfied himself as to the correctness and sufficiency of the Contract Price (Silver Book) or Accepted Contract Amount (Yellow).

Unless otherwise stated in the contract, the Contract Price/Accepted Contract Amount covers all the Contractor's obligations under the contract (including those under provisional sums, if any) and all things necessary for the proper design, execution and completion of the works and the remedying of any defects.

#### 4.4.8 Unforeseeable difficulties/physical conditions: Clause 4.12

We looked at this topic in Part I (Section 2.6). But it may be convenient to summarise the basic differences between the two design-build forms here.

In the Silver Book, as we saw, the Contractor bears the risk of unforeseen difficulties unless this is otherwise stated in the contract (clause 4.12). He is otherwise deemed to have obtained all necessary information about risks, contingencies and other circumstances which could influence or affect the works. By signing the contract, he accepts total responsibility for having foreseen all difficulties and costs of successfully completing the works.

By contrast, the Contractor under clause 4.12 of the Yellow Book may obtain an extension of time and additional payment (his cost but not profit) if he encounters physical conditions which were unforeseeable in the sense that no experienced contractor by the date for tender could reasonably be expected to have foreseen them.

#### 4.4.9 Progress reports: Clause 4.21

Unless otherwise stated in the Particular Conditions, monthly progress reports have to be prepared and submitted by the Contractor to the Engineer (Yellow Book) or Employer (Silver).

The reports have to contain detailed information<sup>6</sup> about the state of the works up to the end of the preceding calendar month; they must continue to be made until the Contractor has completed all the work which is known to be outstanding at the completion date stated in the Taking Over Certificate (see Section 4.10).

<sup>6</sup> See Section 4.8 below for a summary of what information is required under clause 4.21.

The contracts treat the obligation to provide progress reports seriously and the non-provision of the required report will prevent the Contractor obtaining an interim payment (clause 14.3).

## 4.5 Design

### 4.5.1 The Contractor's general design obligations (Yellow and Silver Books): Clause 5.1

Reflecting the very different risk allocation in the two Books between Employer and Contractor, as we discussed in Part I (Section 2.6), the terms of these obligations differ markedly.

As we saw in connection with the Silver Book, by clause 5.1 the Contractor is deemed to have scrutinised at an early stage the Employer's Requirements and is to be responsible for the design of the works and for the accuracy of the Employer's Requirements (including design criteria and calculations), except as stated in clause 5.1 sub-paragraphs (a) to (d).

We state those limited exceptions again here, for convenience:

- (a) portions, data and information stated to be the Employer's responsibility in the contract;
- (b) definitions of intended purposes of works or any part thereof;
- (c) criteria for testing and performance of the completed works;
- (d) portions, data or information which cannot be verified by the Contractor, except as otherwise stated in the contract.

The Yellow Book states the Contractor's general design obligations in quite different terms. The Contractor shall carry out and be responsible for the design of the works; he warrants that he and his designers and design subcontractors have the necessary experience and capability; and gives various undertakings and warranties with respect to the designs he will prepare and the scrutinising of the Employer's Requirements.

As to errors or incompleteness in those Requirements, the corresponding provisions of the Yellow Book (clause 5.1) do not make the Contractor responsible for any such errors or omissions unless an experienced contractor, exercising due care, would have discovered them when scrutinising the Employer's Requirements before commencing the works. Otherwise, the Contractor is entitled to additional time and payment (including profit) for any delay and additional work resulting from the Employer's errors or omissions in his Requirements (clause 1.9).

### 4.5.2 Contractor's documents: Clause 5.2

Clearly, the Contractor's documents are crucial to proper completion of a project and the FIDIC contracts make detailed provision for them.

Clause 5.2 of the Yellow and Silver Books provides that the Contractor's documents shall comprise the technical documents specified in the Employer's Requirements, documents required to satisfy all regulatory approvals, the as-built documents described in clause 5.6 and the operation and maintenance manuals referred to in clause 5.7. The Contractor must prepare all the Contractor's documents, and also any other documents necessary to instruct the Contractor's personnel.

Often the Employer's Requirements will specify Contractor's documents which are to be submitted to the Employer for review. This enables the Employer or Engineer to monitor and have some control over the process without relieving the Contractor of any of his obligations or responsibilities.

Unless otherwise stated in the Employer's Requirements, each review period is not to exceed 21 days, calculated from the date on which the Employer receives a Contractor's document and a notice from the Contractor stating that the document is considered ready, both for review and for use.

The Employer may, within the review period, give notice to the Contractor that a Contractor's document fails (to the extent stated) to comply with the contract. If the document does so fail to comply then it has to be rectified, resubmitted and reviewed at the Contractor's cost.

The review process has to be taken into account when the programme is prepared as, for each part of the works, and except to the extent that the parties otherwise agree, execution of that part should not start before expiry of the review periods for all the Contractor's documents which are relevant to its design and execution.

### 4.5.3 Contractor's undertaking: Clause 5.3

The Contractor gives a general undertaking in similar terms in both Books. He undertakes that the design, the Contractor's documents, the execution and the completed works will be in accordance with:

- the laws applying in the country where the works are carried out; and
- the documents forming the contract, as altered or modified by variations.

## 4.6 Staff and labour: Clause 6

Clause 6 of the Yellow and Silver Books places a number of obligations upon the Contractor with respect to the proper treatment of staff and labour.

They are fairly straightforward, and cover such matters as compliance with labour laws, minimum wages, reasonable facilities, health and safety protection and proper superintendence of the works by the Contractor to ensure their safe and satisfactory execution.

## 4.7 Plant, materials and workmanship

### 4.7.1 Executing the works: Clause 7.1

Clause 7 in both Books deals with the requirements for the items of plant and materials which the Contractor brings to the site in order to execute the project. It covers the Contractor's obligations concerning the quality of his work and the procedures to be followed for tests and in the event that an item of work fails a test.

By clause 7.1 of the Silver and Yellow Books the Contractor must carry out his work:

- in the manner (if any) specified in the contract;
- in a *proper, workmanlike and careful* manner, in accordance with *recognised good practice*; and
- with *properly equipped facilities* and using non-hazardous materials, unless otherwise specified in the contract.

The quality of materials and standard of workmanship will be specified elsewhere in the contract documents, which will normally refer to the national standard specifications of the country of the project, among many other details.

Phrases such as '*proper workmanlike and careful manner*', '*recognised good practice*' and '*properly equipped facilities*' are not precise. These requirements will have to be interpreted by the Engineer or Employer in relation to the actual goods that are supplied and work that is executed by the Contractor.

### 4.7.2 Samples: Clause 7.2

The Contractor is to submit samples of materials, and relevant information, to the Engineer or Employer for review in the Yellow and Silver Books, prior to using the materials in or for the works (clause 7.2).

### 4.7.3 Inspections: Clause 7.3

The contracts give the Engineer (if Yellow Book) or Employer (if Silver) a wide-ranging right to inspect the works in the course of the project. This includes the right to be informed whenever work is ready and before it is covered up.

Under clause 7.3 the Employer's personnel must:

- at all reasonable times have full access to all parts of the site and all places from which natural materials are being obtained; and
- during production, manufacture and construction (at the site and elsewhere), be entitled to examine, inspect, measure and test the materials and workmanship, and to check the progress of manufacture of plant and production and manufacture of materials.

Under the clause, the Contractor must give notice to the Engineer or Employer whenever any work is ready and before it is covered up. The Engineer or Employer is then either to carry out the examination or testing without unreasonable delay, or promptly to give notice to the Contractor that he does not require to do so.

If the Contractor fails to give the notice, he must, if and when required by the Engineer or Employer, uncover the work and then reinstate at his own cost.

#### 4.7.4 Testing: Clause 7.4

The contracts contain detailed provision with regard to testing the quality and performance of the works and any part of them.

Clause 7.4 provides for requirements concerning testing that apply to all tests specified in the contract other than the tests after completion (if any): see further Sections 4.9 and 4.12 below.

The Contractor is to provide everything necessary to carry out the tests specified, unless otherwise stated in the contract. He is to agree with the Engineer or Employer the time and place for the specified testing.

The Engineer or Employer may vary the location or details of specified tests, or instruct the Contractor to carry out additional tests. If these varied or additional tests show that the item is not in accordance with the contract, the additional or varied tests are to be carried out again at the Contractor's expense.

The Engineer or Employer must give the Contractor not less than 24 hours' notice of his intention to attend the tests. If he does not attend at the time and place agreed, the Contractor may proceed with the tests unless otherwise instructed by the Engineer or Employer, and the tests shall be deemed to have been made in his presence and to be accurate.

#### 4.7.5 Rejection and remedial work: Clauses 7.5 and 7.6

By clause 7.5, if any plant, material or workmanship is found to be defective, or not in accordance with the contract, the Engineer or Employer can reject it by notifying the Contractor (but approval must not be unreasonably withheld).

If the Engineer or Employer requires plant, materials or workmanship to be retested, the tests must be repeated under the same terms and conditions.

If the Employer suffers additional costs due to the retesting, the Contractor shall pay these costs to the Employer.

Under clause 7.6, the Contractor must, within a reasonable time, comply with any instruction from the Engineer or Employer to:

- remove and replace any plant or materials which do not conform with the contract; or
- remove and re-execute any works which do not conform with the contract.

The Engineer or Employer should only insist upon removal and replacement when it would be unreasonable to repair.

Also under clause 7.6, the Contractor must comply with any instruction from the Engineer or Employer to execute works which are urgently required for the safety of the contract works. If the Contractor fails to comply with the instruction, the Employer will be entitled to employ others to carry out the instruction at the Contractor's cost.

#### 4.7.6 Ownership: Clause 7.7

Clause 7.7 of the Books also provides for the 'passing of property' or ownership in plant and materials. Unless the laws of the country where the works are carried out provide otherwise, items of plant and materials will become the property of the Employer either: (a) when they are delivered to site; or (b) when the Contractor is entitled to be paid for them, whichever takes place first.

### 4.8 Time: commencement, delays and suspension of the works

#### 4.8.1 Commencement and time for completion of the works: Clauses 8.1 and 8.2

Clause 8.1 of the Books provides for the *contract commencement date* to be notified to the Contractor by the Engineer or Employer at least 7 days prior to the commencement date, and (unless otherwise stated in the contract) for that date to be within 42 days of the date when the contract came into effect.<sup>7</sup>

The Contractor as soon as reasonably practicable after the commencement date must proceed with the design and execution of the works and, by clause 8.2, must complete the whole of the works, and any section,<sup>8</sup> within the time for completion of the works or section.

#### 4.8.2 Programme: Clause 8.3

We looked at the programme and its importance in Part I (Section 1.7).

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<sup>7</sup> In the Yellow Book the contract comes into effect when the Contractor receives the Letter of Acceptance and in the Silver after both parties have signed the Contract Agreement.

<sup>8</sup> Sometimes the overall work is divided into 'sections' of work, each section having its own commencement and completion dates and other contract stages, although coming under the same contract as other parts or sections. If the works are to be divided into sections in this way then this must be provided for in the Particular Conditions (if Silver Book) or Appendix to Tender (if Yellow) by specifying the part or parts of the works which are to be treated as sections.

The Contractor must submit to the Engineer or Employer his programme within 28 days after the commencement date (if Silver Book) or 28 days after notice of the commencement date (if Yellow).

As we saw in Section 1.7, the programme:

- provides the basis for monitoring the Contractor's progress and planning Employer/Engineer activities and obligations;
- becomes a base reference for the Engineer's or Employer's determination of Contractor's claims for extensions of time for completion arising from alleged disruption or delay.

The programme must show:

- the order of execution of the works, including the anticipated timing of each major stage of the works; in the Yellow Book more details of this are required (clause 8.3(a));
- sequencing of the works, taking into account the lead time for obtaining any approvals;
- the periods for review of Contractor's Documents; in the Yellow Book additionally the periods for review of any other submissions, approvals, or consents mentioned in the Employer's Requirements;
- the sequence and timing of inspections and tests.

The programme should be accompanied by a supporting report (or method statement) setting out how the Contractor intends to execute the works and the resources he intends to use.

If the Engineer or Employer thinks the programme does not comply with the contract then he must give notice to the Contractor within 21 days of receiving it stating how the programme does not comply; otherwise, the Contractor is to proceed in accordance with the programme.

As we mentioned in Section 1.7, the Contractor is required to give advance notice or early warning to the Engineer or Employer of potential events which might adversely affect or delay the works. There is no similar obligation on the Engineer or Employer.

Linked to the requirement to maintain valid programmes and to advise the Engineer or Employer of potential delaying events is the requirement to submit monthly progress reports (Section 4.4).

Each report must include charts and detailed descriptions of progress, photographs, details of the manufacture of each major item of plant and materials, records of the Contractor's personnel, copies of quality assurance documents and the like, lists of notices given with respect to Employer's and Contractor's claims, safety statistics and comparisons of planned and actual progress and details of measures being, or to be, adopted to overcome delays.

As we noted in Section 1.7, if the Contractor fails to provide a progress report as required he will not be entitled to receive an interim payment for the relevant period.

### 4.8.3 Delays and extensions of time: Clause 8.4

We have already considered this topic in Part I (Section 1.7) but it is probably helpful to summarise here the main points of similarity and contrast between the two Books.

If any of the circumstances listed under clause 8.4 of the Books occurs and results in delay to completion of the works, the Contractor is entitled to an extension of the time for completion subject to giving notice of claim under clause 20.1.

In the Yellow Book the relevant delay events are:

- a variation or other substantial change in the quantity of an item of work;
- a cause of delay giving rise to an entitlement under another sub-clause;
- exceptionally adverse climatic conditions;
- unforeseeable shortages of personnel or goods caused by epidemic or governmental actions;
- any delay, impediment or prevention caused by or attributable to the Employer, the Employer's personnel or the Employer's other contractors on the site.

In the Silver Book, as we saw, only the first, second and last of these grounds apply (variations, express mention in another clause of the contract or delays attributable to the Employer).

Moreover, in the Silver Book general conditions, no additional time is permitted for (a) unforeseeable physical conditions (whereas it is under clause 4.12 of the Yellow Book), or (b) except in the limited circumstances we looked at earlier in clause 5.1, errors or omissions in the Employer's Requirements (Section 4.5.1).

### 4.8.4 Suspension of the works: Clauses 8.8 to 8.10

Under clause 8.8 the Engineer or Employer may at any time instruct the Contractor to suspend progress of part or all of the works. During such suspension, the Contractor must protect the affected part or parts against any deterioration, loss or damage. The Engineer or Employer can notify the cause of the suspension but does not have to do so.

What is the Contractor's position when the works are thus suspended?

If the cause is notified and is the responsibility of the Contractor, he will not be entitled to any extension of time or additional payment due to the suspension.

Otherwise, he will be entitled (subject to giving notice) to both an extension of time for delay and to payment of the cost he has incurred (but not



profit) as a result of complying with the instruction to suspend and/or resuming work. The Engineer or Employer then proceeds to make a determination under clause 3.5.

By clause 8.10 the Contractor will also be entitled to payment for plant and/or materials that have not yet been delivered to site, if:

- the work on plant or delivery of plant and/or materials has been suspended for more than 28 days; and
- the Contractor has marked the plant and/or materials as the Employer's property in accordance with the Employer's instructions.

#### 4.8.5 Prolonged suspension: Clause 8.11

The contracts try to protect the Contractor from a prolonged suspension. If the suspension lasts for more than 84 days, the Contractor can request permission to recommence. If permission is not given within 28 days, the Contractor can treat the suspension as an omission of the suspended works or give notice to terminate the Contract if the whole of the works is affected by the suspension.

## 4.9 Tests on completion

### 4.9.1 Contractor's obligations: Clause 9.1

The Contractor must demonstrate to the Employer that the works have complied with the requirements of the contract, including the expected performance.

When the works have reached a stage when they are substantially complete and the Contractor believes they are ready to be tested, he notifies the Employer or the Engineer. The tests on completion required under the contract will typically be set out extensively in the contract.

Prior to commencing the tests on completion, the Contractor must:

- provide 'as-built' documents and operation and maintenance manuals;
- give at least 21 days' notice to the Engineer or Employer of the date after which he will be ready to carry out the tests.

The tests on completion should be carried out within 14 days after the above date, on the day or days chosen by the Engineer or Employer.

In considering the results, account must be taken of any adverse effect if the Employer was using the works.

If the tests on completion are unduly delayed by the Employer, the Contractor is entitled in the first place to an extension of time and/or additional payment. If the delay continues for more than 14 days, the Employer

will be deemed to have Taken Over the works (see Section 4.10) on the date when the tests should have been completed.

#### 4.9.2 Delayed tests: Clause 9.2

If the tests on completion are unduly delayed by the Contractor, the Engineer or Employer can instruct the Contractor to carry out the tests within 21 days, on dates fixed by the Contractor.

If the Contractor fails to do so, the Employer may proceed with the tests at the risk and cost of the Contractor. In such a case, the tests will be deemed to have been carried out in the presence of the Contractor and the results will be deemed to be accurate.

#### 4.9.3 Re-testing: Clauses 9.3 and 9.4

If the works fail to pass the tests, the Engineer or Employer or the Contractor may require the failed tests, and tests on completion of related work, to be repeated.

By clause 9.4, if the works fail to pass the repeated tests on completion, the Engineer or Employer can:

- order further retesting;
- issue a Taking-Over Certificate; or
- reject the works if the failure deprives the Employer of substantially the whole of the benefit of the works.

In this latter case, the Employer can terminate the contract as a whole, or in respect of any major part which cannot be put to the intended use, and recover the amounts paid to the Contractor for the rejected part, together with financing costs and the cost of dismantling.

### 4.10 Employer's taking over

#### 4.10.1 Taking over of the works: Clause 10.1

When the works are in his opinion completed and ready to be taken over by the Employer, the Contractor applies by notice to the Engineer or Employer for a Taking-Over Certificate (TOC).<sup>9</sup> If the works are divided into sections (see Section 4.10.2 below), the Contractor similarly applies for a TOC in respect of each section.

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<sup>9</sup> Strictly speaking, the Contractor can apply for the TOC not earlier than 14 days before the works are in his opinion complete and ready to be taken over (clause 10.1).

The issuing of the TOC is an important milestone in the project. It signifies the date at which the works are complete, subject to rectification of defects and completing outstanding items of work, and from which the Employer can go into commercial use and operation of the plant or facility.

Contractually, the date indicated in the TOC is of great importance as it is the date from which:

- the Employer takes responsibility for care and maintenance of the works;
- one half of the retention money (see Section 4.14) is paid to the Contractor;
- the Employer's entitlement to delay damages ends; and
- the Defects Notification Period (see Section 4.11) begins.

The contract discourages delay on the part of the Engineer or Employer in issuing the TOC. Within 28 days after receipt of the Contractor's notice applying for a TOC, he must either:

- issue a TOC stating the date on which the works were completed in accordance with the contract, save for any minor outstanding works and defects; or
- reject the application, giving reasons and specifying all the work required to be done by the Contractor before the issue of the TOC.

If the Engineer or Employer fails to respond within 28 days of receipt of the Contractor's notice, and the works are substantially in accordance with the contract, then the TOC is to be deemed to have been issued on the last day of the 28-day period.

#### 4.10.2 Taking over of part of the works: Clause 10.2

It is sometimes desirable for employers, particularly in highly complex types of construction with multiple uses or free-standing elements, to use and operate parts of the works before they have been completed as a whole.

If the works have been divided into sections, by appropriate drafting of the contract documents, this presents no difficulty so long as the part the Employer wishes to use falls within a section for which a TOC has been issued.

However, the two Books differ over whether an Employer who has not got the benefit of sectional completion but who wishes to use and operate part of the works before the TOC is issued may do so.

In the Silver Book (clause 10.2), unless the parties agree the Employer may not use or take over any parts of the works other than sections.

In the Yellow Book (and the Red) the Engineer can at the sole discretion of the Employer issue a TOC for any part of the works. However, the Employer is not to use any part (except as a temporary measure which is either agreed by the parties or specified in the contract) unless the Engineer has issued a TOC for that part.

In the event that the Employer does nevertheless use any part of the works before a TOC has been issued for that part, then:

- the relevant part is deemed to have been taken over from the date on which it is used;
- the Employer takes over responsibility for the care of that part; and
- if requested by the Contractor, the Employer issues a TOC for that part.

Clause 10.2 then provides for the Contractor to be given the opportunity to carry out outstanding tests on completion, and to be compensated for any costs plus reasonable profit he incurs as a result of the unauthorised taking over and for a proportionate reduction in delay damages.

## 4.11 Defects liability

### 4.11.1 The Defects Notification Period: Clauses 11.1 to 11.3

The Defects Notification Period (or DNP) is the period following Taking Over when the Contractor is to rectify defective works and complete outstanding items of work notified to him during the period. The notification period is 12 months, unless stated otherwise, from the date of completion stated in the TOC for the works (or section).

The contracts' intention is that at or soon after expiry of the DNP the works will be delivered to the Employer in the condition required by the contract, '*fair wear and tear excepted*'.<sup>10</sup>

By clause 11.2, the Contractor is required at his own cost to rectify or complete any defect or notified incomplete item of work attributable to:

- the design of the works;
- plant, materials or workmanship not in accordance with the contract;
- improper operation or maintenance for which the Contractor is responsible;
- failure of the Contractor to comply with any other obligation.

If the notified defect or incomplete work is attributable to any other cause then the Contractor is entitled to have the work involved in rectifying or completing the relevant item treated as a variation under clause 13 (see section 4.13).

### 4.11.2 Failure to remedy defects: Clause 11.4

If the Contractor fails to remedy any defect or damage to the works within a reasonable time, then the Engineer or Employer may by notice set a date by

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<sup>10</sup> This expression, used in clause 11.1, means a fair and reasonable allowance must be made for any use or operation of the plant or facility by the Employer by expiry of the DNP.

which the defect or damage is to be remedied. If the Contractor persists in failing to remedy the defect or damage, then the Employer has a number of options:

- he can carry out the work himself or pay others to do it, claiming the cost of this from the Contractor; or
- he can reduce the contract price appropriately; or
- if the defect or damage is so extensive as to deprive the Employer of substantially the whole benefit of the works or any major part of it, then terminate the contract either as whole or in respect of the relevant part.

In this latter event, the Employer may recover (without prejudice to any rights he might have) all sums paid to the Contractor in respect of the works or the affected part plus financing cost and dismantling and related costs.

#### 4.11.3 Extending the DNP: Clause 11.3

By clause 11.3 the Employer can seek to extend the Defects Notification Period if and to the extent that the works (or section), or a major item of plant, after taking over cannot be used for the purposes for which they were intended by reason of a defect or damage. However, unless this is varied by the Particular Conditions, the DNP cannot be extended by more than two years.

The expiry of the DNP triggers the Contractor's entitlement to the balance of the retention monies, subject to a deduction in proportion to any outstanding rectification work (clause 14.9).

#### 4.11.4 Further tests: Clause 11.6

If the work of rectifying any defects may have affected the performance of the works, the Engineer or Employer may require a repetition of any test required under the contract within 28 days after the remedying of the defect or damage. The cost of performing repeated tests is to be borne by the party liable for the cost of rectifying the defects.

#### 4.11.5 The Performance Certificate: Clause 11.9

Another important milestone is the issue of the Performance Certificate. In both Books the Performance Certificate alone signifies acceptance of the works. The contracts encourage timely issue of the Certificate. It is to be issued by the Engineer or Employer within 28 days of the latest of:

- the expiry of the DNP; or
- as soon thereafter as the Contractor has supplied all the Contractor's documents and completed and tested the works including remedying any defects.

If the certificate is not issued accordingly then it will be deemed to have been issued on the date 28 days after it should have been issued.

#### 4.11.6 Unfulfilled obligations: Clause 11.10

Although the issue of the Performance Certificate signifies acceptance of the works, the parties each remain responsible for the fulfilment of any obligation remaining unperformed at the date of issue of the Certificate. These obligations include the Contractor's clearance of the site under clause 11.11 and the various final accounting and payment steps that are to be undertaken pursuant to clause 14 (see Section 4.14).

### 4.12 Tests after completion

In the Yellow and Silver Books, provision is made in clause 12 for testing after completion; but this clause only applies if such tests are specifically stated in the contract. They tend to be provided for in projects where the complexity of the plant or facility or the technology used make it important to provide for further testing after Taking Over. These tests often involve an extended trial operation.

The tests are to be carried out as soon as reasonably practicable after the works or section have been taken over by the Employer. The Contractor is entitled to 21 days' notice of the date after which the tests after completion will be carried out. Unless otherwise agreed, the tests shall be carried out within 14 days after this date, on the day or days determined by the Employer or Engineer.

### 4.13 Variations and adjustments to the contract price

In any construction project, there will be need to change the initial requirements as construction proceeds. This could be for any number of reasons, including:

- the Employer changing his mind about some requirement;
- the Engineer or Employer needing to issue further information which involves changes to the initial requirements;
- correcting an error in information issued to the Contractor.

The Engineer or Employer may instruct variations under the contract (but cannot vary the terms of the contract themselves, which would require the parties' agreement).

#### 4.13.1 Right to vary: Clause 13.1

The Engineer or Employer can make any variation that he considers necessary, covering any change to the works, except that no variation may comprise the omission of any work which is to be carried out by others.

The Contractor has a limited right to object to a variation. He may do so where, for example, he cannot readily obtain the goods necessary to carry it out, but the Engineer or Employer has the final say and can confirm an instruction to vary.

#### 4.13.2 Variation procedure and value engineering: Clauses 13.2 and 13.3

Variations can be initiated at any time prior to issuing the Taking Over Certificate. This can be in any one of three ways:

- an instruction to the Contractor to carry out or omit certain work;
- a request to the Contractor to submit a proposal;
- the Contractor submitting at any time on his own initiative a proposal which he thinks will be of advantage to the Employer, for example in accelerating completion or improving the efficiency of the plant or facility.

In the latter case, the proposal (volunteered by the Contractor) is called *value engineering*, signifying its (perceived) value or benefit to the Employer. The Contractor benefits if the proposal is accepted by, for example, saving cost he would otherwise have to expend in designing and installing additional plant or equipment.

Clause 13.3 sets out steps that need to be taken where the Employer requests a proposal from the Contractor prior to instructing a variation. These steps require the Contractor to respond promptly and to set out clearly why he cannot comply (if he is of the view that he cannot), or (if he feels he can) giving full details of the proposed work, programme impact and other matters.

The Employer then decides whether to instruct the variation, although the Contractor must proceed with the work pending a response. If a variation is instructed the Contractor will be entitled to additional payment, including profit, which the Engineer or Employer should assess under the clause 3.5 procedure for determinations.

#### 4.13.3 Changes in legislation: Clause 13.7

The Books make specific provision for one type of change which could (and often does) have considerable practical consequences. This is changes in the laws and regulations affecting the works.

By clause 13.7 of both Books, the contract price is to be adjusted for any increase or decrease in cost arising from any change in the laws of the place where the works are carried out made after the Base Date (that is, 28 days prior to the latest date for submission of tender). Thus, any laws or regulations in existence at the date of the contract are at the Contractor's risk; but if they change after the contract has been concluded then the Employer bears the risk if they increase the Contractor's costs.

In the Yellow and Silver Books, if the Contractor thinks he will suffer additional cost and/or delay as a result of such changes then he must give notice under clause 20.1. The Engineer or Employer then agrees or makes a fair determination of the adjustment to be made to the contract price under clause 3.5, including reasonable profit, and any extension of time.

#### 4.13.4 Cost fluctuations: Clause 13.8

The contracts provide for adjustment of the amounts payable to the Contractor to take account of rises or falls in the cost of labour, goods and other inputs to the works. This is, however, provided that the Appendix to Tender contains a completed 'table of adjustment data' (Yellow Book) or the Particular Conditions contain an appropriate adjustment formula (Silver Book).

### 4.14 Payment

In the Yellow and Silver Books the contract is, as we have seen, signed on the basis of a fixed-price lump sum, including all fees, taxes and duties required to be paid by the Contractor under the contract.

#### 4.14.1 Interim payments: Clause 14.3

The Contractor is entitled to payments at intervals during the course of the works, provided he applies for them in accordance with clause 14.3.

He must submit a Statement to the Engineer or Employer after the end of the period of payment stated in the contract (or, if none is stated, at the end of each month).

This Statement must include an estimated contract value of the works and Contractor's documents produced up to the end of the relevant month. It must give effectively an account of sums to be added or deducted between the parties and provide supporting documents necessary for the Engineer or Employer to verify the amounts claimed. It has also to be accompanied by the Contractor's progress report (under clause 4.21) for the period to which the Statement relates.

No payment is to be made until the Employer has received the performance security.

Thereafter, in the Yellow Book, the basic procedure is that the Engineer, within 28 days of receiving the Statement and supporting documents, issues to the Employer an interim payment certificate stating the amount which the Engineer fairly determines to be due to the Contractor. Payment may be withheld for defective work or failure to perform obligations under the Contract, subject to notice to the Contractor.

In the Silver Book, again subject to receiving the performance security, the Employer is to give a notice to the Contractor within 28 days of receiving the



Statement and supporting documents of items in the Statement with which he disagrees, with details. Again, the Employer can withhold sums in respect of defective work or any failure by the Contractor to perform his obligations, subject to notice.

#### 4.14.2 Timing of interim payments: Clause 14.7

In the Yellow Book, the Employer is to pay the Contractor the amount certified in each interim payment certificate within 56 days of the Engineer receiving the Statement and supporting particulars. In the Silver Book, the Employer must pay the amount due in respect of the Statement within 56 days of receiving the Statement and supporting particulars.

The contracts treat the payment of the Contractor seriously. In the event of prolonged non-payment, they permit him to suspend the works or reduce his rate of working, and ultimately to terminate the contract, subject to 21 days' notice (clauses 16.1 and 16.2: see Section 4.16 below).

#### 4.14.3 Advance payment: Clause 14.2

Advance payments are interest-free loans to the Contractor to enable him better to mobilise and get the project works under way. They may be (and often are) made in instalments, or as a single payment.

In the two Books, the Employer must make an advance payment where at least the total amount of such a payment is specified in the contract; where a Statement under clause 14.3 is provided; and where the Contractor has furnished the performance security and an advance payment guarantee (in order to secure the payment).

The amount of the advance is then to be repaid by the Contractor through proportional deductions from interim payments (if Silver Book) or interim payment certificates (if Yellow). The advance must be fully repaid before the issue of the Taking Over Certificate, otherwise the whole of the balance outstanding upon issue of that Certificate shall immediately become due for repayment.

As the advance is repaid, the amount of the advance payment security should be reduced accordingly.

#### 4.14.4 Retention money: Clauses 14.3 and 14.9

This is money retained by the Employer from sums otherwise due to the Contractor as an additional security for the Contractor's performance.

Retention is effected by making a deduction in an interim payment certificate or from an interim payment of an amount calculated by applying the percentage of retention given in the Appendix to Tender (Yellow Book) or Particular Conditions (Silver) until the amount retained reaches the limit of retention money (if any) stated in the Appendix to Tender or Particular

Conditions. Typically, 10% retention is provided for until reaching a limit expressed as 5% of the contract price.

By clause 14.9, one half of the retention monies is to be repaid following issue of the Taking Over Certificate with the balance payable following expiry of the Defects Notification Period.

#### 4.14.5 Delayed payment and the right to financing charges: Clause 14.8

The contracts penalise the Employer for slow payment of sums due by entitling the Contractor to claim compounded financing charges until payment is made.<sup>11</sup>

Clause 14.8 in both Books provides for these charges to be at the annual rate of 3% above the discount rate of the central bank in the country of the currency of payment, unless the contract otherwise provides.

Note that the Contractor is entitled to this payment 'without formal notice or certification, and without prejudice to any other right or remedy' (clause 14.8).

This means the Contractor's right to the charges does not depend upon his giving any notice or receiving any certificate; for example, he is thus able, and arguably ought, to apply for the charges as part of his interim payment application under clause 14.3.

It will be useful to develop this point a little.

By clause 14.3 (e) of the Silver Book and 14.3 (f) of the Yellow, the application Statement should include 'any other additions or deductions which may have become due under the Contract or otherwise, including those under Clause 20 [Claims, Disputes and Arbitration]'. Accrued financing charges under clause 14.8 would appear to fall within this category, and so should be included in the Statement.

The effect of clause 14.8 is that the Contractor need not give any notice or receive any certificate in order to be *entitled to apply* for payment of the accrued financing charges under clause 14.3. However, if having applied for them the Employer does not pay in accordance with clause 14.6, then it would seem the Contractor has a claim under clause 20.1, and should therefore give his initial notice within the 28 days or face the time bar.

Thus, although the *contractual entitlement* to the financing charges arises irrespective of any notice or certificate, the Contractor's *right to claim* those charges in the event of the Employer's non-payment will depend upon his giving his clause 20.1 notice in time. A contractor facing non-payment of accrued charges for late payment should never confuse these two quite different points.

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<sup>11</sup> As we have seen (Section 4.14.2), the Contractor may also suspend the works and ultimately terminate the contract for non-payment.

#### 4.14.6 Financial steps after Taking Over: Clauses 14.10 to 14.13

After Taking Over there are three main steps the parties will need to take to conclude the financial aspects of their contract. These are:

- the Contractor's Statement at Completion (clause 14.10)
- the Final Payment Application process and Discharge (14.11–14.12)
- the Final Payment (14.13)

##### **Contractor's Statement at Completion**

Within 84 days after receiving the Taking Over Certificate for the works, the Contractor must submit to the Engineer or Employer a Statement at Completion with supporting documents. These should show, in detail:

- the value of all work done in accordance with the contract up to the date of completion stated in the Certificate;
- any further sums which the Contractor considers due;
- an estimate of other amounts which the Contractor considers will become due to him under the contract, with the estimated amounts shown separately.

In the Silver Book, the Employer is to notify the Contractor within 28 days of any items in the Statement with which he disagrees, with supporting details, and make payment within 56 days after receiving the Statement and supporting documents (in accordance with clause 14.7).

In the Yellow Book, following a similar timetable, the Contractor is entitled to a certificate from the Engineer within 28 days and payment within 56 days of the Statement and documents.

##### **Final payment application process**

Within 56 days after receiving the Performance Certificate, the Contractor must submit a draft final statement with supporting documents showing:

- the value of all work done in accordance with the contract;
- any further sums which the Contractor considers to be due to him under the contract or otherwise.

If the Engineer or Employer disagrees with or cannot verify any part of the draft final statement then the Contractor is to submit such further information as may reasonably be required, and shall make such changes in the draft as may be agreed. The Contractor then prepares and submits the final statement as agreed.

If there remains any disagreement following discussion then the Contractor is entitled to a certificate or payment in respect of the agreed items. The dispute as to the balance may be referred to a Dispute Adjudication Board.

The aim therefore is to arrive at an agreed final statement, with the matters which cannot be agreed hived off to the decision of a DAB.

### **Discharge**

When submitting the final statement the Contractor is to submit a written discharge stating that the total of the final statement represents full and final settlement of all moneys due to the Contractor under or in connection with the contract. The discharge may state (and it would probably be wise for the Contractor to make sure that it does) that the discharge takes effect only when the Contractor has received the performance security and payment of the outstanding balance of the total stated.

### **Final payment**

In the Yellow Book, within 28 days after receipt of the Contractor's final statement and written discharge, the Engineer is to issue the final payment certificate stating the amount that is finally due to the Contractor. This is after giving credit for all amounts previously paid and for all sums to which the Contractor is entitled under the contract and the balance(if any) due from the Employer to the Contractor or vice versa. The Employer must then make the final payment to the Contractor within 56 days after the date of his receipt of the Engineer's final payment certificate.

In the Silver Book the final payment is to be made within 42 days of receipt of the final statement and written discharge.

#### **4.14.7 Cessation of Employer's liability: Clause 14.14**

The Books provide that the Employer is not to be liable to the Contractor for anything under or in connection with the contract except to the extent that the Contractor has included an amount expressly for it:

- in the final statement; and also
- (except for matters arising after issue of the Taking over Certificate) in the Statement at Completion.<sup>12</sup>

#### **4.15 Termination by the Employer**

The Employer may terminate the contract either:

- for the Contractor's default, as set out in clause 15.2 of the Books; or
- for the Employer's own purposes or convenience.

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<sup>12</sup> Thus, unless the Contractor includes an item in the Statement at Completion he loses his entitlement to payment for it.

As one might expect, the financial and other consequences of a termination differ widely depending on which applies.

#### 4.15.1 Termination for Contractor default: Clause 15.2

We should first mention an important provision in clause 15.1 of both Books: the general right of the Employer or Engineer to issue a notice to the Contractor to make good and remedy any failure and carry out any obligation under the contract within a specified reasonable time. As we shall now see, Failure by the Contractor to comply with such a notice to correct is a ground of termination under clause 15.2.

Clause 15.2 of the Silver Book provides that the Employer can terminate the contract if the Contractor:

- fails to provide the performance security as required by clause 4.2;
- fails to comply with a notice to correct under clause 15.1;
- abandons the works or otherwise plainly demonstrates an intention not to continue performance of his obligations under the contract;
- without reasonable excuse fails to proceed with the works in accordance with clause 8;
- subcontracts the whole of the works or assigns the contract without the required agreement;
- becomes bankrupt or insolvent, goes into liquidation, or one or other listed event of insolvency occurs;
- commits any one of a long list of corrupt acts or the Contractor's personnel or agents commit such acts.

In the Yellow Book, a similar list of grounds applies but with the addition of the Contractor's failure to comply, within 28 days of receiving it, with a notice under clause 7.5 to make good rejected plant, materials or workmanship or an instruction under clause 7.6 to carry out remedial works.

Where any of the grounds apply, the Employer can give 14 days' notice to the Contractor of termination. Immediate notice can be given in the event of an act either of insolvency or of corruption (as specified in clause 15.2).

The Employer should take legal advice before giving notice of termination.

The consequences of issuing a notice when the ground relied on is not made out could be serious and it is not always possible for the Employer to withdraw a notice once given.

After expiry of the Employer's notice the Contractor is to leave the site and deliver any required goods and the Contractor's documents and other design documents to the Employer or Engineer. He should also seek immediately to assign any subcontracts as required in the notice and comply with any reasonable instructions to secure the works or avoid harm or damage to persons or property.

Following termination, the Employer may complete the works himself or arrange for others to do so; and he or his other contractors can use any of the Contractor's goods and design material as needed.

#### 4.15.2 Valuation for works executed at date of termination: Clause 15.3

As soon as practicable after the termination, the Engineer or Employer is to determine the value of the works at the date of termination and any other sums due to the Contractor for work executed.

#### 4.15.3 Payments after termination: Clause 15.4

The Contractor is entitled to receive the value of the work executed in accordance with the contract at the date of termination, less the Employer's losses and extra costs resulting from it.

The Employer is also entitled to withhold further payments until the cost of completing the works, of remedying defects and any damages for delay, together with any other expenses, have been assessed.

#### 4.15.4 Termination for convenience: Clause 15.5

The Employer can terminate the contract at any time for his own convenience by giving notice to the Contractor.

The termination takes effect 28 days after the later of the dates on which the Contractor receives the notice or the Employer returns the Contractor's performance security. The exception to the right to terminate for convenience is that the Employer cannot terminate the contract in order to execute the works himself or arrange for other contractors to do so.

The financial consequences of a termination for convenience are the same as for termination resulting from *force majeure* under clause 19.6. We will consider these shortly, in Section 4.19.

It is noteworthy that the effect of treating the consequences as the same means that, surprisingly perhaps, the Contractor is not entitled to loss of profit even though he finds the contract terminated through no fault of his but entirely for the Employer's own purposes or convenience.

By clauses 15.5 and 16.2, following termination the Contractor is to cease all further work, unless instructed to carry out work for safety and protection purposes, is to hand over Contractor's documents, plant, materials and other work for which he has received payment and is to remove all goods from site (except as necessary for safety) and leave the site.

### 4.16 Suspension and termination by the Contractor

#### 4.16.1 Suspension: Clause 16.1

In the Silver Book, the Contractor may either suspend the works or reduce the rate of work if the Employer fails to:

- provide evidence of his financial arrangements under clause 2.4; or
- pay the Contractor within the times prescribed by clause 14.7.

The Contractor is to give not less than 21 days' notice and is entitled to maintain the suspension or reduction in work rate until he has received the evidence or the payment outstanding.

The position is similar in the Yellow Book, except that in addition to a failure to pay the Contractor, the Engineer's failure to certify an interim payment in accordance with clause 14.6 is a stated ground for suspension.

In both Books, the Contractor can claim costs (plus profit) and an extension of time if he incurs cost or suffers delay as a result of suspending the works or reducing his rate of work in accordance with clause 16.1.

#### 4.16.2 Termination: Clause 16.2

In both Books, the Contractor may terminate the contract if:

- the Employer fails to provide the required evidence of his financial arrangements;
- he fails to pay the Contractor an amount due;
- he substantially fails to perform his obligations under the contract;
- without the Contractor's prior agreement he assigns or transfers to a third party the contract or any benefit or interest in or under it;
- a prolonged suspension affects the whole of the works as described in clause 8.11;
- the Employer becomes bankrupt or one or another listed event of insolvency occurs.

The Yellow Book adds to the above the failure by the Engineer to issue the relevant interim payment certificate within 56 days after receiving the Contractor's Statement and supporting documents.

For each of the above events, the Contractor must give 14 days' notice to the Employer of termination, except that he can by notice terminate immediately in the event of prolonged suspension or insolvency.

As with termination by the Employer, the Contractor should always seek legal advice before giving notice.

#### 4.16.3 Events after termination: Clause 16.3

Following termination, the Contractor ceases all further work, except as may be instructed for the safety of life, property and the works; hands over to the Employer any Contractor's documents, plant, materials and other work for which he has received payment; removes from site all his equipment and facilities; and leaves the site.

#### 4.16.4 Payment on termination: Clause 16.4

Following termination, the Employer must return the performance security and pay:

- the sums payable to the Contractor for work performed for which a price is stated in the contract;
- the cost of plant and materials ordered for the works which have been delivered to the Contractor or which he is liable to accept;
- any other cost or liability reasonably incurred in expectation of completing the works;
- the cost of removing temporary works and the Contractor's equipment from the site and return of these items to the Contractor's base as well as the cost of repatriating the Contractor's staff and labour;
- the amount of any loss of profit or other loss or damage suffered by the Contractor as a result of the termination.

## 4.17 Risk and responsibility

Clause 17 in both Books has the above heading although, as we have seen in this Part of the Handbook and the last, the contracts throughout assign differing degrees and types of risk to the parties and apportion their responsibilities.

What the contracts do in clause 17 is to set out certain specific topics and then to identify within each the risks and responsibilities which are to be assumed by Employer and Contractor and their extents.

### 4.17.1 Indemnities: Clause 17.1

This clause provides for one or other of the parties to '*indemnify and hold harmless*' the other party against certain eventualities.

The obligation to '*indemnify*' in this context means to be fully responsible for discharging a relevant liability which the other party has incurred to a third party, and covers payment of the indemnified party's costs, legal fees and other loss resulting from the liability incurred.

For example, suppose that as the design-build contractor I poorly design a process plant for you, the employer. As a result of that poor design, a river supplying water to a village downstream of the plant becomes polluted and causes injury to others. Then, if you face claims from the injured villagers as the developer of the site, I may have to indemnify you, and '*hold you harmless*' against their various claims, including paying any legal and other expenses you might incur in responding to their claims.

In summary, under clause 17.1 the Contractor must indemnify the Employer against all claims, damages, losses and expenses in respect of injury, disease or death and damage to or loss of property arising out of his design, execution and completion of the works unless the injury or damage is due to the negligence, wilful act or breach of contract of the Employer or the Employer's personnel or agents.



For his part, the Employer must (in summary) indemnify the Contractor with respect to injury, disease or death attributable to the negligence, wilful act or breach of contract of the Employer, or the Employer's personnel or agents and in respect of certain matters excluded from insurance cover.

#### 4.17.2 Contractor's care of the works: Clause 17.2

The Contractor must take full responsibility for the care of the works and goods from the contract commencement date until the Taking Over Certificate is issued (or deemed to be issued). If any loss or damage occurs to the works during this period, other than from one of the causes listed as an Employer's Risk in clause 17.3 (see below), the Contractor must rectify the loss or damage at his own risk and cost.

The Contractor will also be liable for any loss or damage caused by his actions after the issue of the Taking Over Certificate or where the cause of the loss or damage was some earlier event for which he is responsible.

#### 4.17.3 Specific Employer's risks: Clauses 17.3 and 17.4

In the Yellow Book, the Employer's risks listed in clause 17.3 are (in summary) as follows:

- (a) war, hostilities, invasion, act of foreign enemies;
- (b) rebellion, terrorism, sabotage by persons other than the Contractor's personnel, revolution or civil war;
- (c) riot, commotion or disorder within the country where the works are carried out;
- (d) munitions of war, explosives, radiation, contamination by radioactivity and related risks;
- (e) pressure waves caused by aircraft or certain other airborne craft;
- (f) use or occupation of any part of the works except as specified in the contract;
- (g) design of any part of the works by the Employer's personnel or those for whom the Employer is responsible;
- (h) any operation of the forces of nature that was unforeseeable or against which an experienced contractor could not reasonably have been expected to have taken adequate preventative precautions.

In the Silver Book, only items (a)–(d) on this list are Employer's risks under clause 17.3.

In both Books, if any of the listed Employer's Risks result in loss or damage to the works, goods or Contractor's documents, the Contractor must promptly notify the Engineer or Employer and rectify the loss or damage to the extent required by the Engineer or Employer.

If he suffers delay and/or additional cost from rectifying the loss or damage, then the Contractor will, provided he gives his clause 20.1 notice of claim, be entitled to an extension of time and payment of the relevant cost. Note that in the Yellow Book if risks (f) or (g) occur (relating to use and occupation by the Employer and design by the Employer or his personnel), then the Contractor is also entitled to reasonable profit as well as cost; otherwise, in both Books the Contractor's entitlement is to cost incurred only.

#### 4.17.4 Limitation of liability: Clause 17.6

This is a very important provision in the FIDIC Books and covers both the scope and the extent of the parties' liabilities to each other in general.

##### **Consequential loss or damage**

The first limitation is that neither party is to be liable to the other for what is sometimes called 'indirect' or 'consequential' loss or damage. The clause lists examples of this as 'loss of use of any Works, loss of profit, loss of any contract' and then refers more generally to 'any indirect or consequential damage', other than as specifically provided under clauses 16.4 (payment on termination) or 17.1 (indemnities).

What is 'indirect' or 'consequential' loss or damage is a significant topic in itself. It is a concept developed in the common law jurisdictions and can be illustrated by the following example.

An employer contracts to have a house refurbished to a high specification. She does not tell the contractor why she wants the house done up or why she needs it to be ready by a certain date. The contractor does a bad job and causes the work to be delayed by several weeks. The employer claims against the contractor not only the cost of putting right his defective work but also the rent she would have earned on the house had she been able to let it out (as she had intended) for the period when, due to the contractor's poor workmanship, the house could not be occupied.

In this example, the cost of the remedial works is 'direct' loss; the loss of rental income for the period of delay is, however, 'indirect' or 'consequential' loss resulting from the contractor's various defaults. Although the distinction may be difficult to make in practice, in this simple example the remedial works costs are at the date of the contract foreseeable as likely in the natural course of events to result from the contractor's shoddy workmanship or breach of contract. However, if the employer is to recover the loss of rental income, she must show that the contractor at the date of the contract had knowledge of her intention to rent the house out.

##### **Contractor's total liability**

Clause 17.6 also limits the total amount of the Contractor's liability to the Employer.

Except in the case of fraud, deliberate default or reckless misconduct, the total liability of the Contractor to the Employer in connection with the contract is not to exceed the sum stated in the Particular Conditions or, if no sum is stated, the Contract Price (if Silver Book) or Accepted Contract Amount (if Yellow).

## 4.18 Insurance

In both Books insurance must be taken out to cover:

- loss or damage to the works, plant, materials, Contractor's documents and Contractor's equipment;
- liability for personal injury to third parties and property damage; and
- (by the Contractor) injury to the Contractor's personnel.

There are various detailed provisions for the taking out and maintaining of the required types of cover in similar terms in clause 18 of the two Books. It is beyond the scope of this work to examine these here, but note that, generally speaking, the Books assume that the Contractor will take out the relevant insurance, although (apart from the last category above, which is employer's liability cover) the general conditions provide for either party to have this responsibility. If the Employer rather than the Contractor is to take out and maintain the insurance then this should be stated in the Particular Conditions.

## 4.19 Force majeure

Clause 19 of the two Books provides for the parties' remedies in the event of overwhelming events or circumstances beyond their control which prevent them from performing their obligations under the contract.

### 4.19.1 Meaning of 'force majeure': Clause 19.1

The following events are called 'force majeure' and are defined in both Books in similar terms. 'Force majeure' is:

- an exceptional event or circumstance;
- beyond a party's control;
- such that a party could not reasonably have provided against before entering into the contract;
- which, having arisen, such party could not reasonably have avoided or overcome; and
- which is not attributable to the other party.

Clause 19.1 gives examples of the kinds of event that could constitute force majeure but the list is not intended to be exhaustive. It covers events or circumstances that include war, hostilities, rebellion, terrorism, riot, disorder of various types, ionising radiation or contamination and natural catastrophes such as earthquakes and hurricanes.

#### 4.19.2 Notice: Clause 19.2

By clause 19.2, if a party is or will be prevented from performing any of its obligations under the contract by force majeure then it must give notice to the other party of the event or circumstance and specify the obligations whose performance is prevented. The notice must be given within 14 days of the party's becoming aware, or of the date when he should have become aware, of the relevant event or circumstance.

The effect of giving the requisite notice is that the affected party is excused from performance of the relevant obligations for as long as the force majeure prevents it from performing them. An important proviso to this is that force majeure does not apply to a party's obligations under the contract to pay the other party.

#### 4.19.3 Minimising delay and the consequences of force majeure: Clauses 19.3 and 19.4

By clause 19.3, the party affected must at all times make all reasonable efforts to minimise any delay in the performance of the contract as result of the force majeure, and must give notice to the other party when it is no longer affected.

But if the Contractor:

- is prevented from performing any of his obligations by force majeure;
- has given the required notice to the Employer; and
- suffers delay or additional cost as a result of the force majeure; then
- subject to giving his clause 20.1 notice,

he will (clause 19.4) be entitled to an extension of time. Depending on the type of force majeure event and where it occurred, he may also be entitled to any costs he incurred.<sup>13</sup>

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<sup>13</sup> The formula for assessing the entitlement to costs under Clause 19.4 is a little complicated in the two Books. If the force majeure is an event or circumstance falling within one of the listed categories in clause 19.1 other than a natural catastrophe, then the Contractor can recover his costs incurred, except that, where the force majeure falls under the second to fourth categories listed, the event or circumstance must have occurred or existed within the country where the works are or are to be carried out. The net effect seems to be that natural catastrophes are excluded, but the Contractor can get his costs for everything else on the list provided that the riots, etc, occurred in the country where the works were being executed (save for war, hostilities, invasion and act of foreign enemies, where these need not occur in that country).

#### 4.19.4 Prolonged force majeure: Clause 19.6

The contracts release the parties from their obligations if the force majeure has a substantial prolonged effect.

Clause 19.6 says that if the execution of substantially all of the contract works is prevented because of force majeure, for which notice has been given,

- for a continuous period of 84 days; or
- for multiple periods totalling more than 140 days due to the same notified force majeure

then either party (not just the party whose obligations cannot be performed) may give notice to the other of termination of the contract; and the notice takes effect 7 days after being given.

Following such termination, the Contractor:

- ceases all further work, except for work instructed to protect persons or property or for the safety of the works;
- hands over to the Employer the Contractor's documents, plant, materials and other work for which he has received payment;
- removes from site all other equipment and facilities, except as needed for safety, and leaves the site.

The Employer also pays the Contractor the same amounts as are provided for in the event of Contractor's termination under clause 16.4 (see Section 4.16.4 above) except that the Contractor is not entitled to any loss of profit or other loss and damage.

#### 4.19.5 Release from performance under the law: Clause 19.7

This provision is intended to enable the parties to be discharged from further performance if any event or circumstance beyond their control (including, but not limited to, force majeure) arises:

- which makes it impossible or unlawful for either or both of them to fulfil their obligations; or
- which, under the governing law of the contract, entitles them to be released from further performance.

In either case, a party may give notice to the other of the relevant event or circumstance. Upon that notice:

- the parties will be discharged from further performance (but without prejudice to, or not affecting, the rights of either party in relation to previous breaches of contract, if any); and

- the sum payable to the Contractor will be the same as for a termination under clause 19.6 (see above).

Thus, the parties may be discharged from further performance where events or circumstances beyond their control prevent them from performing their obligations in a potentially wider set of situations than force majeure as defined in the Books. The parties may be excused in any such situation where under the governing law of the contract they would be entitled to be discharged.

## 4.20 Contractor's claims, disputes and arbitration

Clause 20 of the Books contains detailed provisions dealing with the submission and processing of claims by the Contractor and the resolution of disputes between the parties.

Employer's claims are dealt with in clause 2.5 of the Books and we considered these in Section 4.2.3 above. In this section, we look at contractors' claims in more detail and in Part III of this Handbook we examine the Dispute Adjudication Board process and arbitration.

### 4.20.1 Contractor's claims: Clause 20.1

We have already seen that in the the two Books the Contractor must give his initial notice of claim within 28 days of the date on which he became or ought to have become aware of the event or circumstance giving rise to the claim. We have also see that, should he be late with this initial notice, then under the express terms of clause 20.1 he is prevented from pursuing any claim in respect of that event or circumstance.

The initial notice in order to be valid need not take any particular form but must '[describe] *the event or circumstance giving rise to the claim*'. An effective initial notice thus need not quantify the claim or describe in any detail the situation or event giving rise to it. The essential purpose of the notice is to alert the Employer or Engineer to the existence of a situation or event which the Contractor treats as giving rise to an entitlement; the Employer or Engineer can then investigate the circumstances as soon as possible.

Assuming that the Contractor does give his initial notice in time, the next steps in the processing of the Contractor's claim are, in summary, as follows.

#### **The detailed claim**

Within 42 days after he became aware, or should have been aware, of the event or circumstance (or within any extended period agreed with the Engineer or Employer), the Contractor must submit a fully detailed claim with full supporting particulars of the basis of the claim and of the amount of time or money claimed.

If a claim event or circumstance has a continuing effect then:

- the fully detailed claim is to be considered as interim;
- the Contractor is to submit at monthly intervals further interim claims, giving the accumulated delay and/or amount claimed; and
- he is to submit his final claim within 28 days after the end of the effects resulting from the event or circumstance giving rise to the claim.

### **The Engineer or Employer's response**

Within 42 days of receiving a claim or any further details supporting a previous claim (or any agreed extension to this timetable), the Engineer or Employer must respond with approval, or disapproval and detailed comments. He might request necessary further information but he should at least respond on the principles of the claim within this period.

### **Determining the claim**

The Engineer or Employer is to proceed in accordance with clause 3.5 (see Section 4.3.2) to agree or determine the Contractor's claim. As we saw, this involves the Engineer consulting with the Employer and the Contractor in an endeavour to reach agreement; or in the Silver Book, the Employer consulting directly or through his Representative. If agreement is not reached, the Engineer or Employer is to make a fair determination and give notice of it with supporting details.

As we also saw in Section 4.3.2, in the Yellow Book the parties are to give effect to the determination unless and until it is revised by a Dispute Adjudication Board, whereas under clause 3.5 of the Silver Book the Contractor can hold off from giving immediate effect to the Employer's determination by giving notice of his dissatisfaction with it 14 days after receiving it; in which case the matter is referred to a DAB.

The DAB is the next step along the path mapped out in the FIDIC general conditions towards a resolution of the Contractor's claim, and more generally of disputes between the parties arising from their contract. From the DAB, the FIDIC forms provide for the parties to take their differences to arbitration, for a final and binding decision; unless they can resolve them beforehand, during the 56-day cooling-off period that the contracts also prescribe.

We shall be looking closely at this FIDIC machinery for resolving disputes, as part of the wider picture of dispute resolution, in the next Part of this Handbook.

# Part III



# 5 Disputes and How to Resolve Them

## 5.1 Introduction

In construction projects, parties often make claims of one kind or another against other parties. A contractor, for example, might assert that he is entitled to an additional payment from an employer for extra work done, or to more time within which to carry out or complete the works. An employer, on the other hand, might assert an entitlement to payment for some obligation not properly performed by the contractor (the work is defective or incomplete, for example), or to an extension to a contractual period.

In this part of the Handbook we consider the different kinds of claim that might be made by one party to a construction contract against another, and the various ways in which disputes between the parties may be resolved.

In Appendix I we illustrate some of the points we have discussed by looking at each of the steps in an international arbitration about a chemical plant in Belgium.

## 5.2 Legal aspects of a construction project

Before we look at the different types of claim, however, it will be helpful to consider in general the legal aspects of a construction project. There are six main features that should be considered:

1. The terms of the construction contract which define the rights and liabilities of the parties to the contract.
2. The law that governs the construction contract.
3. The terms of the construction contract relating to the resolution of disputes between the parties to the contract.
4. The law that applies to the process for resolving such disputes.

5. Rights and liabilities that might arise independently of any contract.
6. Those provisions of law which apply to the project by virtue of its location.

### 5.2.1 The terms of the construction contract

Earlier in this Handbook, we saw how a construction contract will often be a complex document, setting out in detail the rights and obligations of each party to the contract. So a contractor will typically have an obligation to carry out the works with reasonable diligence, for example, and an employer will have an obligation to value and pay for the works at certain intervals and in a prescribed manner. If an event occurs which causes one of the parties to the contract to suffer some detriment, the construction contract will often be the first place such a party will search to see if there is any basis on which it might be compensated by the other party or parties to the contract.

### 5.2.2 The law which governs the construction contract

Like any other contract, a construction contract cannot be seen in isolation from the law that governs it. When people talk about the law governing a contract, they mean the body of law according to which the rights and liabilities of the parties to the contract are to be understood. Different countries have different bodies of law associated with them – China, for example, has a body of law that is different from Russian or English law. If a contract is governed by Chinese law it will be read and understood in accordance with the principles and rules of Chinese law, which, in relation to a particular question, might not be the same as the principles and rules of another body of law. This could make a big difference in some cases. For example, if the words used in the contract are not clear, then Chinese law might produce a result different from that which would have been produced had a different governing law applied to the contract. In another example, one party might try to advance a claim against another party which Chinese law does not recognise but which might be recognised by another body of law.

The governing law of the contract is often stated in the contract documents; often, it is included in the tender documents, and may be difficult to negotiate. The choice of law will normally depend on the employer's preference, or sometimes that of whoever is providing the project finance. Sometimes, the law of the location of the project will require that the contract be governed by local law.

### 5.2.3 The terms of the construction contract relating to the resolution of disputes between the parties

Construction contracts, as well as stating in detail the substantive rights and obligations of the parties to them, also typically contain terms that relate to the steps to be taken if a dispute arises between the parties which cannot be

resolved straightaway by agreement. Such terms might provide for a claim to be made and considered initially by an engineer or other consultant appointed by the employer, and for a number of steps to be taken should one or other party be discontent with the initial decision. If the dispute cannot be resolved any earlier, these steps could lead to an arbitration. We consider in detail what is involved in an arbitration later in this part of the Handbook. In an international construction project, involving parties from different parts of the world, it is very usual for the construction contract to contain terms referring disputes to arbitration if they cannot be resolved at an earlier stage.

#### 5.2.4 The law of the process for resolving a dispute

As well as the governing law of the contract, which applies to determine the substantive rights and liabilities of the parties to it, there is also a body of law which applies to the process, or procedure, for making claims arising from, and deciding disputes concerning, such rights and liabilities. So if, for example, a contract contains a term which refers disputes concerning the contract to arbitration, then the law of the process will be:

- the law that applies to determine the time limits for commencing an arbitration claim;
- rules for the conduct of the arbitration;
- whether the party who loses an arbitration can appeal to a court against the decision;
- whether a party can challenge an arbitration award which is made by (for example) a biased tribunal; and, generally,
- the control to be exercised over arbitration proceedings and the parties' basic rights in relation to them.

Generally speaking, the law of the process or procedure will be the law of the place of the arbitration, even if the governing law of the contract is the law of another country (perhaps the law chosen by the parties). Thus a construction contract might be governed by the law of England, but because the parties had agreed to refer any disputes about the contract to arbitration in Stockholm, Swedish procedural law could apply.

#### 5.2.5 Rights and liabilities that might arise independently of any contract

Rights and liabilities might arise in connection with a project independently of any contract. This could happen in two main types of case:

- First, where works are carried out on the basis of a letter of intent or similar basis but no contract is ever actually concluded. In such a case, it could be difficult to determine which law applies to the parties' transaction;

depending on the applicable law and the facts of the case, however, the party carrying out the work could be entitled to be paid by the party requiring or authorising it.

- Second, where a third party, not in any way involved in the project, causes damage or loss to a party to the project, or suffers loss as a result of some act or omission of such a party. For example, a person who causes the electricity supply to a project to be interrupted could be liable to the contractor or employer or both; or the owner of land adjacent to the project works might be entitled to compensation from one or other of the parties to a project if the works cause his land to become flooded.

### 5.2.6 The law which applies to a project by virtue of its location

This is an important feature of construction projects. The law of the country in which the project is to be carried out will typically include provisions concerning such matters as construction standards and health and safety of workers engaged on the project, and environmental controls. These provisions are often contained in highly complex sets of rules and regulations, and will often require specialist guidance. They arise independently of the contract and may even be at variance with the terms of the contract.

## 5.3 Kinds of claim

Against the above background, let us now consider the different kinds of claim that might be made by one party to a construction contract against another. We can think of such claims as falling into two broad categories:

- claims for which the contract specifically provides; and
- claims for which the contract does not specifically provide, but which nevertheless arise under or in connection with the contract.

### 5.3.1 Claims for which the contract specifically provides

A construction contract for a project of any size will normally specify circumstances in which a party might make a claim against another party to the contract. A useful example is provided by the FIDIC Red Book clauses 15.2 (b) and (c), which provide that, if the Contractor fails to comply with his obligations by abandoning the works or without reasonable excuse failing to carry them out expeditiously, then the Employer may, on giving 14 days' notice to the Contractor, terminate the contract. In that event, the Employer may employ others to complete the work and recover the cost of doing so from the Contractor (clause 15.4). Moreover, he could recover those sums without

prejudice or in addition to any other rights he might have against the Contractor, whether under the contract or otherwise (clause 15.2). This means the Employer could, depending on the governing or proper law of the contract, seek additional compensation from the Contractor beyond what the contract specified.

### 5.3.2 Claims for which the contract does not specifically provide

The above example of the FIDIC clauses points to a type of claim which is not specifically identified by the contract, but nevertheless arises under or in connection with it.

Here is an example: Suppose two parties are negotiating a civil engineering contract. The negotiations take place under pressure as the employer has only a limited time before the works must begin. He tells the other party, the main contractor, that the ground conditions meet certain load-bearing requirements for the envisaged works; he has had geotechnical surveys carried out, he says, by reputable consultants, and is prepared to assure the contractor that the ground conditions will bear the loads required by the works.

The employer then provides the contractor with these geotechnical reports; the contractor has had no time to conduct his own surveys and enters into the contract relying on the information provided. Suppose also that the construction contract itself contains a term recording the provision of the geotechnical information by the employer and stating that this information is accurate and can be relied on by the contractor.

The contractor then commences work, but finds on digging for the pile foundations that the ground conditions are wholly inadequate for the required loads. He looks again at the geotechnical reports on which he relied; on investigation, he discovers that critical data in the reports had been substituted for data in geotechnical reports which had been carried out on an adjacent site that the employer was also developing; and that this substitution resulted from the carelessness of the employer's project management team. As a result of this carelessness, the work so far carried out by the contractor is abortive and he has suffered substantial loss.

In this imaginary case, there is no provision in the contract which specifically says that the contractor is entitled to compensation for his loss; but he could still be able to make a claim for compensation against the employer.

Let us suppose the employer is a UK company and has agreed with the contractor, a Russian corporation, that English law will apply to the contract. Then in English law the following claims could arise:

- A claim to be compensated for the employer's breach of the term of the contract which contains the statement (or 'warranty') that the geotechnical information which the employer has provided is accurate. Note that this claim is one which arises by reason of the terms of the contract but is not one for which the contract specifically provides; it is instead a claim to be

compensated for a breach of the construction contract which is recognised by the general or governing law of the contract.

- A claim to be compensated for a careless misrepresentation, or misstatement, made by the employer through his project team in the course of the contractual negotiations, on which the contractor relied in entering into the contract. This claim would not itself be a claim made by reference to any term of the contract; it could be made even if the contract did not include the statement or warranty that the geotechnical data were accurate. It arises outside the contract, but in connection with it, because the careless statements made induced the contractor to enter into it. This type of claim may be particularly important where there are lengthy and detailed pre-contractual negotiations but where the terms of the executed contract itself do not contain every important detail.

The above examples highlight the importance of considering carefully all of the circumstances if you are a party to a construction contract and suffer some detriment for which another party to the contract may be responsible. In particular, you should never assume that just because the detriment you have suffered, or the circumstances giving rise to it, are not specifically covered by the terms of the contract that you have no claim available against the other party. You might in fact have a claim.

## 5.4 Making a claim

We shall now consider how, in general, a party to a construction contract might make a claim against another party. This topic breaks down into three main questions:

- Do I have a claim?
- If so, when do I make it?
- How do I make my claim?

### 5.4.1 Do I have a claim?

We saw above how claims can be of different kinds; and we saw that you cannot assume that you do not have any claim available to you just because the terms of the contract do not specifically provide for a claim which fits your particular situation or circumstances. Often, however, particularly if the construction contract is a sophisticated one such as one of the family of FIDIC contracts, the first place to look will be the terms of the contract. If the contract does not specifically provide for a claim which matches your situation then, as we discussed above, you will need to examine carefully whether you might have another basis of claim.

## 5.4.2 If I have a claim, when do I make it?

This is a very important question, and the answer depends broadly on two things: first, the particular terms of the construction contract and, second, the law which applies to the process for bringing a claim.

### **Contractual time limits**

The terms of the construction contract may set out certain steps which have to be taken before a claim can be pursued, and time limits for taking those steps.

Suppose you are a contractor under the FIDIC Yellow Book and you encounter unforeseeable physical conditions which, by clause 4.12 of the contract, would entitle you to additional money and time. Before you can make a claim under this clause, you must, as we have seen, give notice to the Engineer describing the physical conditions and why they were unforeseeable within 28 days after you became aware or ought to have become aware of the circumstances giving rise to the claim.

This example shows how important it is to adhere to any time limits specified by the contract.<sup>1</sup>

### **Limits imposed by the law of the process**

In addition, however, to such contractual time limits, the law applying to the process for bringing a claim could also impose time limits for doing so. Many countries have laws that provide for a limit to the time within which a claim can be made. English law, for example, says that if the claim concerns a breach or breaking of a contract then, with some exceptions, it must be made within six years of the date of the breach. This means you must bring your claim in, for example, the High Court within that time limit.

The law of other countries where a party might wish to bring a claim could permit contract-based claims to be made later than this and some could require them to be made earlier. The important point to remember is that, if you think you have a basis for making a claim, you should ensure that you actually make it within the time limited by the terms of the contract and the time prescribed by the law which applies to the process for bringing your claim.

## 5.4.3 How do I make my claim?

The answer to this question depends, again, on both the terms of the particular construction contract and the provisions of the law applying to the process for bringing a claim.

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<sup>1</sup> It is important to note that the effectiveness of a time bar such as that in clause 20.1 depends on the governing law of the contract. Some systems of law, such as those based on the French Civil Code, could in certain circumstances permit a contractor to proceed with a claim even though the contract contains a clause 20.1 time bar and he is late with his initial notice. The effect of the governing law should always be considered if it looks as if a time bar might apply to a claim.

A construction contract may say that a claim should be made in a particular form; that is, it should contain information of a particular type or types set out in a particular way. So the FIDIC contracts, by clause 20.1, require the Contractor to notify a claim by giving a description of the event or circumstance giving rise to it within 28 days; but the Contractor has 42 days within which to provide full details of the claim thus notified.

As well as the contract, the applicable law of the process may prescribe how a claim is to be made. If there is an arbitration agreement, for example, then the applicable law may provide that to bring a claim a party must either follow the steps set out in the agreement or, if there are no such steps, send the other party a notice containing certain information or requirements. Legal advice should always be obtained to ensure that these requirements are all met.

#### 5.4.4 Summary

It is very important for the parties to a contract to understand not only when a claim arises, but also any conditions that have to be fulfilled before a claim can be made. In this connection, both the terms of the contract and the applicable law of the process have to be considered, in order to see what requirements are imposed as to the time, form and content of a claim.

### 5.5 Who decides whether to accept a claim?

Claims are finally decided either by a court of law or by an arbitrator or panel of arbitrators. These ways of deciding a claim are the result of formal legal proceedings, which we examine in some detail shortly.

Many construction contracts, however, provide for a mechanism or procedure for accepting or rejecting a claim before the parties resort to such proceedings. Such a procedure does not usually produce a final decision in relation to a claim; but much expense and time could be saved, and less damage caused to the parties' commercial relationship, by going through a non-final, preliminary procedure than if formal proceedings were immediately resorted to.

Such a non-final procedure will vary from contract to contract, but sometimes it will have two stages.

First, if an engineer or other consultant has been appointed to administer the contract, the claiming party could seek an initial decision from him; the FIDIC Yellow Book, as we have seen, provides by clause 3.5 for the Engineer to make an initial determination of claims after consulting with the parties.



If a party is dissatisfied with such an initial determination then, as the second stage, he may submit his claim to review or further consideration by a person or persons appointed by the parties. In the FIDIC family of contracts, the Dispute Adjudication Board constitutes such a second stage.

The following are typical aspects of such a second-stage procedure:

- The person or persons appointed are independent of the contracting parties.
- Whether one person or more than one is or are appointed depends on the complexity of the claim, the parties' resources and their ability to agree on a single person. The time at which the appointment is made (whether at the start of the project or only after a dispute arises) will also need to be considered.
- The appointed person or persons will normally have suitable technical expertise and, if at all possible, be agreed by all the parties concerned with the disputed claim. This will increase the likelihood of the parties' accepting the decision and not proceeding to an arbitration or other legal process.
- The procedure is flexible and less formal than a court or arbitration. Whatever procedure is adopted, it should ensure that each side is given an opportunity to put its case fairly and fully before any decision is reached.
- The procedure should be as speedy as possible. A timetable should be established at the outset. If a party delays unreasonably, the appointed person or persons should be prepared to make a decision on the claim without his contribution.
- The decision should be interim, in the sense that it will not prevent either party from proceeding to an arbitration or court proceedings; but, in order to produce greater certainty, the parties should consider including in the contract a term to the effect that they will be bound by the decision unless within a stipulated time either party gives the other notice that it intends to begin arbitration or other proceedings.
- The costs of the process should either be borne by each side itself, with the appointed persons' costs being equally borne by the parties, or the appointed persons should have a power to decide which party is to bear their fees and expenses. It is suggested that there should not be any power to award a party's costs against another party, as this is more suited to legal or arbitral proceedings than to an informal, quick and provisional procedure.

## 5.6 The FIDIC Dispute Adjudication Board

We will now look at the FIDIC Dispute Adjudication Board (DAB). The DAB is an important feature of FIDIC contracts, and embodies many of the features of the second, intermediate stage of dispute resolution that we have just considered.

### 5.6.1 Scope

The scope of the matters capable of being referred to a DAB is very wide. Clause 20 of the FIDIC contracts provides that either party can refer to the DAB a dispute of any kind whatsoever in connection with or arising out of the contract, or the execution of the works. This will include, for example, determinations by the Engineer of the Contractor's claims under clause 3.5 of the Yellow and Red Books.

### 5.6.2 Appointment of the DAB

The DAB is intended to be an independent tribunal, comprising either one or three suitably qualified persons. The FIDIC contracts contain detailed provisions for the constitution, formation and operation of a DAB.

The members of a DAB are, as far as possible, to be agreed between the parties. If the contract is one of those in which an Engineer is appointed, and the parties agree, then the Engineer can act as the DAB.

For engineering construction projects, the Red Book general conditions provide for the DAB to be constituted at the inception of the project rather than 'ad hoc', as it is called – that is, after a particular dispute has arisen. FIDIC's view is that where there is likely to be a lot of work on site there is greater scope for disputes and so it is preferable for the DAB to be formed at the outset. Where much of the work is probably going to be done off-site, as in the types of project covered by the Yellow and Silver Books, there is thought to be less scope, so these contracts do not provide for a standing DAB in their general conditions.

The particular conditions for a Red Book contract may, however, provide for an ad hoc rather than a standing DAB, notwithstanding FIDIC's recommendations. In deciding whether to adopt this alternative the parties will need to consider a number of factors:

- A standing DAB is likely to be more expensive than a DAB appointed only after a dispute has arisen. FIDIC recommends that the standing DAB visit the site regularly during the works, be provided with necessary documents and generally be kept abreast of developments; in any large or protracted project this will involve substantial expense. Moreover, a standing DAB appointed at the outset of the project could comprise those whose expertise might not exactly match the particular dispute. An ad hoc DAB could be more flexible, in that the appointments can be tailored to the particular subject matter of the actual dispute.
- On the other hand, a standing DAB will have the advantage of familiarity with the project, and might be able to deliver a decision on a dispute more quickly and reliably. Such a DAB might also be better placed to give an informal opinion on the merits of the dispute than a DAB appointed only once the dispute has arisen, and to do so relatively promptly.

### 5.6.3 Referring a dispute

The FIDIC forms set out clearly, in clause 20, the steps to be taken in referring a dispute to the DAB for decision. These, in summary, are as follows:

- A party must first give notice of his intention to refer the dispute to the DAB for its decision, with a copy to the other party.
- In the Yellow and Silver Books, the parties are to appoint a DAB within 28 days of such a reference. In the Red Book, the DAB will already have been appointed if a standing DAB is used; if such a DAB is not used, then the appointment should also be made within 28 days. Whichever Book is used, the contract should name a person or body to appoint the DAB should the parties fail to agree on the appointment.
- The DAB should normally make its decision within 84 days of having the dispute referred to it.<sup>2</sup> Its decision should be reasoned, and is binding on the parties unless one of them gives a notice of dissatisfaction to the other party or parties within 28 days of receiving the decision (clause 20.4).
- If any party gives a notice of dissatisfaction in the required form and within the time prescribed, the parties are to attempt to settle the dispute amicably within a period of 56 days.
- After expiry of the 56-day period, and if no agreement or settlement has been reached, the dissatisfied party can (even if no attempt at amicable settlement has been made) begin an arbitration of the specific dispute.

### 5.6.4 Reaching a decision

Whether ad hoc or standing, the way in which a DAB arrives at its decision is largely up to it. Often the DAB will conduct a hearing, with written presentations of each party's case being provided beforehand. Lawyers may well be involved, even if much of the DAB's time will be taken up in the technical aspects of the dispute. However the proceedings are conducted, the DAB should give each side a reasonable opportunity to put its case. When the DAB reaches its decision, it should give reasons for doing so, identifying the relevant facts and terms of the contract.

### 5.6.5 Informal opinion?

As an alternative to obtaining a decision from the DAB, the parties could seek an informal opinion from it on the merits of the dispute or, indeed, seek such

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<sup>2</sup> In the case of the Yellow and Silver Books, this is subject to the parties' making certain required payments: see clause 20.4.

an opinion on any matter where the DAB's view might assist in their avoiding an outright dispute in the first place. The parties should approach the DAB jointly for an opinion because the appointment terms of the DAB normally prevent its members dealing with any of the parties separately or unilaterally. This informal, consultative role for the DAB could be helpful to all parties in giving them a respected opinion on the matter or dispute before any finding or decision is made. It is an important addition to the role of the DAB in resolving disputes, and should be seriously considered at an early stage.

### 5.6.6 Arbitration?

As mentioned above, if either party is dissatisfied with the DAB's decision then, provided he has given notice of dissatisfaction in accordance with the contract, he may refer the dispute to arbitration. However, such a party faces a disadvantage at the outset, because the FIDIC contracts provide that the DAB's decision may be relied upon as evidence in the arbitration. Therefore, in practice, the party who is dissatisfied must show how the DAB's decision is in error. If, for example, the DAB is a standing one and if, as envisaged by the FIDIC forms, it is composed of members agreed by the parties, its decision is likely to be treated with respect and given some weight by the arbitral tribunal.

If an arbitration is to take place, then the FIDIC contracts' general conditions provide for arbitration in accordance with the rules of the International Chamber of Commerce (ICC). The parties may, however, change this and select a different institution by suitably-worded particular conditions.

## 5.7 Methods of dispute resolution

The FIDIC DAB illustrates how a contract may provide for a non-final procedure to be followed by the parties before either has recourse to final legal proceedings. Such procedures occupy a kind of intermediate ground between final and informal ways of resolving disputes. We now examine final methods of dispute resolution in more detail; then we review the main ways in which disputes might be resolved informally.

### 5.7.1 Final methods of dispute resolution

Final methods of dispute resolution divide broadly into *arbitration* and *litigation*.

#### **What is arbitration?**

An arbitration is where two or more persons submit the dispute between them to the final decision of a third person or persons, usually agreed by them or appointed by a body whom the parties have agreed should make the

appointment. Unlike litigation, arbitration is in essence a matter of the consent of the parties. The power of an arbitrator to decide any matter arises solely from the parties' agreement.

### **How is an arbitration begun and conducted?**

Often an arbitration will begin and be conducted according to the rules of an institution or body mentioned in the arbitration agreement. Thus, an arbitration agreement could specify that the arbitration is to be subject to or conducted in accordance with the rules of the London Court of International Arbitration, or of the ICC. These bodies are respected and well established in international arbitrations. They publish rules and procedures for the commencement of an arbitration, the appointment of arbitrators, the basic timetable to be followed, and other matters relating to the conduct of the proceedings and the powers of the tribunal.

If no such institutional rules apply, then the proceedings will generally be controlled by the tribunal in conjunction with the parties. In some countries, most notably China, the law does not recognise arbitration except by submission to an arbitration institution.

The courts could become involved in arbitrations. If the arbitration is one to which the English Arbitration Act 1996 applies, for example, then certain basic procedural requirements (such as that the tribunal should act impartially and give each party a reasonable opportunity of putting its case) will apply, and the courts may grant the party affected relief if those requirements are not met. In many places, the relevant law lays down certain basic procedural safeguards for arbitrations. Many of the safeguards provided for in English law, for example, reflect generally-accepted principles of arbitration contained in the *Model Law for International Commercial Arbitration* adopted by the United Nations Commission on International Trade Law (UNCITRAL) in June 1985. This Model Law has, to varying extents, been widely adopted.

### **What happens if a party is unhappy with the result of an arbitration?**

This depends on what system of law applies to the arbitration. If the arbitration is subject to the English Arbitration Act 1996, for example, then there is a limited right of appeal to the High Court on points of law, and a party might be able to challenge an award on certain other grounds. We will look at these grounds in more detail in the next section. They include lack of jurisdiction in the arbitral tribunal, either to decide the particular dispute or to decide any dispute at all between the parties on the grounds that there was never any valid arbitration agreement between them. Other grounds of challenge might be a serious flaw or irregularity in the procedure itself, such as failure to give a party a reasonable opportunity to put its case, or that the tribunal was not properly constituted.

### **What is litigation?**

Litigation is where a dispute is decided by a court of law with jurisdiction or power over the dispute and to which it has been referred in accordance with its procedures. This process is very different from arbitration, because the source of a court's power to decide a dispute is not the agreement of the parties. Parties whose disputes are decided by a court in India, for example, are parties engaged in litigation as opposed to arbitration.

### **How do court proceedings differ from arbitration proceedings?**

The main differences are as follows:

- Arbitration proceedings are generally less formal than court proceedings and the procedures that an arbitral tribunal can adopt are generally more flexible.
- With limitations in some cases, the parties are able to choose their own tribunal in arbitrations, and these often comprise a person or persons with specialist technical knowledge or experience in the relevant industry, although lawyers are often also included in arbitral tribunals.
- Arbitrations are confidential to the parties, which may be an advantage if commercially sensitive issues or reputations are involved.
- Because a party is only obliged to arbitrate a dispute if he has agreed to do so there could be serious difficulties where the dispute involves several parties not all of which are parties to an arbitration agreement or the same agreement. Anyone involved in a project with more than one other party should try to ensure that any dispute that arises can be resolved in the same forum; this will normally require specific legal advice to be obtained.

## **5.7.2 Informal methods of dispute resolution**

Let us look now at informal methods of dispute resolution. These are by their nature hard to define; they range from settlement discussions taking place directly between the parties, often 'without prejudice' (that is, whatever is said may not later be disclosed to a court or arbitrator), to more structured methods.

Broadly, we can distinguish three types of informal method: unstructured negotiation; mediation; and conciliation.

### **Unstructured negotiation**

This is the most informal method of resolving disputes, and consists simply in the parties talking to or corresponding with each other with a view to settlement, normally on a without prejudice basis, either before or after formal proceedings have begun.

## Mediation

Mediation is essentially a structured method of conducting without prejudice negotiations with a view to settling a dispute, using the services of a mediator. This will be a neutral third party, often someone with experience in the industry, in whom the parties to the dispute have confidence. The mediator tries to facilitate settlement discussions by getting the parties to examine their respective cases, seeing if there is any room for negotiation or concessions, and generally to encourage constructive dialogue.

Mediations often take place after litigation or arbitration has commenced. Usually the parties will bear their own costs of the mediation and each pay half of the mediator's fees and expenses. Mediations can often act as a catalyst to settlement even if the dispute does not settle on the day. But in order to be effective, they require a real wish to settle by all parties.

## Conciliation

'Conciliation' is often used interchangeably with 'mediation', but is probably best limited to those cases in which the third party, who again will usually be a respected person in the relevant industry, proposes a solution to the parties after reviewing and discussing with them the merits of their dispute. Otherwise, a conciliation is very similar to a mediation.

In some cases, a party may have to begin final proceedings in order to protect its position; for example, in order to avoid a contractual or legal time bar. In other cases, it might be necessary because the other party will not negotiate about the claim or take it seriously. Even if final proceedings have commenced, it will normally be very sensible to try to use informal methods to resolve the dispute as well. The expense to the parties of final proceedings can be very great, often far greater than they anticipate at the outset, and the cost in terms of management time and energy directed to the proceedings can be just as great.

Moreover, if there has been a good commercial relationship between the parties it will be important to try to salvage as much of this as possible by, if possible, reaching agreement and curtailing formal proceedings. It should also be remembered that obtaining a solution to a dispute by making an agreement is often preferable to having a solution imposed by a court or arbitration tribunal.

### 5.7.3 Arbitration or litigation?

If a formal dispute resolution procedure has to be embarked upon, then arbitration is the method generally favoured by parties to international construction contracts. A party based in one country will normally be prepared to agree to have any disputes with a party based in another resolved by arbitration in a neutral place or seat: neither will wish to have the dispute decided in the other's courts. In government contracts and other situations, a tendering contractor, for example, will have no choice but to submit to the employer's

local court, and the law of the place of the project could impose similar restrictions; but apart from such cases arbitration is in general preferred in international contracts.

As well as neutrality of forum, arbitration is preferred over litigation because enforcement of an arbitral award against the losing party is generally less problematic than seeking to enforce a judgement of a local court. This is largely due to a UN-inspired multilateral treaty, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. This treaty, to which nearly all the world's trading nations are party, provides for the courts in a Convention country to recognise and give effect to arbitration awards published or made in any other state, with certain countries limiting this recognition to other Convention states (under the so-called 'reciprocity proviso'). We look further at enforcement in Section 5.8 below.

Other important reasons why arbitration is favoured are:

- greater flexibility: as we saw in section 5.7.1 above, arbitrations as compared with court proceedings are often more flexible in the procedures they can adopt; the parties and tribunal may generally speaking adopt whatever procedures are best suited to the cost effective and fair resolution of the dispute, whereas courts normally work to rules which tend to be less flexible.
- confidentiality: the parties to an arbitration are generally obliged to keep the proceedings confidential, whereas courts are generally much more public.

The perceived benefits of arbitration where the parties to a contract are based in different parts of the world cover a wide range of commercial activities, including construction projects, and mean that arbitration agreements will very often be included as clauses in such contracts.

Let us therefore consider arbitration in more detail.

## 5.8 Arbitration

We have seen that the basis of an arbitration is the agreement between the parties referring disputes within the scope of the agreement to the final and binding decision of a third person or persons, usually chosen by them or by a body which they have nominated.

We will now look in more detail at: the nature of an arbitration agreement; the importance of the place of arbitration; arbitration institutions which may be responsible for supervising an arbitration; the commencement and conduct of an arbitration; and the conclusion of an arbitration, including challenges to and the enforcement of the award of the arbitrator or arbitrators.



### 5.8.1 The arbitration agreement

In most projects the arbitration agreement between the parties is part of a wider written contract and may be in a standard form, depending on the contract.

What is particularly important is that the words of the arbitration agreement should be clear and certain. They should identify which kinds of dispute are covered by the agreement; whether they are limited, for example, to contractual claims or whether they may relate to any matter connected with the contract. Among the other details which the arbitration agreement should cover are: the manner in which the tribunal is to be constituted; whether the parties themselves are to agree on the tribunal, for example, and what is to happen if they cannot agree; or whether the tribunal is to be constituted, and the arbitration in general supervised by, an institution such as the ICC. The place of the arbitration should also be clearly stated.

Although an arbitration agreement is usually contained in a wider contract, parties who have not already entered into an arbitration agreement could still agree to refer a particular dispute to arbitration after it arises. Such references to arbitration are comparatively rare; they tend to arise where the parties did not consider very carefully what was to happen if a dispute between them should arise. As long as all concerned parties agree, an arbitration of the dispute could still take place.

### 5.8.2 The place of arbitration

One very important aspect of arbitration is the parties' choice of the place of arbitration, often called the 'seat' of the arbitration. This choice is very important because most countries have laws that govern arbitrations taking place within their territories. Choosing to arbitrate a dispute in one country rather than another will therefore affect which laws apply to the arbitration proceedings. This could, in some cases, be very significant; the laws of some countries restrict party autonomy more than those of others, for example, and correspondingly the scope for judicial interference by local courts in the arbitral process could be greater or less.

Further, the place of arbitration could affect the ability of the successful party to enforce an arbitral award or decision against the assets of the losing party in other countries. For example, in some countries an award made in another country will only be recognised and enforced if that other country is a signatory to one or other of the international treaties that exist for the recognition and enforcement of arbitral awards. The most important of these international treaties is the New York Convention of 1958, which we looked at briefly above and consider further below.

### 5.8.3 Arbitration institutions

Arbitration clauses also often name an arbitration institution, according to whose rules and procedures the arbitration is to be conducted. We have already mentioned the ICC as one such institution; its rules and procedures

concern: the initiation of the arbitration proceedings; the constitution of the tribunal; the award or decision of the tribunal; and generally the practical administration of the proceedings. The China International Economic and Trade Arbitration Commission (CIETAC) is another 'supervising' arbitration institution, and in the Middle East the Dubai International Arbitration Centre (DIAC) has achieved prominence. We shall look in more detail at the workings of the ICC shortly.

#### 5.8.4 Commencement of an arbitration

This normally does not present any difficulty. If the arbitration agreement refers to an arbitration institution, the arbitration will commence when the steps set out in the rules of the institution are followed. For example, if the arbitration agreement provides for ICC arbitration then the arbitration will commence when the claimant-party files a Request for Arbitration with the ICC Secretariat in Paris. The Secretariat will then notify the claimant and the respondent-party of its receipt of the Request and the date of receipt by the Secretariat will be deemed to be the date of commencement of the arbitration. If the arbitration agreement provides for CIETAC arbitration, then the proceedings commence from the date on which Notice of Arbitration is sent out by the secretariat of CIETAC; this Notice will only be sent out once an Application for Arbitration has been duly completed and submitted to CIETAC along with all the required documents.

If the arbitration agreement does not provide for an institutional arbitration, then the arbitration will commence when the steps prescribed by the relevant law of the process are taken. So if the parties agree to arbitration in China, for example, Chinese law will normally apply in order to determine what steps are necessary for the arbitration to commence; if they have agreed to arbitration in London, on the other hand, then English law (contained mainly in the Arbitration Act 1996) applies. (If English law applies, the arbitration will commence when a notice of a certain kind is sent to the other party.)

It is important to know how to begin an arbitration because, as we have already seen, either the contract or the applicable law, or both, may require that an arbitration be commenced within a certain period of time if a claim is to be pursued. It is also important because an arbitration which is not properly commenced will be ill-constituted, and any award or decision made by the arbitrators could be deemed invalid by a local court or otherwise be difficult to enforce.

#### 5.8.5 Conduct of the arbitration

As we have just seen, how an arbitration is conducted will depend upon whether the agreement provides for an arbitration institution, by some such words as 'ICC arbitration in London'. However, even if the agreement does not

provide for an institution to supervise the arbitration, it might specify the rules according to which the arbitration is to be conducted. So the agreement might say the 'UNCITRAL rules' are to apply; or even that the ICC rules or some of them are to apply, without the involvement of the ICC itself as a supervising institution.

If no arbitration institution is mentioned in the agreement, the position depends on which law applies. If the place of the arbitration is China and Chinese law applies then the parties should agree an institution before submitting their dispute to arbitration, because Chinese law does not recognise any other kind of arbitration process. If the place of arbitration is, say, England then no such step will be necessary as English law recognizes non-institutional, or 'ad hoc' arbitrations.

The tribunal appointed by the parties will normally decide how the arbitration will proceed after consulting them, including such matters as the exchange of statements of each party's case, the need for expert reports and exchange of factual witness evidence, the need for and extent of any oral hearing and the overall timetable and basic procedure for the arbitration.

### 5.8.6 The arbitration award and challenges to the award

As we have seen, the award or decision of the arbitrators on the case before them is intended by the parties' agreement to be a final decision, subject only to any rights of challenge to the award available under the law applying to the arbitration.

The parties in their arbitration agreement may provide that there is to be no challenge to the award on its merits; that is, in relation to any substantive finding of fact or law made by the arbitrators in coming to their decision. Many countries' procedural law will respect this agreement as being consistent with the aim of finality in arbitrations but, even if there is no such agreement, it could still be difficult to challenge an arbitration decision on its merits. The relevant law might place obstacles in the way of such a challenge, on the basis that the parties have chosen arbitration and should accept the results.

A challenge to an arbitration decision on its merits is to be distinguished from a challenge on the basis that the arbitrators have exceeded their powers. Arbitrators exceed their powers: by making a decision on a matter which was not referred to them; or because there was never any valid arbitration agreement in the first place; or the tribunal was for some reason not properly constituted.

Such a challenge goes to the basic jurisdiction of the arbitrators to reach any decision on the merits of the dispute, and the applicable law might treat this kind of challenge quite differently from a challenge to a decision on its merits. The rules of the arbitration itself, moreover, could also cover this kind of challenge. Typically, if such a challenge is to be made it will be necessary for the party who wishes to make the challenge to have registered its objection to the proceedings at an early stage.

As well as challenging an award on its merits or for want of jurisdiction, the applicable law might permit an award to be challenged on the basis of a serious procedural irregularity in the conduct of the arbitration.

Whether a challenge is to the award on its merits, to the arbitrators' jurisdiction to make the award or any part of it, or to the conduct of the proceedings themselves, it is very important that any steps which the relevant law of the process or the terms of the arbitration agreement require before such a challenge might be mounted are followed in due time.

### 5.8.7 Enforcement of arbitral awards

Suppose that you are a successful claimant in an arbitration against a party based in another country, and you now want to enforce your award; perhaps you have been awarded several million dollars compensation, and now wish to obtain payment. How do you set about doing so?<sup>3</sup>

The first fundamental point to make is that whether and how you are able to enforce your award will depend critically upon

- the place of the arbitration in which the award was made; and
- the place or places where the party against whom you are seeking enforcement has assets.

The place of the arbitration is important because, as we have seen, this will normally determine the law applying to the dispute and affects what rights of enforcement you might have. Your available rights of enforcement, including your ability to enforce any award of costs of the arbitration made in your favour, need to be considered very carefully before agreeing the place of arbitration.

We saw in connection with the New York Convention how the place (or places) where the losing party has assets affects your ability to enforce the award. If you obtain an arbitration award against a party which has assets in a signatory country you may be able to apply to the courts of that country for an order enabling you to enforce the award as if it were a judgement or order of the domestic court.

Of great practical importance to your ability actually to enforce your award will be any interim remedies that are available to you in the country of enforcement. Thus, if you have a Chinese arbitral award against a UK company which you wish to enforce in England, the English High Court will recognise this award under the New York Convention and, ancillary to this recognition,

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<sup>3</sup> You might have obtained security for your claim before the dispute arose; this security could take the form of a bond or guarantee payable against presentation of a conforming arbitral award or court judgement. Your legal advisers should be able to advise you about such securities and draft any necessary documents. Often claims are unsecured, and the successful party has to seek enforcement in other ways.

might also grant you orders to preserve your position pending execution of the award; for example, by ordering, in a suitable case, the freezing or control of the other party's assets both within England and abroad until your award is executed. In China, too, if the relevant court has recognised and agreed to enforce an award the successful party could apply for such steps as the freezing of the other party's bank accounts.

## 5.9 How are international arbitrations conducted?

We saw above how, in many cases, parties to international contracts agree to have their disputes decided by arbitration administered by an arbitration body or institution. In this section, we look in some detail at how an arbitration administered by the International Chamber of Commerce (ICC) would be conducted. We look in particular at the ICC's rules of arbitration; they have features in common with many other arbitration institutions and the ICC is still one of the busiest arbitration institutions in the world, especially for larger disputes.

But before we look at how an ICC arbitration might go, we should say something about the increasing regionalisation of international arbitration. This is a very important and interesting phenomenon which has become really prominent in the last five to ten years, and will affect the way in which increasing numbers of international construction disputes are resolved.

### 5.9.1 The traditional arbitration centres

The ICC is perhaps the best known among a number of traditional centres of international arbitration. It was founded in Paris in 1919 with the aim of promoting trade and investment, open markets and the free flow of capital. It first organised arbitrations in 1923. One of its principal roles since then has been the administration of arbitrations in commercial disputes of all kinds from its secretariat in Paris.

Alongside the ICC in Paris, Sweden developed a reputation as a reliable centre for international arbitration, and the Swedish Chamber of Commerce has been administering arbitrations since 1911. London is also a long-established and busy centre of arbitration, as are New York and Vienna.

These traditional centres have, however, faced increasing competition from institutions which have been able to attract arbitration work from parties doing business in the Middle East, Asia Pacific and other regions. Rather than taking a dispute concerning, say, an oil terminal project in the Gulf to an arbitration administered from Paris or London,<sup>4</sup> the parties, which may have no connection

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<sup>4</sup> The ICC and the London Court of International Arbitration (LCIA), probably the best known of the London arbitration institutions, have gone some way to addressing the pressure towards regionalising arbitration services by establishing a presence outside their home base: notably, in 2005, the joint LCIA–DIFC centre in Dubai.

with either place, could well agree to the Dubai International Arbitration Centre (DIAC), for example, as their administering institution. DIAC is in fact now one of the busiest arbitration institutions in the world, attracting work from parties engaged in business of all kinds in the Middle East, not least construction.

The Singapore International Arbitration Centre is another regional institution which has become extremely popular in the last five to ten years for those doing business in South East Asia and China. Singapore benefits from its geographical position in the region but also its highly developed legal and support services.

One especially important institution in the Asia Pacific region is the China International Economic and Trade Arbitration Commission (CIETAC), which we have already briefly looked at. CIETAC has been in existence in one form or another since the 1950s but it has repeatedly reformed itself and its rules and administration, with the latest revisions to its rules coming into force on 1 May 2012. Together with the Chinese government and legal system, CIETAC has sought to make arbitrations administered by it as acceptable to foreign parties doing business in China or with Chinese counterparties as any of the traditional centres. It is now one of the busiest international arbitration bodies and handles an increasingly large slice of China-related international disputes.

One of the challenges faced by regional centres such as CIETAC and DIAC, however, is the development of a sufficiently reliable legal infrastructure to support arbitration, so that international parties are confident about using them to arbitrate their disputes. Arbitrations do not take place in a legal vacuum. The ability of parties to resolve their disputes in a fair and efficient manner depends upon the laws in the place of their arbitration and, more generally, the legal and administrative system being reliable and in conformity with internationally expected standards. In the United Arab Emirates, for example, a new federal arbitration law is under review with a view to improving the legal framework for arbitrations taking place within its boundaries, including Dubai. China has taken several steps in this direction, particularly since becoming a member of the World Trade Organisation in 2001, including raising the calibre of judges dealing with arbitration matters, making arbitration law more consistent and reforming and improving CIETAC's rules and structures. The trend which has become clear in the last five to ten years is likely to continue. However, the ICC remains a highly important administering institution for international arbitration and its rules have been taken by many other institutions, such as CIETAC itself, as the basis for their own rules.

We will look now, in outline, at how an arbitration administered by the ICC might work. You will find the ICC arbitration rules current at the date of publication of this Handbook in Appendix 2. We have also included the current Singapore International Arbitration Centre rules.

## 5.9.2 ICC arbitration

Let us imagine that an arbitration agreement to which you are a party provides for ICC arbitration. You now wish to commence an arbitration against the other party to the construction contract. This, in summary, is how the arbitration would go.<sup>5</sup>

- First, you duly submit a Request for Arbitration to the ICC Secretariat in Paris, France, and pay an advance payment of expenses. In your Request you: summarise the nature and circumstances of the dispute giving rise to your claim; attach the basic contractual documents; and state the relief that you seek, including the approximate amounts claimed. If stated in the arbitration agreement, you refer to the place of arbitration, the law applicable to the merits of the dispute, and the number of arbitrators who are to hear the dispute. If these matters are not stated in the arbitration agreement then you will express your comments as to these matters, and you also comment on the language in which you think the arbitration should be conducted.
- When it is received by the Secretariat, a copy of your Request is sent to the responding party. Within 30 days of receipt, the responding party should, unless time is extended, file an Answer, which will contain the respondent's own summary of the nature and circumstances giving rise to the dispute and a summary of the defence to the claims, as well as any counterclaim against you. The respondent will also address such matters as the number of arbitrators, the place and law of the arbitration and the language of the arbitration.
- After receiving the Answer, including any counterclaim, you will have (subject to any extension of time) 30 days within which to file a Reply to any counterclaim.
- Once the above statements of the parties' cases are duly filed, the next important step is usually the appointment of the tribunal which is to decide the various claims and cross-claims. If the parties have already agreed on the number of arbitrators that will prevail; but if they have not then the ICC will decide this. It will appoint a sole arbitrator unless it thinks that the dispute warrants three arbitrators, in which case the parties will each nominate one arbitrator for confirmation by the ICC.<sup>6</sup>
- If either party wishes to challenge the appointment of an arbitrator, whether on grounds of lack of independence or otherwise, a written statement setting out the grounds of challenge must be made to the Secretariat within a limited period, and the ICC will then decide on the challenge.

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<sup>5</sup> The following account is based on the ICC Rules 2012, those current at publication. Like other arbitration institutions the ICC updates and modifies its rules from time to time and care should be taken to use the most recent rules. Moreover, the rules should be consulted in full as they cover such important matters as interim and conservatory measures, among others beyond the scope of this Handbook.

<sup>6</sup> Strictly speaking up, arbitrators are confirmed and appointed by the International Court of Arbitration of the ICC (the ICC court), which is the ICC's independent arbitration body.

- After the arbitration tribunal is appointed, it will be provided with the file of the case, containing the various statements of case and attached documents, and you as claimant will have to pay an advance on costs. The ICC will also fix the place of the arbitration, unless that has already been agreed; the language of the proceedings will be fixed by the tribunal, again subject to the parties' agreement; and the tribunal will determine, if not already agreed, which rules of law shall apply to the merits of the dispute.
- An important procedural step is the drawing up and agreement of the Terms of Reference of the arbitration; the tribunal is meant to draw this document up and arrange for the parties to approve and sign it. These steps should all be taken within two months of the date of the submission of the file to the tribunal by the ICC Secretariat. The Terms of Reference should contain:
  - the full names and a description of the parties;
  - the addresses of the parties to which notifications and communications arising in the course of the arbitration should be sent;
  - a summary of the parties' respective claims and the relief sought by each, with an indication of the amounts claimed and counterclaimed;
  - normally, a list of issues to be determined by the tribunal;
  - full contact details of the arbitrators.

The Terms of Reference are important because once they have been signed no claims or counterclaims outside the limits of the Terms of Reference can be made unless the tribunal gives permission. This may not always be given readily, especially if a new claim is presented at a late stage of the proceedings. In practice, ICC tribunals may wish to be flexible about defining the issues at the Terms of Reference stage and sometimes insert words to the effect that the issues described are meant to be outline only and not an exact or definitive statement.

When drawing up the Terms of Reference, or as soon as possible thereafter, the tribunal should convene a case management conference to consult with the parties about the best and most efficient procedures to adopt for the reference. This will include establishing a timetable for the arbitration. The parties working with the tribunal should aim for the most efficient and cost-effective conduct of the proceedings, enabling the tribunal to establish the facts of the case in as short a time as possible consistent with giving each side a reasonable opportunity to present its case.

The actual rules for how the tribunal is to achieve this are relatively few; the ICC Rules are intended to allow maximum flexibility in the approach taken by the tribunal. The main features of these rules are as follows:

- After studying all the documents and submissions provided to them, the tribunal will hear the parties if either asks for a hearing or if the tribunal believes that there should be a hearing; unless any of the parties requests a hearing, the tribunal may decide the case solely on the documents submitted by the parties.



- The tribunal may decide to hear witnesses, both factual and expert witnesses.
- The tribunal may, after consultation with the parties, appoint experts to advise it on matters raised in the proceedings, provided that the parties are given an opportunity to question such experts at a hearing.
- The tribunal may at any time during a hearing summon any party to provide additional evidence.
- If a party fails to appear at a hearing without valid excuse the tribunal may proceed with the hearing in its absence.

When the tribunal is satisfied that the parties have had a reasonable opportunity to present their cases it will declare the proceedings closed. Unless the tribunal requests or permits it, no further submissions or evidence after this stage can be admitted.

After the proceedings have been closed, the tribunal will indicate a date by which the draft award or decision will be submitted to the ICC Court for formal approval. This should be done within six months unless this period is extended by the Court.

The award should state the reasons on which it is based. It will be deemed to be made at the place of the arbitration and on the date stated in the award.

Every award is binding on the parties. By submitting to ICC arbitration the parties are deemed to undertake to carry out any award without delay and to have waived their right to any form of recourse insofar as such waiver can validly be made.

Appendix I of this Handbook gives a fully worked-out ICC arbitration, that is, from start to finish. It concerns a chemical plant in Belgium. The parties are Chinese and Serbian. They try to negotiate a solution to their dispute, but end up fighting the case through to a final arbitration award.

You will be able to see how the dispute unfurls, the efforts the two parties make to resolve it, the commencement of the arbitration, the formal documents filed, the arguments advanced at the hearing before the arbitrators and, finally, the formal decision, or award, that is produced.

We hope this will give a real flavour of how an international construction arbitration might go, and illustrate in an interesting and enjoyable way many of the points which we have been discussing.

# APPENDIX I

## ***Yugo Design Company v Sino Industries Corporation: An International Chamber of Commerce Arbitration***

### **The parties**

Sino Industries Corporation is a Chinese private enterprise active in foreign heavy construction and engineering projects, often as an EPC contractor. Yugo Design Company is a Serbian private company specialising in designing and fabricating industrial filtration systems.

### **The project**

In late 2008, a company called Spider Industries Inc, registered in the British Virgin Islands, began discussions with Sino Industries with a view to awarding Sino Industries the EPC contract for a major chemical waste disposal plant in Belgium. Mr. Paul Web was the sole owner and controller of Spider Industries and, in discussions with Mr. Chen Ming Tian, President of International Operations for Sino Industries, assured Mr. Chen that financing for the project would shortly be in place. Mr. Web said that he had been in positive negotiations with a consortium of banks which were ready to lend the necessary USD 60 million to finance the envisaged plant.

Sino Industries was very anxious to get into the European heavy plant market. It had carried out a number of projects in the Middle East successfully in related industries but had yet to become involved in any significant way with a major European project. Mr. Chen in particular advised his company directors to support the project and enter into discussions with Spider Industries.

## The Letter of Award

Following further discussions between Mr. Web and Mr. Chen, Spider Industries issued a Letter of Award to Sino Industries in February 2009 for the execution of a 350,000 metric tonnes per annum capacity chemical waste disposal plant on a lump sum EPC basis. The Letter of Award was expressed to be the basis for the award of an EPC contract for the work within 30 days from the date of the Letter.

The Letter of Award also provided that

*...the EPC contract shall be fixed and not subject to escalation, binding on Spider Industries and Sino Industries subject to financial institutions providing approval to the necessary loan of USD 60 million to Spider Industries and approval of the EPC contract by Spider Industries and its technical consultants.*

*The EPC contract shall have no effect and there shall be no obligation of any sort on either Spider Industries or Sino Industries if both the above two conditions are not met ...*

The Letter of Award identified Yugo Design Company as a specialist contractor for the filtration system and envisaged that a subcontract for the design and execution of this specialist plant would be entered into between Sino Industries and Yugo Design.

Following discussions directly between Spider Industries and Yugo Design a Letter of Interest was issued by Spider Industries to Yugo Design at the end of 2009 for a planned capacity of 350,000 mtpa, a copy of which was sent to Sino Industries.

## The Letter of Intent

In early January 2010, on the basis of this Letter of Interest, Sino Industries issued a Letter of Intent to Yugo Design setting out the scope and certain terms of the proposed subcontract between them. A fixed price lump sum of USD 3.85 million was mentioned. Because the Letter of Award made any obligation on the part of Spider Industries to pay Sino Industries dependent upon obtaining the necessary finance, Sino Industries correspondingly provided in the Letter of Intent to Yugo Design for its obligation to pay (except in relation to an advance payment) to be contingent upon Spider Industries' achieving financial closure for the project.

After the Letter of Intent had been issued, Mr. Chen of Sino Industries discussed with Mr. Marko Varnic, general manager of Yugo Design, the terms of the envisaged subcontract between them, including exchanging draft commercial conditions and attachments to the draft subcontract. Yugo Design

insisted in the course of these discussions that payment, apart from the advance, was to be covered by an irrevocable Letter of Credit. A meeting was fixed for 31 January 2010 in Brussels at Spider Industries' offices to deal with the points arising from the Letter of Intent and to discuss the terms of the envisaged subcontract.

## The subcontract

In the course of the meeting in January, subcontract documents were prepared and signed on behalf of Yugo Design and Sino Industries. Clause 16 of the subcontract provided as follows:

*Financial closure is expected shortly for the project and all payments (except the advance) shall be dependent upon Spider Industries' achieving financial closure.*

The subcontract contained as an appendix a schedule of payments calculated as a percentage of the subcontract price.

The very first payment was an advance of 10% against production of parent company and performance guarantees. There were then four payment stages or milestones: a payment of 10% of the contract price on approval of basic engineering and placement of major orders (milestone 2); 70% of the contract price would be payable on receipt and acceptance of materials on site on a pro rata basis (milestone 3); 5% would then be paid on completion of total erection of the system (milestone 4); and the last 5% within 30 days of successful commissioning, performance testing and handing over (milestone 5).

The subcontract document was based on an earlier printed form which Sino Industries had used on previous similar projects. It was tailored to the particular project with Yugo Design and provided for: a statement of the responsibilities of the contractor (Sino Industries); the responsibilities of the subcontractor (Yugo Design); commencement and completion of work; inspections; mechanical acceptance of the work; final acceptance of the facility; change orders; warranties concerning the work; performance testing and guarantees; default; termination; suspension of work; force majeure; and covered other matters including the parties' respective rights and obligations with respect to insurance, loss or damage, inventions and licences and provisions concerning the form of notices and communications.

The subcontract also provided for arbitration as the means of resolving disputes between the parties. By clause 29 of the subcontract conditions: '... any dispute arising under this subcontract shall be referred to ICC arbitration in London by a tribunal of three arbitrators...'. By clause 28 of the subcontract English law was stated to be the governing law of the subcontract.

## Progress of the project

After Sino Industries and Yugo Design signed the subcontract in January 2010, Yugo Design commenced work preparing basic engineering, and received its advance payment on production of the required guarantees. The subcontract had provided for a notice to proceed to manufacturing to be issued at the end of February 2010, the date by which both Yugo Design and Sino Industries believed that financial closure would be obtained by Spider Industries.

However, financial closure for the project was not achieved by the end of February, although both Sino Industries and Yugo Design proceeded to prepare the engineering and generally to progress the work.

In April 2010, Spider Industries contacted Yugo Design directly and asked them to stop work on the filtration system because a more powerful and expensive plant would be required. Discussions with the banks who would be providing the financing for the project had led to the conclusion that a more powerful plant was required, achieving 550,000 mtpa rather than the 350,000 which was being designed.

Discussions took place directly between Yugo Design and Spider Industries resulting in an agreement between those parties to an outline technical specification for the upgraded plant together with a new lump-sum fixed price of USD 5.22 million. Sino Industries was then requested to amend the subcontract in accordance with the new price.

Sino Industries was, however, concerned that financial closure had not yet been achieved. It was reluctant to take on additional liabilities without the financing being in place.

A meeting was held in May 2010 between all three parties at which Mr. Web of Spider Industries assured both Mr. Chen and Mr. Varnic that financial closure was very likely to be achieved in the next two months. Sino Industries and Yugo Design both believed Mr. Web's assurances.

Subsequently contractor and subcontractor proceeded to prepare designs and produce draft contract documents to reflect an amended subcontract incorporating the upgraded and more expensive plant.

By November 2010, many of the details for the upgraded plant had been finalised on a technical level and both Yugo Design and Sino Industries had prepared detailed draft amended contract documents.

Spider Industries had throughout this period reassured both that financial closure was imminent. However, Yugo Design in particular was getting very anxious about the financing. Under the subcontract, Sino Industries were meant to open a Letter of Credit when financial closure was achieved, which would guarantee payment to Yugo Design. In the absence of such a security, Yugo Design was proceeding, they believed, at their own risk. They therefore pressed Spider Industries for clarity on financial closure and also pressed Sino Industries to sign an amended subcontract.

In November 2010, moreover, Yugo Design was ready with many of the materials for dispatch to site but Spider Industries were not ready to receive them on site. Basic engineering and placement of major orders had also taken place in August 2010, and an invoice rendered in respect of that milestone. However, although Sino Industries had passed that invoice onto Spider Industries for payment to be released, no payment had been released and Yugo Design were increasingly anxious to secure payment as soon as possible.

## December meeting

A meeting was therefore arranged in December 2010. The minutes of the meeting, which took place between 14 and 15 December, were signed by all the parties attending. Item (1) of the minutes recorded that: '*Spider Industries/Sino Industries informed the meeting that payment towards the second milestone would be released by the end of December 2010*'.

Item (5) of the minutes recorded an agreement by all attending that in view of Yugo Design's readiness with many of the materials, it would render an invoice for 60% of the stage 3 percentage which would become payable upon clearance of the materials for dispatch; this in turn would be achieved when the materials were checked against the general arrangement drawings and inspection test results were obtained or the inspection tests were witnessed. The parties also agreed to proceed towards preparing a final draft amended subcontract.

At the December meeting, Spider Industries repeated its assurance that financial closure was imminent. However, following the meeting Spider Industries wrote to Yugo Design to say that the committee of the bankers providing the finance had decided that it would not be possible for disbursements to commence until March 2011. Spider Industries indicated that it would endeavour to provide finance in the interim from private placements and issue of bonds.

At this point, Yugo Design instructed lawyers who sent a letter to Spider Industries protesting at the non-payment against milestone 2 and the failure to make any payment in respect of milestone 3. Although it seemed clear that the materials had not been cleared for dispatch, Yugo Design contended that payment against milestone 3 had nevertheless fallen due because the materials had been ready for inspection as required. Sino Industries, in the meantime, had prepared substantial technical and contract documentation but had not signed any contract containing a higher contract price with Yugo Design or Spider Industries. They were awaiting developments and, in particular, financing being put in place.

By February 2011, Sino Industries had also received a letter from Yugo Design's lawyers seeking payment in respect of the second and third milestones. It was contended by the lawyers that Sino Industries as the main contractor

was liable to pay Yugo Design even if it had not received payment from Spider Industries and financial closure had not taken place. Sino Industries denied these allegations in reply to Yugo Design's lawyers.

On 9 May 2011, having received no satisfactory answer and no further payment, Yugo Design served a notice by letter on Sino Industries giving them thirty days to pay or Yugo Design would terminate the subcontract in accordance with its terms. Sino Industries still refused to pay, and so by a further letter dated 20 June 2011 Yugo Design gave notice that it was terminating the subcontract with effect from that date.

## **Yugo Design decides to begin an arbitration**

After its termination letter, Yugo Design continued to press Sino Industries for payment and formulated its various other claims for compensation under the subcontract. Sino Industries continued to deny liability. After consulting its lawyers, Yugo Design made the decision to begin an arbitration.

But it was reluctant to take this step; its lawyers advised that it could not be assured of success, and that the costs of the proceedings would be considerable. Estimates were discussed; if Yugo Design lost the arbitration, it would normally have to pay Sino Industries' costs, which would probably be about the same level as its own. On the other hand, Sino Industries had taken a hard line and did not seem willing to talk, certainly at this stage; they seemed confident that they owed no sums to Yugo Design. Yet Yugo Design had incurred very substantial losses, which it could not afford to write off; Mr. Varnic was also personally convinced that Sino Industries should pay a substantial sum at least, and probably would do so if Yugo Design showed they were serious.

So the decision to commence proceedings was taken, but Yugo Design's lawyers advised that at some suitable moment they initiate settlement discussions with Sino Industries' representatives, on a 'without prejudice' basis (so that whatever was said could not be referred to in the arbitration, if the matter did not settle). Depending on how these discussions went, it might be appropriate to propose a mediation, with a mutually acceptable person appointed to help carry the discussions to a conclusion. Mr. Vamic thought this was a good idea, though he was reluctant to display any weakness or lack of confidence in Yugo Design's case by appearing too keen on beginning discussions. They would have to judge very carefully when these should be mentioned.

## **The arbitration begins**

Arbitration was the means of resolving disputes provided for in the subcontract; ICC arbitration in particular, with the proceedings taking place in London. Therefore, Yugo Design's representatives had to commence an ICC arbitration.

To commence the arbitration, Yugo Design's lawyers prepared a Request for Arbitration. This was a fairly simple document, which can be found at Tab A to this Appendix.

The Request for Arbitration identified the parties, the contract and the arbitration agreement, and set out in fairly short terms the nature and circumstances of the dispute. The claim advanced was for payment of sums due under the subcontract. Because Yugo Design had not received payment from either Sino Industries or Spider Industries, it had terminated the subcontract by issuing a notice of termination in accordance with the terms of the subcontract. This step was also identified in the Request for Arbitration.

The Request then went on to seek payment in relation to the two milestone payments which it alleged had fallen due but remained unpaid; these sums were calculated on the basis of a subcontract price of USD 5.22 million. Yugo Design alleged that the subcontract price had been increased to this amount following Spider Industries' request for a higher capacity plant in April 2010. Yugo Design also claimed the cost of demobilising the work and of cancelling commitments to sub-suppliers which had been entered into in connection with the work. Interest was claimed on these sums. These various claims were made pursuant to the terms of the subcontract.

Having prepared the Request for Arbitration, Yugo Design's lawyers addressed it by covering letter to the secretariat of the ICC in Paris, enclosing six copies with supporting documents and a cheque as advance on payment. The Request contained the name and address of Yugo Design's representative for purpose of all communications in respect of the proceedings. In its Request for Arbitration, Yugo Design named a Mr. John Smith, an experienced lawyer specialising in construction disputes, as one of the arbitrators who (subject to confirmation by the ICC) would be making up the ICC tribunal.

The documents attached to the Request for Arbitration were the documents on which Yugo Design intended to rely in stating its case. These documents included: the subcontract; the invoices which had been rendered for the milestone payments; and a schedule of the additional costs incurred as a consequence of the termination.

When the ICC secretariat in Paris received the Request for Arbitration it sent a copy to Sino Industries. Within 30 days of receiving the Request, Sino Industries filed an Answer to the Request, containing its own summary of the nature and circumstances giving rise to the dispute and a summary of the defence to the claim. This document can be found at Tab B to this Appendix.

In its Answer to the Request, Sino Industries disputed that it was obliged to make any payment to Yugo Design. Yugo Design had already received the advance payment. Under the subcontract, all other payments were made dependent upon financial closure being achieved by Spider Industries. Since no such closure had been achieved, no obligation to make a payment arose under the subcontract.

Sino Industries also disputed that the subcontract price had been increased. Sino Industries believed that, whatever had been agreed between Spider



Industries and Yugo Design, Sino Industries was not a party to it. Sino Industries accepted that English law applied to the contract. It did so because this had been specifically provided for in the subcontract.

Sino Industries disputed that milestone 3 had ever been achieved. It contended that contractually this payment stage had never been achieved and so Yugo Design was not entitled to any payment for it.

Because the basis on which Yugo Design had purported to terminate the contract was non-payment of sums which were not in fact due, Sino Industries contended that the termination was not in accordance with the contract, and therefore unlawful, so that no compensation resulting from the termination was due to Yugo Design.

Sino Industries did not have any counterclaim to make against Yugo Design. If there had been any complaint about the standard or quality of the work provided by Yugo Design then Sino Industries would be obliged to raise these matters as a counterclaim at this stage of the ICC proceedings. However, because the project had never reached the stage where the materials had actually been dispatched to site, and there were no defects in the designs actually provided by Yugo Design, Sino Industries did not have a counterclaim to set off against Yugo Design's claim on the invoices it rendered, assuming Yugo Design could establish those claims.

Because Sino Industries' Answer to the Request for Arbitration raised a number of issues which needed to be responded to, Yugo Design's representatives served a Reply to Answer, which will be found at Tab C of this Appendix.

This set out the case which Yugo Design would be making in reply to Sino Industries' defence to the original claim. In the course of this statement of its case Yugo Design contended that the meeting in December 2010, at which the parties agreed on certain steps to be taken, constituted an amendment to the subcontract which removed the precondition of financial closure. Yugo Design's case was that, by this amendment, the obligation to pay was absolute or unqualified and, as the other party to the subcontract, Sino Industries had to pay whether or not financial closure was achieved.

## **Appointment of tribunal**

The parties had therefore at this point exchanged their statements of case which had been duly filed with the secretariat of the ICC in Paris. The next step was to appoint the tribunal to decide the various claims. The parties had already agreed on the number of arbitrators. Yugo Design had nominated Mr. John Smith as arbitrator and Sino Industries, in its Answer to the Request for Arbitration, had said it wished to appoint Mr. Simon Montagu, a well-respected consulting engineer with experience of arbitrations. The ICC confirmed their appointment as well as the appointment of the third arbitrator, Professor Dag Hammarsen, a Danish professor of engineering, to act as president of the tribunal. Professor Hammarsen had been nominated by both parties and had long been known to Mr. Smith and Mr. Montagu.

At this point, if either of the parties had wished to challenge the appointment of an arbitrator, whether on the grounds of lack of independence or bias or otherwise, then it was incumbent on it to do so in writing setting out the grounds of challenge.

Once the tribunal had been appointed, it was provided with the file of the case, containing the various statements of case and the attached documents.

## **Terms of Reference**

The next important procedural step was the drawing up of the Terms of Reference for the arbitration. This was done initially by the president, who then obtained the agreement of the other members of the tribunal; the draft Terms of Reference was then circulated to the two parties.

There was a short procedural meeting held in London in May 2012 at which the Terms of Reference were agreed and signed by each party's representative.

The Terms of Reference summarised the parties' respective claims and the relief sought, with an indication of the amount claimed. It included a list of the issues in the arbitration and full contact details of the parties. A provisional timetable for the arbitration was agreed. January 2013 was the stipulated date for the hearing. Five days were set aside.

Directions were given for the proper conduct of the proceedings. Bearing the above timetable in mind, provision was made for the exchange of witness statements for various witnesses of fact on which each side would be relying. There was also provision made for the parties to provide copies of all the documents on which each would rely at the hearing; and for the exchange and filing with the ICC of full written submissions on fact and law. A paginated hearing bundle of files for the hearing was also directed to be provided by a certain date.

## **Settlement discussions?**

Throughout the process of commencing and then proceeding with the arbitration, Yugo Design and its advisers were considering whether it would be tactically appropriate to initiate settlement discussions with Sino Industries. It had been agreed in principle at the outset that this would be a good idea; but to date Sino Industries showed no sign of any willingness to compromise, and had maintained very limited contact generally with both Yugo Design's senior management and its legal team.

An important tactical decision had therefore to be taken. Mr. Varnic discussed the matter with his lawyers and then with Yugo Design's managing director. The result of these discussions was that Yugo Design should try to begin negotiations. Each side had stated its case in the arbitration and the

tribunal had been appointed. Although substantial legal costs had been incurred, still greater costs would result if the matter went to a hearing; and there was always the significant risk of failing to establish the case, which would result in still more costs. Eventually it was agreed that Mr. Varnic would telephone Mr. Chen in the next few days and suggest that they had an informal discussion, without prejudice, about settling the dispute between their two companies. Depending on how this initial approach went, it might be possible to take the discussion forward, either by continuing the informal negotiations, or perhaps by mediation, if both parties felt that using a neutral third party would be helpful.

Meanwhile, it was necessary to get on with the proceedings as if no settlement were in prospect.

## Steps before the hearing

The parties' statements of case and the Terms of Reference defined the issues for the arbitration hearing to take place in January 2013. On the basis of these issues, each party proceeded to prepare its evidence.

This consisted initially of statements in writing of witnesses describing the facts involved in the dispute from their own knowledge or experience. Each side had two witnesses. For Sino Industries, Mr. Chen and his associate Mr. Yin were the two witnesses. Both these gentlemen had attended all the relevant meetings with Yugo Design and Spider Industries. Yugo Design also had two witnesses, Mr. Varnic and his colleague, Ms Selenko. Statements were obtained with a view to each witness being cross-examined by the legal representative of the other side.

By 'cross-examination' is meant the asking of questions of each witness by the other side's legal representative with a view to putting to that witness the other side's case fairly and effectively. A party has an opportunity to put questions to the other side's witnesses as part of the process of giving that party a fair opportunity to present its case to the tribunal.

It is normal in ICC, as in other, arbitrations for such cross-examination to take place, although there is considerable difference between arbitrations conducted in European jurisdictions and those which follow a more English procedure. In an arbitration in Paris, for example, there may well be no or not very substantial cross-examination, with the tribunal playing a much more inquisitorial role than would be normal in an English-style arbitration. Even in English-style arbitrations, the procedure may well be modified, in the interests of efficiency or because it is thought desirable for some other reason, so that the scope and extent of cross-examination is limited. 'Cultural' differences of this kind reflect different legal traditions. The procedures of the ICC, as with other major arbitration institutions, are intended to be flexible and can accommodate these different approaches. The paramount aim is to ensure that, whatever procedures are adopted, the parties each have a fair

and reasonable opportunity to present their case to an independent and impartial tribunal.

Sino Industries had few documents and did not intend to rely on any documents beyond those which had been attached to its statements of case in the arbitration (often called ‘the pleadings’).

As the claimant, Yugo Design wished to elicit more documents. It had a fairly extensive correspondence file which it tendered as the documents upon which it would be relying at the hearing. When Sino Industries did not produce a corresponding number of documents, Yugo Design made an application to the tribunal by letter to try to oblige Sino Industries to produce additional documents, on the grounds that this was fair and would assist the tribunal to reach a proper decision. However, Sino Industries replied to this application by a letter pointing out that the directions which the tribunal had earlier made had required each side to produce only those documents upon which it would be relying. Since Sino Industries intended to rely only on the documents attached to its statements of case, it should not be obliged to provide any additional documents.

The tribunal considered the submissions of the parties and, in a short written decision, upheld Sino Industries’ refusal to provide additional documents.

## Settlement?

The hearing of the arbitration was approaching. As had earlier been agreed within the Yugo Design camp, Mr. Varnic made his approach by telephone to Mr. Chen. Mr. Chen was receptive to the idea of beginning discussions. He said the difficulty was that Sino Industries’ management had been advised by their lawyers that they had a good defence to Yugo Design’s claims, mainly on the basis of the financial closure condition in the contract. It would be very difficult, Mr. Chen said, to agree any payment to Yugo Design on that basis; really some additional argument or evidence would be needed. Mr. Varnic debated with Mr. Chen for some time the merits of the claims and defences, and pointed to the considerable costs that would be incurred if the matter did not settle soon. He also said that he hoped the parties’ commercial relationship could be preserved by a settlement, and mentioned some projects in which Yugo Design were involved where they had some influence about who would be the main contractors.

Although the discussion between the two managers was polite, and even friendly, no settlement of any part of the dispute seemed likely to result. Mr. Varnic said he would report back to his board, as did Mr. Chen; they also agreed to keep their line of communication open and to speak again if either thought it would be productive to do so. But the net result of their conversation was that a settlement looked unlikely, and each side had to prepare to fight the arbitration through to a decision.

## The hearing

As the tribunal had directed, the parties exchanged and filed full written submissions on fact and law in advance of the hearing in January 2013. The hearing files had been prepared, each side and the tribunal having a copy of the same files with the same pagination.

The arbitration hearing took place in a special dispute resolution centre in central London. The hearing itself was conducted in a large room with a long table and three chairs for the tribunal, and on each side a long table for each party and its representatives. In the middle of the room was a table, with a chair for the witness to sit in during his or her cross-examination.

The proceedings were informal. On the first morning of the hearing, the chairman opened the proceedings by introducing the tribunal and inviting each party to introduce its representatives and to identify those attending the hearing.

Arbitrations are private. Only those who are connected with and authorised by a party are generally permitted to attend any arbitration hearing. Sometimes a representative of the ICC secretariat will be in attendance as well. In addition, it is often necessary to have a stenographer or shorthand typist available to take a transcript of the evidence so that a clear record is available for the parties and the tribunal when it comes to writing its award or decision. In the present case, the parties employed a stenographer.

In London arbitrations, it is usual for witnesses to be present while witnesses from the other side of the dispute are being cross-examined. Unlike other places, such as Germany, the witnesses do not normally leave the room while other witnesses are being cross-examined. This can often save time and it is not usual for anyone to derive any advantage from sending a witness or witnesses out of the room.

After the proceedings had opened, the representative of the claimant, Yugo Design, made a short oral opening speech. The tribunal's earlier direction to provide full written submissions removed the need for lengthy oral submissions. This both saves time and removes confusion because each side should know before the proceedings actually open what is the other side's detailed case on facts and law from the written submissions.

After the claimant's representative had opened the case, Sino Industries' representative did not need to say anything in opening as well, and the proceedings went forward to the first witness.

The first witness to be called was Mr. Varnic. In many arbitrations, the normal pattern is for the witnesses of the claimant to be cross-examined first.

The procedure was straightforward. Mr. Varnic entered the 'witness box', the table in the middle of the room where witnesses sit; this had on it a set of the files for the hearing. Yugo Design's representative asked him to look at his signed witness statement and then asked him to confirm that this was his evidence for the arbitration. Having done this, Mr. Varnic was cross-examined by counsel for Sino Industries.

The cross-examination went on for half a day. Mr. Varnic was taken to documents and asked to accept certain things by reference to them. When he did not accept these, further questions were asked, by reference to further documents. In this way, counsel for Sino Industries began to put to Mr. Varnic each aspect of Sino Industries' defence to which Mr. Varnic could speak as a witness. So where Mr. Varnic was not present for part of a meeting, but only his associate Ms Selenko, Mr. Varnic was not directly asked about those particular events. He was generally only asked about events of which he had direct knowledge.

The technique in cross-examination is to tailor the questions to the witness who has direct knowledge of the facts about which he is invited to speak. In this way, duplication is avoided as well as 'hearsay', that is, where a witness says only what he has been told and not what he knows from his own direct experience or knowledge. Although hearsay is not excluded, generally speaking, in ICC or other arbitration proceedings, its value as evidence is normally less than that of direct evidence.

Following Mr. Varnic's cross-examination, counsel for the claimant, Yugo Design, asked him certain questions in 're-examination'. These are questions which are not intended to suggest the answer but which are intended to go over certain issues which have arisen in the course of the cross-examination. Generally speaking, certainly in English-sited proceedings, it is not permitted to cover in re-examination matters which have not been covered in cross-examination. The witness's substantial evidence is intended to be included in his witness statement and not to be elicited in the course of a re-examination, which is generally short.

Following Mr. Varnic, the second witness of Yugo Design was called. Ms. Viktoria Selenko confirmed her evidence in accordance with her statement, as had Mr. Varnic, and then was cross-examined. Her cross-examination, however, was somewhat shorter than Mr. Varnic's because the matters on which she could speak were fewer. Her cross-examination was concluded quickly and there was no re-examination.

It was then the turn of Sino Industries' witnesses to be cross-examined.

The first witness in the 'box' was Mr. Chen. He was asked, in the usual way, to confirm his evidence by reference to his witness statement. He was then cross-examined at length by counsel for Yugo Design. Using essentially the same techniques of cross-examination, Mr. Chen was asked about documents which he had either seen or written himself and, in relation to those documents, was asked to accept certain propositions. For example, by reference to a meeting minute which he had signed he was asked to accept that he had agreed that the second milestone payment to Yugo Design would be released by the end of December. Mr. Chen answered the question by saying that, although the minutes showed that Sino Industries had apparently been party to this agreement, it was in reality only Spider Industries who, as everyone knew, had any control over the release of payments; and so the minute was in that respect somewhat misleading.

Yugo Design's representative then pressed Mr. Chen, asking him how he could really say the minutes were misleading: Sino Industries was, after all, meant to be the EPC contractor and, contractually speaking, payments would be routed through Sino Industries, who were contractually responsible. Mr. Chen agreed that payments would be routed through Sino Industries, but did not accept that his company was contractually responsible for them, since he pointed to the financial closure precondition. Again, Mr. Chen was pressed when it was suggested to him that the subcontract had been amended by the meeting in December; but Mr. Chen persisted in saying that there had been no amendment, only that the parties were moving towards agreeing a comprehensive set of amendments to the subcontract.

After the cross examination of Mr. Chen, there was a short re-examination. Then Mr. Yin was asked to give his evidence. Having confirmed his evidence by reference to his witness statement he was cross-examined; but his cross-examination was considerably shorter than Mr. Chen's, since he was not present at all the same meetings and, in any event, was adopting a subordinate role throughout. Mr. Chen was the primary target for the Yugo Design cross-examination. Having been cross-examined for one and a half hours, Mr. Yin was discharged, there having been no re-examination.

## **The closing submissions**

The witnesses for each side had, by this time, been cross-examined and given their evidence. The proceedings had now lasted two and half days, and good progress was being maintained. Normally, the president will keep an eye on the clock. He or she will ensure, or try to ensure, that the time set aside for the arbitration is kept to, with each side being given broadly an equal chance (depending on the extent of its case) to make its submissions and cross-examine witnesses.

The proceedings had gone smoothly and it now came to the question of whether closing submissions would be required. These are submissions which the parties make at the end of the evidence, drawing together the various matters that have arisen in the course of the evidence, and relating the evidence to the details of each side's case.

The tribunal conferred briefly, and announced to the parties that it would be assisted by brief oral closing submissions. In other words, it would not be necessary for the parties to withdraw and produce detailed written submissions. This was quite normal; and the hearing adjourned for a short period to permit each side's representatives to consider the evidence and produce its concluding statement.

On the following day, the parties reassembled. Sino Industries' representative began his closing submissions. In English arbitrations (the ICC in London tends to follow this procedure), the responding party normally goes first in making closing submissions; the idea being that the claimant, who bears the

burden of proving its case, should have the last word. This is not an inflexible rule; it depends on the individual circumstances. Where, for example, the issues on the claim are relatively simple but there is a very significant and complicated counterclaim, raising many factual and expert matters, it may be sensible for the roles to be reversed and the responding party to take the role of the claimant, including making its oral submissions.

Sino Industries' representative's closing speech was short and relied to a large extent on the matters already set out in his written submissions. Specific passages from the transcript were cited, giving references for the tribunal's convenience. Points arising from the evidence were emphasised in support of Sino Industries' case and against that of Yugo Design.

In his closing submissions Sino Industries' representative tried to paint a broader picture for the tribunal; although Yugo Design might be presenting its claim as a simple claim on invoices it was in effect, Sino Industries submitted, asking the tribunal to have Sino Industries compensate Yugo Design for its losses incurred at the hands of Spider Industries. Both parties were taking a risk in proceeding with the project; both parties knew that no one would be paid until financing was in place. The suggestion that the December minutes amounted to an amendment was farfetched against the factual background of that meeting and the minutes themselves. The circumstances were summarised and the conclusion drawn: there was no entitlement on Yugo Design's part to be paid because there was no financial closure. The other matters were subsidiary to this but were covered in the closing submissions; these included whether milestone 3 had been achieved; and whether any increase in the sub-contract price had been agreed.

In reply, Yugo Design's representative contended in his closing submission that there had been an agreement to delete the financial closure precondition in the subcontract. He said that this had been agreed at the December meeting, and shown clearly by the terms of the meeting minutes. He went on to summarise the effect of the evidence on this point, before going on to address the tribunal on each of the other issues in the arbitration in turn.

In the course of the closing submissions, members of the tribunal asked questions of each side's representative. One question put by one of the arbitrators was how it could be said that the December meeting amounted to an amendment when it appeared that the parties had understood from the outset that no one would be paid unless financing was in place; this was put to counsel for Yugo Design. He replied that the position had changed by the end of 2010 and that, in those particular circumstances, the parties at the December meeting in fact agreed to a new payment arrangement.

Other questions were put on various matters to each counsel for the parties. Once the closing submissions had been completed, and any final questions asked and responded to, the chairman of the tribunal announced that the proceedings were closed.

The tribunal had earlier indicated, with the parties' agreement, that the matters to be covered by the hearing in January were limited to liability



matters only. This is not an unusual way of dividing up proceedings, where it is efficient to do so. The original Request for Arbitration had contained a schedule setting out various heads of loss. These matters, however, logically would only arise once liability had been decided in favour of Yugo Design. If Yugo Design failed to persuade the tribunal that Sino Industries was liable (because, for example, the financial closure precondition applied) then there would be no point in going on to consider quantum. Issues of quantum, or recovery, would simply not arise. It made sense, in the particular circumstances, for this matter to be adjourned to a subsequent hearing should liability be decided in favour of Yugo Design.

It should be noted that, in dividing matters up in this way, the claimant party is in no way prejudiced; there is no presumption that the claimant will lose.

Normally, the decision to divide matters into liability or quantum in arbitrations is considered at an early stage. It may even be considered at the stage where Terms of Reference come to be drawn up. The guiding consideration is efficiency and good sense. Dividing matters in this way also leaves room for the parties to attempt to agree quantum should liability be decided in the claimant's favour; even if agreement cannot be reached, the tribunal under the ICC rules can appoint an expert to report to it on quantum, and this will often be determinative on such matters.

## The award

At the conclusion of an ICC hearing, it is normal for the president to indicate to the parties roughly when an award might be expected. The 'award' is simply the name given to the formal document containing the tribunal's decision. It does not necessarily mean that the claimant has won anything. The ICC tribunal also, at the conclusion of the hearing, typically requests that each side provide a schedule of costs. This will enable the tribunal to decide what legal costs should be awarded at the same time as preparing its award.

The award will be final on the matters referred to the tribunal for the particular hearing covered by the award. This could mean that the award is interim with respect to other matters; in particular, if quantum has been left over to a separate hearing the award may be final on matters of liability but interim with respect to the other matters referred to arbitration.

An award is a formal document which sets out the contentions of the parties and gives reasons for the decision reached. The award in our imaginary arbitration is provided at Tab D of this appendix.

If either party has any objection to the way in which the procedure was conducted by the tribunal during the arbitration this should be raised well before the award is released. Failure to make the objection at an early stage will, certainly under English procedural rules and those of many other

countries, mean that the party wishing to make the objection will not be able to do so. Any objections as to the jurisdiction of the tribunal should also have been raised well before release of the award. Normally, a party must raise an objection to procedure or jurisdiction as soon as it becomes apparent to that party that either the procedure is seriously irregular or the tribunal does not have jurisdiction to consider some or all of the matters purportedly referred to it.

## The result

In our case, there was victory for Sino Industries. The tribunal ruled that the financial closure precondition continued to apply. There had been no amendment of the precondition subsequently. Having ruled on this, it was not necessary for the tribunal to consider any of the other issues referred to it. Those issues only really arose if the main issue went against Sino Industries. However, because the matters were referred to it, the tribunal felt obliged to give a short ruling on the other matters. It held that there had been no agreement to an increase in the subcontract price. The tribunal also held that milestone 3 had not been achieved. The termination, or purported termination, by Yugo design was unlawful because Sino Industries was not in fact in breach of any of its payment obligations under the subcontract. Costs were awarded against Yugo Design in a particular sum assessed by the tribunal. The award was signed by each member of the tribunal and witnessed.

Strictly speaking, the award was issued not by the tribunal but by the International Court of Arbitration of the ICC. The secretariat of the ICC received the award in draft from the tribunal and considered it for obvious errors, and generally to ensure that it accorded with the standards and forms of the ICC. Once those formalities were concluded the award was issued by the Court of the ICC and constituted the award of the ICC binding on the parties.

Having received this award, Sino Industries looked to Yugo Design for immediate payment of the costs assessed by the tribunal. The ICC rules provide that the terms of an award should be given effect to immediately by the parties concerned. Yugo Design was a solvent and responsible party and, in due Course, albeit after some delay, paid the costs ordered by the award.

Where a successful party is not so fortunate as Sino Industries there can be considerable problems in the way of enforcing an award. This applies to an order for costs as well as a substantive award on the merits. As indicated in the main body of this Handbook, the main method of enforcement where the other party has assets outside the jurisdiction of the place of arbitration is the New York Convention, which provides the courts of the relevant country with the power and duty to give effect to the award provided certain conditions are satisfied.

## TAB A

### IN THE INTERNATIONAL COURT OF ARBITRATION (CASE NO: 12345/AB)

#### BETWEEN:

YUGO DESIGN COMPANY

Claimant

and

SINO INDUSTRIES CORPORATION

Respondent

#### REQUEST FOR ARBITRATION

#### The project

1. The claimant (“Yugo Design”) is a company incorporated in Serbia having its registered office at 123, Bodbereski St, Belgrade. Yugo Design is a specialist designer and fabricator of filtration systems for industrial plant.
2. The respondent (“Sino Industries”) is a company incorporated in the People’s Republic of China whose registered office is at 1 IF, 5 Fuchengmenwai Road, Beijing 100065. Sino Industries undertakes heavy industrial projects both inside and outside China.
3. By a subcontract dated 31st January 2010 between Yugo Design and Sino Industries, Yugo Design undertook the design and fabrication of a filtration system for a chemical waste disposal plant in Belgium with a capacity of 350,000 metric tonnes per annum (“the subcontract”). The lump sum price under the subcontract was USD 3,850,000. A copy of the subcontract is attached at Tab 1.
4. Subsequently in or about July 2010 the parties agreed a variation of the subcontract by which Yugo Design agreed to design and fabricate a filtration system for a plant with a capacity of 550,000 mtpa and at a lump sum price of USD 5,220,000. This agreed variation to the scope and price of the subcontract is contained in or evidenced by e-mail and other exchanges between Mr. Chen of Sino Industries and Mr. Varnic of Yugo Design between 4th June 2010 and 20th July 2010, copies of which are attached at Tab 2.

#### Arbitration

5. By clause 29 of the subcontract the parties agreed to refer any dispute arising thereunder or in connection therewith to arbitration pursuant to the International Chamber of Commerce rules of arbitration to take place in London. The parties agreed by clause 28 that English law should govern the subcontract.

6. It was further agreed that the arbitral tribunal should consist of three arbitrators appointed in accordance with the ICC Rules. In accordance with Article 8.4 of those rules Yugo Design nominates Mr. John Smith as one arbitrator for confirmation and attaches a copy of his CV hereto.

### The dispute

7. There were express terms of the subcontract as follows:
  - (a) Pursuant to clause 3, the contractor would pay the subcontractor for the subcontract work in accordance with the terms of the subcontract.
  - (b) Pursuant to the schedule of payments contained in schedule B to the subcontract, the subcontractor would be paid an advance of 10% of the subcontract price upon submission of bank guarantees.
  - (c) Pursuant to schedule B to the subcontract, the subcontractor would be entitled to payment of 10% of the subcontract price upon approval of basic engineering and placement of major orders.
  - (d) Pursuant to schedule B to the subcontract, the subcontractor was entitled to be paid 70% of the subcontract price upon receipt and acceptance of materials on site on a pro rata basis.
  - (e) By clause 18.1 of the subcontract, should the contractor default in making payments due to the subcontractor pursuant to the terms of the subcontract then the subcontractor would be entitled upon giving notice in accordance with clause 17 to terminate the subcontract.
  - (f) By clause 18.2 of the subcontract, in the event of termination of the subcontract for default in payment of sums due the subcontractor would be entitled to recover reasonable costs incurred by the subcontractor as a result of the termination.

### Payments due under the subcontract

8. On 31st February 2010 Yugo Design produced bank guarantees in accordance with schedule B to the subcontract and thereupon became entitled to 10% of the subcontract price as an advance against its performance under the subcontract. The sum of USD 385,000 was due accordingly and was paid by Sino Industries on or about 14th March 2010.
9. Yugo Design proceeded with the design and fabrication of the filtration system in accordance with the terms of the subcontract and on or about 19th August 2010 achieved the second payment stage pursuant to schedule B to the subcontract. Yugo Design accordingly became entitled pursuant to the subcontract to the sum of USD 522,000 being 10% of the agreed revised lump sum price under the subcontract.
10. Yugo Design submitted invoice number ABY 67899 dated 1st September 2010 (Tab 3) in respect of the second payment stage but Sino Industries has failed to pay the above sum or any sum in respect of that stage.

11. Further, in accordance with an agreement reached between the parties at a meeting on 14th and 15th December 2010 varying the payment terms of the subcontract and contained in or evidenced by minutes signed by the parties (a copy of which is provided at Tab 4), Yugo Design submitted invoice number ABC 15936 dated 18th December 2010 in the sum of USD 2,192,400 (Tab 5), being 60% of 70% of the revised subcontract price, and became entitled to payment of that sum on or about 31st January 2011. Despite repeated requests Sino Industries has failed to pay that sum or any sum in respect of the third payment stage.

### Termination of the subcontract

12. By reason of the non-payment of payment stages two and three Sino Industries was in breach of the subcontract and accordingly by notice dated 9th May 2011 (Tab 6) Yugo Design gave notice to Sino Industries pursuant to clause 17 of the subcontract that if it continued in default of its payment obligations Yugo Design would within 30 days of the date of the notice terminate the subcontract.
13. Sino Industries acknowledged receipt of the notice but took no steps towards remedying its default. Accordingly by a further letter dated 20th June 2011 (Tab 7) Yugo Design served notice pursuant to clause 18.1 terminating the sub-contract with effect from that date.

### Sums claimed

14. Yugo Design is entitled to and claims the following sums:
  - (a) USD 522,000 and USD 2,192,400 in respect of payment stages two and three respectively.
  - (b) Pursuant to clause 18.2 of the subcontract, USD 915,000 in respect of liabilities to suppliers, demobilisation and other costs incurred by Yugo Design in consequence of the termination. A breakdown of these costs is provided at Tab 8.

### Interest

15. Pursuant to clause 23 of the subcontract Yugo Design is entitled to interest at the rate of 9% per annum on all sums due and owing thereunder and claims such interest on the above mentioned sums as set out in Tab 9.

AND Yugo Design claims:

1. USD 3,629,400
2. Interest at the rate of 9% thereon.

Signed: Howard Johnson & Co.  
94 Cornhill, London EC4 7SR

**TAB B****IN THE INTERNATIONAL COURT OF ARBITRATION  
(CASE NO: 12345/AB)****BETWEEN:**

YUGO DESIGN COMPANY

Claimant

and

SINO INDUSTRIES CORPORATION

RespondentANSWER TO REQUEST**The project**

1. Paragraphs 1 and 2 of the Request for Arbitration are admitted.
2. As to the subcontract, paragraph 3 of the Request is admitted but paragraph 4 is denied. It is denied that any variation to the terms of the subcontract in respect either of the scope or of the price was ever agreed between the parties. The e-mail and other exchanges relied upon do not have the effect of agreeing any such variation. In any event, pursuant to clause 36.9 of the subcontract any agreement to vary its terms, in order to be binding, had to be in writing signed by both parties to the subcontract. There is no document signed by both parties containing the alleged variation.

**Arbitration**

3. Paragraphs 5 and 6 of the Request are admitted. Sino Industries nominates Mr. Simon Montagu as arbitrator for confirmation and attaches a copy of his CV.

**Terms of the subcontract**

4. The summary of the terms of the subcontract in paragraph 7 of the Request is admitted as such. Sino Industries will refer to the full terms of the subcontract for their true meaning and effect.
5. Paragraph 8 of the Request is admitted. The advance under the subcontract was paid on the date mentioned.
6. As to paragraphs 9 and 10 of the Request, it is admitted that the second payment stage was achieved, in that basic engineering was approved and major orders were placed in or about August 2010, and that subsequently Yugo Design rendered an invoice in respect of that payment stage to Sino Industries. It is however denied that Yugo Design thereupon became due to such payment from Sino Industries.

7. By clause 16 of the subcontract it was expressly provided that all payments to Yugo Design (except the initial advance payment) were dependent upon the Owner (Spider Industries Ltd.) achieving financial closure for the project. Financial closure has never been achieved. Accordingly no payment is due to Yugo Design in respect of the second payment stage notwithstanding that that stage was achieved.
8. As to paragraph 11 of the Request, it is admitted that at the meeting on 14th and 15th December 2010 referred to the parties agreed to revise the payment terms in respect of payment stage 3 but Sino Industries contends (a) that the agreed revised conditions for payment in respect of that payment stage were never in fact achieved at the date of purported termination of the subcontract and (b) in any event, even if such conditions had been achieved, Sino Industries was not obliged to make any payment in respect of it to Yugo Design since financial closure for the project was never achieved.

### Termination of the subcontract and sums claimed

9. In the circumstances it is denied that Sino Industries was in breach of its payment obligations under the subcontract and accordingly denied that Yugo Design lawfully terminated the subcontract in accordance with its terms.
10. It is therefore denied that Yugo Design is entitled to any of the sums claimed or interest thereon. The various sums referred to in paragraph 14(b) of the Request are in any event not admitted.

Signed: Snooks, Jones & Cobbold  
196, St Mary Axe, London EC1 6TR

Lawyers for the Respondent

[Dated]

**TAB C****IN THE INTERNATIONAL COURT OF ARBITRATION  
(CASE NO: 12345/AB)****BETWEEN:**

YUGO DESIGN COMPANY

Claimant

and

SINO INDUSTRIES CORPORATION

RespondentREPLY TO ANSWER

1. As to paragraph 2 of the Answer to Request it is denied that, pursuant to clause 36.9 of the subcontract, a variation thereto was required to be in writing signed by the parties to the subcontract. On its proper construction clause 36.9 of the subcontract provides merely that the variation must be in writing signed by the party against whom it is alleged that the subcontract was varied. In this case the e-mail and other exchanges relied upon in the Request for Arbitration were sufficient to constitute the variation.
2. It is admitted that the subcontract contained the “financial closure condition” referred to in paragraph 7 of the Answer to Request, but contended that the subcontract was amended to remove the condition. At the meeting between the parties on 14th and 15th December 2010 referred to in paragraph 11 of the Request for Arbitration it was agreed that Sino Industries would make payment to Yugo Design in respect of the second payment stage by the end of December 2010. That agreement was not subject to financial closure being achieved by the Owner.
3. Further, in view of Yugo Design’s readiness with part of the materials necessary for the filtration system it was agreed at the same meeting in December that Yugo Design would render an invoice for 60% of 70% of the subcontract price in respect of those materials, which invoice would become payable upon clearance of the materials for dispatch irrespective of whether financial closure was achieved.
4. Yugo Design relies upon items (1) and (5) of the signed minutes of the December meeting in support of paragraphs 2 and 3 above, a copy of which is attached hereto.
5. On or about 18th December 2010 Yugo Design rendered its invoice number ABY 15936 in respect of the materials and subsequently informed Sino Industries on several occasions during January 2011 that the materials were ready for inspection and clearance but Sino Industries did not respond to that information or inspect or clear the materials at any time prior to termination of the subcontract on 20th June 2011.



In those circumstances Yugo Design contends that it discharged its contractual obligations under the subcontract and that payment in respect of the above invoice became due from Sino Industries.

6. In the circumstances Yugo Design is clearly entitled to payment in respect of payment stages two and three of the subcontract and interest thereon as claimed in the Request for Arbitration.

Signed: Howard Johnson & Co.  
94 Cornhill, London EC4 7SR

Lawyers for the Claimant

[Dated]

**TAB D**

IN THE INTERNATIONAL COURT OF ARBITRATION  
(CASE NO: 12345/AB)

BETWEEN:

YUGO DESIGN COMPANY

Claimant

and

SINO INDUSTRIES CORPORATION

Respondent

FINAL AWARD

**The parties**

1. The claimant, Yugo Design Co, is a private company registered in the Republic of Serbia and having its registered office at 123, Bodbereski St, Belgrade. The claimant is a specialist designer and fabricator of filtration systems for industrial plant.
2. The respondent, Sino Industries, is a company registered in the People's Republic of China whose registered office is at 1 IE, 5 Fuchengmenwai Road, Beijing 100065.

**The parties' representatives**

3. The claimant is represented by:  
Mr. Peter Frump, of Howard Johnson & Co, 94 Cornhill, London EC4 7SR
4. The respondent is represented by:  
Mr. Arnold Jones, of Snooks, Jones & Cobbold, 196 St Mary Axe, London EC1 6TR
5. At the hearing of the arbitration which took place on 6–8 January 2013 Mr. Frump and Mr. Jones represented the claimant and the respondent respectively.

**The contract**

6. The parties entered into a subcontract dated 31 January 2010 for the design and fabrication of a filtration system for a chemical waste disposal plant in Belgium for a lump sum price of USD 385,0000.
7. The dispute between the parties relates to the subcontract.

## Arbitration

8. By clause 29 of the subcontract the parties agreed in writing to refer any disputes arising thereunder or in connection therewith to arbitration pursuant to the International Chamber of Commerce rules of arbitration to take place in London. It was further agreed that the arbitral tribunal should consist of three arbitrators appointed in accordance with ICC rules.
9. Pursuant to Art 9(2) of the ICC rules on 10 January 2012 the Secretary General of the International Court of Arbitration confirmed the appointment of Mr. John Smith as arbitrator on the nomination of the claimant and Mr. Simon Montagu as arbitrator on the nomination of the respondent. On 11 February 2012 the Secretary General confirmed Professor Dag Hammarsen as president of the arbitral tribunal on the joint nomination of the co-arbitrators.
10. A preliminary hearing took place on 10 May 2012 at the International Dispute Resolution Centre, Fleet Street, London, at which directions were given for the conduct of the reference and a provisional timetable stated; the directions and timetable were subsequently confirmed by a letter from the tribunal to each party dated 12 May 2012. The Terms of Reference were signed by the parties at the conclusion of the procedural hearing.
11. On 20 July 2012 the claimant made written application to the tribunal for an order for production of additional documents by the respondent. This application was resisted by the respondent by letter dated 25 July. Having considered the parties' submissions the tribunal ruled by letter dated 10 August 2012 that the respondent was not obliged to produce the additional documents requested.
12. A hearing in this reference took place in London at the International Dispute Resolution Centre, Fleet Street, between 6 and 8 January 2013. The issues for the hearing were with the parties' agreement directed to be limited to liability only.

## Tribunal's decision and reasons for decision

13. This case concerns a project for the design and construction of a major chemical waste disposal plant in Belgium. The promoter of this project was a company registered in the British Virgin Islands called Spider Industries Inc, whose sole owner and controller was a Mr. Paul Web. In late 2008 Mr. Web entered into discussions with the respondent with a view to awarding the respondent the EPC contract for the project.
14. Mr. M. T. Chen was the President of International Operations for the respondent during the relevant period. Mr. Web assured Mr. Chen at the outset that the necessary finance for the project would be in place imminently. USD 60 million was apparently required for the project and Mr. Web had, he said, been in discussions with a consortium of banks who were ready to lend this sum.
15. As we understand it, the respondent was very anxious to get into the European heavy plant market and progressed discussions with Spider Industries. During

these discussions the claimant was mentioned as the intended subcontractor for the design and fabrication of the filtration system for the plant.

16. In February 2009 Spider Industries issued a Letter of Award to the respondent for the execution of a 350,000 metric tonne per annum capacity chemical waste disposal plant on a lump sum EPC basis. The Letter of Award provided that the envisaged EPC contract was to have no effect and there was to be no obligation of any sort on either Spider Industries or the respondent if the envisaged loan of USD 60 million to Spider Industries was not approved by the financial institutions referred to in the Letter of Award. The Letter of Award also specifically mentioned the claimant as the intended specialist contractor for the filtration system.
17. Following discussions between Spider Industries and the claimant a Letter of Interest was issued by Spider Industries to the claimant at the end of 2009 for a planned capacity of 350,000 mtpa, a copy of which was sent to the respondent. On the basis of this Letter of Interest, the respondent issued in January 2010 a Letter of Intent to the claimant setting out the scope and certain terms of the proposed subcontract between them. A fixed price lump sum of USD 3.85 million was mentioned. The Letter of Intent also provided for the respondent's obligation to make payment (except in relation to an advance payment) to the claimant to be contingent upon Spider Industries achieving financial closure for the project; this became known in the course of the hearing as the 'financial closure precondition'.
18. Following the issue of the Letter of Intent discussions took place between Mr. Chen of the respondent and Mr. Marko Varnic, General Manager of the claimant, as to the terms of the envisaged subcontract between them. A meeting was fixed for 31st January 2010 in Brussels at Spider Industries' offices in order to discuss various matters arising from the Letter of Intent and to agree the terms of a subcontract. In the course of the meeting subcontract documents were prepared and signed on behalf of both the claimant and the respondent.

### The subcontract

19. Clause 16 of the subcontract provided as follows:  
*'Financial closure is expected shortly for the project and all payments (except the advance) shall be dependent upon Spider Industries achieving financial closure.'*
20. The subcontract contained as an appendix a schedule of payments calculated as percentages of the subcontract price. These, so far as relevant, were as follows:
  - (i) 10% advance against submission of:
    - (a) A bank guarantee for the like amount valid until completion of deliveries.
    - (b) A performance guarantee in accordance with clause 13 of the contract.
    - (c) A parent company guarantee in accordance with clause 19.3 of the subcontract.
  - (ii) 10% on approval of basic engineering and placement of major orders.
  - (iii) 70% after receipt and acceptance of materials on site, pro rata basis.'

## Progress of the project

21. Following the execution of the subcontract the claimant proceeded to prepare the basic engineering and received payment of the advance of 10% upon production of required guarantees.
22. Although it is not disputed that both parties anticipated that financial closure would be obtained shortly after the execution of the subcontract, in fact this was not the case; and it is common ground that financial closure was never in fact achieved. However, both claimant and respondent received repeated assurances from Spider Industries that financial closure was imminent. The evidence which we have heard shows that these assurances were made from before the execution of the subcontract right up until the stage at which the claimant served a notice purporting to terminate the subcontract in June 2011.
23. However, before that stage was reached two events occurred which have particular importance for the issues which we have to decide in this arbitration.
24. First, in April 2010 Spider Industries contacted the claimant directly and asked them to stop work on the filtration system because a more powerful and expensive plant would be required. In particular, following discussions with the financing institutions, Spider Industries wanted to achieve 550,000 mtpa rather than the 350,000 which was then being designed. After discussions directly between the claimant and Spider Industries, an agreement between those parties was reached as to an outline technical specification for the intended upgraded plant together with a new lump sum fixed price for this work of USD 5.22 million. This contrasted with the original subcontract price, in the subcontract between the claimant and the respondent, of USD 3.85 million.
25. The respondent was requested to amend the subcontract to provide for the new plant and increased price by both Spider Industries and the claimant, but the respondent's evidence is that it was reluctant to do so since financial closure had not yet been achieved. It was reluctant to take on additional liabilities without the financing being in place. However, it is not disputed by the parties that subsequent to April 2010 both the claimant and the respondent, in conjunction with Spider Industries, proceeded to prepare designs and produce draft contract documentation to reflect an amended subcontract which would incorporate the upgraded and more expensive plant. The claimant relies, in part, upon this conduct to contend that the respondent agreed to an increased subcontract price.
26. The second event of particular relevance to the issues which we have to decide concerns the events leading up to and including a meeting held between 14 and 15 December 2010 at Spider Industries' offices, at which both commercial and technical matters were discussed. The minutes of this meeting were signed by both claimant and respondent. At this meeting, according to the minutes, it was agreed that '*... payment towards the second milestone would be released by the end of December 2010*'. The minutes also record it as having been agreed that, in view of the claimant's readiness to dispatch many of the materials necessary for the

fabrication of the plant, the claimant would render an invoice for 60% of the 70% due under payment stage 3 which would become payable upon clearance for dispatch; this in turn would be achieved when the materials were checked against the general arrangement drawings and inspection test results were obtained or the inspection tests were witnessed. The minutes also record the parties as agreeing to proceed towards preparing a final draft amended subcontract.

27. Before and during the meeting in December, Spider Industries had repeated its assurance to both parties that financial closure was imminent. Pending obtaining approval for the long term debt Spider Industries said that it would be able to obtain interim finance through private placements and issue of bonds. It was not disputed during the hearing that at the time of the December meeting the claimant was ready with a substantial portion of the materials but Spider Industries was not ready to receive them. Accordingly, the minutes record the above arrangements as to the rendering of an invoice in respect of the materials.
28. The events leading up to and including the December meeting are relied upon by the claimant to contend that the condition of financial closure in clause 16 of the subcontract was amended by agreement of the parties. The claimant contends that the agreement reached at the December meeting, as evidenced by the minutes of that meeting, was to the effect that the respondent was undertaking without qualification to make payment towards the second milestone by the end of December and to make the third milestone payment in accordance with the invoicing procedure agreed upon.

## Issues

The parties have identified the following issues for our decision:

- Was the respondent's payment obligation conditional upon Spider Industries achieving financial closure for the project?
- Was the subcontract price varied?
- Were the conditions for milestone 3 achieved?

We set out below our conclusions in relation to each of these issues and our reasons for them.

### Was the respondent's payment obligation conditional on Spider Industries achieving financial closure for the project?

29. We hold that the respondent's obligation to make payment to the claimant was, except for the advance payment, conditional upon Spider Industries' achieving financial closure for the project. In our view the claimant has not established that clause 16 of the subcontract, which expressly contains this condition, was amended by the parties' subsequent agreement.

30. The principal matter upon which the claimant relied is the terms of the December meeting minutes. We accept and find that the minutes do contain agreements as to the payment terms for the subcontract works. We find that the parties at that point reached a stage where it was necessary for them to address certain pressing matters; in particular, the fact that payment in relation to milestone 2 had not been made and, secondly, that although the claimant was ready with a substantial part of the materials Spider Industries was not in a position to receive them. In our view the parties were attempting to agree an interim, holding measure pending the execution of an amended subcontract.
31. We do not think that item (1) of the minutes, which records that payment towards the second milestone would be released by the end of December, amounts to an amendment of the financial closure precondition contained in the subcontract. Although it is correct to say that the respondent signed the minutes containing this item, and that in the minutes themselves 'Spider Industries/Sino Industries' are recorded as having stated that payment would be released by the end of December 2010, in our view that is not sufficient to establish the claimant's case. The minutes have to be interpreted against the evidence available to us of the background to the meeting; and against that background we find that it was Spider Industries who was undertaking to make the payment by the end of December, the respondent being (as all concerned were aware) in no position to release any payments. We also find that the reference to the respondent in the meeting minutes at item (1) is due to the fact that, as the main contractor, payments would be routed through the respondent. It seems to us difficult to contend on the evidence that by agreeing to this item of the minutes the respondent was in some way abandoning the financial closure precondition. It regarded this as essential, as the evidence in our view demonstrates, to protecting its position vis-à-vis Spider Industries.
32. For similar reasons, we do not accept the claimant's case that merely by agreeing to the revised payment terms as to milestone 3 the respondent was agreeing to abandon the financial closure precondition in the subcontract. The modification to the milestone 3 payment terms was precisely that: a modification of the payment terms contained in the schedule to the subcontract. It did not amount to an abandonment of the condition for the obligation to make a payment in accordance with those terms arising. The evidence we have heard of the background to and contents of the meeting in December lead us to the conclusion that item (5) of the meeting minutes cannot properly be construed in the way contended for by the claimant.
33. We accordingly find that the financial closure precondition was not amended or abandoned by the parties' agreement.

### Was the subcontract price varied?

34. We find that there was no agreement to vary the subcontract price. The matters relied upon by the claimant are essentially the conduct of the respondent in preparing

contract documentation and draft guarantees to reflect the increased price subsequent to April 2010. It is common ground that the respondent did indeed prepare such documents and engage in at times lengthy negotiations and discussions on the basis of an increased price and more powerful plant. However, we do not regard this as sufficient to establish the claimant's case on this issue. For that case to be established, it is necessary to show that the conduct of the respondent clearly demonstrated an intention to accept the higher price. What the matters relied upon by the claimant demonstrate, however, is merely conduct consistent with such an intention. It is equally consistent with a willingness on the part of the respondent to cooperate with both Spider Industries and the claimant; and this seems to us to be the effect of the evidence overall. Accordingly, we have found that there was no agreement between the parties to vary the subcontract price. In light of this finding we do not think it necessary for us to decide whether, as the respondent contends, clause 36.9 of the subcontract required any such agreement to be in writing signed by both parties.

### Were the conditions for milestone 3 achieved?

35. This issue concerns whether or not the agreed amended conditions for achieving milestone 3 of the subcontract in December 2010 had in fact been achieved before the claimant served its notice in June 2011 purporting to terminate the subcontract.
36. We have already set out above the modification of the original milestone 3 payment terms that was agreed at the December meeting. In our view, on the evidence the conditions for this milestone were not achieved. There was no evidence to the effect that clearance had been given to the materials available for dispatch. The most that was contended by the claimant was that it had offered to have the materials inspected but that this was not followed up or any inspections arranged by the respondent. However, there was no documentary evidence provided for any such request; and the oral evidence given of this was patchy and unreliable. In any event, we do not believe that contractually any such request would have been sufficient to achieve the milestone, which provides specifically for clearance to have been obtained. At most, in our view, if requests had been made which were not pursued as they ought to have been by the respondent that would give rise to a claim for damages on the basis of a breach, presumably of an implied obligation to act upon requests duly made by the claimant. In the event, no alternative claim of this sort was advanced.
37. Accordingly, we find that the conditions for milestone 3 were not achieved.
38. The effect of our findings on issue 1 (above) is that no payment is due to the claimant from the respondent. Accordingly, when the claimant served its notice purporting to terminate the subcontract in June 2011 it had no contractual justification for doing so and its purported termination was therefore unlawful. We necessarily conclude that the claimant is not entitled to any of the relief sought for all the reasons set out above.



## Costs

39. Both parties have submitted statements of costs. The tribunal pursuant to Art 31 of the ICC rules considers that the respondent as the successful party in this arbitration should be awarded its costs and assesses these in the sum set out in the attachment to this Award, which it regards as reasonable costs.

## Summary of awards

40. The claims advanced by the claimant in this arbitration are dismissed.
41. The claimant shall pay the respondent the following sums by way of costs: *[each item of costs allowed as reasonable is then set out]* within 28 days of this Award in respect of the respondent's costs in the arbitration.
42. The claimant shall bear the total fees of the tribunal and the ICC's administrative costs in the sum of *[a sum in USD is stated]*. Accordingly, the claimant shall pay to the respondent *[a sum in USD representing the contribution already made by Sino Industries to fees and expenses pursuant to the ICC rules]*.

Place of Arbitration: London

Signed by the tribunal: *[each member of the tribunal signs and dates the Award and their signatures are witnessed]*

[Dated]

# **APPENDIX IIA**

## **Rules of Arbitration of the International Chamber of Commerce\***

### **Arbitration Rules**

#### **Rules of Arbitration of the International Chamber of Commerce**

**In force as from 1 January 2012**

### **INTRODUCTORY PROVISIONS**

#### **ARTICLE 1**

##### **International Court of Arbitration**

- 1 The International Court of Arbitration (the “Court”) of the International Chamber of Commerce (the “ICC”) is the independent arbitration body of the ICC. The statutes of the Court are set forth in Appendix I.
- 2 The Court does not itself resolve disputes. It administers the resolution of disputes by arbitral tribunals, in accordance with the Rules of Arbitration of the ICC (the “Rules”). The Court is the only body authorized to administer arbitrations under the Rules, including the scrutiny and approval of awards rendered in accordance with the Rules. It draws up its own internal rules, which are set forth in Appendix II (the “Internal Rules”).
- 3 The President of the Court (the “President”) or, in the President’s absence or otherwise at the President’s request, one of its Vice-Presidents shall have the power to take urgent decisions on behalf of the Court, provided that any such decision is reported to the Court at its next session.

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- 4 As provided for in the Internal Rules, the Court may delegate to one or more committees composed of its members the power to take certain decisions, provided that any such decision is reported to the Court at its next session.
- 5 The Court is assisted in its work by the Secretariat of the Court (the “Secretariat”) under the direction of its Secretary General (the “Secretary General”).

## ARTICLE 2

### Definitions

In the Rules:

- (i) “arbitral tribunal” includes one or more arbitrators;
- (ii) “claimant” includes one or more claimants, “respondent” includes one or more respondents, and “additional party” includes one or more additional parties;
- (iii) “party” or “parties” include claimants, respondents or additional parties;
- (iv) “claim” or “claims” include any claim by any party against any other party;
- (v) “award” includes, *inter alia*, an interim, partial or final award.

## ARTICLE 3

### Written Notifications or Communications; Time Limits

- 1 All pleadings and other written communications submitted by any party, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for each arbitrator, and one for the Secretariat. A copy of any notification or communication from the arbitral tribunal to the parties shall be sent to the Secretariat.
- 2 All notifications or communications from the Secretariat and the arbitral tribunal shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification or communication may be made by delivery against receipt, registered post, courier, email, or any other means of telecommunication that provides a record of the sending thereof.
- 3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with Article 3(2).
- 4 Periods of time specified in or fixed under the Rules shall start to run on the day following the date a notification or communication is deemed to have been made in accordance with Article 3(3). When the day next following such date is an official holiday, or a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall commence on the first following business day. Official holidays and non-business days are included in the calculation of the period of time. If the last day of the relevant period of time granted is an official holiday or

a non-business day in the country where the notification or communication is deemed to have been made, the period of time shall expire at the end of the first following business day.

## COMMENCING THE ARBITRATION

### ARTICLE 4

#### Request for Arbitration

- 1 A party wishing to have recourse to arbitration under the Rules shall submit its Request for Arbitration (the “Request”) to the Secretariat at any of the offices specified in the Internal Rules. The Secretariat shall notify the claimant and respondent of the receipt of the Request and the date of such receipt.
- 2 The date on which the Request is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of the arbitration.
- 3 The Request shall contain the following information:
  - a) the name in full, description, address and other contact details of each of the parties;
  - b) the name in full, address and other contact details of any person(s) representing the claimant in the arbitration;
  - c) a description of the nature and circumstances of the dispute giving rise to the claims and of the basis upon which the claims are made;
  - d) a statement of the relief sought, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
  - e) any relevant agreements and, in particular, the arbitration agreement(s);
  - f) where claims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each claim is made;
  - g) all relevant particulars and any observations or proposals concerning the number of arbitrators and their choice in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
  - h) all relevant particulars and any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.

The claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 4 Together with the Request, the claimant shall:
  - a) submit the number of copies thereof required by Article 3(1); and
  - b) make payment of the filing fee required by Appendix III (“Arbitration Costs and Fees”) in force on the date the Request is submitted.

In the event that the claimant fails to comply with either of these requirements, the Secretariat may fix a time limit within which the claimant

must comply, failing which the file shall be closed without prejudice to the claimant's right to submit the same claims at a later date in another Request.

- 5 The Secretariat shall transmit a copy of the Request and the documents annexed thereto to the respondent for its Answer to the Request once the Secretariat has sufficient copies of the Request and the required filing fee.

## ARTICLE 5

### Answer to the Request; Counterclaims

- 1 Within 30 days from the receipt of the Request from the Secretariat, the respondent shall submit an Answer (the "Answer") which shall contain the following information:
  - a) its name in full, description, address and other contact details;
  - b) the name in full, address and other contact details of any person(s) representing the respondent in the arbitration;
  - c) its comments as to the nature and circumstances of the dispute giving rise to the claims and the basis upon which the claims are made;
  - d) its response to the relief sought;
  - e) any observations or proposals concerning the number of arbitrators and their choice in light of the claimant's proposals and in accordance with the provisions of Articles 12 and 13, and any nomination of an arbitrator required thereby; and
  - f) any observations or proposals as to the place of the arbitration, the applicable rules of law and the language of the arbitration.The respondent may submit such other documents or information with the Answer as it considers appropriate or as may contribute to the efficient resolution of the dispute.
- 2 The Secretariat may grant the respondent an extension of the time for submitting the Answer, provided the application for such an extension contains the respondent's observations or proposals concerning the number of arbitrators and their choice and, where required by Articles 12 and 13, the nomination of an arbitrator. If the respondent fails to do so, the Court shall proceed in accordance with the Rules.
- 3 The Answer shall be submitted to the Secretariat in the number of copies specified by Article 3(1).
- 4 The Secretariat shall communicate the Answer and the documents annexed thereto to all other parties.
- 5 Any counterclaims made by the respondent shall be submitted with the Answer and shall provide:
  - a) a description of the nature and circumstances of the dispute giving rise to the counterclaims and of the basis upon which the counterclaims are made;

- b) a statement of the relief sought together with the amounts of any quantified counterclaims and, to the extent possible, an estimate of the monetary value of any other counterclaims;
- c) any relevant agreements and, in particular, the arbitration agreement(s); and
- d) where counterclaims are made under more than one arbitration agreement, an indication of the arbitration agreement under which each counterclaim is made.

The respondent may submit such other documents or information with the counterclaims as it considers appropriate or as may contribute to the efficient resolution of the dispute.

- 6 The claimant shall submit a reply to any counterclaim within 30 days from the date of receipt of the counterclaims communicated by the Secretariat. Prior to the transmission of the file to the arbitral tribunal, the Secretariat may grant the claimant an extension of time for submitting the reply.

## ARTICLE 6

### Effect of the Arbitration Agreement

- 1 Where the parties have agreed to submit to arbitration under the Rules, they shall be deemed to have submitted *ipso facto* to the Rules in effect on the date of commencement of the arbitration, unless they have agreed to submit to the Rules in effect on the date of their arbitration agreement.
- 2 By agreeing to arbitration under the Rules, the parties have accepted that the arbitration shall be administered by the Court.
- 3 If any party against which a claim has been made does not submit an answer, or raises one or more pleas concerning the existence, validity or scope of the arbitration agreement or concerning whether all of the claims made in the arbitration may be determined together in a single arbitration, the arbitration shall proceed and any question of jurisdiction or of whether the claims may be determined together in that arbitration shall be decided directly by the arbitral tribunal, unless the Secretary General refers the matter to the Court for its decision pursuant to Article 6(4).
- 4 In all cases referred to the Court under Article 6(3), the Court shall decide whether and to what extent the arbitration shall proceed. The arbitration shall proceed if and to the extent that the Court is *prima facie* satisfied that an arbitration agreement under the Rules may exist. In particular:
  - (i) where there are more than two parties to the arbitration, the arbitration shall proceed between those of the parties, including any additional parties joined pursuant to Article 7, with respect to which the Court is *prima facie* satisfied that an arbitration agreement under the Rules that binds them all may exist; and

- (ii) where claims pursuant to Article 9 are made under more than one arbitration agreement, the arbitration shall proceed as to those claims with respect to which the Court is *prima facie* satisfied (a) that the arbitration agreements under which those claims are made may be compatible, and (b) that all parties to the arbitration may have agreed that those claims can be determined together in a single arbitration.

The Court's decision pursuant to Article 6(4) is without prejudice to the admissibility or merits of any party's plea or pleas.

- 5 In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.
- 6 Where the parties are notified of the Court's decision pursuant to Article 6(4) that the arbitration cannot proceed in respect of some or all of them, any party retains the right to ask any court having jurisdiction whether or not, and in respect of which of them, there is a binding arbitration agreement.
- 7 Where the Court has decided pursuant to Article 6(4) that the arbitration cannot proceed in respect of any of the claims, such decision shall not prevent a party from reintroducing the same claim at a later date in other proceedings.
- 8 If any of the parties refuses or fails to take part in the arbitration or any stage thereof, the arbitration shall proceed notwithstanding such refusal or failure.
- 9 Unless otherwise agreed, the arbitral tribunal shall not cease to have jurisdiction by reason of any allegation that the contract is non-existent or null and void, provided that the arbitral tribunal upholds the validity of the arbitration agreement. The arbitral tribunal shall continue to have jurisdiction to determine the parties' respective rights and to decide their claims and pleas even though the contract itself may be non-existent or null and void.

## **MULTIPLE PARTIES, MULTIPLE CONTRACTS AND CONSOLIDATION**

### **ARTICLE 7**

#### **Joinder of Additional Parties**

- 1 A party wishing to join an additional party to the arbitration shall submit its request for arbitration against the additional party (the "Request for Joinder") to the Secretariat. The date on which the Request for Joinder is received by the Secretariat shall, for all purposes, be deemed to be the date of the commencement of arbitration against the additional party. Any such joinder shall be subject to the provisions of Articles 6(3)–6(7) and 9. No additional

- party may be joined after the confirmation or appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The Secretariat may fix a time limit for the submission of a Request for Joinder.
- 2 The Request for Joinder shall contain the following information:
    - a) the case reference of the existing arbitration;
    - b) the name in full, description, address and other contact details of each of the parties, including the additional party; and
    - c) the information specified in Article 4(3) subparagraphs c), d), e) and f).The party filing the Request for Joinder may submit therewith such other documents or information as it considers appropriate or as may contribute to the efficient resolution of the dispute.
  - 3 The provisions of Articles 4(4) and 4(5) shall apply, *mutatis mutandis*, to the Request for Joinder.
  - 4 The additional party shall submit an Answer in accordance, *mutatis mutandis*, with the provisions of Articles 5(1)–5(4). The additional party may make claims against any other party in accordance with the provisions of Article 8.

## ARTICLE 8

### Claims Between Multiple Parties

- 1 In an arbitration with multiple parties, claims may be made by any party against any other party, subject to the provisions of Articles 6(3)–6(7) and 9 and provided that no new claims may be made after the Terms of Reference are signed or approved by the Court without the authorization of the arbitral tribunal pursuant to Article 23(4).
- 2 Any party making a claim pursuant to Article 8(1) shall provide the information specified in Article 4(3) subparagraphs c), d), e) and f).
- 3 Before the Secretariat transmits the file to the arbitral tribunal in accordance with Article 16, the following provisions shall apply, *mutatis mutandis*, to any claim made: Article 4(4) subparagraph a); Article 4(5); Article 5(1) except for subparagraphs a), b), e) and f); Article 5(2); Article 5(3) and Article 5(4). Thereafter, the arbitral tribunal shall determine the procedure for making a claim.

## ARTICLE 9

### Multiple Contracts

Subject to the provisions of Articles 6(3)–6(7) and 23(4), claims arising out of or in connection with more than one contract may be made in a single arbitration, irrespective of whether such claims are made under one or more than one arbitration agreement under the Rules.



## ARTICLE 10

### Consolidation of Arbitrations

The Court may, at the request of a party, consolidate two or more arbitrations pending under the Rules into a single arbitration, where:

- a) the parties have agreed to consolidation; or
- b) all of the claims in the arbitrations are made under the same arbitration agreement; or
- c) where the claims in the arbitrations are made under more than one arbitration agreement, the arbitrations are between the same parties, the disputes in the arbitrations arise in connection with the same legal relationship, and the Court finds the arbitration agreements to be compatible.

In deciding whether to consolidate, the Court may take into account any circumstances it considers to be relevant, including whether one or more arbitrators have been confirmed or appointed in more than one of the arbitrations and, if so, whether the same or different persons have been confirmed or appointed.

When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties.

## THE ARBITRAL TRIBUNAL

### ARTICLE 11

#### General Provisions

- 1 Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.
- 2 Before appointment or confirmation, a prospective arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The prospective arbitrator shall disclose in writing to the Secretariat any facts or circumstances which might be of such a nature as to call into question the arbitrator's independence in the eyes of the parties, as well as any circumstances that could give rise to reasonable doubts as to the arbitrator's impartiality. The Secretariat shall provide such information to the parties in writing and fix a time limit for any comments from them.
- 3 An arbitrator shall immediately disclose in writing to the Secretariat and to the parties any facts or circumstances of a similar nature to those referred to in Article 11(2) concerning the arbitrator's impartiality or independence which may arise during the arbitration.
- 4 The decisions of the Court as to the appointment, confirmation, challenge or replacement of an arbitrator shall be final, and the reasons for such decisions shall not be communicated.

- 5 By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.
- 6 Insofar as the parties have not provided otherwise, the arbitral tribunal shall be constituted in accordance with the provisions of Articles 12 and 13.

## **ARTICLE 12**

### **Constitution of the Arbitral Tribunal**

#### **Number of Arbitrators**

- 1 The disputes shall be decided by a sole arbitrator or by three arbitrators.
- 2 Where the parties have not agreed upon the number of arbitrators, the Court shall appoint a sole arbitrator, save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators. In such case, the claimant shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the decision of the Court, and the respondent shall nominate an arbitrator within a period of 15 days from the receipt of the notification of the nomination made by the claimant. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.

#### **Sole Arbitrator**

- 3 Where the parties have agreed that the dispute shall be resolved by a sole arbitrator, they may, by agreement, nominate the sole arbitrator for confirmation. If the parties fail to nominate a sole arbitrator within 30 days from the date when the claimant's Request for Arbitration has been received by the other party, or within such additional time as may be allowed by the Secretariat, the sole arbitrator shall be appointed by the Court.

#### **Three Arbitrators**

- 4 Where the parties have agreed that the dispute shall be resolved by three arbitrators, each party shall nominate in the Request and the Answer, respectively, one arbitrator for confirmation. If a party fails to nominate an arbitrator, the appointment shall be made by the Court.
- 5 Where the dispute is to be referred to three arbitrators, the third arbitrator, who will act as president of the arbitral tribunal, shall be appointed by the Court, unless the parties have agreed upon another procedure for such appointment, in which case the nomination will be subject to confirmation pursuant to Article 13. Should such procedure not result in a nomination within 30 days from the confirmation or appointment of the co-arbitrators or any other time limit agreed by the parties or fixed by the Court, the third arbitrator shall be appointed by the Court.

- 6 Where there are multiple claimants or multiple respondents, and where the dispute is to be referred to three arbitrators, the multiple claimants, jointly, and the multiple respondents, jointly, shall nominate an arbitrator for confirmation pursuant to Article 13.
- 7 Where an additional party has been joined, and where the dispute is to be referred to three arbitrators, the additional party may, jointly with the claimant(s) or with the respondent(s), nominate an arbitrator for confirmation pursuant to Article 13.
- 8 In the absence of a joint nomination pursuant to Articles 12(6) or 12(7) and where all parties are unable to agree to a method for the constitution of the arbitral tribunal, the Court may appoint each member of the arbitral tribunal and shall designate one of them to act as president. In such case, the Court shall be at liberty to choose any person it regards as suitable to act as arbitrator, applying Article 13 when it considers this appropriate.

## **ARTICLE 13**

### **Appointment and Confirmation of the Arbitrators**

- 1 In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's nationality, residence and other relationships with the countries of which the parties or the other arbitrators are nationals and the prospective arbitrator's availability and ability to conduct the arbitration in accordance with the Rules. The same shall apply where the Secretary General confirms arbitrators pursuant to Article 13(2).
- 2 The Secretary General may confirm as co-arbitrators, sole arbitrators and presidents of arbitral tribunals persons nominated by the parties or pursuant to their particular agreements, provided that the statement they have submitted contains no qualification regarding impartiality or independence or that a qualified statement regarding impartiality or independence has not given rise to objections. Such confirmation shall be reported to the Court at its next session. If the Secretary General considers that a co-arbitrator, sole arbitrator or president of an arbitral tribunal should not be confirmed, the matter shall be submitted to the Court.
- 3 Where the Court is to appoint an arbitrator, it shall make the appointment upon proposal of a National Committee or Group of the ICC that it considers to be appropriate. If the Court does not accept the proposal made, or if the National Committee or Group fails to make the proposal requested within the time limit fixed by the Court, the Court may repeat its request, request a proposal from another National Committee or Group that it considers to be appropriate, or appoint directly any person whom it regards as suitable.
- 4 The Court may also appoint directly to act as arbitrator any person whom it regards as suitable where:

- a) one or more of the parties is a state or claims to be a state entity; or
  - b) the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group; or
  - c) the President certifies to the Court that circumstances exist which, in the President's opinion, make a direct appointment necessary and appropriate.
- 5 The sole arbitrator or the president of the arbitral tribunal shall be of a nationality other than those of the parties. However, in suitable circumstances and provided that none of the parties objects within the time limit fixed by the Court, the sole arbitrator or the president of the arbitral tribunal may be chosen from a country of which any of the parties is a national.

## ARTICLE 14

### Challenge of Arbitrators

- 1 A challenge of an arbitrator, whether for an alleged lack of impartiality or independence, or otherwise, shall be made by the submission to the Secretariat of a written statement specifying the facts and circumstances on which the challenge is based.
- 2 For a challenge to be admissible, it must be submitted by a party either within 30 days from receipt by that party of the notification of the appointment or confirmation of the arbitrator, or within 30 days from the date when the party making the challenge was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
- 3 The Court shall decide on the admissibility and, at the same time, if necessary, on the merits of a challenge after the Secretariat has afforded an opportunity for the arbitrator concerned, the other party or parties and any other members of the arbitral tribunal to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

## ARTICLE 15

### Replacement of Arbitrators

- 1 An arbitrator shall be replaced upon death, upon acceptance by the Court of the arbitrator's resignation, upon acceptance by the Court of a challenge, or upon acceptance by the Court of a request of all the parties.
- 2 An arbitrator shall also be replaced on the Court's own initiative when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits.

- 3 When, on the basis of information that has come to its attention, the Court considers applying Article 15(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the arbitral tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.
- 4 When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the arbitral tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted arbitral tribunal.
- 5 Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to Articles 15(1) or 15(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances.

## **THE ARBITRAL PROCEEDINGS**

### **ARTICLE 16**

#### **Transmission of the File to the Arbitral Tribunal**

The Secretariat shall transmit the file to the arbitral tribunal as soon as it has been constituted, provided the advance on costs requested by the Secretariat at this stage has been paid.

### **ARTICLE 17**

#### **Proof of Authority**

At any time after the commencement of the arbitration, the arbitral tribunal or the Secretariat may require proof of the authority of any party representatives.

### **ARTICLE 18**

#### **Place of the Arbitration**

- 1 The place of the arbitration shall be fixed by the Court, unless agreed upon by the parties.

- 2 The arbitral tribunal may, after consultation with the parties, conduct hearings and meetings at any location it considers appropriate, unless otherwise agreed by the parties.
- 3 The arbitral tribunal may deliberate at any location it considers appropriate.

## ARTICLE 19

### Rules Governing the Proceedings

The proceedings before the arbitral tribunal shall be governed by the Rules and, where the Rules are silent, by any rules which the parties or, failing them, the arbitral tribunal may settle on, whether or not reference is thereby made to the rules of procedure of a national law to be applied to the arbitration.

## ARTICLE 20

### Language of the Arbitration

In the absence of an agreement by the parties, the arbitral tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract.

## ARTICLE 21

### Applicable Rules of Law

- 1 The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
- 2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.
- 3 The arbitral tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers.

## ARTICLE 22

### Conduct of the Arbitration

- 1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.

- 2 In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties.
- 3 Upon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings or of any other matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.
- 4 In all cases, the arbitral tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.
- 5 The parties undertake to comply with any order made by the arbitral tribunal.

## ARTICLE 23

### Terms of Reference

- 1 As soon as it has received the file from the Secretariat, the arbitral tribunal shall draw up, on the basis of documents or in the presence of the parties and in the light of their most recent submissions, a document defining its Terms of Reference. This document shall include the following particulars:
  - a) the names in full, description, address and other contact details of each of the parties and of any person(s) representing a party in the arbitration;
  - b) the addresses to which notifications and communications arising in the course of the arbitration may be made;
  - c) a summary of the parties' respective claims and of the relief sought by each party, together with the amounts of any quantified claims and, to the extent possible, an estimate of the monetary value of any other claims;
  - d) unless the arbitral tribunal considers it inappropriate, a list of issues to be determined;
  - e) the names in full, address and other contact details of each of the arbitrators;
  - f) the place of the arbitration; and
  - g) particulars of the applicable procedural rules and, if such is the case, reference to the power conferred upon the arbitral tribunal to act as *amiable compositeur* or to decide *ex aequo et bono*.
- 2 The Terms of Reference shall be signed by the parties and the arbitral tribunal. Within two months of the date on which the file has been transmitted to it, the arbitral tribunal shall transmit to the Court the Terms of Reference signed by it and by the parties. The Court may extend this time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

- 3 If any of the parties refuses to take part in the drawing up of the Terms of Reference or to sign the same, they shall be submitted to the Court for approval. When the Terms of Reference have been signed in accordance with Article 23(2) or approved by the Court, the arbitration shall proceed.
- 4 After the Terms of Reference have been signed or approved by the Court, no party shall make new claims which fall outside the limits of the Terms of Reference unless it has been authorized to do so by the arbitral tribunal, which shall consider the nature of such new claims, the stage of the arbitration and other relevant circumstances.

## **ARTICLE 24**

### **Case Management Conference and Procedural Timetable**

- 1 When drawing up the Terms of Reference or as soon as possible thereafter, the arbitral tribunal shall convene a case management conference to consult the parties on procedural measures that may be adopted pursuant to Article 22(2). Such measures may include one or more of the case management techniques described in Appendix IV.
- 2 During or following such conference, the arbitral tribunal shall establish the procedural timetable that it intends to follow for the conduct of the arbitration. The procedural timetable and any modifications thereto shall be communicated to the Court and the parties.
- 3 To ensure continued effective case management, the arbitral tribunal, after consulting the parties by means of a further case management conference or otherwise, may adopt further procedural measures or modify the procedural timetable.
- 4 Case management conferences may be conducted through a meeting in person, by video conference, telephone or similar means of communication. In the absence of an agreement of the parties, the arbitral tribunal shall determine the means by which the conference will be conducted. The arbitral tribunal may request the parties to submit case management proposals in advance of a case management conference and may request the attendance at any case management conference of the parties in person or through an internal representative.

## **ARTICLE 25**

### **Establishing the Facts of the Case**

- 1 The arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means.
- 2 After studying the written submissions of the parties and all documents relied upon, the arbitral tribunal shall hear the parties together in person



if any of them so requests or, failing such a request, it may of its own motion decide to hear them.

- 3 The arbitral tribunal may decide to hear witnesses, experts appointed by the parties or any other person, in the presence of the parties, or in their absence provided they have been duly summoned.
- 4 The arbitral tribunal, after having consulted the parties, may appoint one or more experts, define their terms of reference and receive their reports. At the request of a party, the parties shall be given the opportunity to question at a hearing any such expert.
- 5 At any time during the proceedings, the arbitral tribunal may summon any party to provide additional evidence.
- 6 The arbitral tribunal may decide the case solely on the documents submitted by the parties unless any of the parties requests a hearing.

## **ARTICLE 26**

### **Hearings**

- 1 When a hearing is to be held, the arbitral tribunal, giving reasonable notice, shall summon the parties to appear before it on the day and at the place fixed by it.
- 2 If any of the parties, although duly summoned, fails to appear without valid excuse, the arbitral tribunal shall have the power to proceed with the hearing.
- 3 The arbitral tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the arbitral tribunal and the parties, persons not involved in the proceedings shall not be admitted.
- 4 The parties may appear in person or through duly authorized representatives. In addition, they may be assisted by advisers.

## **ARTICLE 27**

### **Closing of the Proceedings and Date for Submission of Draft Awards**

As soon as possible after the last hearing concerning matters to be decided in an award or the filing of the last authorized submissions concerning such matters, whichever is later, the arbitral tribunal shall:

- a) declare the proceedings closed with respect to the matters to be decided in the award; and
- b) inform the Secretariat and the parties of the date by which it expects to submit its draft award to the Court for approval pursuant to Article 33.

After the proceedings are closed, no further submission or argument may be made, or evidence produced, with respect to the matters to be decided in the award, unless requested or authorized by the arbitral tribunal.

## ARTICLE 28

### Conservatory and Interim Measures

- 1 Unless the parties have otherwise agreed, as soon as the file has been transmitted to it, the arbitral tribunal may, at the request of a party, order any interim or conservatory measure it deems appropriate. The arbitral tribunal may make the granting of any such measure subject to appropriate security being furnished by the requesting party. Any such measure shall take the form of an order, giving reasons, or of an award, as the arbitral tribunal considers appropriate.
- 2 Before the file is transmitted to the arbitral tribunal, and in appropriate circumstances even thereafter, the parties may apply to any competent judicial authority for interim or conservatory measures. The application of a party to a judicial authority for such measures or for the implementation of any such measures ordered by an arbitral tribunal shall not be deemed to be an infringement or a waiver of the arbitration agreement and shall not affect the relevant powers reserved to the arbitral tribunal.

Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat. The Secretariat shall inform the arbitral tribunal thereof.

## ARTICLE 29

### Emergency Arbitrator

- 1 A party that needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal (“Emergency Measures”) may make an application for such measures pursuant to the Emergency Arbitrator Rules in Appendix V. Any such application shall be accepted only if it is received by the Secretariat prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 and irrespective of whether the party making the application has already submitted its Request for Arbitration.
- 2 The emergency arbitrator’s decision shall take the form of an order. The parties undertake to comply with any order made by the emergency arbitrator.
- 3 The emergency arbitrator’s order shall not bind the arbitral tribunal with respect to any question, issue or dispute determined in the order. The arbitral tribunal may modify, terminate or annul the order or any modification thereto made by the emergency arbitrator.
- 4 The arbitral tribunal shall decide upon any party’s requests or claims related to the emergency arbitrator proceedings, including the reallocation of the costs of such proceedings and any claims arising out of or in connection with the compliance or non-compliance with the order.

- 5 Articles 29(1)–29(4) and the Emergency Arbitrator Rules set forth in Appendix V (collectively the “Emergency Arbitrator Provisions”) shall apply only to parties that are either signatories of the arbitration agreement under the Rules that is relied upon for the application or successors to such signatories.
- 6 The Emergency Arbitrator Provisions shall not apply if:
  - a) the arbitration agreement under the Rules was concluded before the date on which the Rules came into force;
  - b) the parties have agreed to opt out of the Emergency Arbitrator Provisions; or
  - c) the parties have agreed to another pre-arbitral procedure that provides for the granting of conservatory, interim or similar measures.
- 7 The Emergency Arbitrator Provisions are not intended to prevent any party from seeking urgent interim or conservatory measures from a competent judicial authority at any time prior to making an application for such measures, and in appropriate circumstances even thereafter, pursuant to the Rules. Any application for such measures from a competent judicial authority shall not be deemed to be an infringement or a waiver of the arbitration agreement. Any such application and any measures taken by the judicial authority must be notified without delay to the Secretariat.

## **AWARDS**

### **ARTICLE 30**

#### **Time Limit for the Final Award**

- 1 The time limit within which the arbitral tribunal must render its final award is six months. Such time limit shall start to run from the date of the last signature by the arbitral tribunal or by the parties of the Terms of Reference or, in the case of application of Article 23(3), the date of the notification to the arbitral tribunal by the Secretariat of the approval of the Terms of Reference by the Court. The Court may fix a different time limit based upon the procedural timetable established pursuant to Article 24(2).
- 2 The Court may extend the time limit pursuant to a reasoned request from the arbitral tribunal or on its own initiative if it decides it is necessary to do so.

### **ARTICLE 31**

#### **Making of the Award**

- 1 When the arbitral tribunal is composed of more than one arbitrator, an award is made by a majority decision. If there is no majority, the award shall be made by the president of the arbitral tribunal alone.

- 2 The award shall state the reasons upon which it is based.
- 3 The award shall be deemed to be made at the place of the arbitration and on the date stated therein.

## **ARTICLE 32**

### **Award by Consent**

If the parties reach a settlement after the file has been transmitted to the arbitral tribunal in accordance with Article 16, the settlement shall be recorded in the form of an award made by consent of the parties, if so requested by the parties and if the arbitral tribunal agrees to do so.

## **ARTICLE 33**

### **Scrutiny of the Award by the Court**

Before signing any award, the arbitral tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be rendered by the arbitral tribunal until it has been approved by the Court as to its form.

## **ARTICLE 34**

### **Notification, Deposit and Enforceability of the Award**

- 1 Once an award has been made, the Secretariat shall notify to the parties the text signed by the arbitral tribunal, provided always that the costs of the arbitration have been fully paid to the ICC by the parties or by one of them.
- 2 Additional copies certified true by the Secretary General shall be made available on request and at any time to the parties, but to no one else.
- 3 By virtue of the notification made in accordance with Article 34(1), the parties waive any other form of notification or deposit on the part of the arbitral tribunal.
- 4 An original of each award made in accordance with the Rules shall be deposited with the Secretariat.
- 5 The arbitral tribunal and the Secretariat shall assist the parties in complying with whatever further formalities may be necessary.
- 6 Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

## ARTICLE 35

### Correction and Interpretation of the Award; Remission of Awards

- 1 On its own initiative, the arbitral tribunal may correct a clerical, computational or typographical error, or any errors of similar nature contained in an award, provided such correction is submitted for approval to the Court within 30 days of the date of such award.
- 2 Any application of a party for the correction of an error of the kind referred to in Article 35(1), or for the interpretation of an award, must be made to the Secretariat within 30 days of the receipt of the award by such party, in a number of copies as stated in Article 3(1). After transmittal of the application to the arbitral tribunal, the latter shall grant the other party a short time limit, normally not exceeding 30 days, from the receipt of the application by that party, to submit any comments thereon. The arbitral tribunal shall submit its decision on the application in draft form to the Court not later than 30 days following the expiration of the time limit for the receipt of any comments from the other party or within such other period as the Court may decide.
- 3 A decision to correct or to interpret the award shall take the form of an addendum and shall constitute part of the award. The provisions of Articles 31, 33 and 34 shall apply *mutatis mutandis*.
- 4 Where a court remits an award to the arbitral tribunal, the provisions of Articles 31, 33, 34 and this Article 35 shall apply *mutatis mutandis* to any addendum or award made pursuant to the terms of such remission. The Court may take any steps as may be necessary to enable the arbitral tribunal to comply with the terms of such remission and may fix an advance to cover any additional fees and expenses of the arbitral tribunal and any additional ICC administrative expenses.

## COSTS

### ARTICLE 36

#### Advance to Cover the Costs of the Arbitration

- 1 After receipt of the Request, the Secretary General may request the claimant to pay a provisional advance in an amount intended to cover the costs of the arbitration until the Terms of Reference have been drawn up. Any provisional advance paid will be considered as a partial payment by the claimant of any advance on costs fixed by the Court pursuant to this Article 36.
- 2 As soon as practicable, the Court shall fix the advance on costs in an amount likely to cover the fees and expenses of the arbitrators and the ICC

administrative expenses for the claims which have been referred to it by the parties, unless any claims are made under Article 7 or 8 in which case Article 36(4) shall apply. The advance on costs fixed by the Court pursuant to this Article 36(2) shall be payable in equal shares by the claimant and the respondent.

- 3 Where counterclaims are submitted by the respondent under Article 5 or otherwise, the Court may fix separate advances on costs for the claims and the counterclaims. When the Court has fixed separate advances on costs, each of the parties shall pay the advance on costs corresponding to its claims.
- 4 Where claims are made under Article 7 or 8, the Court shall fix one or more advances on costs that shall be payable by the parties as decided by the Court. Where the Court has previously fixed any advance on costs pursuant to this Article 36, any such advance shall be replaced by the advance(s) fixed pursuant to this Article 36(4), and the amount of any advance previously paid by any party will be considered as a partial payment by such party of its share of the advance(s) on costs as fixed by the Court pursuant to this Article 36(4).
- 5 The amount of any advance on costs fixed by the Court pursuant to this Article 36 may be subject to readjustment at any time during the arbitration. In all cases, any party shall be free to pay any other party's share of any advance on costs should such other party fail to pay its share.
- 6 When a request for an advance on costs has not been complied with, and after consultation with the arbitral tribunal, the Secretary General may direct the arbitral tribunal to suspend its work and set a time limit, which must be not less than 15 days, on the expiry of which the relevant claims shall be considered as withdrawn. Should the party in question wish to object to this measure, it must make a request within the aforementioned period for the matter to be decided by the Court. Such party shall not be prevented, on the ground of such withdrawal, from reintroducing the same claims at a later date in another proceeding.
- 7 If one of the parties claims a right to a set-off with regard to any claim, such set-off shall be taken into account in determining the advance to cover the costs of the arbitration in the same way as a separate claim insofar as it may require the arbitral tribunal to consider additional matters.

## **ARTICLE 37**

### **Decision as to the Costs of the Arbitration**

- 1 The costs of the arbitration shall include the fees and expenses of the arbitrators and the ICC administrative expenses fixed by the Court, in

accordance with the scale in force at the time of the commencement of the arbitration, as well as the fees and expenses of any experts appointed by the arbitral tribunal and the reasonable legal and other costs incurred by the parties for the arbitration.

- 2 The Court may fix the fees of the arbitrators at a figure higher or lower than that which would result from the application of the relevant scale should this be deemed necessary due to the exceptional circumstances of the case.
- 3 At any time during the arbitral proceedings, the arbitral tribunal may make decisions on costs, other than those to be fixed by the Court, and order payment.
- 4 The final award shall fix the costs of the arbitration and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
- 5 In making decisions as to costs, the arbitral tribunal may take into account such circumstances as it considers relevant, including the extent to which each party has conducted the arbitration in an expeditious and cost-effective manner.
- 6 In the event of the withdrawal of all claims or the termination of the arbitration before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses. If the parties have not agreed upon the allocation of the costs of the arbitration or other relevant issues with respect to costs, such matters shall be decided by the arbitral tribunal. If the arbitral tribunal has not been constituted at the time of such withdrawal or termination, any party may request the Court to proceed with the constitution of the arbitral tribunal in accordance with the Rules so that the arbitral tribunal may make decisions as to costs.

## **MISCELLANEOUS**

### **ARTICLE 38**

#### **Modified Time Limits**

- 1 The parties may agree to shorten the various time limits set out in the Rules. Any such agreement entered into subsequent to the constitution of an arbitral tribunal shall become effective only upon the approval of the arbitral tribunal.
- 2 The Court, on its own initiative, may extend any time limit which has been modified pursuant to Article 38(1) if it decides that it is necessary to do so in order that the arbitral tribunal and the Court may fulfil their responsibilities in accordance with the Rules.

## **ARTICLE 39**

### **Waiver**

A party which proceeds with the arbitration without raising its objection to a failure to comply with any provision of the Rules, or of any other rules applicable to the proceedings, any direction given by the arbitral tribunal, or any requirement under the arbitration agreement relating to the constitution of the arbitral tribunal or the conduct of the proceedings, shall be deemed to have waived its right to object.

## **ARTICLE 40**

### **Limitation of Liability**

The arbitrators, any person appointed by the arbitral tribunal, the emergency arbitrator, the Court and its members, the ICC and its employees, and the ICC National Committees and Groups and their employees and representatives shall not be liable to any person for any act or omission in connection with the arbitration, except to the extent such limitation of liability is prohibited by applicable law.

## **ARTICLE 41**

### **General Rule**

In all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law.

## **APPENDIX I – STATUTES OF THE INTERNATIONAL COURT OF ARBITRATION**

### **ARTICLE 1**

#### **Function**

- 1 The function of the International Court of Arbitration of the International Chamber of Commerce (the “Court”) is to ensure the application of the Rules of Arbitration of the International Chamber of Commerce, and it has all the necessary powers for that purpose.
- 2 As an autonomous body, it carries out these functions in complete independence from the ICC and its organs.



- 3 Its members are independent from the ICC National Committees and Groups.

## **ARTICLE 2**

### **Composition of the Court**

The Court shall consist of a President,<sup>1</sup> Vice-Presidents,<sup>2</sup> and members and alternate members (collectively designated as members). In its work it is assisted by its Secretariat (Secretariat of the Court).

## **ARTICLE 3**

### **Appointment**

- 1 The President is elected by the ICC World Council upon the recommendation of the Executive Board of the ICC.
- 2 The ICC World Council appoints the Vice-Presidents of the Court from among the members of the Court or otherwise.
- 3 Its members are appointed by the ICC World Council on the proposal of National Committees or Groups, one member for each National Committee or Group.
- 4 On the proposal of the President of the Court, the World Council may appoint alternate members.
- 5 The term of office of all members, including, for the purposes of this paragraph, the President and Vice-Presidents, is three years. If a member is no longer in a position to exercise the member's functions, a successor is appointed by the World Council for the remainder of the term. Upon the recommendation of the Executive Board, the duration of the term of office of any member may be extended beyond three years if the World Council so decides.

## **ARTICLE 4**

### **Plenary Session of the Court**

The Plenary Sessions of the Court are presided over by the President or, in the President's absence, by one of the Vice-Presidents designated by the President. The deliberations shall be valid when at least six members are present.

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<sup>1</sup> Referred to as "Chairman of the International Court of Arbitration" in the Constitution of the International Chamber of Commerce.

<sup>2</sup> Referred to as "Vice-Chairmen of the International Court of Arbitration" in the Constitution of the International Chamber of Commerce.

Decisions are taken by a majority vote, the President or Vice-President, as the case may be, having a casting vote in the event of a tie.

## **ARTICLE 5**

### **Committees**

The Court may set up one or more Committees and establish the functions and organization of such Committees.

## **ARTICLE 6**

### **Confidentiality**

The work of the Court is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity. The Court lays down the rules regarding the persons who can attend the meetings of the Court and its Committees and who are entitled to have access to materials related to the work of the Court and its Secretariat.

## **ARTICLE 7**

### **Modification of the Rules of Arbitration**

Any proposal of the Court for a modification of the Rules is laid before the Commission on Arbitration before submission to the Executive Board of the ICC for approval, provided, however, that the Court, in order to take account of developments in information technology, may propose to modify or supplement the provisions of Article 3 of the Rules or any related provisions in the Rules without laying any such proposal before the Commission.

## **APPENDIX II – INTERNAL RULES OF THE INTERNATIONAL COURT OF ARBITRATION**

### **ARTICLE 1**

#### **Confidential Character of the Work of the International Court of Arbitration**

- 1 For the purposes of this Appendix, members of the Court include the President and Vice-Presidents of the Court.
- 2 The sessions of the Court, whether plenary or those of a Committee of the Court, are open only to its members and to the Secretariat.

- 3 However, in exceptional circumstances, the President of the Court may invite other persons to attend. Such persons must respect the confidential nature of the work of the Court.
- 4 The documents submitted to the Court, or drawn up by it or the Secretariat in the course of the Court's proceedings, are communicated only to the members of the Court and to the Secretariat and to persons authorized by the President to attend Court sessions.
- 5 The President or the Secretary General of the Court may authorize researchers undertaking work of an academic nature to acquaint themselves with awards and other documents of general interest, with the exception of memoranda, notes, statements and documents remitted by the parties within the framework of arbitration proceedings.
- 6 Such authorization shall not be given unless the beneficiary has undertaken to respect the confidential character of the documents made available and to refrain from publishing anything based upon information contained therein without having previously submitted the text for approval to the Secretary General of the Court.
- 7 The Secretariat will in each case submitted to arbitration under the Rules retain in the archives of the Court all awards, Terms of Reference and decisions of the Court, as well as copies of the pertinent correspondence of the Secretariat.
- 8 Any documents, communications or correspondence submitted by the parties or the arbitrators may be destroyed unless a party or an arbitrator requests in writing within a period fixed by the Secretariat the return of such documents, communications or correspondence. All related costs and expenses for the return of those documents shall be paid by such party or arbitrator.

## **ARTICLE 2**

### **Participation of Members of the International Court of Arbitration in ICC Arbitration**

- 1 The President and the members of the Secretariat of the Court may not act as arbitrators or as counsel in cases submitted to ICC arbitration.
- 2 The Court shall not appoint Vice-Presidents or members of the Court as arbitrators. They may, however, be proposed for such duties by one or more of the parties, or pursuant to any other procedure agreed upon by the parties, subject to confirmation.
- 3 When the President, a Vice-President or a member of the Court or of the Secretariat is involved in any capacity whatsoever in proceedings pending before the Court, such person must inform the Secretary General of the Court upon becoming aware of such involvement.
- 4 Such person must be absent from the Court session whenever the matter is considered by the Court and shall not participate in the discussions or in the decisions of the Court.

- 5 Such person will not receive any material documentation or information pertaining to such proceedings.

### **ARTICLE 3**

#### **Relations between the Members of the Court and the ICC National Committees and Groups**

- 1 By virtue of their capacity, the members of the Court are independent of the ICC National Committees and Groups which proposed them for appointment by the ICC World Council.
- 2 Furthermore, they must regard as confidential, vis-à-vis the said National Committees and Groups, any information concerning individual cases with which they have become acquainted in their capacity as members of the Court, except when they have been requested by the President of the Court, by a Vice-President of the Court authorized by the President of the Court, or by the Court's Secretary General to communicate specific information to their respective National Committees or Groups.

### **ARTICLE 4**

#### **Committee of the Court**

- 1 In accordance with the provisions of Article 1(4) of the Rules and Article 5 of its statutes (Appendix I), the Court hereby establishes a Committee of the Court.
- 2 The members of the Committee consist of a president and at least two other members. The President of the Court acts as the president of the Committee. In the President's absence or otherwise at the President's request, a Vice-President of the Court or, in exceptional circumstances, another member of the Court may act as president of the Committee.
- 3 The other two members of the Committee are appointed by the Court from among the Vice-Presidents or the other members of the Court. At each Plenary Session the Court appoints the members who are to attend the meetings of the Committee to be held before the next Plenary Session.
- 4 The Committee meets when convened by its president. Two members constitute a quorum.
- 5 (a) The Court shall determine the decisions that may be taken by the Committee.
  - (b) The decisions of the Committee are taken unanimously.
  - (c) When the Committee cannot reach a decision or deems it preferable to abstain, it transfers the case to the next Plenary Session, making any suggestions it deems appropriate.

- (d) The Committee's decisions are brought to the notice of the Court at its next Plenary Session.

## **ARTICLE 5**

### **Court Secretariat**

- 1 In the Secretary General's absence or otherwise at the Secretary General's request, the Deputy Secretary General and/or the General Counsel shall have the authority to refer matters to the Court, confirm arbitrators, certify true copies of awards and request the payment of a provisional advance, respectively provided for in Articles 6(3), 13(2), 34(2) and 36(1) of the Rules.
- 2 The Secretariat may, with the approval of the Court, issue notes and other documents for the information of the parties and the arbitrators, or as necessary for the proper conduct of the arbitral proceedings.
- 3 Offices of the Secretariat may be established outside the headquarters of the ICC. The Secretariat shall keep a list of offices designated by the Secretary General. Requests for Arbitration may be submitted to the Secretariat at any of its offices, and the Secretariat's functions under the Rules may be carried out from any of its offices, as instructed by the Secretary General, Deputy Secretary General or General Counsel.

## **ARTICLE 6**

### **Scrutiny of Arbitral Awards**

When the Court scrutinizes draft awards in accordance with Article 33 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of the arbitration.

## **APPENDIX III – ARBITRATION COSTS AND FEES**

### **ARTICLE 1**

#### **Advance on Costs**

- 1 Each request to commence an arbitration pursuant to the Rules must be accompanied by a filing fee of US\$ 3,000. Such payment is non-refundable and shall be credited to the claimant's portion of the advance on costs.
- 2 The provisional advance fixed by the Secretary General according to Article 36(1) of the Rules shall normally not exceed the amount obtained

by adding together the ICC administrative expenses, the minimum of the fees (as set out in the scale hereinafter) based upon the amount of the claim and the expected reimbursable expenses of the arbitral tribunal incurred with respect to the drafting of the Terms of Reference. If such amount is not quantified, the provisional advance shall be fixed at the discretion of the Secretary General. Payment by the claimant shall be credited to its share of the advance on costs fixed by the Court.

- 3 In general, after the Terms of Reference have been signed or approved by the Court and the procedural timetable has been established, the arbitral tribunal shall, in accordance with Article 36(6) of the Rules, proceed only with respect to those claims or counterclaims in regard to which the whole of the advance on costs has been paid.
- 4 The advance on costs fixed by the Court according to Articles 36(2) or 36(4) of the Rules comprises the fees of the arbitrator or arbitrators (hereinafter referred to as “arbitrator”), any arbitration-related expenses of the arbitrator and the ICC administrative expenses.
- 5 Each party shall pay its share of the total advance on costs in cash. However, if a party’s share of the advance on costs is greater than US\$ 500,000 (the “Threshold Amount”), such party may post a bank guarantee for any amount above the Threshold Amount. The Court may modify the Threshold Amount at any time at its discretion.
- 6 The Court may authorize the payment of advances on costs, or any party’s share thereof, in instalments, subject to such conditions as the Court thinks fit, including the payment of additional ICC administrative expenses.
- 7 A party that has already paid in full its share of the advance on costs fixed by the Court may, in accordance with Article 36(5) of the Rules, pay the unpaid portion of the advance owed by the defaulting party by posting a bank guarantee.
- 8 When the Court has fixed separate advances on costs pursuant to Article 36(3) of the Rules, the Secretariat shall invite each party to pay the amount of the advance corresponding to its respective claim(s).
- 9 When, as a result of the fixing of separate advances on costs, the separate advance fixed for the claim of either party exceeds one half of such global advance as was previously fixed (in respect of the same claims and counterclaims that are the subject of separate advances), a bank guarantee may be posted to cover any such excess amount. In the event that the amount of the separate advance is subsequently increased, at least one half of the increase shall be paid in cash.
- 10 The Secretariat shall establish the terms governing all bank guarantees which the parties may post pursuant to the above provisions.
- 11 As provided in Article 36(5) of the Rules, the advance on costs may be subject to readjustment at any time during the arbitration, in particular to take into account fluctuations in the amount in dispute, changes in the

- amount of the estimated expenses of the arbitrator, or the evolving difficulty or complexity of arbitration proceedings.
- 12 Before any expertise ordered by the arbitral tribunal can be commenced, the parties, or one of them, shall pay an advance on costs fixed by the arbitral tribunal sufficient to cover the expected fees and expenses of the expert as determined by the arbitral tribunal. The arbitral tribunal shall be responsible for ensuring the payment by the parties of such fees and expenses.
  - 13 The amounts paid as advances on costs do not yield interest for the parties or the arbitrator.

## **ARTICLE 2**

### **Costs and Fees**

- 1 Subject to Article 37(2) of the Rules, the Court shall fix the fees of the arbitrator in accordance with the scale hereinafter set out or, where the amount in dispute is not stated, at its discretion.
- 2 In setting the arbitrator's fees, the Court shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award, so as to arrive at a figure within the limits specified or, in exceptional circumstances (Article 37(2) of the Rules), at a figure higher or lower than those limits.
- 3 When a case is submitted to more than one arbitrator, the Court, at its discretion, shall have the right to increase the total fees up to a maximum which shall normally not exceed three times the fees of one arbitrator.
- 4 The arbitrator's fees and expenses shall be fixed exclusively by the Court as required by the Rules. Separate fee arrangements between the parties and the arbitrator are contrary to the Rules.
- 5 The Court shall fix the ICC administrative expenses of each arbitration in accordance with the scale hereinafter set out or, where the amount in dispute is not stated, at its discretion. In exceptional circumstances, the Court may fix the ICC administrative expenses at a lower or higher figure than that which would result from the application of such scale, provided that such expenses shall normally not exceed the maximum amount of the scale.
- 6 At any time during the arbitration, the Court may fix as payable a portion of the ICC administrative expenses corresponding to services that have already been performed by the Court and the Secretariat.
- 7 The Court may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses as a condition for

- holding an arbitration in abeyance at the request of the parties or of one of them with the acquiescence of the other.
- 8 If an arbitration terminates before the rendering of a final award, the Court shall fix the fees and expenses of the arbitrators and the ICC administrative expenses at its discretion, taking into account the stage attained by the arbitral proceedings and any other relevant circumstances.
  - 9 Any amount paid by the parties as an advance on costs exceeding the costs of the arbitration fixed by the Court shall be reimbursed to the parties having regard to the amounts paid.
  - 10 In the case of an application under Article 35(2) of the Rules or of a remission pursuant to Article 35(4) of the Rules, the Court may fix an advance to cover additional fees and expenses of the arbitral tribunal and additional ICC administrative expenses and may make the transmission of such application to the arbitral tribunal subject to the prior cash payment in full to the ICC of such advance. The Court shall fix at its discretion the costs of the procedure following an application or a remission, which shall include any possible fees of the arbitrator and ICC administrative expenses, when approving the decision of the arbitral tribunal.
  - 11 The Secretariat may require the payment of administrative expenses in addition to those provided in the scale of administrative expenses for any expenses arising in relation to a request pursuant to Article 34(5) of the Rules.
  - 12 When an arbitration is preceded by an attempt at amicable resolution pursuant to the ICC ADR Rules, one half of the ICC administrative expenses paid for such ADR proceedings shall be credited to the ICC administrative expenses of the arbitration.
  - 13 Amounts paid to the arbitrator do not include any possible value added tax (VAT) or other taxes or charges and imposts applicable to the arbitrator's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the arbitrator and the parties.
  - 14 Any ICC administrative expenses may be subject to value added tax (VAT) or charges of a similar nature at the prevailing rate.

## ARTICLE 3

### ICC as Appointing Authority

Any request received for an authority of the ICC to act as appointing authority will be treated in accordance with the Rules of ICC as Appointing Authority in UNCITRAL or Other *Ad Hoc* Arbitration Proceedings and shall be accompanied by a non-refundable filing fee of US\$ 3,000. No request shall be processed



unless accompanied by the said filing fee. For additional services, ICC may at its discretion fix ICC administrative expenses, which shall be commensurate with the services provided and shall normally not exceed the maximum amount of US\$ 10,000.

## ARTICLE 4

### Scales of Administrative Expenses and Arbitrator's Fees

- 1 The Scales of Administrative Expenses and Arbitrator's Fees set forth below shall be effective as of 1 January 2012 in respect of all arbitrations commenced on or after such date, irrespective of the version of the Rules applying to such arbitrations.
- 2 To calculate the ICC administrative expenses and the arbitrator's fees, the amounts calculated for each successive tranche of the amount in dispute must be added together, except that where the amount in dispute is over US\$ 500 million, a flat amount of US\$ 113,215 shall constitute the entirety of the ICC administrative expenses.
- 3 All amounts fixed by the Court or pursuant to any of the appendices to the Rules are payable in US\$ except where prohibited by law, in which case the ICC may apply a different scale and fee arrangement in another currency.

<b>A Administrative Expenses</b>	
<b>Amount in dispute (in US Dollars)</b>	<b>Administrative expenses*</b>
up to 50,000	\$3,000
from 50,001 to 100,000	4.73%
from 100,001 to 200,000	2.53%
from 200,001 to 500,000	2.09%
from 500,001 to 1,000,000	1.51%
from 1,000,001 to 2,000,000	0.95%
from 2,000,001 to 5,000,000	0.46%
from 5,000,001 to 10,000,000	0.25%
from 10,000,001 to 30,000,000	0.10%
from 30,000,001 to 50,000,000	0.09%
from 50,000,001 to 80,000,000	0.01%
from 80,000,001 to 500,000,000	0.0035%
over 500,000,000	\$113,215

\*For illustrative purposes only, the table on page 55 indicates the resulting administrative expenses in US\$ when the proper calculations have been made.

<b>B Arbitrator's Fees</b>		
<b>Amount in dispute (in US Dollars)</b>	<b>Fees**</b>	
	<b>minimum</b>	<b>maximum</b>
up to 50,000	\$3,000	18.0200%
from 50,001 to 100,000	2.6500%	13.5680%
from 100,001 to 200,000	1.4310%	7.6850%
from 200,001 to 500,000	1.3670%	6.8370%
from 500,001 to 1,000,000	0.9540%	4.0280%
from 1,000,001 to 2,000,000	0.6890%	3.6040%
from 2,000,001 to 5,000,000	0.3750%	1.3910%
from 5,000,001 to 10,000,000	0.1280%	0.9100%
from 10,000,001 to 30,000,000	0.0640%	0.2410%
from 30,000,001 to 50,000,000	0.0590%	0.2280%
from 50,000,001 to 80,000,000	0.0330%	0.1570%
from 80,000,001 to 100,000,000	0.0210%	0.1150%
from 100,000,001 to 500,000,000	0.0110%	0.0580%
over 500,000,000	0.0100%	0.0400%

\*\* For illustrative purposes only, the table on page 56 indicates the resulting range of fees in US\$ when the proper calculations have been made.

<b>Amount in Dispute (in US Dollars)</b>	<b>A Administrative Expenses* (in US Dollars)</b>
up to 50,000	3,000
from 50,001 to 100,000	3,000 +4.73% of amt. over 50,000
from 100,001 to 200,000	5,365 +2.53% of amt. over 100,000
from 200,001 to 500,000	7,895 +2.09% of amt. over 200,000
from 500,001 to 1,000,000	14,165 +1.51% of amt. over 500,000
from 1,000,001 to 2,000,000	21,715 +0.95% of amt. over 1,000,000
from 2,000,001 to 5,000,000	31,215 +0.46% of amt. over 2,000,000
from 5,000,001 to 10,000,000	45,015 +0.25% of amt. over 5,000,000
from 10,000,001 to 30,000,000	57,515 +0.10% of amt. over 10,000,000
from 30,000,001 to 50,000,000	77,515 +0.09% of amt. over 30,000,000
from 50,000,001 to 80,000,000	95,515 +0.01% of amt. over 50,000,000
from 80,000,001 to 100,000,000	98,515 +0.0035% of amt. over 80,000,000
from 100,000,001 to 500,000,000	99,215 +0.0035% of amt. over 100,000,000
over 500,000,000	113,215

\* See page 54.

<b>B Arbitrator's Fees**</b> (in US Dollars)		<b>Minimum</b>	<b>Maximum</b>
up to 50,000	3,000	18.0200% of amount in dispute	
from 50,001 to 100,000	3,000 +2.6500% of amt. over 50,000	9.010 +13.5680% of amt. over 50,000	
from 100,001 to 200,000	4,325 +1.4310% of amt. over 100,000	15,794 +7.6850% of amt. over 100,000	
from 200,001 to 500,000	5,756 +1.3670% of amt. over 200,000	23,479 +6.8370% of amt. over 200,000	
from 500,001 to 1,000,000	9,857 +0.9540% of amt. over 500,000	43,990 +4.0280% of amt. over 500,000	
from 1,000,001 to 2,000,000	14,627 +0.6890% of amt. over 1,000,000	64,130 +3.6040% of amt. over 1,000,000	
from 2,000,001 to 5,000,000	21,517 +0.3750% of amt. over 2,000,000	100,170 +1.3910% of amt. over 2,000,000	
from 5,000,001 to 10,000,000	32,767 +0.1280% of amt. over 5,000,000	141,900 +0.9100% of amt. over 5,000,000	
from 10,000,001 to 30,000,000	39,167 +0.0640% of amt. over 10,000,000	187,400 +0.2410% of amt. over 10,000,000	
from 30,000,001 to 50,000,000	51,967 +0.0590% of amt. over 30,000,000	235,600 +0.2280% of amt. over 30,000,000	
from 50,000,001 to 80,000,000	63,767 +0.0330% of amt. over 50,000,000	281,200 +0.1570% of amt. over 50,000,000	
from 80,000,001 to 100,000,000	73,667 +0.0210% of amt. over 80,000,000	328,300 +0.1150% of amt. over 80,000,000	
from 100,000,001 to 500,000,000	77,867 +0.0110% of amt. over 100,000,000	351,300 +0.0580% of amt. over 100,000,000	
over 500,000,000	121,867 +0.0100% of amt. over 500,000,000	583,300 +0.0400% of amt. over 500,000,000	

\*\* See page 54.

## APPENDIX IV – CASE MANAGEMENT TECHNIQUES

The following are examples of case management techniques that can be used by the arbitral tribunal and the parties for controlling time and cost. Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.

- a) Bifurcating the proceedings or rendering one or more partial awards on key issues, when doing so may genuinely be expected to result in a more efficient resolution of the case.
- b) Identifying issues that can be resolved by agreement between the parties or their experts.
- c) Identifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.
- d) Production of documentary evidence:
  - (i) requiring the parties to produce with their submissions the documents on which they rely;
  - (ii) avoiding requests for document production when appropriate in order to control time and cost;
  - (iii) in those cases where requests for document production are considered appropriate, limiting such requests to documents or categories of documents that are relevant and material to the outcome of the case;
  - (iv) establishing reasonable time limits for the production of documents;
  - (v) using a schedule of document production to facilitate the resolution of issues in relation to the production of documents.
- e) Limiting the length and scope of written submissions and written and oral witness evidence (both fact witnesses and experts) so as to avoid repetition and maintain a focus on key issues.
- f) Using telephone or video conferencing for procedural and other hearings where attendance in person is not essential and use of IT that enables online communication among the parties, the arbitral tribunal and the Secretariat of the Court.
- g) Organizing a pre-hearing conference with the arbitral tribunal at which arrangements for a hearing can be discussed and agreed and the arbitral tribunal can indicate to the parties issues on which it would like the parties to focus at the hearing.
- h) Settlement of disputes:
  - (i) informing the parties that they are free to settle all or part of the dispute either by negotiation or through any form of amicable dispute resolution methods such as, for example, mediation under the ICC ADR Rules;
  - (ii) where agreed between the parties and the arbitral tribunal, the arbitral tribunal may take steps to facilitate settlement of the dispute, provided that every effort is made to ensure that any subsequent award is enforceable at law.

Additional techniques are described in the ICC publication entitled “Techniques for Controlling Time and Costs in Arbitration”.

## **APPENDIX V – EMERGENCY ARBITRATOR RULES**

### **ARTICLE 1**

#### **Application for Emergency Measures**

- 1 A party wishing to have recourse to an emergency arbitrator pursuant to Article 29 of the Rules of Arbitration of the ICC (the “Rules”) shall submit its Application for Emergency Measures (the “Application”) to the Secretariat at any of the offices specified in the Internal Rules of the Court in Appendix II to the Rules.
- 2 The Application shall be supplied in a number of copies sufficient to provide one copy for each party, plus one for the emergency arbitrator, and one for the Secretariat.
- 3 The Application shall contain the following information:
  - a) the name in full, description, address and other contact details of each of the parties;
  - b) the name in full, address and other contact details of any person(s) representing the applicant;
  - c) a description of the circumstances giving rise to the Application and of the underlying dispute referred or to be referred to arbitration;
  - d) a statement of the Emergency Measures sought;
  - e) the reasons why the applicant needs urgent interim or conservatory measures that cannot await the constitution of an arbitral tribunal;
  - f) any relevant agreements and, in particular, the arbitration agreement;
  - g) any agreement as to the place of the arbitration, the applicable rules of law or the language of the arbitration;
  - h) proof of payment of the amount referred to in Article 7(1) of this Appendix; and
  - i) any Request for Arbitration and any other submissions in connection with the underlying dispute, which have been filed with the Secretariat by any of the parties to the emergency arbitrator proceedings prior to the making of the Application.

The Application may contain such other documents or information as the applicant considers appropriate or as may contribute to the efficient examination of the Application.
- 4 The Application shall be drawn up in the language of the arbitration if agreed upon by the parties or, in the absence of any such agreement, in the language of the arbitration agreement.

- 5 If and to the extent that the President of the Court (the “President”) considers, on the basis of the information contained in the Application, that the Emergency Arbitrator Provisions apply with reference to Article 29(5) and Article 29(6) of the Rules, the Secretariat shall transmit a copy of the Application and the documents annexed thereto to the responding party. If and to the extent that the President considers otherwise, the Secretariat shall inform the parties that the emergency arbitrator proceedings shall not take place with respect to some or all of the parties and shall transmit a copy of the Application to them for information.
- 6 The President shall terminate the emergency arbitrator proceedings if a Request for Arbitration has not been received by the Secretariat from the applicant within 10 days of the Secretariat’s receipt of the Application, unless the emergency arbitrator determines that a longer period of time is necessary.

## ARTICLE 2

### Appointment of the Emergency Arbitrator; Transmission of the File

- 1 The President shall appoint an emergency arbitrator within as short a time as possible, normally within two days from the Secretariat’s receipt of the Application.
- 2 No emergency arbitrator shall be appointed after the file has been transmitted to the arbitral tribunal pursuant to Article 16 of the Rules. An emergency arbitrator appointed prior thereto shall retain the power to make an order within the time limit permitted by Article 6(4) of this Appendix.
- 3 Once the emergency arbitrator has been appointed, the Secretariat shall so notify the parties and shall transmit the file to the emergency arbitrator. Thereafter, all written communications from the parties shall be submitted directly to the emergency arbitrator with a copy to the other party and the Secretariat. A copy of any written communications from the emergency arbitrator to the parties shall be submitted to the Secretariat.
- 4 Every emergency arbitrator shall be and remain impartial and independent of the parties involved in the dispute.
- 5 Before being appointed, a prospective emergency arbitrator shall sign a statement of acceptance, availability, impartiality and independence. The Secretariat shall provide a copy of such statement to the parties.
- 6 An emergency arbitrator shall not act as an arbitrator in any arbitration relating to the dispute that gave rise to the Application.

## **ARTICLE 3**

### **Challenge of an Emergency Arbitrator**

- 1 A challenge against the emergency arbitrator must be made within three days from receipt by the party making the challenge of the notification of the appointment or from the date when that party was informed of the facts and circumstances on which the challenge is based if such date is subsequent to the receipt of such notification.
- 2 The challenge shall be decided by the Court after the Secretariat has afforded an opportunity for the emergency arbitrator and the other party or parties to provide comments in writing within a suitable period of time.

## **ARTICLE 4**

### **Place of the Emergency Arbitrator Proceedings**

- 1 If the parties have agreed upon the place of the arbitration, such place shall be the place of the emergency arbitrator proceedings. In the absence of such agreement, the President shall fix the place of the emergency arbitrator proceedings, without prejudice to the determination of the place of the arbitration pursuant to Article 18(1) of the Rules.
- 2 Any meetings with the emergency arbitrator may be conducted through a meeting in person at any location the emergency arbitrator considers appropriate or by video conference, telephone or similar means of communication.

## **ARTICLE 5**

### **Proceedings**

- 1 The emergency arbitrator shall establish a procedural timetable for the emergency arbitrator proceedings within as short a time as possible, normally within two days from the transmission of the file to the emergency arbitrator pursuant to Article 2(3) of this Appendix.
- 2 The emergency arbitrator shall conduct the proceedings in the manner which the emergency arbitrator considers to be appropriate, taking into account the nature and the urgency of the Application. In all cases, the emergency arbitrator shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.

## **ARTICLE 6**

### **Order**

- 1 Pursuant to Article 29(2) of the Rules, the emergency arbitrator's decision shall take the form of an order (the "Order").

- 2 In the Order, the emergency arbitrator shall determine whether the Application is admissible pursuant to Article 29(1) of the Rules and whether the emergency arbitrator has jurisdiction to order Emergency Measures.
- 3 The Order shall be made in writing and shall state the reasons upon which it is based. It shall be dated and signed by the emergency arbitrator.
- 4 The Order shall be made no later than 15 days from the date on which the file was transmitted to the emergency arbitrator pursuant to Article 2(3) of this Appendix. The President may extend the time limit pursuant to a reasoned request from the emergency arbitrator or on the President's own initiative if the President decides it is necessary to do so.
- 5 Within the time limit established pursuant to Article 6(4) of this Appendix, the emergency arbitrator shall send the Order to the parties, with a copy to the Secretariat, by any of the means of communication permitted by Article 3(2) of the Rules that the emergency arbitrator considers will ensure prompt receipt.
- 6 The Order shall cease to be binding on the parties upon:
  - a) the President's termination of the emergency arbitrator proceedings pursuant to Article 1(6) of this Appendix;
  - b) the acceptance by the Court of a challenge against the emergency arbitrator pursuant to Article 3 of this Appendix;
  - c) the arbitral tribunal's final award, unless the arbitral tribunal expressly decides otherwise; or
  - d) the withdrawal of all claims or the termination of the arbitration before the rendering of a final award.
- 7 The emergency arbitrator may make the Order subject to such conditions as the emergency arbitrator thinks fit, including requiring the provision of appropriate security.
- 8 Upon a reasoned request by a party made prior to the transmission of the file to the arbitral tribunal pursuant to Article 16 of the Rules, the emergency arbitrator may modify, terminate or annul the Order.

## ARTICLE 7

### Costs of the Emergency Arbitrator Proceedings

- 1 The applicant must pay an amount of US\$ 40,000, consisting of US\$ 10,000 for ICC administrative expenses and US\$ 30,000 for the emergency arbitrator's fees and expenses. Notwithstanding Article 1(5) of this Appendix, the Application shall not be notified until the payment of US\$ 40,000 is received by the Secretariat.
- 2 The President may, at any time during the emergency arbitrator proceedings, decide to increase the emergency arbitrator's fees or the ICC administrative expenses taking into account, *inter alia*, the nature of the case and the nature and amount of work performed by the emergency arbitrator, the Court, the President and the Secretariat. If the party which



submitted the Application fails to pay the increased costs within the time limit fixed by the Secretariat, the Application shall be considered as withdrawn.

- 3 The emergency arbitrator's Order shall fix the costs of the emergency arbitrator proceedings and decide which of the parties shall bear them or in what proportion they shall be borne by the parties.
- 4 The costs of the emergency arbitrator proceedings include the ICC administrative expenses, the emergency arbitrator's fees and expenses and the reasonable legal and other costs incurred by the parties for the emergency arbitrator proceedings.
- 5 In the event that the emergency arbitrator proceedings do not take place pursuant to Article 1(5) of this Appendix or are otherwise terminated prior to the making of an Order, the President shall determine the amount to be reimbursed to the applicant, if any. An amount of US\$ 5,000 for ICC administrative expenses is non-refundable in all cases.

## **ARTICLE 8**

### **General Rule**

- 1 The President shall have the power to decide, at the President's discretion, all matters relating to the administration of the emergency arbitrator proceedings not expressly provided for in this Appendix.
- 2 In the President's absence or otherwise at the President's request, any of the Vice-Presidents of the Court shall have the power to take decisions on behalf of the President.
- 3 In all matters concerning emergency arbitrator proceedings not expressly provided for in this Appendix, the Court, the President and the emergency arbitrator shall act in the spirit of the Rules and this Appendix.

# APPENDIX IIB

## Rules of Arbitration of the Singapore International Arbitration Centre\*

(4<sup>th</sup> Edition, 1 July 2010)

### 1. Scope of Application and Interpretation

- 1.1 Where parties have agreed to refer their disputes to the SIAC for arbitration, the parties shall be deemed to have agreed that the arbitration shall be conducted and administered in accordance with these Rules. If any of these Rules is in conflict with a mandatory provision of the applicable law of the arbitration from which the parties cannot derogate, that provision shall prevail.
- 1.2 These Rules shall come into force on 1 July 2010 and unless the parties have agreed otherwise, shall apply to any arbitration which is commenced on or after that date.
- 1.3 In these Rules –

“Award” means any decision of the Tribunal on the substance of the dispute and includes a partial or final award or an award by an Emergency Arbitrator pursuant to Schedule 1;

“Board” means the Board of Directors of the Centre;

“Centre” means the Singapore International Arbitration Centre, a company incorporated under the Companies Act of the Republic of Singapore as a company limited by guarantee;

“Chairman” means the Chairman of the Centre and includes the Deputy Chairman and the Chief Executive Officer;

“Committee of the Board” means a committee consisting of not less than two Board members appointed by the Chairman (which may include the Chairman);

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“Registrar” means the Registrar of the Centre and includes any Deputy Registrar;

“Tribunal” includes a sole arbitrator or all the arbitrators where more than one is appointed;

Any pronoun shall be understood to be gender-neutral; and

Any singular noun shall be understood to refer to the plural in the appropriate circumstances.

## **2. Notice, Calculation of Periods of Time**

- 2.1 For the purposes of these Rules, any notice, communication or proposal, shall be in writing. Any such written communication may be delivered or sent by registered postal or courier service or transmitted by any form of electronic communication (including electronic mail and facsimile) or delivered by any other means that provides an independent record of its delivery. It is deemed to have been received if it is delivered (i) to the addressee personally, (ii) to his habitual residence, place of business or designated address, (iii) to any address agreed by the parties, (iv) according to the practice of the parties in prior dealings, or (v) if none of these can be found after making reasonable inquiry, then at the addressee’s last-known residence or place of business.
- 2.2 The notice, communication, or proposal is deemed to have been received on the day it is delivered.
- 2.3 For the purposes of calculating any period of time under these Rules, such period shall begin to run on the day following the day when a notice, communication or proposal is received. If the last day of such period is not a business day at the place of receipt pursuant to Rule 2.1, the period is extended until the first business day which follows. Non-business days occurring during the running of the period of time are included in calculating the period.
- 2.4 The parties shall file with the Registrar a copy of any notice, communication or proposal concerning the arbitral proceedings.

## **3. Notice of Arbitration**

- 3.1 A party wishing to commence an arbitration (the “Claimant”) shall file with the Registrar a Notice of Arbitration which shall comprise:
- a. a demand that the dispute be referred to arbitration;
  - b. the names, addresses, telephone number(s), facsimile number(s) and electronic mail address(es), if known, of the parties to the arbitration and their representatives, if any;
  - c. a reference to the arbitration clause or the separate arbitration agreement that is invoked and a copy of it;
  - d. a reference to the contract out of or in relation to which the dispute arises and where possible, a copy of it;
  - e. a brief statement describing the nature and circumstances of the dispute, specifying the relief claimed and, where possible, an initial quantification of the claim amount;

- f. a statement of any matters which the parties have previously agreed as to the conduct of the arbitration or with respect to which the Claimant wishes to make a proposal;
  - g. a proposal for the number of arbitrator(s) if this is not specified in the arbitration agreement;
  - h. unless the parties have agreed otherwise, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators, or a proposal for a sole arbitrator if the arbitration agreement provides for a sole arbitrator;
  - i. any comment as to the applicable rules of law;
  - j. any comment as to the language of the arbitration; and
  - k. payment of the requisite filing fee.
- 3.2 The Notice of Arbitration may also include the Statement of Claim referred to in Rule 17.2.
- 3.3 The date of receipt of the complete Notice of Arbitration by the Registrar shall be deemed the date of commencement of the arbitration. For the avoidance of doubt, the Notice of Arbitration is deemed to be complete when all the requirements of Rule 3.1 are fulfilled. The Centre shall notify the parties on the commencement of arbitration.
- 3.4 The Claimant shall at the same time send a copy of the Notice of Arbitration to the Respondent, and it shall notify the Registrar that it has done so, specifying the mode of service employed and the date of service.
- 4. Response to the Notice of Arbitration**
- 4.1 The Respondent shall send to the Claimant a Response within 14 days of receipt of the Notice of Arbitration. The Response shall contain:
- a. a confirmation or denial of all or part of the claims;
  - b. a brief statement describing the nature and circumstances of any counterclaim, specifying the relief claimed and, where possible, an initial quantification of the counterclaim amount;
  - c. any comment in response to any statements contained in the Notice of Arbitration under Rules 3.1 (f), (g), (h), (i) and (j) or any comment with respect to the matters covered in such rules; and
  - d. unless the parties have agreed otherwise, the nomination of an arbitrator if the arbitration agreement provides for three arbitrators or, if the arbitration agreement provides for a sole arbitrator, agreement with Claimant's proposal for a sole arbitrator or a counter-proposal.
- 4.2 The Response may also include the Statement of Defence and a Statement of Counterclaim, as referred to in Rules 17.3 and 17.4.
- 4.3 The Respondent shall at the same time send a copy of the Response to the Registrar, together with the payment of the requisite filing fee for any counterclaim, and shall notify the Registrar of the mode of service of the Response employed and the date of service.

**5. Expedited Procedure**

5.1 Prior to the full constitution of the Tribunal, a party may apply to the Centre in writing for the arbitral proceedings to be conducted in accordance with the Expedited Procedure under this Rule where any of the following criteria is satisfied:

- a. the amount in dispute does not exceed the equivalent amount of \$5,000,000, representing the aggregate of the claim, counterclaim and any setoff defence;
- b. the parties so agree; or
- c. in cases of exceptional urgency.

5.2 When a party has applied to the Centre under Rule 5.1, and when the Chairman determines, after considering the views of the parties, that the arbitral proceedings shall be conducted in accordance with the Expedited Procedure, the following procedure shall apply:

- a. The Registrar may shorten any time limits under these Rules;
- b. The case shall be referred to a sole arbitrator, unless the Chairman determines otherwise;
- c. Unless the parties agree that the dispute shall be decided on the basis of documentary evidence only, the Tribunal shall hold a hearing for the examination of all witnesses and expert witnesses as well as for any argument;
- d. The award shall be made within six months from the date when the Tribunal is constituted unless, in exceptional circumstances, the Registrar extends the time; and
- e. The Tribunal shall state the reasons upon which the award is based in summary form, unless the parties have agreed that no reasons are to be given.

**6. Number and Appointment of Arbitrators**

6.1 A sole arbitrator shall be appointed unless the parties have agreed otherwise or unless it appears to the Registrar, giving due regard to any proposals by the parties, the complexity, the quantum involved or other relevant circumstances of the dispute, that the dispute warrants the appointment of three arbitrators.

6.2 If the parties have agreed that any arbitrator is to be appointed by one or more of the parties, or by any third person including the arbitrators already appointed, that agreement shall be treated as an agreement to nominate an arbitrator under these Rules.

6.3 In all cases, the arbitrators nominated by the parties, or by any third person including the arbitrators already appointed, shall be subject to appointment by the Chairman in his discretion.

6.4 The Chairman shall appoint an arbitrator as soon as practicable. Any decision by the Chairman to appoint an arbitrator under these Rules shall be final and not subject to appeal.

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- 6.5 The Chairman is entitled in his discretion to appoint any nominee whose appointment has already been suggested or proposed by any party.
- 6.6 The terms of appointment of each arbitrator shall be fixed by the Registrar in accordance with these Rules and Practice Notes for the time being in force, or in accordance with the agreement of the parties.
- 7. Sole Arbitrator**
- 7.1 If a sole arbitrator is to be appointed, either party may propose to the other the names of one or more persons, one of whom would serve as the sole arbitrator. Where the parties have reached an agreement on the nomination of a sole arbitrator, Rule 6.3 shall apply.
- 7.2 If within 21 days after receipt by the Registrar of the Notice of Arbitration, the parties have not reached an agreement on the nomination of a sole arbitrator, or if at any time either party so requests, the Chairman shall make the appointment as soon as practicable.
- 8. Three Arbitrators**
- 8.1 If three arbitrators are to be appointed, each party shall nominate one arbitrator.
- 8.2 If a party fails to make a nomination within 14 days after receipt of a party's nomination of an arbitrator, or in the manner otherwise agreed by the parties, the Chairman shall proceed to appoint the arbitrator on its behalf.
- 8.3 Unless the parties have agreed upon another procedure for appointing the third arbitrator, or if such agreed procedure does not result in a nomination within the time limit fixed by the parties or by the Centre, the third arbitrator, who shall act as the presiding arbitrator, shall be appointed by the Chairman.
- 9. Multi-party Appointment of Arbitrator(s)**
- 9.1 Where there are more than two parties in the arbitration, and three arbitrators are to be appointed, the Claimant shall jointly nominate one arbitrator and the Respondent shall jointly nominate one arbitrator. In the absence of both such joint nominations having been made within 28 days of the filing of the Notice of Arbitration or within the period agreed by the parties, the Chairman shall appoint all three arbitrators and shall designate one of them to act as the presiding arbitrator.
- 9.2 Where there are more than two parties in the arbitration, and one arbitrator is to be appointed, all parties are to agree on an arbitrator. In the absence of such a joint nomination having been made within 28 days of the filing of the Notice of Arbitration or within the period agreed by the parties, the Chairman shall appoint the arbitrator.

**10. Qualifications of Arbitrators**

- 10.1 Any arbitrator, whether or not nominated by the parties, conducting an arbitration under these Rules shall be and remain at all times independent and impartial, and shall not act as advocate for any party.
- 10.2 In making an appointment under these Rules, the Chairman shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.
- 10.3 The Chairman shall also consider whether the arbitrator has sufficient availability to determine the case in a prompt and efficient manner appropriate to the nature of the arbitration.
- 10.4 An arbitrator shall disclose to the parties and to the Registrar any circumstance that may give rise to justifiable doubts as to his impartiality or independence as soon as reasonably practicable and in any event before appointment by the Chairman.
- 10.5 An arbitrator shall immediately disclose to the parties, to the other arbitrators and to the Registrar any circumstance of a similar nature that may arise during the arbitration.
- 10.6 If the parties have agreed on any qualifications required of an arbitrator, the arbitrator shall be deemed to meet such qualifications unless a party states that the arbitrator is not so qualified within 14 days after receipt by that party of the notification of the nomination of the arbitrator. In the event of such a challenge, the procedure for challenge and replacement of an arbitrator in Rules 11 to 14 shall apply.
- 10.7 No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any arbitrator or with any candidate for appointment as party-nominated arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability or independence in relation to the parties, or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any ex parte communication relating to the case with any candidate for presiding arbitrator.

**11. Challenge of Arbitrators**

- 11.1 Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess any requisite qualification on which the parties have agreed.
- 11.2 A party may challenge the arbitrator nominated by him only for reasons of which he becomes aware after the appointment has been made.

**12. Notice of Challenge**

- 12.1 A party who intends to challenge an arbitrator shall send a notice of challenge within 14 days after the receipt of the notice of appointment of the arbitrator who is being challenged or, except as provided in Rule 10.6, within 14 days after the circumstances mentioned in Rule 11.1 or 11.2 became known to that party.
- 12.2 The notice of challenge shall be filed with the Registrar and shall be sent simultaneously to the other party, the arbitrator who is being challenged and the other members of the Tribunal. The notice of challenge shall be in writing and shall state the reasons for the challenge. The Registrar may order a suspension of the arbitration until the challenge is resolved.
- 12.3 When an arbitrator is challenged by one party, the other party may agree to the challenge. The challenged arbitrator may also withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge.
- 12.4 In instances referred to in Rule 12.3, the procedure provided in Rule 6 and Rules 7, 8 or 9, as the case may be, shall be used for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator, a party had failed to exercise his right to nominate. The time-limit provided in those Rules shall commence from the date of receipt of the agreement of the other party to the challenge or the challenged arbitrator's withdrawal.

**13. Decision on Challenge**

- 13.1 If, within 7 days of receipt of the notice of challenge, the other party does not agree to the challenge and the arbitrator who is being challenged does not withdraw voluntarily, a Committee of the Board shall decide on the challenge.
- 13.2 If the Committee of the Board sustains the challenge, a substitute arbitrator shall be appointed in accordance with the procedure provided in Rule 6 and Rules 7, 8 or 9, as the case may be, even if during the process of appointing the challenged arbitrator, a party had failed to exercise his right to nominate. The time-limit provided in those Rules shall commence from the date of the Registrar's notification to the parties of the decision by the Committee of the Board.
- 13.3 If the Committee of the Board denies the challenge, the arbitrator shall continue with the arbitration unless the Registrar ordered the suspension of the arbitration pursuant to Rule 12.2. Pending the determination of the challenge by the Committee of the Board, the challenged arbitrator shall be entitled to proceed in the arbitration.
- 13.4 The Committee of the Board may fix the costs of the challenge and may direct by whom and how such costs should be borne.
- 13.5 The Committee of the Board's decision made under this Rule shall be final and not subject to appeal.



**14. Replacement of an Arbitrator**

- 14.1 In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed in accordance with the procedure applicable to the nomination and appointment of the arbitrator being replaced.
- 14.2 In the event that an arbitrator refuses or fails to act or in the event of a *de jure* or *de facto* impossibility of him performing his functions or that he is not fulfilling his functions in accordance with the Rules or within prescribed time limits, the procedure for challenge and replacement of an arbitrator provided in Rules 11 to 13 and 14.1 shall apply.
- 14.3 After consulting with the parties, the Chairman may in his discretion remove an arbitrator who refuses or fails to act, or in the event of a *de jure* or *de facto* impossibility of him performing his functions, or if he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.

**15. Repetition of Hearings in the Event of Replacement of an Arbitrator**

If under Rules 12 to 14 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated unless otherwise agreed by the parties. If any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the Tribunal after consulting with the parties. If the Tribunal has issued an interim or partial award, any hearings related solely to that award shall not be repeated, and the award shall remain in effect.

**16. Conduct of the Proceedings**

- 16.1 The Tribunal shall conduct the arbitration in such manner as it considers appropriate, after consulting with the parties, to ensure the fair, expeditious, economical and final determination of the dispute.
- 16.2 The Tribunal shall determine the relevance, materiality and admissibility of all evidence. Evidence need not be admissible in law.
- 16.3 As soon as practicable after the appointment of all arbitrators, the Tribunal shall conduct a preliminary meeting with the parties, in person or by any other means, to discuss the procedures that will be most appropriate and efficient for the case.
- 16.4 The Tribunal may in its discretion direct the order of proceedings, bifurcate proceedings, exclude cumulative or irrelevant testimony or other evidence and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
- 16.5 A presiding arbitrator may make procedural rulings alone, subject to revision by the Tribunal.
- 16.6 All statements, documents or other information supplied to the Tribunal and the Registrar by one party shall simultaneously be communicated to the other party.

**17. Submissions by the Parties**

- 17.1 Unless the Tribunal determines otherwise, the submission of written statements shall proceed as set out in this Rule.
- 17.2 Unless already submitted pursuant to Rule 3.2, the Claimant shall, within a period of time to be determined by the Tribunal, send to the Respondent and the Tribunal a Statement of Claim setting out in full detail
- (a) a statement of facts supporting the claim;
  - (b) the legal grounds or arguments supporting the claim; and
  - (c) the relief claimed together with the amount of all quantifiable claims.
- 17.3 Unless already submitted pursuant to Rule 4.2, the Respondent shall, within a period of time to be determined by the Tribunal, send to the Claimant a Statement of Defence setting out its full defence to the Statement of Claim, including without limitation, the facts and contentions of law on which it relies. The Statement of Defence shall also state any counterclaim, which shall comply with the requirements of Rule 17.2.
- 17.4 If a counterclaim is made, the Claimant shall, within a period of time to be determined by the Tribunal, send to the Respondent a Statement of Defence to the Counterclaim stating in full detail which of the facts and contentions of law in the Statement of Counterclaim it admits or denies, on what grounds it denies the claims or contentions, and on what other facts and contentions of law it relies.
- 17.5 A party may amend its claim, counterclaim or other submissions unless the Tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim or counterclaim may not be amended in such a manner that the amended claim or counterclaim falls outside the scope of the arbitration agreement.
- 17.6 The Tribunal shall decide which further submissions shall be required from the parties or may be presented by them. The Tribunal shall fix the periods of time for communicating such submissions.
- 17.7 All submissions referred to in this Rule shall be accompanied by copies of all supporting documents which have not previously been submitted by any party.
- 17.8 If the Claimant fails within the time specified to submit its Statement of Claim, the Tribunal may issue an order for the termination of the arbitral proceedings or give such other directions as may be appropriate.
- 17.9 If the Respondent fails to submit a Statement of Defence, or if at any point any party fails to avail itself of the opportunity to present its case in the manner directed by the Tribunal, the Tribunal may proceed with the arbitration.

**18. Seat of Arbitration**

- 18.1 The parties may agree on the seat of arbitration. Failing such an agreement, the seat of arbitration shall be Singapore, unless the Tribunal determines, having regard to all the circumstances of the case, that another seat is more appropriate.
- 18.2 The Tribunal may hold hearings and meetings by any means it considers expedient or appropriate and at any location it considers convenient or appropriate.

**19. Language of Arbitration**

- 19.1 Unless the parties have agreed otherwise, the Tribunal shall determine the language to be used in the proceedings.
- 19.2 If a document is written in a language other than the language(s) of the arbitration, the Tribunal, or if the Tribunal has not been established, the Registrar, may order that party to submit a translation in a form to be determined by the Tribunal or the Registrar.

**20. Party Representatives**

Any party may be represented by legal practitioners or any other representatives, subject to such proof of authority as the Registrar or the Tribunal may require.

**21. Hearings**

- 21.1 Unless the parties have agreed on documents-only arbitration, the Tribunal shall, if either party so requests or the Tribunal so decides, hold a hearing for the presentation of evidence and/or for oral submissions on the merits of the dispute, including without limitation any issue as to jurisdiction.
- 21.2 The Tribunal shall fix the date, time and place of any meeting or hearing and shall give the parties reasonable notice.
- 21.3 If any party to the proceedings fails to appear at a hearing without showing sufficient cause for such failure, the Tribunal may proceed with the arbitration and may make the award based on the submissions and evidence before it.
- 21.4 Unless the parties agree otherwise, all meetings and hearings shall be in private, and any recordings, transcripts, or documents used shall remain confidential.

**22. Witnesses**

- 22.1 Before any hearing, the Tribunal may require any party to give notice of the identity of witnesses, including expert witnesses, whom it intends to produce, the subject matter of their testimony and its relevance to the issues.
- 22.2 The Tribunal has discretion to allow, refuse or limit the appearance of witnesses.

- 22.3 Any witness who gives oral evidence may be questioned by each of the parties, their representatives and the Tribunal in such manner as the Tribunal shall determine.
- 22.4 The Tribunal may direct the testimony of witnesses to be presented in written form, either as signed statements or sworn affidavits or any other form of recording. Subject to Rule 22.2, any party may request that such a witness should attend for oral examination. If the witness fails to attend, the Tribunal may place such weight on the written testimony as it thinks fit, disregard it or exclude it altogether.
- 22.5 Subject to the mandatory provisions of any applicable law, it shall be proper for any party or its representatives to interview any witness or potential witness prior to his appearance at any hearing.

### **23. Tribunal-Appointed Experts**

- 23.1 Unless the parties have agreed otherwise, the Tribunal:
- a. may following consultation with the parties, appoint an expert to report on specific issues; and
  - b. may require a party to give such expert any relevant information, or to produce or provide access to any relevant documents, goods or property for inspection.
- 23.2 Any expert so appointed shall submit a report in writing to the Tribunal. Upon receipt of such a written report, the Tribunal shall deliver a copy of the report to the parties and invite the parties to submit written comments on the report.
- 23.3 Unless the parties have agreed otherwise, if the Tribunal considers it necessary, any such expert shall, after delivery of his written report, participate in a hearing. At the hearing, the parties shall have the opportunity to question him.

### **24. Additional Powers of the Tribunal**

In addition to the powers specified in these Rules and not in derogation of the mandatory rules of law applicable to the arbitration, the Tribunal shall have the power to:

- a. order the correction of any contract, but only to the extent required to rectify any mistake which it determines to have been made by all the parties to that contract. This is subject to the condition that the proper law of the contract allows rectification of such contract;
- b. upon the application of a party, allow one or more third parties to be joined in the arbitration, provided that such person is a party to the arbitration agreement, with the written consent of such third party, and thereafter make a single final award or separate awards in respect of all parties;
- c. except as provided in Rules 28.2 and 29.4, extend or abbreviate any time limits provided by these Rules or by its directions;

- d. conduct such enquiries as may appear to the Tribunal to be necessary or expedient;
- e. order the parties to make any property or item available, for inspection in the parties' presence, by the Tribunal or any expert;
- f. order the preservation, storage, sale or disposal of any property or item which is or forms part of the subject-matter of the dispute;
- g. order any party to produce to the Tribunal and to the other parties for inspection, and to supply copies of any document in their possession or control which the Tribunal considers relevant to the case and material to its outcome;
- h. issue an award for unpaid costs of arbitration;
- i. direct any party to give evidence by affidavit or in any other form;
- j. direct any party to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party;
- k. order any party to provide security for legal or other costs in any manner the Tribunal thinks fit;
- l. order any party to provide security for all or part of any amount in dispute in the arbitration;
- m. proceed with the arbitration notwithstanding the failure or refusal of any party to comply with these Rules, or with the Tribunal's orders or directions or any partial award or to attend any meeting or hearing, and to impose such sanctions as the Tribunal deems appropriate;
- n. determine the law applicable to the arbitral proceedings; and
- o. determine any claim of legal or other applicable privilege.

## 25. Jurisdiction of the Tribunal

- 25.1 If a party objects to the existence, validity or scope of the arbitration agreement or to the jurisdiction of the Centre over a claim or counterclaim or a claim relied on for the purpose of a set-off before the Tribunal is appointed, a Committee of the Board shall decide, without prejudice to the admissibility or merits of a claim or claims, if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist. The arbitral proceedings shall be terminated if the Committee of the Board is not so satisfied.
- 25.2 The Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, termination or validity of the arbitration agreement. For that purpose, an arbitration agreement which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the Tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration agreement.
- 25.3 A plea that the Tribunal does not have jurisdiction shall be raised not later than in the Statement of Defence or in a Statement of Defence to a Counterclaim. A plea that the Tribunal is exceeding the scope of its

jurisdiction shall be raised promptly after the Tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its jurisdiction. In either case the Tribunal may nevertheless admit a late plea under this Rule if it considers the delay justified. A party is not precluded from raising such a plea by the fact that he has nominated, or participated in the nomination of, an arbitrator.

- 25.4 The Tribunal may rule on a plea referred to in Rule 25.3 either as a preliminary question or in an award on the merits.
- 25.5 A party may rely on a claim or defence for the purpose of a set-off to the extent permitted by the applicable law.

## **26. Interim and Emergency Relief**

- 26.1 The Tribunal may, at the request of a party, issue an order or an award granting an injunction or any other interim relief it deems appropriate. The Tribunal may order the party requesting interim relief to provide appropriate security in connection with the relief sought.
- 26.2 A party in need of emergency interim relief prior to the constitution of the Tribunal may apply for such relief pursuant to the procedures set forth in Schedule 1.
- 26.3 A request for interim relief made by a party to a judicial authority prior to the constitution of the Tribunal, or in exceptional circumstances thereafter, is not incompatible with these Rules.

## **27. Applicable law, *amiable compositeur***

- 27.1 The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply the law which it determines to be appropriate.
- 27.2 The Tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorised the Tribunal to do so.
- 27.3 In all cases, the Tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.

## **28. The Award**

- 28.1 The Tribunal shall, after consulting with the parties, declare the proceedings closed if it is satisfied that the parties have no further relevant and material evidence to produce or submission to make. The Tribunal may, on its own motion or upon application of a party but before any award is made, reopen the proceedings.
- 28.2 Before issuing any award, the Tribunal shall submit it in draft form to the Registrar. Unless the Registrar extends time or the parties agree otherwise, the Tribunal shall submit the draft award to the Registrar within 45 days from the date on which the Tribunal declares the proceedings closed. The Registrar may, as soon as practicable, suggest

modifications as to the form of the award and, without affecting the Tribunal's liberty of decision, may also draw its attention to points of substance. No award shall be issued by the Tribunal until it has been approved by the Registrar as to its form.

- 28.3 The Tribunal may make separate awards on different issues at different times.
- 28.4 If any arbitrator fails to cooperate in the making of the award, having been given a reasonable opportunity to do so, the remaining arbitrators shall proceed in his absence.
- 28.5 Where there is more than one arbitrator, the Tribunal shall decide by a majority. Failing a majority decision, the presiding arbitrator alone shall make the award for the Tribunal.
- 28.6 The award shall be delivered to the Registrar, who shall transmit certified copies to the parties upon the full settlement of the costs of arbitration.
- 28.7 The Tribunal may award simple or compound interest on any sum which is the subject of the arbitration at such rates as the parties may have agreed or, in the absence of such agreement, as the Tribunal determines to be appropriate, in respect of any period which the Tribunal determines to be appropriate ending not later than the date of the award.
- 28.8 In the event of a settlement, if any party so requests, the Tribunal may render a consent award recording the settlement. If the parties do not require a consent award, the parties shall confirm to the Registrar that a settlement has been reached. The Tribunal shall be discharged and the arbitration concluded upon payment of any outstanding costs of arbitration.
- 28.9 By agreeing to arbitration under these Rules, the parties undertake to carry out the award immediately and without delay (subject to Rule 29), and they also irrevocably waive their rights to any form of appeal, review or recourse to any state court or other judicial authority, insofar as such waiver may be validly made. An award shall be final and binding on the parties from the date it is made.

## **29. Correction of Awards and Additional Awards**

- 29.1 Within 30 days of receipt of the award, a party may, by written notice to the Registrar and to any other party, request the Tribunal to correct in the award any error in computation, any clerical or typographical error or any error of a similar nature. Any other party may comment on such request within 15 days of its receipt. If the Tribunal considers the request to be justified, it shall make the correction within 30 days of receipt of the request. Any correction, made in the original award or in a separate memorandum, shall constitute part of the award.
- 29.2 The Tribunal may correct any error of the type referred to in Rule 29.1 on its own initiative within 30 days of the date of the award.
- 29.3 Within 30 days of receipt of the award, a party may, by written notice to the Registrar and to any other party, request the Tribunal to make an

additional award as to claims presented in the arbitral proceedings but not dealt with in the award. Any other party may comment on such request within 15 days of its receipt. If the Tribunal considers the request to be justified, it shall make the additional award within 45 days of receipt of the request.

- 29.4 Within 30 days of the receipt of the award, a party may, by written notice to the Registrar and to any other party, request that the Tribunal give an interpretation of the award. Any other party may comment on such request within 15 days of its receipt. If the Tribunal considers the request to be justified, it shall give the interpretation in writing within 45 days after the receipt of the request. The interpretation shall form part of the award.
- 29.5 The Registrar may extend the time limits in this Rule.
- 29.6 The provisions of Rule 28 shall apply in the same manner with the necessary or appropriate changes in relation to a correction of an award and to any additional award made.

### **30. Fees and Deposits**

- 30.1 The Tribunal's fees and the Centre's fees shall be ascertained in accordance with the Schedule of Fees in force at the time of commencement of the arbitration. Alternative methods in determining the Tribunal's fees may be agreed by parties prior to the constitution of the Tribunal.
- 30.2 The Registrar shall fix the advances on costs of the arbitration. Unless the Registrar directs otherwise, 50% of such advances shall be payable by the Claimant and the remaining 50% of such advances shall be payable by the Respondent.
- 30.3 Where the amount of the claim or the counterclaim is not quantifiable at the time payment is due, a provisional estimate of the costs of the arbitration shall be made by the Registrar. Such estimate may be based on the nature of the controversy and the circumstances of the case. This may be adjusted in light of such information as may subsequently become available.
- 30.4 The Registrar may from time to time direct parties to make further advances towards costs of the arbitration incurred or to be incurred on behalf of or for the benefit of the parties.
- 30.5 If a party fails to make the advances or deposits directed, the Registrar may, after consultation with the Tribunal and the parties, direct the Tribunal to suspend the work and set a time limit on the expiry of which the relevant claims or counterclaims shall be considered as withdrawn without prejudice to reintroducing the same claims or counterclaims in another proceeding.
- 30.6 Parties are jointly and severally liable for the costs of the arbitration. Any party is free to pay the whole of the advances or deposits on costs of the arbitration in respect of the claim or the counterclaim should the



other party fail to pay its share. The Tribunal or the Registrar may suspend its work, in whole or in part, should the advances or deposits directed under this Rule remain either wholly or in part unpaid. On the application of a party, the Tribunal may issue an award for unpaid costs pursuant to Rule 24(h).

- 30.7 If the arbitration is settled or disposed of without a hearing, the costs of arbitration shall be finally determined by the Registrar. The Registrar shall have regard to all the circumstances of the case, including the stage of proceedings at which the arbitration is settled or disposed of. In the event that the costs of arbitration determined are less than the deposits made, there shall be a refund in such proportions as the parties may agree, or failing an agreement, in the same proportions as the deposits were made.
- 30.8 All advances shall be made to and held by the Centre. Any interest which may accrue on such deposits shall be retained by the Centre.

**31. Costs of Arbitration**

- 31.1 The Tribunal shall specify in the award, the total amount of the costs of the arbitration. Unless the parties have agreed otherwise, the Tribunal shall determine in the award the apportionment of the costs of arbitration among the parties.
- 31.2 The term “costs of the arbitration” includes:
- a. the Tribunal’s fees and expenses;
  - b. the Centre’s administrative fees and expenses; and
  - c. the costs of expert advice and of other assistance required by the Tribunal.

**32. Tribunal’s Fees and Expenses**

- 32.1 The fees of the Tribunal shall be fixed by the Registrar in accordance with the Schedule of Fees and the stage of the proceedings. In exceptional circumstances, the Registrar may allow an additional fee over that prescribed in the Schedule of Fees to be paid.
- 32.2 The Tribunal’s reasonable out-of-pocket expenses necessarily incurred and other allowances shall be reimbursed in accordance with the Practice Notes for the time being in force.

**33. Party’s Legal and Other Costs**

The Tribunal shall have the authority to order in its award that all or a part of the legal or other costs of a party (apart from the costs of the arbitration) be paid by another party.

**34. Exclusion of Liability**

- 34.1 The Centre including its directors, officers, employees or any arbitrator shall not be liable to any person for negligence, act or omission in connection with any arbitration governed by these Rules.

34.2 The Centre including its directors, officers, employees or any arbitrator shall not be under any obligation to make any statement in connection with any arbitration governed by these Rules. No party shall seek to make any director, officer, employee or arbitrator act as a witness in any legal proceedings in connection with any arbitration governed by these Rules.

**35. Confidentiality**

35.1 The parties and the Tribunal shall at all times treat all matters relating to the proceedings and the award as confidential.

35.2 A party or any arbitrator shall not, without the prior written consent of all the parties, disclose to third party any such matter except:

- a. for the purpose of making an application to any competent court of any State to enforce or challenge the award;
- b. pursuant to the order of or a subpoena issued by a court of competent jurisdiction;
- c. for the purpose of pursuing or enforcing a legal right or claim;
- d. in compliance with the provisions of the laws of any State which are binding on the party making the disclosure;
- e. in compliance with the request or requirement of any regulatory body or other authority; or
- f. pursuant to an order by the Tribunal on application by a party with proper notice to the other parties.

35.3 In this Rule, “matters relating to the proceedings” means the existence of the proceedings, and the pleadings, evidence and other materials in the arbitration proceedings and all other documents produced by another party in the proceedings or the award arising from the proceedings, but excludes any matter that is otherwise in the public domain.

35.4 The Tribunal has the power to take appropriate measures, including issuing an order or award for sanctions or costs, if a party breaches the provisions of this Rule.

**36. General Provisions**

36.1 A party who knows that any provision or requirement under these Rules has not been complied with and proceeds with the arbitration without promptly stating its objection shall be deemed to have waived its right to object.

36.2 In all matters not expressly provided for in these Rules, the Chairman, the Registrar and the Tribunal shall act in the spirit of these Rules and shall make every reasonable effort to ensure the fair, expeditious and economical conclusion of the arbitration and the enforceability of the award.

36.3 The Registrar may from time to time issue Practice Notes to supplement, regulate and implement these Rules for the purpose of facilitating the administration of arbitrations governed by these Rules.

## **SCHEDULE 1**

### **EMERGENCY ARBITRATOR**

1. A party in need of emergency relief may, concurrent with or following the filing of a Notice of Arbitration but prior to the constitution of the Tribunal, make an application for emergency interim relief. The party shall notify the Registrar and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by e-mail, facsimile transmission or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties. The application shall also be accompanied by payment of any fees set by the Registrar for proceedings pursuant to this Schedule 1.
2. The Chairman shall, if he determines that the Centre should accept the application, seek to appoint an Emergency Arbitrator within one business day of receipt by the Registrar of such application and payment of any required fee.
3. Prior to accepting appointment, a prospective Emergency Arbitrator shall disclose to the Registrar any circumstance that may give rise to justifiable doubts as to his impartiality or independence. Any challenge to the appointment of the Emergency Arbitrator must be made within one business day of the communication by the Registrar to the parties of the appointment of the Emergency Arbitrator and the circumstances disclosed.
4. An Emergency Arbitrator may not act as an arbitrator in any future arbitration relating to the dispute, unless agreed by the parties.
5. The Emergency Arbitrator shall, as soon as possible but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceedings by telephone conference or on written submissions as alternatives to a formal hearing. The Emergency Arbitrator shall have the powers vested in the Tribunal pursuant to these Rules, including the authority to rule on his own jurisdiction, and shall resolve any disputes over the applicability of this Schedule 1.
6. The Emergency Arbitrator shall have the power to order or award any interim relief that he deems necessary. The Emergency Arbitrator shall give reasons for his decision in writing. The Emergency Arbitrator may modify or vacate the interim award or order for good cause shown.
7. The Emergency Arbitrator shall have no further power to act after the Tribunal is constituted. The Tribunal may reconsider, modify or vacate the interim award or order of emergency relief issued by the Emergency

Arbitrator. The Tribunal is not bound by the reasons given by the Emergency Arbitrator. Any order or award issued by the Emergency Arbitrator shall, in any event, cease to be binding if the Tribunal is not constituted within 90 days of such order or award or when the Tribunal makes a final award or if the claim is withdrawn.

8. Any interim award or order of emergency relief may be conditioned on provision by the party seeking such relief of appropriate security.
9. An order or award pursuant to this Schedule 1 shall be binding on the parties when rendered. By agreeing to arbitration under these Rules, the parties undertake to comply with such an order or award without delay.
10. The costs associated with any application pursuant to this Schedule 1 shall initially be apportioned by the Emergency Arbitrator, subject to the power of the Tribunal to determine finally the apportionment of such costs.
11. These Rules shall apply as appropriate to any proceeding pursuant to this Schedule 1, taking into account the inherent urgency of such a proceeding. The Emergency Arbitrator may decide in what manner these Rules shall apply as appropriate, and his decision as to such matters is final and not subject to appeal.

## SCHEDULE 2

### SPECIAL PROVISIONS FOR SIAC DOMESTIC ARBITRATION RULES

#### ***Article 1 – Repeal***

The Domestic Arbitration Rules of the Singapore International Arbitration Centre, 2nd Edition, 1 September 2002 (SIAC Domestic Arbitration Rules) shall cease to apply to arbitrations administered by the Centre.

#### ***Article 2 – Transitional Provision***

Where parties have by agreement expressly referred to arbitration under the SIAC Domestic Arbitration Rules, the agreement shall be deemed to be a reference to arbitration under these Rules and to this Schedule.

#### ***Article 3 – Summary Award***

1. Upon the expiry of the time limit for the filing of Statement of Claim, Statement of Defence and Counterclaim under Rule 17 of these Rules, but not later than 21 days after the expiry, if a party considers that there is no valid defence to its claim or any substantial part of its claim, it may file with the Tribunal and serve on the other party and the Registrar an application for a summary award on the claim or part of the claim. “Claim” in this Article includes a counterclaim.
2. The application shall be accompanied by an affidavit stating the full facts and detailed grounds in support of it.
3. Within 21 days after service of the application and affidavit, the other party must, if it wishes to contest the application, file and serve an affidavit in opposition. The applicant must file any reply affidavit within 14 days from receipt of the opposition. No further affidavit may be filed without leave of the Tribunal.
4. The Tribunal may on hearing the application:
  - a. make an award summarily; or
  - b. make an order dismissing the application; or
  - c. make an order requiring security for the applicant’s claim or part of the claim.
5. The Tribunal’s award or order shall be made in writing within 21 days after the close of hearing unless extended by the Registrar.
6. Costs referred to in Rules 31, 32 and 33 of these Rules may be awarded in the discretion of the Tribunal.
7. Rules 28.2, 29.1 and 29.2 of these Rules shall apply, with the necessary or appropriate changes, to a summary award made under this Article.
8. Where the application is dismissed, the Tribunal shall proceed to continue with the arbitration.

# Index

- Arbitral Proceedings
  - ICC arbitration
    - applicable rule of law, 149
    - case establishment, 151–2
    - case management conference and timetable, 151
    - closing and draft award submission, 152
    - conducting, 149–50
    - emergency arbitrator, 153–4
    - file transmission, 148
    - governing rules, 149
    - hearings, 152
    - interim measures, 153
    - language, 149
    - place, 148–9
    - proof of authority, 148
    - terms of reference, 150–151
  - SIAC arbitration, 184
- Arbitral Tribunal
  - ICC arbitration
    - arbitrator *see* Arbitrator
    - case management techniques, 171–2
    - constitution, 145–6
    - general provisions, 144–5
    - language, 149
    - place, 148–9
    - transmission, 148
  - SIAC
    - additional powers, 187–8
    - amiable compositeur*, 189
    - applicable law, 189
    - award *see* Award
    - confidentiality, 193
    - cost, 192
    - exclusion of liability, 192–3
    - expenses and fees, 192
    - experts appointment, 187
    - fees and deposits, 191–2
    - interim and emergency relief, 189
    - jurisdiction, 188–9
    - legal cost, 192
- Arbitration Institutions
  - CIETAC, 96
  - conduct arbitration, 96–97
  - DIAC, 96
  - ICC *see* International Chamber of Commerce (ICC)
  - traditional centers, 99–100
- Arbitrator
  - ICC arbitration
    - appointment and confirmation, 146–7
    - challenges, 147
    - disclose, 144
    - emergency, 153–4
    - impartial and independent, 144
    - number of arbitrators, 145
    - provisions, 145
    - replacement, 144, 147–8
    - responsibility, 145
    - sole, 145
    - three arbitrators, 145–6
  - SIAC arbitration
    - appointment, 180–181
    - challenges, 182
    - decision, 183
    - emergency, 194–5
    - multi-party appointment, 181
    - qualification, 182
    - repetition hearings, 184
    - replacement, 184

- Arbitrator (*cont'd*)
  - sole, 181
  - three, 181
- Award
  - draft award submission, ICC, 152
  - ICC arbitration
    - deposit, 155
    - enforcement, 155
    - making, 154–5
    - modification and signing, 155
    - notification, 155
    - parties consent, 155
    - remission, 156
    - time limits, final award, 154
  - SIAC arbitration
    - correction and additional, 190–191
    - description, 189–90
    - draft from submission, 189–90
- BOT *see* build-operate-transfer (BOT)
- Breach of contract, 3
- Build-operate-transfer (BOT)
  - concession period, 18
  - contract
    - construction, 20–21
    - offtake agreement, 21
  - parties
    - construction contractors, 19
    - financial institutions, 20
    - government/government agency, 18–19
    - operator, 19
    - project company, 19
- Case management techniques, ICC
  - arbitration, 171–2
- Claims, contract
  - accepting and rejecting, 86–87
  - making
    - form and information, 86
    - process, 85
    - requirement, 86
    - time limits, 85
  - non-specific identification, 83–84
  - specific identification, 82–83
- Compensation, 3–4
- Construction contract
  - FIDIC, 29–30
  - lump sum, 27–8
  - prime cost/reimbursable, 28
  - targets, 29
  - unit price, 28–9
- Contract
  - agreement, 4–5
  - breach of, 3
  - capacity and authority, 6–8
  - compensation, 3–4
  - definition, 3
  - dispute resolution, projects
    - agreement, 80–81
    - claim *see* Claims, Contract
    - features, 79–80, 82
    - governing law, 80
    - procedure, 81
    - rights and liabilities, 81–2
    - steps, 81
    - terms, 80
  - elements, 5–6
  - written *see* Written contract
- Contractor, FIDIC design-build
  - contracts
    - claim and arbitration, 74–5
    - completion test, 53–4
    - contract price/accepted amount, 45
  - Contractor's representative, 44
  - documents, 46–7
  - frameworks, 44–5
  - monthly progress report, 45–6
  - obligations
    - description, 41
    - 'fit for the purpose', 42–3
    - price, supplies and installation, 42
    - requirements, 43
    - rights, 42
    - Silver and Yellow books, 46
    - staff and labour, 47
  - performance security, 43–4
  - plant, materials and workmanship
    - inspections, 48–9
    - material samples, 48
    - ownership, 50
    - project execution, 48
    - rejection and remedial work, 49–50

- testing, quality and performance
    - of work, 49
  - subcontract, 44
  - suspension, 66–7
  - tests after completion, 58
  - termination, 67
  - undertakings, 47
  - unforeseeable difficulties, 45
  - works, 43
- Costs and fees
  - ICC arbitration
    - administrative expenses and arbitrator's fees, 168–70
    - advance payment, 156–7, 164–6
    - authority appointment, 167–8
    - emergency arbitrator, 175–6
    - tribunal decisions, 157–8, 166–7
  - SIAC arbitration
    - determination, 192
    - legal, 192
- Defects liability
  - DNP, 56
  - extension, DNP, 57
  - performance certificate, 57
  - remedy, 56–7
  - repetition and cost, tests, 57
  - unfulfilled obligations, 58
- Defects Notification Period (DNP), 56–7
- Design responsibility
  - contractor, 24–5
  - silver and yellow books, 26
- Dispute resolution
  - arbitration
    - agreement, 95
    - award, 97–8
    - commencement, 96
    - conduct, 96–7
    - description, 94
    - enforcement of awards, 98–9
    - ICC, 101–3
    - institutions, 95–6
    - place, 95
    - traditional arbitration centres, 99–100
  - Construction projects
    - contract *see* Contract
    - features, 79–80, 82
    - FIDIC Dispute Adjudication Board
      - see* FIDIC Dispute Adjudication Board
    - final methods
      - arbitration, 90–91, 93–4
      - litigation, 92, 94
    - informal methods
      - conciliation, 93
      - description, 92
      - mediation, 93
      - unstructured negotiation, 92
  - Emergency arbitrator
    - ICC arbitration rules
      - application, measures, 172–3
      - appointment and file transmission, 173
      - challenges, 174
      - cost, 175–6
      - general rule, 176
      - Order, 174–5
      - place, 174
      - proceedings, 174
    - SIAC arbitration, 194–5
- Employer responsibility
  - FIDIC design-build contracts
    - claims, 38–9
    - evidence of financial arrangements, 37–8
    - liability, 64
    - part of work, 55
    - right of access and possession, 37
    - works, 54–5
  - termination *see* Termination
- FIDIC design-build contracts
  - administration
    - determination, Yellow and Silver Books, 40–41
    - engineer, role, 39–40
    - instructions, 41
    - representatives, employer's, 41
  - commencement and time, 50
  - contractor *see* Contractor, FIDIC design-build contracts
  - defects liability *see* Defects liability
  - delays and extension of time, 52
  - description, 33



- FIDIC design-build contracts (*cont'd*)
- employer responsibility *see* Employer responsibility
  - force majeure *see* Force majeure
  - insurance, 71
  - payment *see* Payment
  - price variations and adjustments
    - cost fluctuations, 60
    - description, 58
    - laws and regulations changes, 59–60
    - right to vary, 58–9
    - variation procedure and value engineering, 59
  - programme, 50–52
  - prolonged suspension, 53
  - responsibility, 33–4
  - risk and responsibility
    - care of works and goods, 69
    - employer's risk, 69–70
    - indemnities, 68–9
    - liability limitation, 70–71
  - standard/boilerplate provisions
    - communications, 34–5
    - compliance, 36–7
    - hierarchy of documents, 35–6
    - language, 35
    - standard forms, 33
  - termination *see* Termination
  - tests after completion, 58
  - work suspension, 52–3
  - written contract, 33
- FIDIC Dispute Adjudication Board (DAB)
- appointment, 88
  - arbitration, 90
  - informal opinion, 89–90
  - proceedings and decision, 89
  - referring dispute, 89
  - scope, 88
- FIDIC Silver Book, 22–4
- Force majeure
- delay minimization and consequences, 72
  - discharge, 73–4
  - meaning, 71–2
  - notice, 72
  - prolonged effect, 73
- ICC *see* International Chamber of Commerce (ICC)
- insurance, 71
- Internal rules of International Court of Arbitration
- Committee, 163–4
  - confidentiality, work, 161–2
  - members participation, 162–3
  - relationships, 163
  - scrutiny, 164
  - Secretariat, 164
- International Chamber of Commerce (ICC)
- arbitration
- authority appointment, 167–8
  - award *see* Award
  - case management techniques, 171–2
  - commencement, 139–42
  - consolidation, 144
  - costs *see* costs and fees
  - definitions, 138
  - emergency rules *see* Emergency arbitrator rules
  - International Court of Arbitration, 137–8
  - joinder, 142–3
  - limitation, liability, 159
  - modified time limits, 158
  - multiple contracts, 143
  - multiple parties claims, 143
  - proceedings *see* Arbitral Proceedings
  - tribunal *see* Arbitral Tribunal
  - Waiver, 159
  - written notifications, 138–9
- dispute resolution
- agreement, 101
  - arbitrator appointment, 101
  - award, 103
  - features, rules, 102–3
  - notification, respondents, 101
  - procedure, 102
  - request, 101
  - statement and counter claim, 101
  - terms of reference, 102
  - tribunal, 102

- International Court of Arbitration
  - (CASE NO: 12345/AB)
  - answer to request, 125–6
  - final award
    - arbitration, 130
    - contracts, 129
    - costs, 136
    - issues, 133
    - milestone 3, 135–6
    - parties, 129
    - parties' representatives, 129
    - progress of project, 132–3
    - respondent's obligation, 133–4
    - subcontract, 131
    - subcontract price, 134–5
    - tribunal's decision, 130–131
  - reply to answer, 127–8
  - request for arbitration
    - disputes, 123
    - interest, 124
    - payments due under subcontract, 123–4
    - project, 122
    - sums claimed, 124
    - termination of subcontract, 124
- Liability
  - defects *see* Defects liability
  - limitation
    - consequential loss/damage, 70
    - contractor's, 70–71
  - lump sum contracts, 27–8
- Payment
  - advance, 61
  - cessation, employer's liability, 64
  - delay and charge, 62
  - description, 60
  - financial steps after taking over
    - contractor's statement, completion, 63
    - final payment, 64
    - final payment application process and discharge, 63–4
  - interim, 60–61
  - retention money, 61–2
  - timing, 61
  - prime cost/reimbursable contracts, 28
- Risk
  - allocation, 15
  - BOT, 18–21
  - design responsibility, 24–6
  - EPC /turnkey projects, 18
  - FIDIC Silver Book *see* FIDIC Silver Book
  - Red and Yellow Books, 15
  - traditional approach
    - engineer/architect, 16–17
    - red and yellow book, 17
  - unforeseen physical conditions, 24
- Singapore International Arbitration Centre (SIAC) arbitration
  - arbitrator *see* Arbitrator
  - domestic rules
    - award, 196
    - repeal, 196
    - transitional provision, 196
  - expedited procedure, 180
  - general provisions, 193
  - hearings, 186
  - language, 186
  - notice
    - calculation, period of time, 178
    - delivery, 178
    - filing, 178
    - requirements, 178–9
    - response, 179
    - written and electronic communication, 178
  - proceedings, 184
  - representatives, 186
  - scope, 177–8
  - seat of arbitration, 186
  - statements submission, 185
  - witnesses, 186–7
- Statutes of International Court of Arbitration
  - appointment, 160
  - Committees, 161
  - confidentiality, 161
  - function, 159–60
  - members composition and Secretariat, 160
  - Plenary Sessions, 160–161
  - rule modification, 161

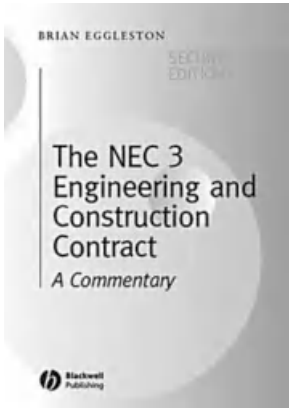
- Target contracts, 29
- Termination
  - contractor
    - events, 67
    - payment, 67–8
    - requirements, 67
  - employer
    - contractor default, 65
    - own convenience, 66
    - payment, 66
    - works valuation and date, 66
- Tests on completion
  - contractor's obligations, 53–4
  - delay, 54
  - re-testing, 54
- Unit price contracts, 28–9
- Written contract
  - clarity and certainty, 8
  - construction
    - delay damages, 13–14
    - delays and extensions of time, 12–13
    - FIDIC, 11
    - particular conditions, 14
    - Programme, 12
    - requirements, 10–11
    - standard terms, 14
  - description, 5
  - FIDIC contracts, 33
  - procedure, 9
  - risk allocation, 9–10
- Yugo Design Company v Sino Industries Corporation*
  - appointment of tribunal, 110–112
  - arbitration, 110–112
  - award, 120–121
  - closing submissions
    - claimant, 120
    - proceedings, 118
    - tribunal members, 119
  - December meeting, 109–10
  - hearing
    - arbitration, 114
    - cross-examination, 118
    - proceedings, 116
    - tribunal, 114–15
    - witness's substantial evidence, 117
  - in International Court of Arbitration
    - see* International Court of Arbitration (CASE NO: 12345/AB)
  - letter of award, 106
  - letter of intent, 106–7
  - outcome, 121
  - parties, 105
  - progress, project, 108–9
  - project, 105
  - settlement, 115
  - settlement discussions, 113–14
  - subcontract, 107
  - terms of reference, 113



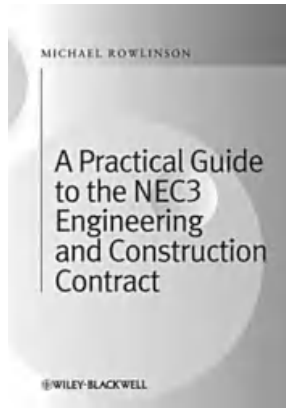
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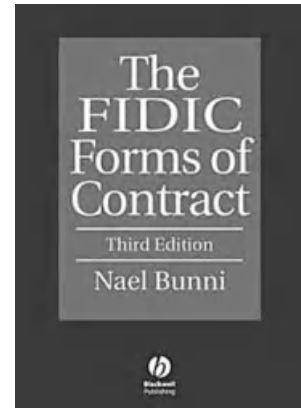
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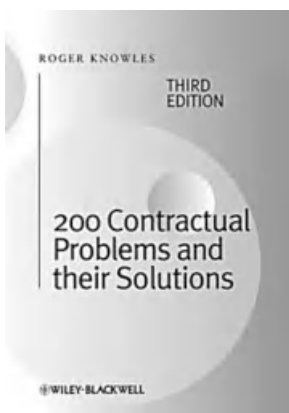
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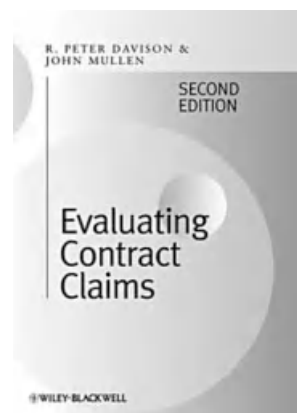
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