

STANDARD FORM CONTRACTING; THE ROLE FOR FIDIC CONTRACTS DOMESTICALLY AND INTERNATIONALLY

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This paper focuses on the FIDIC standard form contracts which are in common use internationally. In the authors' view, there is a lot to be said to returning to the widespread use of standard form contracting in Australia using the internationally recognised FIDIC contract.

Standard Form Contracting In Australia

In Australia today there are three major, current standard form contracts for traditional contracting on the basis of construction to the principal's design. They are the AS 4000 – 1997, ABIC MW-1 2003 and PC-1 1998. In addition, AS 2124 –1992 and earlier editions of the AS 2124 form remain popular. Variations of these forms, particularly the AS 4000 series, that have been developed for particular styles of contracting are also popular.¹ Variations dealing with Design and Construct projects and for use in back to back subcontracting are also widely used.

A good starting point for considering any standard form contract is to be cognisant of who produced it. The Australian Standard series of contracts are produced for Standards Australia by a panel of industry representatives that appear on their covers. However, the origins of AS 2124 date back to the mid 1920s to a contract developed by the Australian Institution of Engineers. In 1952 Australian Standards took over the production of the contract and renamed it CA24-1952. It was first produced as the AS 2124 contract in 1978. There were several revisions after that, and it was rewritten as AS 4000 in 1997.²

The ABIC, or Australian Building Industry Contract is produced jointly by Master Builders Australia (MBA) and the Royal Australian Institute of Architects (RAIA). That contract replaced the JCC series of contracts

¹ In total there are 16 standard form contracts in the set. See *Asset Maintenance and service contracts – the Standards suite is complete* Pilley, John, (2005) 21 BCL 6

² *Standard Conditions of Contract*, John L. Pilley and Harley Coobes, Issue 4, BDPS News, April 2001

(produced by the Joint Contracts Committee (JCC) which included BOMA, now the Property Council), the SBW-1 and 2 and NPWC3. Those contracts are also occasionally still found in use.

The PC-1 1998 standard form contract is published by the Property Council of Australia. It may be widely used, but if it is, the authors have not come across it in practice. PC-1 differs from other standard form contracts in that it was produced by the Property Council of Australia (PCA) representing the interests of the commercial property industry in Australia. It explicitly does not aim to balance the competing interests of the Employer and the Contractor, and reflects the view “*that people who initiate and pay for building and construction projects are entitled to set the agenda and allocate the risks.*” The PCA describes the contract as ‘unashamedly client-focussed’ and suitable for all non-residential and engineering construction projects, including projects where some design is carried out by the Contractor, and for use as a design and construct contract.³

While there are other standard contracts in use in particular sectors of the Australian engineering and construction industry, it is these contracts that are the focus of many of the major texts on construction law in Australia.⁴

The Move Away From Standard Forms

Over the last twenty years in Australia, however, there has been a significant move away from using standard form contracts in major projects and towards the use of “bespoke” contracts. This has come about for a number of reasons. Perhaps partly it has been the ease that word-processing has introduced to make amendments to the standard forms. More significantly, in many cases the Employer has set out to, and has, changed the risk allocation embodied in the standard forms. One reason often articulated to justify the move to bespoke contracts, is the growing number of ways of project contracting.

Notwithstanding major projects and major Employers have all but abandoned the standard form contracting, straight forward medium sized projects often incorporate AS 2124 or AS 4000 by reference. But even here, typically such contracts also contain a long list of Special Conditions that take precedence over the General Conditions.

³ http://propertycouncil.gravitymax.com.au/nat/page.asp?622=270538&e_page=17330 (November 2007).

⁴ *Understanding Australian Construction Contracts* Bailey and Bell, *Brooking on Building Contracts* (4th ed) Cremean, Shnookal and Whitten

How did we get to this situation where standard form contracts are not used for major projects? 20 years ago, as word-processing became commonplace, major law firms with an engineering and construction focus developed in house Special Conditions that amended the standard form contracts – then the AS 2124, JCC and MBW 1 contracts. Parallel with developing their sets of Special Conditions for projects of a particular type, the major law firms developed data bases of unreported decisions that dealt with the interpretation of standard form contract clauses. In those days dispute resolution in major contracts was primarily by arbitration, often by retired builders or other construction professionals without legal qualifications, and in that forum even decisions by lower courts were highly persuasive. In an analogy with the Falklands' war, unreported decisions were sometimes referred to as Exocet missiles; your opponent didn't know they were coming until they were produced, with suitable flourish, at the arbitral hearing.

However, attaching Special Conditions to the rear of standard forms had, and still has problems. It drew attention to the changes that were being made. Worse, the so called consensus contracts, the standard forms that had been developed with a degree of balance between the parties, achieved that balance in the detail of their terms, and assigned risk accordingly. Changing the detail in Special Conditions changed that balance and transferred risk (usually to the Contractor). Typically in the 1990s and 2000s the transfer of risk was down the contracting chain as contracts were primarily drafted by parties higher in the chain. Although having the changes in stand alone Special Conditions drew attention to those changes, even experienced contractors often signed such Special Conditions not realising the significant changes that had been made. On the other hand, sometimes there was (and is) significant debate about agreeing changes proposed in Special Conditions. In some cases, contractors simply refused to agree to any change to a standard form of contract.

At the same time as major law firms were developing their firm based standard Special Conditions, if we can call them that, project delivery methods did become more diverse. The late 1980s building boom brought with it a flurry of contracting styles. This was reflected in the increasing complexity of the Special Conditions that were being drafted, and by and large, the standard form contracts did not keep up. The Lump Sum but with schedule of rates contracts of the 1970's were largely replaced with straight Lump Sum contracts, and Cost Plus contracts, but were soon added to by Design and Construct, Fast Track contracts, Partnering contracts, Target Price contracts (of various forms) and so on. BOOT contracts, (Build Own, Operate, Transfer) and EPC (Engineer, Procure and Construct) and a wide variety of other forms of contract became popular in major infrastructure projects.

Drafting contracts by attaching Special Conditions was inherently dangerous; there was always the likelihood of inconsistency between the standard General Conditions and the added Special Conditions. In fact a large number of the

contract disputes that cross a construction lawyer's desk have such an inconsistency at their core. A consistent document is more likely to be produced if it can be read from cover to cover.

And so, roughly speaking, we arrived at the point about ten years ago where major law firms had bespoke contracts available for their clients that probably started life as a standard form contract, but were significantly modified for the type of project envisaged. To all intents and purposes, these are standard form contracts developed by the major law firms. They are modified for the particular project under consideration, and, accordingly, are sometime referred to as bespoke contracts.⁵ This now appears to the authors to be the major way of contracting significant projects in Australia.

Each major law firm has its own style of contract which is typically recognisable to the lawyers in other major firms. The law firm that produces the contract will typically puts its name on the cover. Sometimes the original standard form contract is also identified, but not always. When disputes arise about a bespoke contract, it is often a forensic exercise of some difficulty to work out where a particular clause in issue has come from and how, in the changed framework of the contract read as a whole, it should be interpreted.

Tendering a major project nowadays inevitably requires obtaining legal advice on every term in a proposed bespoke contract.

However, interestingly as we move into the new decade it seems fair to say that two things have happened in contracting. First, there seems to be a swing against the constant push to transfer risk to contractors. Major contracts written by experienced lawyers do not seek to push risk unfairly onto contractors, even if they are instructed only by the Principal in producing the draft contract. For all the uncertainty some partnering type clauses introduced into commercial contracts, the validity of the underlying thesis that a project has to proceed on a co-operative and fair basis has been accepted. An unfair contract doesn't make a project more profitable for a principal, it raises the prospects of number of highly unpleasant scenarios that a principal might face during the progress of a project.

Secondly, although the variety of contracting methods continues to grow, project delivery has mostly fallen into one of three main types; a conventional construction project, a design and construct project, or an engineer, procure and construct (EPC) project. Other forms of contracting, and there have been a lot of them, seem to be on the decline.

⁵ Bespoke - an item custom-made to the buyer's specification

The FIDIC Contracts

None of AS 2124/AS 4000, ABIC MW-1 and PC-1 have an international equivalent that is commonly used outside of Australia. Internationally the most commonly used construction project contract used is the FIDIC construction contract, known as the red book.

The FIDIC contract suite is produced by the International Federation of Consulting Engineers, or, in French, the Fédération Internationale des Ingénieurs-Conseils. Hence the acronym FIDIC. They are published in hardcopy and/or electronically in 13 languages, and more than 40,000 copies are sold each year. They are used in both common law and civil law countries. FIDIC contracts have been adopted by a number of development agencies for projects funded by them, such as Australia (Ausaid), France, Japan (Japan International Cooperation Agency [JICA]) and Korea. The use of FIDIC contracts is world wide, and their use is increasing. By way of an example, FIDIC contracts are being used for the multi billion dollar duplication of the locks in the Panama Canal.

Perhaps the largest rival to the FIDIC contracts on the world stage is the NEC suite of contracts, the New Engineering Contracts, published in London by the UK Institution of Civil Engineers. It is interesting (at least to the Engineer/Lawyer authors) to note that both contracts are produced by engineering institutions, and that the Australian Standard AS 2124/4000 contracts have a similar pedigree.

The FIDIC contracts provide a central role for the Engineer in the certification process during the performance of the works. It is the Engineer who performs the certification process that in other contracts is performed by a role described as the Superintendent, Architect or similar.

The first FIDIC contract was published in 1957 under the title of Conditions of Contract (International) for Works of Civil Engineering Construction. This contract was intended to be used for civil engineering works procured by the traditional method of a contractor constructing the works to a design prepared by an independent consulting engineer, acting on behalf of the Employer. This contract became known as the red book because of its cover, a title still used for its successor. Indeed, FIDIC contracts are still often referred to as "books". The FIDIC books contain considerable content that is not intended to be contractual but is in fact of guidance to the their operation and use. Subsequent editions of the Construction contract were published in 1967, 1973, 1977, 1987, 1992 and 1999. The 1973 version was of particular importance because it followed closely the fourth edition of the English ICE

Conditions of Contract and took advantage of UK jurisprudence that had interpreted that contract.

The FIDIC Construction Contract was a straightforward construction focussed contract and was unsuitable for projects where major items of plant were fabricated away from the construction site to a design by a contractor. Accordingly, in 1963, FIDIC published a contract directed to projects for mechanical and electrical works, the Contract for Plant and Design-Build. This contract became known as the yellow book. This contract had an emphasis on testing and commissioning and was focussed on the manufacture and installation of plant. Subsequent editions of it were published in 1980, 1987 and 1999.

In the mid-1990s FIDIC responded to the increasing popularity of projects proceeding as design and construct projects, and where, if relevant, the builder had to commission all plant. The first edition of the FIDIC Conditions of Contract for Design-Build and Turnkey is known as the orange book. An update of this contract was published in 1999 that reflected the modern concept that the builder does not actually design the plant that is incorporated into a facility; it has engineers specify the plant and tenders for it and then incorporates it into the project. The process of engineer, procure and then construct is ordinarily also followed by commissioning also performed by the Contractor. FIDIC called the updated contract the Conditions of Contract for EPC/Turnkey Projects, coloured it silver, and it is known as the silver book.

In 1999 the three then current contracts were updated. The 1999 version of the FIDIC contracts are the current versions, although as referred to below, they are soon to be updated. The 1999 updates were prepared by a single committee which aimed to standardise the terminology used and to make them as user-friendly as possible. The three colours were retained,

FIDIC also publishes a number of documents of considerable usefulness. Principally, it publishes guides to contracts. It also publishes a document, The Contracts Guide that includes the text of all three contracts side by side.⁶ The guide commences with assistance to the reader in deciding which of the three main FIDIC contracts is most applicable to the project under consideration. It goes on to provide assistance on how to manage prequalification, invitations for and evaluation of tender, letters of intent and so on. It contains a helpful explanation of each of the terms in each of the three main contracts, but it does not refer to judicial authority on them. The Guide is published in English, French, German, Spanish and Arabic.

⁶ The FIDIC Contracts Guide

This approach is sensible as more than 85% of the content of each of the three main FIDIC contracts is the same.

These three main FIDIC contracts are commonly referred to as the "rainbow" suite. In addition FIDIC published a Short Form of Contract in 1999 (the green book), and the Conditions of Contract for Design, Build and Operate Projects (the gold book) in 2007.

Thus currently FIDIC publishes Conditions of Contract for:

- Construction (1999) (the red book);
- Plant and Design-Build (1999) (the yellow book);
- EPC/Turnkey Projects (1999) (the silver book);
- Design, Build and Operate Projects (2007) (the gold book);
- Short Form (1999) (the green book).

There is one further contract published by FIDIC that should be mentioned. As discussed below, FIDIC does not ordinarily permit its standard form contracts to be amended, unless a special licence is negotiated. This is an important feature of FIDIC contracts. Ordinarily the standard form of the FIDIC contract must be amended by what are termed Particular Conditions; what we in Australia would ordinarily refer to as Special Conditions. The international multilateral development banks that fund development projects around the world have particular requirements for their global projects to protect their interests. They have negotiated a licence with FIDIC to publish the MDB Harmonised Edition of the FIDIC Conditions of Contract for Construction. The MDB Edition contains a number of specific changes and additions so that a repetitive set of Particular Conditions are not required for every project. Changes include placing obligations on the Contractor in respect of staff and labour force, and clauses which provide the banks with a right to audit the Contractor's accounts. There is an MDB Supplement to the Contracts Guide which highlights and discusses the differences between the red book and the MDB Edition.

The differences between the contracts published by FIDIC are essentially based on the style of project delivery contemplated. Fundamentally which party prepares the design, and how risk is allocated is addressed differently. The Construction Contract is based on the principal (referred to as the Employer) providing the design. The other FIDIC contracts contemplate the design being performed by the Contractor. The EPC/Turnkey Projects Contract is used when the Contractor not only takes most of the risk in design and construction, but it also has to hand the project over to the Employer in a fully operational state.

The standard clauses in the three main FIDIC contracts are divided into 20 clauses. Of them, 17 have the same content, although there are some differences between them that reflect the differences required by the different forms of project delivery. Clauses 3, 5 and 12 vary between the contracts in the following way:

	Construction (red book)	Plant and Design-Build (yellow book)	EPC/Turnkey (silver book)	Design Build Operate (gold book)
3	Engineer's Duties and Authority	Engineer's Duties and Authority	Employer's Administration	Engineer's Duties and Authority
5	Nominated Subcontractors	Design	Design	Design
12	Measurement and Evaluation	Tests after Completion	Tests after Completion	

Clause 12 of the Construction Contract is of particular interest as it provides the process of assessment of a Contractor's claim. While the terms contemplate that a lump sum for the works (or components of it) might be specified, somewhat unusually in the Australian context, the standard form of the contract contemplates payment on the basis of a schedule of rates. This type of contract is still reasonably common in civil works projects in Australia, but has fallen out of use in straight forward construction projects. The risk of measurement in building projects in Australia is nowadays ordinarily carried by the Contractor.

The FIDIC contracts are coherent and consistent with a logical arrangement of clauses. They have been drafted by independent consulting engineers and lawyers with experience in the drafting and management of international construction contracts. The Update Task Group which produced the 1999 editions had representatives from Sweden, UK, Germany, France and Argentina, i.e. significant input from people with experience in civil law as well as the common law. Although the ultimate design of these contracts and the content is the responsibility of FIDIC, the drafts were reviewed by persons from 15 different countries. A number of organisations such as the European International Contractors, the International Association of Dredging Contractors and the International Bar Association also reviewed the drafts.

The forms of contract within the suite cover most common forms of project delivery, but each contract may need to be adapted to suit particular project delivery concepts. In effect the approach is similar to that taken in the AS 4000 series contracts and can be contrasted with the approach in the NEC contracts. The NEC contract is a single contract with a number of optional clauses which is intended to have sufficient flexibility in its terms to allow for any form of project delivery.

Of course the FIDIC contract suite has not been specifically developed for any particular legal system. FIDIC explicitly warns that:

- modifications to the General Conditions may be required in some legal jurisdictions; and
- the standard form contracts do not contain any limitation on the duration of legal liability.

In Australia, it is immediately apparent that the relevant Security of Payment regime that applies to a particular contract should be incorporated to provide consistency of operation. The Engineer should expressly be deemed to be delivering a Payment Certificate on behalf of the Employer in response to a Payment Claim, and the time limits for delivering it should be made consistent with the time limits in the relevant Act. Similarly, in Victoria, it would be wise to ensure the Contractor is required in its Payment Claims to differentiate claims made under the contract for excluded amounts which cannot be made under the *Building and Construction Industry Security of Payment Act*.

It also goes without saying, that prior to using a FIDIC contract in Australia the terms should be considered in the light of Australian jurisprudence.

The Administration of FIDIC Contracts

FIDIC contracts are not just about documenting the contractual entitlements of parties. Commensurate with the “No Dispute” concepts that underpinned the introduction of AS 4000 and the plain English language adopted in the NEC contract, FIDIC contracts include project management procedures essential for the efficient execution of the Works. The users of these contracts are expected to be the individuals who write and administer the contracts. FIDIC contracts are not intended to be put in the bottom drawer and forgotten about; they are intended to provide the framework of the relationship between the parties as it actually occurs on site. Accordingly, they provide for clear communication between the Engineer, the Employer and the Contractor. The language used is clear and it is essential that the Engineer and the Contractor's Representative should be familiar with their provisions. The Contracts should be referred in the day-to-day communications and management of the Works and the Contract. The Contractor needs to follow the strict provisions of the Contract in relation to the giving of notice of a claim. A failure to comply with a time limit is intended to disentitle the Contractor from an extension of time or a Variation.

To assist with the most practical aspects of project delivery under a FIDIC contract, FIDIC organises training courses, workshops, seminars and conferences around the world for its contracts. There should be no excuse for an Engineer, a Principal or a Contractor not understanding what is required of it. FIDIC presents training courses on:

- Practical Use of FIDIC Contracts;
- Claims and Dispute Resolution;
- Dispute Adjudication Boards;
- Contract Management; and
- Professional Services Agreement.

In addition, FIDIC cooperates with other organisations in organising international conferences. It takes part in conferences on:

- International Contracts Users (IBA);
- International Contracts and Dispute Resolution (ICC); and
- Dispute Boards (Dispute Review Board Foundation).

To assist in all aspects of contracting, in addition to the standard form Conditions of Contract referred to above, FIDIC also publishes the following related documents:

- Standard Prequalification Forms for Contractors 2008;
- Project Procurement 2008;
- Quality Based Selection 2010; and
- Quality of Construction 2001.

The Advantage of a Standard Form Contract

The advantages of using a standard form are many:

- Contractors, Employers and Engineers who use a standard form contract become familiar with the rights and obligations that they have under that form of contracting. This improves communication and efficiency in contract administration. This is of particular importance in international contracting where communication is more difficult and misunderstandings are proportionately more likely to arise.
- The cost of tendering is reduced as Contractors familiar with the standard form know there is no risk that is hidden in the detail of terms they are unfamiliar with.

- The cost of negotiating the contract is reduced. Increasingly negotiating the legal terms of a bespoke contract based on a major law firm's contract has become a major cost of project delivery. Using a trusted standard form reduces the potential area of disagreements, or at the very least, provides an impartial starting point from which the parties can negotiate from.
- The tendered price is likely to be less than for a bespoke contract, as Contractors do not have to price additional risks they are not familiar with or are not usually required to assume.

There are particular reasons why the FIDIC standard form contract should be used. While any particular term in a FIDIC contract might be debated in the context of Australian jurisprudence, from an international perspective, the contract is world's best practice. Its dispute resolution procedure, and the reference of disputes to a Dispute Adjudication Board leads the Australian standard form contracts.

There are good reason for not encouraging modification to standard form contracts. Even a small change can have a dramatic effect on how a contract is interpreted. FIDIC does not sanction its standard forms to be amended in the way that has occurred in Australia to the Australian standard forms.

The format in which FIDIC publishes its contracts (either in hardcopy or as encrypted PDF electronic files) is designed to actively discourage unauthorised copying and amendment of the General Conditions. Any project specific amendments to FIDIC General Conditions must be detailed in the Particular Conditions. This ensures that any changes that are made to the standard conditions are obvious and transparent. Insisting on this process maintains the integrity of the FIDIC General Conditions and reduces the time for assessing tender documents. It also minimises the possibility that a tenderer might be unaware of a project specific amendment that significantly increases Contractor's risks.

It is hoped that this approach to amendment of the standard form of FIDIC contracts is maintained. Standard form contracting increases certainty and the practical familiarity of those charged with actually using the contract. At least part of the need to amend a standard form contract has been avoided by the publication of the suite of contracts. All major forms of project delivery are catered for within the existing FIDIC framework.

However, as referred to above, since 2005 the Multilateral Development Banks have used the MDB Edition of the FIDIC Construction Contract. In

considering the requirements of the MDBs for amendments to the general conditions, FIDIC developed a policy under which it might agree to amendment of the standard General Conditions. To gain approval:

- the amendments should be required for a specific and relatively unique project;
- the Particular Conditions consolidated in the General Conditions will make procurement simpler and more transparent;
- the Terms of Use and an appropriate licence fee must be agreed; and
- the specific amendments are made by competent drafters.

In situations where FIDIC does agree to amendments of its General Conditions, the licence to use the FIDIC contract requires that either FIDIC or the contracting parties can ask to be supplied for the General Conditions track marked to show the changes from the standard version provided by FIDIC in a Word file.

The Engineer

Notwithstanding one of the perceived advantages of using a standard form contract is that judicial precedent aids certainty to its interpretation, it is beyond the role of this paper to consider how individual terms of the standard form contracts have been interpreted by the courts. But it should be said in the international sphere it would seem preferable to use an international contract so that decisions of individual state courts in Australia might be swept aside by larger international concepts of contracting that apply equally to civil code jurisdictions as they do in any state of Australia. It is interesting, in this respect, to note that even in England, when the New Engineering Contract was first produced in 1993, perhaps the largest competitor to the FIDIC contract suite on the global stage,⁷ drafting of that contract started from first principles rather building on an existing standard form. Similarly AS 4000 was a major rewrite of AS 2124. Both examples suggest hanging on to judicial precedent, while comfortable and empowering for lawyers, is not something the construction world values as highly as the lawyers do.

⁷ The NEC contracts are published in London by the Institution of Civil Engineers (Thomas Telford Ltd)

It is beyond the scope of this paper to compare the individual terms of the standard form contracts in use in Australia and compare them to each other and those in FIDIC contracts. In this regard the reader is referred, as a starting point, to the excellent work *Understanding Australian Construction Contracts*⁸ and in particular the excellent comparison tables that appear at the end of each chapter.

However, the role and independence of the engineer is a central issue in contracting and warrants special mention.

Each of AS 2124/AS 4000, ABIC MW-1 and PC-1 provide a role for a superintendent. In AS 2124 and AS 4000 the role is defined as “the superintendent”, although historically the role was more often than not performed by an engineer. In the ABIC MW-1 the role is performed by “the Architect” reflecting the fact the RAIA is one of the authors of the standard form. In PC-1 the role is performed by the “Contract Administrator”. The role performed differs between the contracts. In PC-1 the Contract Administrator is the agent for Principal in all matters. Further, in PC-1 there is no obligation on the Principal to ensure the Contractor Administrator performs fairly, reasonably or to a similar standard of conduct.

The fourth edition of the FIDIC Construction Contract published in 1987 introduced an express term requiring the Engineer to act impartially when giving a decision or taking any action which might affect the rights and obligations of the Parties. Prior to that, the impartiality of the Engineer in performing certification functions was implied. Judges in Australia and the UK have used a variety of words to express the implied obligation of a certifier, be it engineer, architect or however named in a construction contract, to act fairly. It has been referred to as an obligations to act with “*independence and impartiality*”,⁹ and to “*act in a fair and unbiased manner*” and to “*reach such decisions fairly, holding the balance between his client and the contractor*”.¹⁰ The certifier “*must be fair and he must be honest*” and must act “*impartially and fairly*”,¹¹ “*honestly and impartially*”,¹² “*fairly, impartially and in accordance with the powers given to him by the*

⁸ Bailey and Bell

⁹ *Dixon v South Australian Railways Commissioner* [1923] HCA 45, (1923) 34 CLR 71 per Isaacs J

¹⁰ *Sutcliffe v Thackrah* (1974) AC 727, 737 per Lord Reid.

¹¹ *Ibid*, 740, 741 per Lord Morris.

¹² *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, (2002) 18 BCL 322.

conditions"¹³ and “to hold the balance fairly as between employer and contractor”.¹⁴

Nevertheless, in engineering and construction contracts there is always a tension between the obligation to act independently in exercising the certification function and the fact the certifier is engaged and employed by the principal. More than that, in engineering and construction contracts the certifier does perform functions and gives directions as the agent for the principal.

Under the *Security of Payment* legislation as it exists on Australia’s East coast, even though the certification function must be performed independently, the response to a Payment Claim must be in a Payment Schedule from the principal. Accordingly, having performed an independent assessment, the certifier then has to change hats and deliver a Payment Schedule as agent for the principal.

This complexity is perennial in engineering and construction contracts. It is, in the authors’ opinion, a central reason why the certification role should be performed by an engineer or an architect. Both these professions have a long history and culture of performing the certifying role, and have developed appropriate professional ethical codes.

Some engineering and construction contracts in Australia seek to get around the dual role of the certifier by adding something of a legal fiction. They include a term stating that notwithstanding that the certifier is employed by the principal (and in fact may even be an employee of the principal), the certifier is independent and *not* the agent of the principal. Of course, as the certifier is not a party to the construction contract, it is somewhat difficult to see how the construction contract can define the relationship between the certifier and the principal, but quite arguably the definition has contractual effect as between the principal and the contractor. Further, as between the contractor and the principal, the parties plainly intend a contractor will have redress against the principal if the certifier is unfair. Such contracts therefore typically also impose an obligation on the principal to ensure the certifier acts fairly. This creates the somewhat tortuous path for pleaders on behalf of contractors claiming against principals. The action of the certifier must be pleaded as unfair and hence the principal has breached *its* obligation of ensuring the certifier *would* act fairly.

¹³ *Cantrell v Wright and Fuller Ltd* [2003] EWHC 1545 (TCC); (2003) 91 Con LR 97

¹⁴ *Scheldebouw BV v St James Homes (Grosvenor Dock Ltd* [2006] EWHC 89, [24] per Jackson J

In revising the FIDIC contract forms to the 1999 versions, considerable attention was given to this issue. A survey of FIDIC contract users was carried out by Reading University in the 1990s and about half of the replies expressed a preference for an express term requiring the Engineer to act impartially as in the 1987 FIDIC Construction Contract, while the other half did not feel comfortable with the Engineer being required to act impartially while he was being employed and paid by the Employer.

In the result the 1999 editions of the Construction Contract and Contract for Plant and Design-Build state: "*whenever carrying out duties or exercising authority, specified in or implied by the Contract, the Engineer shall be deemed to act for the Employer*". In this way, a failure by the Engineer to perform its role properly will entitle to the Contractor to directly pursue the Employer without the somewhat artificial route relied on in many Australian pleadings.

Notwithstanding the explicit acknowledgement that the Engineer is the Employer's agent, the FIDIC Contracts expressly require that: "*Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances.*"

The drafting is to be commended. The Engineer is clearly the agent for the Employer and clearly is charged with the role of determining disagreements between the Employer and the Contractor in the first instance. Not inconsistently with that role, it also has to make fair decisions. The term also, in mandatory language not used anywhere else in the contract, requires the Engineer to consult with both parties with the purpose of trying to reach agreement. It is a contract that requires a commitment to dialogue.

That the Engineer is both the agent of the Employer and contractually required to act fairly are not inconsistent with Australian jurisprudence. Whether the contract says the certifier is or is not the agent of the principal or makes no pronouncement, Australian courts tend to use very similar words to describe the fairness obligation in certification.

For example, some contracts the subject of judicial interpretation have gone even further and given the certification role to the principal itself. In one such contract the court found that the power of the principal to value variations itself and "in its sole discretion" nevertheless had to be exercised "honestly,

bona fide, and reasonably”.¹⁵ In the leading case of *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*,¹⁶ Hodgson JA found that the project manager, appointed as the certifier *and* as acting as agent of the principal had to exercise its certifying functions honestly and impartially. And in a case where the principal’s representative took the place of the certifier under the ICE Conditions of Contract, the court nevertheless found that the principal was bound to act honestly, fairly and reasonably in arriving at its judgment, even where no such obligation was expressed in the contract.¹⁷

In *Costain v Bechtel* a contract based on the NEC standard form was considered. It was argued that because the project manager was specifically, under the amended contract in question, employed to act in the interests of the Employer, he was not obliged to act impartially. In dismissing the argument Jackson J said “It would be a most unusual basis for any building contract to postulate that every doubt shall be resolved in the favour of the Employer and every discretion shall be exercised against the Contractor.”¹⁸

The FIDIC EPC/Turnkey Contract does not have an Engineer named as such. In that contract the certification function is carried out by the Employer’s Representative.

Another change made in the 1999 Construction Contract is that the Employer now can replace the Engineer on 42 days notice. The Contractor can prevent this happening by raising a reasonable objection on notice to the Employer.

Forty two days is a time period used elsewhere in FIDIC contracts. It is also the time in which the Engineer must respond to a Contractor's claim with approval, or with disapproval with detailed comments.

Risk allocation

All modern contracts are directly concerned with providing clear risk allocation as between the parties. Good contracts assign risk to the party who can best manage them.

¹⁵ *WMC Resources Ltd v Leighton Contractors Pty Ltd* [1999] WASCA 10; (2000) 16 BCL 53, 62 per Ipp J.

¹⁶ *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* [2002] NSWCA 211, (2002) 18 BCL 322.

¹⁷ *Balfour Beatty Civil Engineering Ltd v Docklands Light Railway Ltd* (1996) 78 BLR 42.

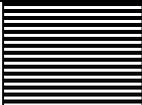
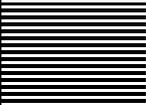
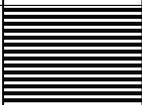
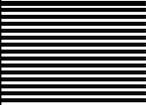
¹⁸ *Costain Ltd v Bechtel Ltd* [2005] EWHC 1018 (TCC)

Within the overall scheme of intended risk allocation, particularly in respect of design risk, each of the FIDIC contracts aims to be fair and equitable by allocating risks to the party best able to control, deal with and manage them. In comparison to earlier editions, and consistent with the authors' observations of the direction in Australia referred to above, the 1999 editions somewhat reduced the Contractor's exposure to certain risks. In particular changes in the following areas reduced Contractor's risk:

- the definition of events comprising Force Majeure was broadened;
- the Contractor recovers time and money for Force Majeure;
- the Contractor has greater power in relation to the Employer's ability to pay and in ensuring that payment is made in full and on time.

The differences in risk allocation between the Contractor and Employer in the three main forms of FIDIC Contracts is illustrated in the following table:



Clause	Risk	CONS [Red]	P&DB [Yellow]	EPCT [Silver]
1.9	Delayed drawings or instructions			
1.9	Errors in the Employer 's requirements			
2.1	Right of access to the Site			

4.7	Setting out			
4.12	Unforeseeable physical conditions			
4.24	Fossils			
7.4	Testing delays by Employer			
7.5	Rejection of materials			
7.6	Remedial work			
8.4(a)	Extension of Time for Completion - Variation			
8.4(b)	Extension of Time for Completion - delay giving entitlement to an EOT			
8.4(c)	Exceptionally adverse climatic conditions			
8.4(d)	Unforeseeable shortages and the availability of personnel or Goods caused by epidemic or government actions			
8.4(e)	Delay, impediment or prevention caused by the Employer its personnel or other contractors			
8.5	Delay caused by Authorities			
8.6	Rate of progress			
8.9	Consequences of Suspension			

9.4	Failure to pass Tests on Completion			
11.4	Failure to remedy Defects			
12.1/14.1	Increased of quantities during construction			
12.4	Omission of work through a Variation			
12.4	Failure to pass tests after Completion			
13.3	Variation procedure			
13.7	Adjustment for changes in legislation			
13.8	Adjustment for changes in cost			
14.8	Delayed payment			
15.4	Payment after Termination			
17.1	Indemnities			
17.2	Care of the Works prior to the Taking Over Certificate			
17.4	Consequences of Employer's risks			
19.4	Consequences of force majeure			

20.1	Contractor's claims			
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Structure of FIDIC Contracts

The structure of each of the contracts is as follows:

- 1 General Provisions
- 2 - 5 Employer, Engineer, Contractor, Nominated Subcontractors - duties and obligations of the different organisations that play a part in the execution of the Works
- 6 - 7 Staff and labour, Plant Materials and Workmanship - the requirements for the items which the Contractor brings to the Site
- 8 - 11 Commencement, delays and suspension, Tests on Completion, Employers Taking Over, Defects - follows the sequence for events during the construction
- 12 - 14 Measurement and Evaluation, Variations and Adjustments, Contract Price and Payment - procedures for the Employer to pay the Contractor for the work
- 15 - 16 Termination by Employer, Suspension and Termination by Contractor
- 17 Risk and responsibility - relates to the project as a whole, and includes subclauses used rarely, as well as matters concerning Parties' responsibilities
- 18 Insurance - procedures which must be implemented before the Works commence
- 19 Force Majeure

- 20 Claims, Disputes and Arbitration - procedures for submission and response to Contractors claims, the appointment of the Dispute Adjudication Board (DAB), obtaining the DAB's decision, amicable settlement and arbitration.

FIDIC Contract provisions in the Australian context

The FIDIC suite of contracts has evolved over a considerable time period, with input from a wide range of Engineers, Contractors, Employers, lawyers and various interested organisations representing many players in the construction industry. There are many who contend these contracts represent best international contracting practice, without favouring either the Contractor or the Employer. However, FIDIC contracts have had significantly different input to standard form contracts currently in general use in Australia and it is therefore not surprising that a number of provisions are unusual by Australian standards.

For example, FIDIC Contracts provide for:

- Termination for convenience by the Employer, other than to carry out the work itself or by another contractor. In this event, the Contractor is not entitled to recover its lost profit.
- The Contractor can slow down or suspend the work if the Engineer does not certify an Interim Payment Certificate within 49 days from the Contractor's Statement (ie a claim). Australian *Security of Payment* legislation provides a more extensive right in any event.
- Termination by the Contractor after 14 days notice if the Engineer does not certify an Interim Payment Certificate within 56 days from the Contractor's Statement.
- Termination by the Contractor after 14 days notice if the Employer does not make payment of an Interim Payment Certificate within 98 days from the Contractor's Statement.
- If the Employer considers it is entitled to any payment by the Contractor, it must make a formal claim to the Engineer, following a similar procedure to that which the Contractor must follow.

- Either Party may be excused from performance of its contractual obligations (except with respect to obligations to pay the other Party) by an exceptional event or circumstance (Force Majeure). The Contract may be terminated if a Party is or will be prevented by Force Majeure from performing its obligations for a continuous period of 84 days, or from multiple periods totalling more than 140 days due to the same event. In the event of such termination the Contractor is entitled to payment of its costs, but not loss of profit.
- A formal dispute between the parties is submitted to a Dispute Adjudication Board (DAB) in the first instance. The DAB must hand down its determination for resolution of the dispute within 84 days. This determination is binding on both parties unless and until it is overturned by arbitration or litigation, which can only be commenced if a party issues a notice of dissatisfaction within 28 days of the DAB's determination. The Construction Contract provides for a "full-term" DAB appointed at the start of the project which is intended to maintain an ongoing knowledge of the progress of the works and the contract by regular site visits and meetings with the parties. The other major FIDIC Contracts provide for an "ad hoc" DAB, appointed only after a dispute arises with its activities confined to resolution of the specific dispute.

Contract provisions which may be superseded by the law of the country

Although the FIDIC contracts are intended to be used in any country, including both common law and civil law systems, there are a number of provisions that may be inconsistent with domestic law. FIDIC recognises that the terms of the contract must be considered for each application in each country. In Australia, as referred to above, FIDIC contracts should be harmonised with the relevant *Security of Payment* legislation. Other state based legislation also needs to be considered.

On an international level the following are some of the provisions that are in this category:

- The 28 day time limit for submission of a Contractor's Claim may be illegal in some countries.
- Delay Damages (liquidated damages) which are in excess of a genuine pre-estimate of the likely damages caused by a delay would not be enforced by the courts in many common-law countries (including

Australia). However, contractual penalties are permissible under the civil code in many countries.

- In some countries the Employer is entitled to Delay Damages even if the delay does not cause it any loss. In other countries the Employer must be able to show some loss before it could claim Delay Damages.
- In some countries the right to Delay Damages can be lost if a legal procedure is not followed (rather than a contractual procedure).
- The extent of permissible variations may be constrained by the law, e.g. competition law in the European Union may put a limit on the extent to which the scope of the original contract (let by competitive tendering) can be increased.
- The Contractor might be entitled to certification of Completion before 100% of the work has been finished, e.g. in the Philippines the Contractor is entitled to certification at 95%.

The parties to a contract may wish to avoid the application of domestic national law by stipulating the applicable law in the contract. Going further, the contracting parties could make reference to a legal framework that is independent of any country. This could be a non state body of law, such as the Unidroit Principles of International Commercial Contracts. Of course, domestic law will give varying effect to such terms.

Update of the rainbow suite

FIDIC has an Update Task Group which is currently reviewing the three main FIDIC contracts with a view to issuing a new edition in 2010 or 2011. Although the extent of the changes to be made has not yet been finalised, the new editions will have the same structure and clauses as the 1999 editions. Experience with the use of these contracts in the last 10 years has demonstrated that the overall structure is logical and easy to follow.

The current indications are the planned changes will be aimed at improvement of the existing wording, rather than any wholesale change to the structure or layout of the documents.

The most recent of the major contracts issued by FIDIC, the Contract for Design, Build and Operate Projects (the gold book), incorporates a number of improvements that are being considered for incorporation into the Construction Contract, the Plant Design-Build Contract and the EPC/Turnkey Projects Contract. Some of these relate to terminology, such as replacing the term Force Majeure with the term "exceptional risk", revising the definition of "dispute" and the term "communications" being replaced with "notices and other communications". Standardisation is seen as an important thing to maintain.

Certain features of the MDB Edition will be incorporated into the revised contract. For example, the term Contractor Data will be introduced in lieu of the Appendix to Tender. This term is becoming common in Australian contracts.

One of the major changes being considered takes us back to the issue of defining the independent role of the certifier with as much precision as possible. The current suggestion for the next edition is that the Engineer's role and obligation will be defined to be "*...to act as the experienced, professional and independent Engineer for the purposes of the Contract*". This adds to the issue of agency and independence a standard of performance of the Engineer that looks commensurate with the sort of standard that would be expected under the Australian domestic law of negligence.

In keeping with the idea that FIDIC contracts are intended to define the relationship between the contracting parties in a practical way, and in a way that those administering the contract can understand, a new subclause under clause 8 is proposed to ensure that *both* parties have a contractual obligation to give advance early warning of certain things. The current contracts only require the Contractor to give advance notice or early warning to the Engineer of potential events which might adversely affect or delay the Works. The proposed text for the new provision is: "*Each Party shall endeavour to give Notice to the other Party in advance of any known or probable future events or circumstances which may adversely affect the Works, including delaying the execution of the Works, or increasing the Contract Price.*"

Other changes being considered include:

- including the design requirements more clearly in the contract;
- including the operation and maintenance manuals in the contract;

- clarification of the Works to be performed;
- providing more definition of what is required of the Contractor's program. The suggested text is: "*The Programme shall fully comply with the requirements set out in Annex X of the Particular Conditions*". The specific requirements in Annex X are then intended to ensure that the programme is prepared in sufficient detail to ensure good planning, execution and monitoring of the works;
- providing for automatic extensions of time in circumstances where the DAB has decided that the Contractor is entitled to an extension of time;
- refining the formation of the DAB procedures;
- putting a greater emphasis on health and safety;
- provide for a changed regime for Employer's Taking Over so that issuing a Taking-Over Certificate will shift Care of the Works to the Employer but only the Performance Certificate will certify acceptance of the Works;
- modifying the claims, disputes and arbitration process. It is proposed the approach in the Design, Build and Operate Projects Contract will be put into the main FIDIC contracts.

Construction Subcontract 2010

The original FIDIC Conditions of Subcontract 1994 was produced for use with the FIDIC Construction Contract 1987. Work on drafting a new subcontract started in 2006. A draft was presented at the FIDIC International Users' Conference in December 2008 for review, and user's comments were reviewed and amendments were made to the review edition. A test edition of the new subcontract was issued at the FIDIC International Users' Conference in December 2009.

The features of the new Subcontract are:

- It is as back-to-back with the FIDIC 1999 Construction Contract as possible, and follows the format of the 1999 suite. It incorporates by reference the terms of the 1999 Construction Contract, including the Annexures and Particular Conditions and therefore must be read with it.
- It incorporates the principle of “pay when paid”, but not “pay if paid”. Thus, the Main Contractor is not relieved from ever making payment just because it never receives payment from the Employer. However, the Guidance Notes give an alternative clause for jurisdictions where pay-when-paid provisions are not enforceable, as is the case under *Security of Payment* legislation in most Australian jurisdictions.
- It incorporates seven Annexes. The published document comprises 35 pages of Conditions of Contract clauses; plus 31 pages of Guidance Notes and alternative clauses for a number of commonly occurring issues. The seven Annexes comprise:
 - A: Particulars of the Main Contract;
 - B: Scope of Subcontract Works and Schedule of Subcontract Documents;
 - C: Incentive(s) for Early Completion, Taking-Over by the Contractor, and Subcontract Bill of Quantities and/or schedule of prices (if any);
 - D: Equipment, Temporary Works, Facilities, and Free-Issue Materials to be Provided by the Contractor;
 - E: Insurances;
 - F: Subcontract Programme;
 - G: Other Items.
- It expressly requires the Main Contractor to coordinate the works including the works of all its subcontractors. The Subcontractor is required to co-operate with the Main Contractor, other subcontractors

and the Employer's personnel. The Subcontractor has an obligation, whenever required by a Contractor's Instruction, to submit details of the arrangements and methods which it proposes to adopt for the execution of the Subcontract Works, and no significant alteration to these arrangements and methods can be made without the Contractor's prior consent.

- It sets out definitive programming requirements for the Subcontractor's programme. The Main Contractor is entitled to rely upon the Subcontract Programme when co-ordinating the Works and/or planning its activities and those of other subcontractors. The Main Contractor is required to give the Subcontractor all reasonable cooperation and assistance in order that it may progress the Subcontract Works as required by the Subcontract Programme.
- It provides for Taking-Over of the Subcontract Works when the Main Works are taken over. The default position is that the Subcontract Works are deemed to have been taken over when the relevant part of the Main Works are taken over by the Employer, however, the Subcontractor remains obliged to the Main Contractor until such time as the Main Contractor is relieved of its obligations by the Employer. If the Main Contractor is to take over the Subcontract Works before the relevant Main Works are taken over by the Employer, then this must be stated in Annex C.
- It provides that the Subcontract Defects Notification Period expires on the date of expiry of the Main Contract defects notification period. The Subcontractor has the same obligations after Taking-Over to remedy defects and outstanding works as those set out under Clause 11 of the Main Contract. Performance is certified under the Subcontract only when the Performance Certificate is issued under the Main Contract.
- Clause 20, claims and disputes, is drafted giving three options for subcontracts of differing complexity, value and importance. In particular, it incorporates an option which addresses the issue of multiparty dispute resolution.

Whilst the Subcontractor assumes and performs all the obligations and liabilities of the Main Contractor in relation to Subcontract Works, there are exclusions for setting out, quality assurance, rights-of-way, etc in Annex A. The Subcontractor is required to carry out the Subcontract Works so that there is no breach of contract by the Main Contractor under the Main Contract.

In relation to disputes, the Subcontract provides for the ‘middle ground’ in Clause 20 for Subcontracts of mid-range complexity where there is a probability that a Subcontract dispute is related to a dispute under the Main Contract. The sequence of steps in the first and second alternative dispute resolution methods are given in the Guidance Notes.

In Clause 20, the Main Contractor can notify the Subcontractor that a dispute is related to a Main Contract dispute. There is then a ‘moratorium’ of 112 days: the Subcontract dispute is suspended during this time, giving the Main Contractor the opportunity to obtain a decision on its dispute with the Employer from the Main Contract DAB, however, the decision of the Main Contract DAB is not binding on the Subcontractor. After the moratorium has expired, the Subcontractor has the option to refer the dispute to the Subcontract DAB or directly to arbitration, as it so wishes. The Main Contractor may only refer the dispute to the Subcontract DAB. If the Subcontract dispute is unrelated, either Party can refer it to a Subcontract DAB, to be appointed on an ad-hoc basis.

In the first alternative (simple) option for dispute resolution, there is no provision for the Main Contractor to decide whether a dispute is related or unrelated to a dispute under the Main Contract. The Subcontract dispute is to be resolved by arbitration, and there is no DAB.

The second alternative dispute resolution method is the related/unrelated option. A related dispute arises from a related claim (ie related to a claim under the Main Contract), an unrelated dispute arises from an unrelated claim. If the dispute does not arise from a Subcontractor’s claim, then there is provision for the Main Contractor to decide whether the dispute is related or unrelated to a dispute under the Main Contract. In a related dispute, the Subcontractor gets a share of the benefit that the Main Contractor receives under the Main Contract. If the Subcontractor is not satisfied with that share, then the dispute is treated in the same way as an unrelated dispute, to be decided by a Subcontract DAB.

Conclusion

The FIDIC contract suite provides an internationally accepted platform for Australian companies doing business internationally and domestically. The contracts incorporate many features that should make them attractive to Australian lawyers including fair risk allocation, sensible provisions relating to the certification process and best practice dispute resolution mechanisms. They are not intended to only be consulted when parties fall into dispute, but provide strong day to day guidance. They are excellently supported in this regard by collateral documents and training opportunities.

FIDIC is committed maintaining the integrity of its contracts as standard forms. Whereas Australian Standard form contracts have, in recent years, been somewhat seen as just the starting point for a bespoke contract, a FIDIC contract should not be modified in the same way. The adoption of FIDIC into the Australian engineering and construction scene would see a return to standard form contracting on an international platform.

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MTECC