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7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money (not including Variation)?

While there is no reported case law on Sub-Clause 20.1, Nigerian courts would treat the sub-clause as a valid precondition to Contractor claims. However, Nigerian courts are not likely to allow an Employer, who has breached its obligations and whose breach resulted in the claim that a Contractor did not give notice of within the allowable timeline (in Clause 20.1), to benefit from its own wrong.

8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?

As stated in the answer to question 7, there is no case law on Sub-Clause 20.1 as a precondition for Contractor claims for additional time and/or money. Nigerian courts will treat Sub-Clause 20.1 as a valid precondition to Contractor claims for additional time and money where no modification has been made to the time for completion and/or contract price following the Variation.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute boards decisions enforced in your jurisdiction?

Under Nigerian law, the principle of sanctity of contract is upheld. Thus, Nigerian courts would require parties to give effect to the decisions of dispute boards until they are set aside through a final award in arbitration. However, if a party can

demonstrate that a dispute board's decision was obtained by fraud or misrepresentation, such party may successfully apply to a Nigerian court to set aside the decision.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (ICC, AAA, UNCITRAL, bespoke, etc) are used in construction projects? And what seats?

It is common for parties to choose arbitration as the final stage for dispute resolution. For domestic projects, arbitration is usually conducted under the Arbitration and Conciliation Act 1988. Parties are free to choose the rules and the seat of the arbitration.

11. Are there any notable local court decisions interpreting FIDIC contracts? If so, please provide a short summary.

There is no reported court decision that has interpreted FIDIC contracts in Nigeria.

12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed in your jurisdiction that you would like to share?

No.

Notes

- 1 Baker, Mellors, Chalmers and Lavers, *FIDIC Contracts: Law and Practice* (Informa Law from Routledge 2009), para 8.222.
- 2 As suggested by *ibid*, para 8.222.

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FIDIC Around the World: Kazakhstan

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For convenience, in this questionnaire, clause references are references to clauses in the 1999 Red Book.

1. What is your jurisdiction?

The Republic of Kazakhstan.

2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?

Yes, FIDIC forms are used in Kazakhstan, including the Red Book, Pink Book, Yellow Book, Orange Book and Silver Book. Compared to the Russian Federation, FIDIC forms are used more often in the private sector in Kazakhstan in different projects.

In addition, FIDIC forms are used for infrastructure and road construction projects financed by international banks (the European Bank for Reconstruction and Development, China Development Bank, Asian Development Bank, and others).

In Kazakhstan, there is no bespoke standard construction contract form similar to FIDIC. Other construction contract forms such as ICE, JCT and NEC3, are not widely used in Kazakhstan.

As from 2006, the Ministry responsible for road development, recommended the use of FIDIC forms in almost all road construction projects. In 2011, specific rules were developed by

the Ministry for road construction projects. Under these rules, the Engineer's role is compatible with the general understanding of the Engineer's role in international construction projects. Previously, before 2011, the role of the Engineer was very formal and did not meet international standards in the construction sphere.

In 2015, the Engineer's role in the construction process in Kazakhstan increased further because of significant changes in local construction legislation. The Engineer has become more than just a part of the design development team. The Engineer's roles are: project management; quality and technical supervision; supervision of compliance with the project design documentation; cost control; and the Employer's representation on site.

3. Do FIDIC produce their forms of contract in the language of your jurisdiction? If no, what language do you use?

No, FIDIC does not produce its forms of contract in the Kazakh language. However, FIDIC does produce certain forms in Russian, which is also an official language in Kazakhstan.

In general, contracts are usually executed in two languages: English and Russian.

4. Are any amendments required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what amendments are required?

Yes, substantial amendments are required in order to comply with mandatory legislation.

For example, the contract agreement form must be amended to add essential terms, including the total project cost with reference to a lump sum price or other price mechanism, the timeframe for completion, the detailed subject of

the works, etc. In addition, Sub-Clause 8.7 must be amended, as liquidated damages are not applicable under Kazakh law. Amendments must also be made to Clauses 10 and 11 to reflect that, under Kazakh law, no claims may be brought after signature of the taking over certificate, except for hidden defects.

These examples are not exhaustive.

5. Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what (non-essential) amendments are common in your jurisdiction?

Yes, several amendments are commonly made. For example, the provisions for a dispute adjudication board are unfortunately usually deleted from the contracts, and this option is rarely used in Kazakhstan. The arbitration clause is usually amended to provide for local litigation or local arbitration. In addition, the common law boilerplate clauses are usually amended to be more specific in order to avoid arguments on terminology in the future. Interim payment certificates are generally replaced by monthly acceptance acts (the form of which is established by local legislation). Indemnity terms under Sub-Clause 17.1 are very difficult to enforce in Kazakhstan, except for insurance agreements, and are generally not used. This list is not exhaustive.

More generally, the structure of the contract based on the FIDIC forms assumes the use of two main parts: the General Conditions and the Particular Conditions. In Kazakhstan this approach of amending the general conditions in a separate part of the contract is not usually followed. Instead, parties generally include all changes in the General Conditions and no

Particular Conditions are included as part of the contract. Sometimes, our clients contact FIDIC directly to request their approval to amend the General Conditions. It takes one or two weeks to obtain permission from FIDIC.

6. Does your jurisdiction treat Sub-Clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to Employer claims (save for those expressly mentioned in the sub-clause)?

In some specific situations, yes. There is an obligation to claim (notify) first and to allow time for voluntarily acceptance or denial of the claim.

7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money (not including Variations)?

Yes, Sub-Clause 20.1 works as a condition precedent under Kazakh law.

8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?

Yes, Sub-Clause 20.1 works as a condition precedent under Kazakh law.

9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute board decisions enforced in your jurisdiction?

In Kazakhstan, there are only ten to 20 projects where a dispute

adjudication board has been used under a FIDIC contract. Most of these projects are managed by foreign Contractors and international Engineers.

The local construction market does not recognise dispute boards as an effective institution, mainly because of the impossibility of enforcing dispute board decisions in Kazakhstan. In addition, the local mentality does not allow parties to trust the dispute board professionals.

Artyushenko & Partners is organising joint events with FIDIC and the Dispute Resolution Board Foundation (DRBF) in Almaty to promote the use of dispute adjudication boards, including training in Russian.

10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?

The most common practice is to use local courts, especially for State-owned/financed projects. Alternatively, if arbitration is used, parties generally choose LCIA, ICC and other foreign arbitration institutions with Paris, London or Washington, DC as the seat of arbitration. The third most common choice is local arbitration with the seat of arbitration in Almaty or Astana.

Approximately half of all construction contracts with foreign parties select English law as the applicable law for the contract, which is permissible under Kazakh law. Other contracts usually apply Kazakh law.

Even though Kazakhstan is party to the New York Convention, there are difficulties enforcing arbitration decisions in Kazakhstan.

11. Are there any notable local court decisions interpreting FIDIC contracts? If so, please provide a short summary.

There are not many local court cases involving FIDIC contracts. The problems generally encountered are poor translations of contracts into Russian or a lack of understanding by local judges as to the turnkey approach, the role of the Engineer and other issues arising under FIDIC forms.

12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed in your jurisdiction that you would like to share?

A 2015 reform in Kazakhstan made it possible to carry out the final commissioning of projects without the involvement of any State bodies and has given the Engineer a role compatible with international practice (see our response to question 2 above).

The construction sphere in Kazakhstan is changing. The use of Eurocodes, instead of Soviet Union construction rules, is already legal. The BIM approach to design and development is expected to become mandatory in the coming years. These developments will have an effect on FIDIC construction projects in Kazakhstan in the future.

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