

Kluwer Arbitration Blog

The Annual ICC FIDIC Conference Day 2 Recap: From Resolution to Avoidance

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On 17 and 18 October 2024, ICC and FIDIC co-hosted the annual ICC-FIDIC Conference on International Construction Contracts and Dispute Resolution in Seoul. On the second day, the panels focused more on dispute resolution aspects of construction projects and FIDIC.

Session 5: Part I—Recent ICC and FIDIC Highlights

Day 2 commenced with updates on the latest developments in FIDIC contracts and ICC arbitral awards involving FIDIC forms. Part 1 of the session dealt with international expansion of FIDIC and its role to provide a robust and uniform framework for construction contracts. It was moderated by Ms. Donna Huang (Director of Arbitration and ADR, North Asia, ICC Dispute Resolution Services), with Mr. Vincent Leloup (Founder & Managing Partner, Exequatur and Chairman, FIDIC Contracts Committee) and Ms. [Daduna Kokhreidze](#) (General Counsel, FIDIC) providing updates more related to FIDIC, and Ms. Alya Ladjimi (ADR Counsel, ICC International Centre for ADR) and Ms. [Živa Filipi?](#) (Managing Counsel, ICC International Court of Arbitration) providing insights from an ICC perspective.

The panelists acknowledged how FIDIC forms, now used in more than 170 countries, have become a standard contract in a global sense. It was observed that FIDIC is making meaningful headways into countries that tend to be more adherent to local laws. Notably, FIDIC is also expanding its contract resources by providing translations of key documents and now offers key contract forms in 28 different languages, including Korean.

It was discussed how construction continues to form a large segment of the ICC caseload. Cases involving construction and energy, often with a construction angle account for more than 40 percent of ICC's caseload.

Ms. Ladjimi and Ms. Filipi? also touched upon dispute avoidance. They shared their thoughts on key elements of the [ICC Commission Guide on Effective Conflict Management](#) (the “Guide”) and the [Report on Facilitating Settlement in International Arbitration](#) (the “Report”). As discussed during Session 3 on day 1, the Guide highlights the importance of flexibility in dispute resolution, as well as tailored approaches customized for each case. The panelists also noted that it is often beneficial to continue the efforts to reach a settlement even after the arbitration has already started.

Among others, the Report emphasizes the arbitrators' role and the timing of settlement discussions. The focus of FIDIC's [Practice Note on Dispute Avoidance](#) (the "Practice Note") is more on the use of dispute boards in preventing disputes and facilitating cooperation among the players.

Session 5: Part II—Application of FIDIC Contracts and Arbitration Practices Under Korean Law

Part II focused on how a local law—in this case, Korean law—may affect the application of FIDIC Contracts and international arbitration practices. Professor Seung-Hyeon (Alex) Kim (School of Law, Chung-Ang University) offered his valuable insights into Korean law, with Ms. Filipi and Ms. Kokhreidze also sharing their thoughts.

Professor Kim noted at the outset that although Korean parties often chose FIDIC Contracts, they may encounter challenges due to the different legal systems involved: the Korean legal system being the civil law system and the FIDIC Contracts based on the common law system. This may have a practical impact particularly on (i) the extent of damages arising from fitness of purpose issues, (ii) delays caused by reasons not attributable to the contractor, and (iii) the employer's right to retroactively terminate the contract. Regarding (i), Professor Kim opined that, compared with common law jurisdiction, Korean courts tend to be less strict when deciding whether the work is fit for its purpose and are also more prone to deny the contractor's liability or reduce the same based on the contributory negligence doctrine. Regarding (ii), he noted that Korean courts require the contractor to be at fault for the employers to seek damages based on delay or any other breaches. Regarding (iii), Professor Kim referred to Article 668 of the Korean Civil Code, which forbids retroactive termination of construction contracts for completed buildings or structures. This article can be considered a statutory limit for enforcing Sub-clauses 9.4 and 11.4 of the FIDIC Contracts, which recognize the employer's right to terminate and the contractor's obligation to restore the original state.

Session 6: Navigating Conflict Management, Dispute Avoidance, Dispute Boards, and Arbitration

In the following session, moderated by [Ms. Aisha Nadar](#) (Senior Consultant, Advokatfirman Runeland AB), the panel delved into the effective use of conflict management and dispute avoidance solutions at various levels, from internal management level of the companies (i.e., parties) to engineers, dispute boards, and arbitrators.

[Mr. Marco Ruggiero](#) (Head of CM International of Pini Group) placed great emphasis on the engineer's role in the early stage of pre-action dialogue between the parties regarding risk assessment, before the matter escalates into a claim. It was stated that while the engineer assumes a crucial yet difficult dual role as the employer's representative and an impartial decision-maker, yet can ultimately benefit the employer by de-escalating potential conflicts. Mr. Ruggiero also stressed the importance of the engineer's timely decisions, as delayed determination would inevitably erode trust to the engineer.

[Ms. Nina Tsaturova](#) (Head of Legal & Director, Intelligent Solution LLC) presented her analysis on the parties' compliance with dispute board decisions. According to the 2018 DRBF Statistical

Database, dispute boards have been employed in over 2,700 projects, covering about US\$270 billion in construction costs. A staggering 85 to 98% of cases that obtained recommendations or decisions from dispute boards have not proceeded into arbitration or litigation. Ms. Tsaturova noted that while this may not necessarily mean parties' acceptance of and compliance with the recommendations or decisions as written, it indicates that dispute boards played a meaningful role in conflict de-escalation. Even when the parties commence an arbitration, dispute board decisions may limit the scope of arbitration and assist the arbitral tribunal by providing factual background and analysis based on technical expertise.

Ms. Sae Youn Kim (Partner, Kim & Chang) concentrated specifically on the practicalities of effective conflict management after the commencement of arbitration. It was discussed how once a dispute escalates into arbitration, it becomes increasingly difficult for the parties to initiate settlement discussions as they are reluctant to appear weak. As such, it is more feasible for the parties to include windows for mediation or settlement early in the proceedings, such as during the first case management conference, and incorporating tools like a sealed offer clause in Procedural Order No. 1. Ms. Kim also recommended practical tips that would be conducive to reaching a settlement, such as seeking the tribunal's early decision on preliminary issues when applicable and adopting an opt-out method for mediation/settlement procedures embedded as part of the arbitration proceedings. Ms. Kim highlighted that it is becoming increasingly popular for the parties to seek the tribunal's preliminary views, typically after one round of submission, which may help the parties settle prior to the more costly stages and concentrate on key issues if the arbitration continues.

Session 7: Disruption

Moderated by **Mr. James Perry** (Partner, PS Consulting and Member of the FIDIC President's list of dispute board adjudicators), panelists **Dr. Helena Hsi-Chia Chen** (Partner, Chen & Chang, Attorneys-at-Law), **Mr. Mukul Soul** (APAC Managing Director, Diales), and **Ms. Marianne C Ramey** (President, Project Advisors International LLC) shared their experience and insights on a number of related issues, ranging from documentation and proof of the different components of a claim for disruption to how they are addressed on site and in dispute resolution.

The panel started by defining disruption and distinguishing it from delay. It was clarified that delay is measured in terms of critical path and relates to changes in the Time for Completion, whereas disruption results in a loss of efficiency for both critical and noncritical work activities, leading to increased costs.

The panel discussion then unfolded around the difficulty of proving the claim and therefore, the importance of records and documentation—"records, records, and records." While it is not always prioritized in practice, it is important to maintain thorough and correct records on site, as records are what "transform a narrative from a claim to inconvertible evidence" in dispute resolution. The main reason that losses arising from disruption is very difficult to recover is that they are not substantiated enough, mainly due to a lack of records and documentation.

The panel then moved on to provide a snapshot of disruption analysis, including the choice of methodology, the identification of disruptive events, productivity and causation analysis, and quantification of disruption. The panel emphasized choosing the most appropriate analysis method

and establishing a clear cause-effect relationship between disruptive events and productivity loss.

The panel also touched on the issue of notice periods and prescription periods. As discussed during Session 1 on day 1, whether a party is time-barred from belatedly raising a disruption claim is largely dependent on who is hearing the case. This may be particularly problematic for parties from certain cultures.

Session 8: Closing Remarks

Ms. Filipi? and Ms. Kokhreidze jointly concluded the two-day conference with their closing remarks. Expressing appreciation to the Ministry of Justice of Korea and other sponsors, they emphasized the importance of Asia, with 25% of ICC Arbitrations involving Asian parties, and reiterated the importance of dispute resolution and avoidance, on which both ICC and FIDIC strive to provide more effective and efficient guidelines. They highlighted ICC and FIDIC'S commitment to continued capacity and awareness building in all parts of the world, including Asia, regarding dispute avoidance and resolution.

Concluding Thoughts

While there may be slight differences in factors that different players triaged, the conference showed that all players—employers, contractors, subcontractors and suppliers, experts, counsel, and institutions—see eye-to-eye on steps that are necessary to further develop and expand the construction industry: the right use of standard contracts, clearer guidelines on issues such as concurrent delay and notice of claims, understanding of local laws and cultures, and efficient, economic, and less antagonistic method of avoiding or resolving disputes. ICC's Guide and Report, as well as FIDIC's Practice Notes, reflect increasing demand for these dispute avoidance and resolution methods and serve as tools to promote them. This year's ICC-FIDIC conference showed that there is great interest in and demand for dispute avoidance and resolution, including those in accordance with the FIDIC.

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