

Kluwer Arbitration Blog

The Annual ICC FIDIC Conference Recap (Part I): Challenges and Emerging Trends in Construction Dispute Resolution

Bami Yoo (Assistant Editor for East and Central Asia) (Lee & Ko) and Seung-Woon Lee (Lee & Ko LLP) · Tuesday, November 5th, 2024

On 17 and 18 October 2024, the International Chamber of Commerce (ICC) and FIDIC co-hosted the annual ICC FIDIC Conference on International Construction Contracts and Dispute Resolution in Seoul. During the two-day conference, the speakers presented an update on developments and trends in the construction industry while sharing their insights into contracts and disputes. This part reports on the first day, while part 2 outlines to the second day.

Welcome and Keynote Session

Welcoming remarks from [Ms. Daduna Kokhraidze](#) (General Counsel, FIDIC), [Ms. Catherine Karakatsanis](#) (President, FIDIC), and [Ms. Živa Filipi](#) (Managing Counsel, ICC International Court of Arbitration) signaled the beginning of the conference. It was followed by the keynote session, chaired by [Mr. Kevin Kim](#) (Founding Partner of Peter & Kim), with [Professor Hong-Sik \(Justin\) Chung](#) (Deputy Minister for International Legal Affairs, the Ministry of Justice of the Republic of Korea) and [Mr. Jae Wan Lee](#) (Chairman and CEO, Sekwang Engineering Consultants Co., Ltd. and former President, FIDIC) as keynote speakers.

Professor Chung highlighted the changing industry landscapes of Korean contractors. The statistics show that the overseas project order of the top ten Korean contractors decreased sharply by 50%—from \$64.9 billion in 2012 to \$33.3 billion in 2023. This sharp decrease is almost entirely attributable to an extreme decrease in plant projects—\$39.5 billion in 2012 to \$1.8 billion in 2023. While Korean contractors have become more cautious in bidding for new projects, they have been gradually transforming their business portfolios to focus on public-private partnership (PPP), independent power producers (IPP), and renewable energy projects.

Mr. Lee concluded the keynote session with the engineering perspective of FIDIC. He stressed the need for better representation of the Korean engineering industry in the international construction market, and the role that the Korea Engineering and Consulting Association (KENCA) could and should play in the endeavor. He also highlighted that collaborating with FIDIC would be instrumental in expanding the Korean engineering industry in the global market.

Session 1: ICC, FIDIC, and Korean Contractors Roundtable with Korean In-House Counsel

A panel of Korean contractors, moderated by [Mr. Ki Jeung Park](#) (Partner, Yulchon LLC and Chair, Society of Construction Law), discussed issues that are becoming increasingly relevant to the construction industry.

Ms. Suh-Young Lauren Hong (Senior Legal Counsel, LG Energy Solution) offered her insight on intellectual property disputes in the industry. Particularly with IP licenses that involve policy concerns such as climate change, courts in different jurisdictions—in *Siemens v. GM*, the courts in the UK and the US—have rendered seemingly conflicting judgments. She observed that even when companies enforce their IP rights, courts have begun to consider the potential adverse effects of climate change and other policy concerns before deciding whether to force infringers off the market.

Mr. Jin Young Kim (In-House Counsel and Vice President, Doosan Enerbility) discussed a more classical topic of concurrent delay. While the FIDIC's 1999 Silver Book does not mention concurrent delay, the 2017 version requires the parties to adopt rules and procedures to deal with this issue. Many contracts now include an anti-concurrency clause, where the contractor would not be entitled to an extension of time for concurrent delays. In 2017, the English court held that there is no policy reason why such anti-concurrency clause should not be upheld (*North Midland Building Ltd v Cyden Homes Ltd* [2017] EWHC). Mr Kim noted that given the considerable imbalance of bargaining power between the employer and the contractor, it is often very difficult for the contractor to negotiate for a fairer concurrency clause. He concluded by urging FIDIC to provide clearer and fairer guidelines on the issue of concurrent delay.

[Mr. Kyoungho Kim](#) (Head of Legal, Onejoon Co., Ltd) offered his insight on subcontract forms from the subcontractor/supplier side. He highlighted that many subcontractors choose to use the same FIDIC form as the main contract, which may lead to some contract clauses being impractical and unenforceable. For instance, subcontracts in Korea are subject to certain mandatory legal protections for policy reasons. While FIDIC or its Guidelines allow for pay-when-paid clause, deduction for retention, or set-off against a subcontractor, these may not be allowed in Korea.

Mr. Jaewon Li (Team Leader of Disputes Resolution Team, Hyundai E&C) continued the session, discussing notice of claim, which remains one of the most crucial issues, particularly because time-bar disputes are inherently associated with all-or-nothing outcomes. He stressed that problems tend to arise particularly with the second time bar, where a party fails to submit a comprehensive and fully detailed claim, which was a key concern for contractors. He also highlighted the importance of governing law in determining whether a party is time-barred from raising a claim due to any non-compliance with notice of claim procedures.

The final speaker of the roundtable, Mr. Kyungjoon Park (Legal Counsel, GS Engineering & Construction) addresses the back-to-back contracts in PPP, typically one concluded between a special purpose vehicle (SPV) that the Government Contracting Authority establishes and the Government Contracting Authority, and the other between the SPV and the EPC contractor. He pointed out that inconsistent interpretations of these contracts may lead to project delays and/or disputes. He also shared his experience where the employer took opposite positions towards the contractor and the lender in terms of the provisional completion, which escalated to a dispute between the contractor and the employer, and also between subcontractors and the contractors.

Session 2: Variations vs Claims

In the following session moderated by [Ms. Yasemin Çetinel](#) (Founding Partner, Cetinel Law Firm, Turkey), the panel explored the issues of variations and claims, focusing on their distinction and highlighting practical implications and solutions based on their experience.

[Mr. Peter Caldwell](#) (Independent Arbitrator and Mediator, Caldwell Ltd.) provided a historical background and characteristics of variations and claims in construction projects. He shed light on the often-overlooked role that the governing law plays, stressing that, particularly with the issue of damages, civil law tends to require fault of a party, and may be more sympathetic to the contractor if a breach has been caused by reasons other than the contractor's fault, while common law tends to take a strict-liability approach.

[Ms. Helen Hyunkyung Lee](#) (Partner, HFW, Singapore) noted that many instances may qualify either as a variation or a claim depending on how they are characterized. It may often be easier to seek additional payment on the basis of variation, as filing a claim requires providing financial information and proving entitlements to costs. In addition, addressing accountability issues for the employer can be more challenging. From the employer's point of view, it is also easier to internally approve a variation because it implies added value, rather than accountability.

[Mr. Vincent Leloup](#) (Founder & Managing Partner, Exequatur, France and Chairman, FIDIC Contracts Committee) concluded the session by providing his insights from a FIDIC perspective. He gave a snapshot of claims procedures under the FIDIC's 2017 Yellow Book, highlighting that variations are expressly excluded from money/time claim procedures. He then discussed several common misconceptions that FIDIC users may have. For example, making a claim for the time and price is not the only available remedy when the contractor seeks to challenge the engineer's opinion regarding the nature of its instruction (i.e., whether the engineer's opinion constitutes a variation). The contractor may seek remedy through a Sub-Clause 20.3(c) claim (claim for entitlements other than time and price), followed by an agreement or determination process.

Session 3: Oxford Style Debate on the Necessity of Dispute Boards

The conference took a more dynamic turn with the start of the afternoon session. With [Mr. Taner Dedezade](#) (Partner, Howard Kenedy) chairing the debate, [Ms. Danna Er](#) (Partner, Eldan Law) and [Ms. Engy Serag](#) (Executive Director, Contracts & Operation Commercial, Orascom Construction) argued in favor of dispute boards, that they were vital for dispute avoidance, and [Mr. Charles Nirac](#) [Mr. Charles Nairac](#) (Member, ICC International Court of Arbitration and Partner, White & Case LLP) and [Mr. Nicholas Turner](#) (Partner, Pinsent Masons) took up the opposing side.

The proposition team side argued for the benefit of flexibility and the opportunity for the dispute resolution board to serve as a channel of communication and transparency to all players. The opposition team highlighted that the claimant can effectively ambush the respondent given that the entire process only takes 84 days, and that the board, in reality, serves as a precursor to arbitration.

Session 4: Efficient Use of Experts and Other Case Management Best Practices in Construction Arbitration

The conference turned the conversation to the role and use of expert witnesses. Chaired by [Mr. Peter Rosher](#) (Partner, Reed Smith LLP), this interactive session had [Ms. Ellen Alexander Wong](#) (Senior Consultant at HKA) present her thoughts from the perspective of an expert, and [Mr. Peter Anagnostou](#) (Partner at Gowling WLG) shared his insights from a counsel's point of view.

Regarding the timing of engaging experts, Mr. Anagnostou mentioned that typically the parties engage technical experts first to understand the nature of the problem, then move on to delay experts and finally quantum experts. He is in favor of engaging delay experts from early stages or, at the latest, prior to the document production stage. As a delay expert herself, Ms. Wong discussed the importance of engaging a delay expert at the right moment in light of building the common database of evidence needed for analysis, choosing the most appropriate and practical methodology, and setting the right baseline, which all require review of a very large amount of documentation and therefore may prove to be a challenge under a tight timeline.

The session also addressed expert witness testimony during a hearing, focused specifically on the effectiveness of hot-tubbing. Ms. Wong noted that the effectiveness of hot-tubbing is heavily dependent on personality, experience, and language of the experts. Mr. Anagnostou agreed with Ms. Wong, adding that he would ensure a fair procedure that would give each expert comparable voice. Mr. Rocher commented that his past experience with hot-tubbing had been very effective, and that counsel also had the added benefit of finding out issues that the Tribunal considered material.

Concluding Thoughts

The first day of the Annual ICC-FIDIC Conference explored the evolving challenges in global construction and the relevance of both emerging and traditional issues. Industry experts discussed how international arbitration and dispute avoidance mechanisms can respond to these challenges, highlighting the importance of understanding local laws and the need for harmonized and clear guidelines. These themes set the stage for the second day of the conference, where more emphasis would be placed on efforts made by ICC and FIDIC on responding to the industry's dynamic needs.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe [here](#). To submit a proposal for a blog post, please consult our [Editorial Guidelines](#).

This entry was posted on Tuesday, November 5th, 2024 at 8:32 am and is filed under [Construction](#), [Dispute boards](#), [Experts](#), [FIDIC](#), [ICC](#)

You can follow any responses to this entry through the [Comments \(RSS\)](#) feed. You can leave a response, or [trackback](#) from your own site.