

Internationalisation of the Australian Construction Market: Case for Using FIDIC Contracts

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Abstract: Increasing foreign direct investment in Australia has encouraged new participants to enter the Australian Construction Market. In this context construction contracts increasingly involve cross border transactions whereby the Principal, the Contractor, or both, are either foreign entities or have parent companies from foreign jurisdictions. Governments undertaking large scale infrastructure projects and looking for value for money are also reducing barriers to entry through free trade agreements (FTAs) and encouraging competition between Australian contractors and foreign contractors. Given the internationalisation of the Australian Construction Market and the increasing size, scale and value of projects, it is questionable whether standard form contracts used in Australia, such as those published by Standards Australia (AS), remain apposite. This paper discusses some of the new foreign contractors who have entered to the Australian Construction Market in recent years. The paper discusses the three main *Fédération Internationale des Ingénieurs-Conseils* (FIDIC) Contracts, Construction (Red Book), Plant and Design Build (Yellow Book) and EPC Turnkey (Silver Book). The treatment of key concepts in the FIDIC Contracts including Unforeseen Site Conditions (Latent Conditions), Extensions of Time, Delay Damages, Variations and Dispute Resolution is compared to the AS Contracts and Construction Law in Australia. The advantages and disadvantages of using the FIDIC Contracts are considered. The paper also discusses judicial consideration of the FIDIC contracts. The impact of applicable regulation, such as Security of Payment legislation, Contractor Licencing and Foreign Contractors Withholding Tax, is also discussed. The use of the FIDIC Contracts in foreign jurisdictions such as in the Middle East and by multilateral development banks (MDBs) is considered. The paper concludes that the forms published by FIDIC are appropriate for projects in Australia where at least one of the parties may be a foreign entity.

Stream: The future of the delivery of public infrastructure

Keywords: construction contracts, major projects, FIDIC, foreign contractors' withholding tax, free trade agreements.

1 Introduction

This paper considers the appropriateness of using the FIDIC Contracts in Australia and the legal issues arising as a result.

2 Australian Construction Market: New Foreign Players

Table 1: Example of Foreign Contractors Active in the Australian Construction Market*

Foreign Contractor	ACN / ARBN	Speciality	Example Current Project(s)	Contract	Parent Company	Country of Origin
Samsung C&T Corporation	ARBN 160 079 470	Multiple	Roy Hill Iron Ore Mine, WA	EPC	Samsung C&T Corporation	South Korea
Ghella Pty Ltd	ACN 142 392 461	Infrastructure (Tunnelling)	Legacy Way, Brisbane (in JV with BMD and Acconia)	PPP / Concession	Ghella S.p.A	Italy
Acciona Infrastructure Australia Pty Ltd	ACN 140 915 251	Infrastructure (Roads, Water)	Legacy Way, Brisbane / Toowoomba Second Range	PPP / Concession	ACCIONA Infraestructuras SA	Spain

Consolidated Contracting Company Australia Pty Ltd	ACN 140 609 052	Multiple	Crossing Australia Pacific LNG and QCLNG Pipelines, QLD (in JV with McConnell Dowell)	EPC	Consolidated Contractors Company	Greece
VINCI Constructions Australia Pty Ltd / Entrepose Group	ACN 166 804 904	Multiple	Wheatstone LNG, WA (in JV with Thiess Pty Ltd)	EPC	VINCI	France
Ferrovial Agroman (Australia) Pty Ltd	ACN 150 820 116	Infrastructure (Roads)	Toowoomba Second Range Crossing	PPP / Concession	Ferrovial	Spain
Técnicas Reunidas, S.A. (TR)	ARBN 159 554 686	Process Plants / Oil & Gas	Burrup Technical Ammonium Nitrate, WA Santos GLNG	EPC	Técnicas Reunidas, S.A	Spain
Saipem Australia Pty Ltd	ACN 000 544 507	Oil & Gas	LNG, Qld / Browse FLNG, WA	EPC	Saipem S.p.A.	Italy
China Petroleum Engineering & Construction Corporation (Australia) Pty Ltd	ACN 159 909 574	Oil & Gas	Arrow Energy - Daandine Expansion Project	Construction Services	China Petroleum Engineering & Construction Corporation (CPECC)	China
Hyundai Engineering and Construction Co., Ltd (HDEC)	Not Known	Multiple	Rex Minerals – Hillside Copper Project (JV with AECOM)	ECI	Hyundai Motor	South Korea
Bouygues Construction Australia Pty Ltd	ACN 144 013 801	Infrastructure	North Strathfield Rail Underpass	Alliance	Bouygues S.A.	France

*Excludes long established Australian Contractors with Foreign Owners: e.g. Thiess and Leighton (CIMIC)(owned by Hochtief, Germany, ACS, Spain), John Holland (China Communications Construction Company Limited (CCCI), China), Laing O'Rourke (Laing O'Rourke, UK), Brookfield Multiplex (Brookfield Asset Management, Canada), McConnell Dowell (Aveng Limited, South Africa) and Clough (Murray & Roberts, South Africa) and Foreign Contractors established in Australia for decades: e.g. . Fluor Australia Pty Ltd (Fluor Corporation, USA) and Bechtel Australia Proprietary Limited (Bechtel Corporation, USA).

3 FIDIC Contracts

FIDIC is the French acronym for the International Federation of Consulting Engineers (in French: *Fédération Internationale des Ingénieurs-Conseils*), headquartered in Geneva, Switzerland. FIDIC is a true international organisation with 101 members and associates from across the world from both common law and civil law jurisdictions. FIDIC celebrated its centenary in 2013. Consult Australia (formerly the Association of Consulting Engineers Australia (ACEA)) is the Australian member of FIDIC and it has been a member since 1952. The FIDIC Contracts were based originally on the Institution of Civil Engineers (ICE) forms from the United Kingdom and were first published in 1956.¹ The use of the FIDIC Contracts is widespread throughout the world, in particular due to such contracts being mandated by the World Bank and the acceptance of FIDIC as the accepted standard in jurisdictions without their own standards, such as in the Middle East.²

3.1 Rainbow Suite

Table 2: FIDIC Contracts (Rainbow Suite)

Colloquial Name	Year of Publication	Full Name	Scope
Red Book or CONS	1999	Conditions of Contract for <u>Construction</u> (First Ed. 1999). For Building and Engineering Works designed by the Employer.	Construction Contract
Yellow Book or P&DB	1999	Conditions of Contract for <u>Plant & Design-Build</u> (First Ed, 1999). For Electrical & Mech. Plant & For Building & Engineering Works Designed by the Contractor.	Design and Construct Contract (D&C)
Silver Book or EPCT	1999	Conditions of Contract for <u>EPC Turnkey Projects</u> (First Edition, 1999)	EPC Turnkey

The Rainbow Suite of FIDIC Contracts are intended for use for major works. Each Contract contains 20 Clauses, each with numerous sub-clauses. CONS and P&DB are administered by an Engineer (the equivalent to a Superintendent in the Australian Standards Contracts) whereas EPCT is intended to be a two party contract (without independent administration by the Engineer) where the Employer appoints an Employer's Representative as its agent. The intention of EPCT is for the EPC Contractor to assume more risk than usual in construction contracts, for example, Clause 4.11 [*Sufficiency of the Contract Price*] expressly confirms the common law position that the Contract Price covers all things necessary for the design, execution and completion of the Works including the remedying of defects.

FIDIC also publishes a number of other forms of contract to supplement the Rainbow Suite:

Table 3: Other FIDIC Contracts

Colloquial Name	Year of Publication	Full Name	Scope
JV Agreement	1992	<u>Joint Venture</u> (Consortium) Agreement, 1st Ed 1992	Joint Ventures
Sub-consultancy Agreement	1992	<u>Sub-Consultancy</u> Agreement, 1st Ed 1992	Sub-Consultant Services Construction
Green Book	1999	The <u>Short Form</u> of Contract (First Edition, 1999)	Contract – Small Value
Blue Green Book	2006	Form of Contract for <u>Dredging</u> and Reclamation Works (First Ed. 2006)	Dredging Contract
White Book	2006	Client/Consultant Model <u>Services Agreement</u> , 4th Ed	Consulting Services
Gold Book	2008	Conditions of Contract for <u>Design, Build and Operate</u> Projects (2008 Gold Book; 1st Ed)	Design, Build and Operate (DBO)
Subcontract	2011	Conditions of <u>Subcontract</u> for Construction (First Edition, 2011)	Subcontract

3.2 Multilateral Development Bank (MDB) Harmonised Edition

In addition to the FIDIC suite of contracts, in 2005 FIDIC published a version of the Red Book for use under licence by Multilateral Development Banks (MDBs) such as the World Bank and Asian Development Bank and aid agencies like AusAID, called the MDB Harmonised Construction Contract General Conditions (MDB Edition). The latest version of the MDB Harmonised Construction Contract was published in June 2010.

It is beyond the scope of this paper to consider the detail of the MDB Edition. FIDIC has published a FIDIC Contracts Guide Supplement for the MDB Harmonised Construction Contract.³ A paper by Donald Charrett lists the specific amendments to the Red Book in the MDB edition such as reductions to contractor risk, specific requirements with respect to labour, health and safety and prohibition of corrupt and fraudulent practices.⁴

3.3 FIDIC Guidance and Articles

For the Rainbow Suite, FIDIC publishes an excellent 358 page guide that discusses each of the three major FIDIC Contracts.⁵ The format of the guide contains each of the 20 Primary Clauses from each Contract (plus Sub-Clauses) in a side by side format with annotated commentary on each, including comparing the effect and risk allocation between each of the three contracts. The FIDIC Guide is useful for assisting the parties, administering engineer and the courts in understanding the background of how the contracts are to work.⁶

In addition to the primary FIDIC Guide, as FIDIC is used across the world there is also extensive literature published on the FIDIC Contracts. FIDIC itself has on its website a list of over 100 resource articles published on FIDIC Contracts including links to PDF copies of the articles (see: <http://fidic.org/node/6159>) (accessed 11 September 2015).

3.4 Dispute Resolution under FIDIC Contracts

Clause 20 of the FIDIC Contracts concerns claims, disputes and arbitration.⁷ As the FIDIC Contracts are intended for use in international transactions, the FIDIC Contracts include a staged dispute resolution process. After the Contract has made its claim (Clause 20.1 [*Contractor's Claims*]) the first stage of dispute resolution is before a Dispute Adjudication Board (DAB) of one or three members (as nominated in the Particular Conditions of Contract)(Clauses 20.2 – 20.4). The appendix to the FIDIC Guide contains a “General Conditions of Dispute Adjudication Agreement” for the DAB’s engagement. After the DAB has made its decision, unless a party provides a “notice of dissatisfaction” within 28 days after it received the DAB’s decision, the DAB’s decision is expressed by Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] to be final and binding on the parties, although enforceability of the DABs decision is questionable (see below). If a notice of dissatisfaction has been given and within time, thereafter, the parties are then obliged to attempt to settle the dispute amicably, however arbitration may be commenced within 56 days after the day the notice of dissatisfaction has been given, even if no attempt at amicable settlement has been made (Clause 20.5 [*Amicable Settlement*]).

An arbitration under the FIDIC Contracts is finally settled by three arbitrators under the Rules of Arbitration of the International Chamber of Commerce (Clause 20.6 [*Arbitration*]). A failure to comply with the DABs decision may itself be also referred to arbitration (Clause 20.7 [*Failure to Comply with a Dispute Adjudication Board's Decision*]). Also, a dispute may be referred to arbitration where there is not DAB in place because of a party, or the parties’, intransigence, or because the DABs appointment has expired (Clause 20.8 [*Expiry of Dispute Adjudication Board's Appointment*]).

The intent therefore is that all disputes under the FIDIC Contracts unless settled amicably are to be finally determined by arbitration. Given the international use of the FIDIC Contracts, this is important concerning enforcement of the DAB’s decision or that of an arbitral tribunal so that the parties can, if they are incorporated or domiciled in differed jurisdictions, to take advantage of the New York Convention.⁸ The other advantage of ultimate reference of disputes to ICC Arbitration is speed, given under Article 30 of the 2012 ICC Rules, the arbitral tribunal must render its final award within six months of agreement or approval of the tribunal’s terms of reference.⁹

There is some controversy whether an arbitration considering whether a DABs decision, which is deemed to be final and binding under the operation of Clause 20.4, is a hearing de novo or merely a hearing regarding enforcement. The need for the provision is obviously because the DAB’s decision is not an arbitral award to which the New York Convention applies, thus an arbitration must be held so that a party may take advantage of the convention to enforce the DABs award. In *CRW Joint Operation v PT Perusahaan Gas Legara (Persero)*

TBK [2011] SGCA 33 (13 July 2011) it was held by the Singapore Court of Appeal (at [101]) that a binding but non-final DAB decision could not be enforced by arbitration without a full rehearing of the merits, meaning, Clause 20.4 and 20.7 may not have the effect intended. By comparison, in *Peterborough City Council v Enterprise Managed Services Ltd* [2014] EWHC 3193 (TCC) (10 October 2014) it was held (by Edwards-Stuart J. at [28]) that a DABs decision could be enforced by specific performance where, in that case, the right to refer the DABs decision to arbitration had been removed and replaced by the right to enforce the DABs decision before the courts. The later approach is only appropriate where FIDIC is used in a domestic contract.

4 Comparison of AS4902-2000 (Design and Construct) to FIDIC Silver Book (EPCT)

The premise of this article is that, given the number of international contractors active in the Australian construction market, for major works contracts, strong consideration should be given by Employers to using the FIDIC Contracts, at least as a starting point, as opposed to a bespoke contract tailored from the Australian Standards contracts. This is particularly the case where the scope of work involves an international element, such as overseas engineering or procurement or overseas Pre-Assembled Modularisation (PAMs). The author is not alone in making this argument.¹⁰

For the purpose of comparison, the author compares the treatment of key risks in AS4902-2000 General Conditions of Contract for Design and Construct and the FIDIC Silver Book, as an Employer may, for the same scope of work (design and construct), consider using either contract as an appropriate standard form.

Table 4: Key Risk Comparison: AS4902 and FIDIC Silver Book

Risk	AS4902 Clause	AS4902 Risk Allocation	FIDIC Silver Book Clause	FIDIC Silver Book Risk Allocation
Latent Conditions	Clause 25	<u>Principal:</u> the Principal bears the risk if a latent condition as defined in Clause 25.1 arises, as the Contractor is entitled to a deemed variation under Clause 25.3	Clauses 4.10 and 4.12	<u>Contractor:</u> the risk of unforeseeable difficulties, such as unforeseen site conditions, lies with the Contractor, except in the case of Force Majeure.
Extensions of Time	Clauses 34.2 – 34.5	<u>Principal:</u> the definition of <i>qualifying cause of delay</i> and Clause 34.3 allocates the risk of delay for both Principal caused and neutral events to the Principal, with the Contractor only responsible for delay caused by its own breach or industrial conditions or inclement weather occurring after the date for practical completion.	Clause 8.4	<u>Employer:</u> generally under Clause 8.4 (c) and other Clauses where an EOT entitlement is stated (e.g. Clause 4.24 [<i>Fossils</i>]) the risk of delay is allocated to the Employer for Employer caused delays or for delays attributable to the Employer, such as by the Employer's other Contractors. <u>Contractor:</u> the risk of neutral delays is borne by the Contractor.
Delay Damages	Clause 34.9	<u>Principal:</u> Contractor is entitled to claim delay damages for compensable causes, which is defined in clause 1 as any act, default or omission of the Superintendent, the Principal or its	Clauses 2.1, 4.24, 7.4, 8.9, 10.3, 12.4, 16.1, 17.3, 17.4, 19.4 and 20.1	<u>Employer:</u> generally under EPCT the Contractor can claim additional Cost (includes on and offsite overheads but excludes profit unless stated in clause) for Principal caused delays under Clause 2.1 [<i>Right of Access to the Site</i>], finding of fossils etc. Clause 4.24 [<i>Fossils</i>],

consultants, agents or other contractors (not being employed by the Contractor)

Employer caused delay to testing – Clause 7.4 [*Testing*], Employer directed suspension – Clause 8.9 [*Consequences of Suspension*], Employer caused delay to Tests on Completion – Clauses 10.3 [*Interference with Tests on Completion*] and 12.4 [*Failure to Pass Tests on Completion*], Suspension Due to Employer Delay in Financing or Payments – Clause 16.1 [*Contractor’s Entitlement to Suspend Work*], Occurrence of Employer’s Risks (war, riot, pressure waves etc.) – Clauses 17.3 [*Employer’s Risks*] and 17.4 [*Consequences of Employer’s Risks*], Force Majeure – Clause 19.4 [*Consequence of Force Majeure*]. It is submitted a claim for delay damages for breach of Contract for Employer breaches is also not excluded if notified in time under Clause 20.1, although such a claim may be impacted by Clause 4.11 [*Sufficiency of the Contract Price*].

Variations	Clause 36	<p><u>Principal:</u> Superintendent (as agent for the Principal) may direct variations to the WUC; in reply the Contractor provides a variation proposal with proposed EOT and cost adjustments. Price of variation is agreed or otherwise determined by the Superintendent.</p>	Clause 13.1 – 13.3	<p><u>Employer:</u> the Employer has the right to vary the Works, either by an instruction or requesting a variation proposal from the Contractor. EOT and adjustment to the Contract Price is agreed or otherwise determined by the Engineer or Employer (for EPCT) under Clause 3.5 [<i>Determinations</i>].</p>
Force Majeure / Frustration	Clause 40	<p><u>Contractor and Principal:</u> if frustration at law the Contract is terminated, the Contractor gets paid cost but no loss of profit, Principal bears costs of completion of the work (if possible) or demolition if not possible.</p>	Clause 19	<p><u>Employer:</u> while either party can declare Force Majeure, it is Contractor who if prevented from performing the Works by Force Majeure, may claim additional time and costs under Clause 19.4 [<i>Consequences of Force Majeure</i>]</p>

5 Consideration of FIDIC Contracts by the Courts

Given the standard form of dispute resolution is arbitration, it is unsurprising, in the common law jurisdictions of the world at least, that there is been limited consideration of the FIDIC Contracts by the courts. There some notable decisions that give judicial interpretation of some key FIDIC Contract clauses, discussed below.

5.1 Judicial Consideration of FIDIC Contracts by Australian Courts

Sedgman South Africa (Pty) Limited & Ors v Discovery Copper Botswana (Pty) Limited [2013] QSC 105

This decision involved an EPC Contract for construction of the Boseto Copper Mine, with the relevant general terms of contract being an amended form of the FIDIC EPCT “Silver Book”. The matter became before His Honour Justice Phillip McMurdo of the Supreme Court of Queensland, because the parties had nominated that their contract would be governed by Queensland law, even though the location of the Works was Botswana.

The primary issue for consideration before His Honour was the operation of the interim payment regime in Clause 14 [*Contract Price and Payment*] and in particular Clause 14.6 [*Interim Payments*]. The facts of this case were that the applicant EPC Contractor was claiming judgment for an interim payment in the sum of USD\$20,027,470.07 (an amount which included disputed claims for variations) pursuant a Statement at Completion under Clause 14.10, the EPC Contractor’s last claim for an interim payment under Clause 14.6. This claim was despite the existence of the usual DAB and Arbitration provisions in Clause 20. Clause 14.3 [*Application for Interim Payments*] of the FIDIC Silver Book requires the Contractor to submit a “Statement” detailing the amounts to which the Contractor considers himself to be entitled to payment. The Contract under consideration also included a Schedule of Payments, as such Clause 14.4 [*Schedule of Payments*] applied. Under Clause 14.6, the Employer was to “within 7 days after receiving a Statement and supporting documents, give to the Contractor notice of any items in the Statement with which the Employer disagrees, with supporting particulars. Payments due shall not be withheld...” (Note: the standard FIDIC Silver Book provides for the Employer’s response to the Statement within 28 days).

The Employer did not give the notice of disagreement to the Contractor’s Statement within the seven days required, but did give a statement after some 21 days. The applicant EPC Contractor contended that by operation of Clause 14.6 the Contractor’s claim as detailed in its Statement was due and therefore the respondent Employer was precluded from disputing the Statement and therefore was bound to pay the amount demanded.

His Honour found that Clause 14.6 did not operate in the way the EPC Contractor contended. His Honour referred to a number of other provisions of the Contract that applied to determine whether an amount was due, including Clause 3.5 [*Determinations*], which concerns determination of matters under the Contract including, for example, claims for variations (refer Clause 13.3 [*Variations Procedure*] and Clause 20 [*Claims, Disputes and Arbitration*]). He found (at paragraphs [34] and [35]) that Clause 14.6 “does not state that amounts become due by the operation of clause 14.6 itself. Instead, it operates in respect of payments which are due by other terms of the contract, by providing that they are not to be withheld except in the circumstances which it defines.

[35] *In my view, the evident purpose of the Employer’s notice provision in clause 14.6 is to provide information to the Contractor of the amount (if any) likely to be paid in response to the Statement and the basis (if any) for the Employer’s resistance to the payment of the whole of the amount claimed.*” (emphasis supplied)

Under the Silver Book there is no Engineer, acting independently, who issues an Interim Payment Certificate which the Employer is bound to pay. His Honour’s decision in *Sedgman* is consistent with the interpretation of Clause 14.6 of the Silver Book in the FIDIC Guide (at page 245) that the Employer’s notice under Clause 14.6 does not define the Contractor’s entitlement to payment, rather, it is information only regarding the amount the Contractor is likely to be paid. The Employer’s obligation is under Clause 14.7 [*Payments*] to pay the amount due, which is determined solely by the Employer, it is submitted, acting in its discretion. The amount due may be different to the amount in the Employer’s Clause 14.6 notice. Amounts due that may also be claimed under Clause 14.3 include variations approved under Clause 13.3 and determined by the Employer under Clause 3.5 and Claims either agreed or approved by the Employer under Clause 20 or otherwise determined by the DAB or in arbitration.

In summary, *Sedgman* confirms that because EPCT has no Engineer as independent certifier, the Employer’s notice under Clause 14.6 is not a certificate, nor is the Statement deemed to be one in absence of provision of a such a notice either within time or at all.

5.2 Judicial Consideration of FIDIC Contracts by Courts in Other Jurisdictions

Obrascon Huarte Lain SA v HM Attorney General for Gibraltar [2015] EWCA Civ 712 (09 July 2015) (on Appeal from [2014] EWHC 1028 (TCC))

This decision of the England and Wales Court of Appeal (Jackson, Gloster and Floyd LJJ) (dismissing the appeal from an earlier decision of Justice Akenhead) concerns the FIDIC Yellow Book (Plant Design & Build) and in particular the treatment of unforeseeable physical conditions (i.e. latent conditions) under Clause 4.12 and rights of termination by the Employer under Clause 15.2. The analysis in both decisions provides useful guidance to lawyers when advising clients about the proper approach to analysing unforeseeable site conditions and also the approach to Notices to Correct (or notices to show cause under AS Contracts) and termination notices.

The Appellant Contractor Obrascon, a Spanish Contractor, was engaged by the Government of Gibraltar to design and construct a road and tunnel under the eastern end of the runway of the Gibraltar Airport. Famously, the runway at Gibraltar traverses the road such that the existing road has a level crossing closed during takeoffs and landings. The construction method chosen was to build the concrete walls of the tunnel in situ by excavating three trenches into the ground along the tunnel alignment, concreting the roof in situ and then excavating under the concrete roof to form the tunnel. On excavating the trenches, Obrascon discovered that some of the material was contaminated and required either removal to Spain or treatment on a neighbouring spoil yard. The contamination constituted lead from past military activities at the Site and hydrocarbon contamination from aircraft uses. The Contractor also suspended works claiming the design also had to be changed such that the tunnel would be excavated before forming the roof, changing the method of construction of the roof from in situ to pre-cast concrete. The Contractor faced significant delays, such that after 2 ½ years into a 2 year Contract period, the Contractor had only completed 25% of the Works.

The Contractor, facing mounting losses, claimed an extension of time and extra payment for unforeseeable physical conditions under Clause 4.12 [*Unforeseeable Physical Conditions*]. The Employer, on the basis of the Contractor's suspension and delay, advised the Contractor it was failing to proceed with the works "with due expedition and without delay", as required by Clause 8.1 of the Conditions. After 6 months of discussions between the parties about the design with little or no work on Site, the Employer terminated the Contract.

The primary issue considered at first instance and on appeal was whether the contamination was reasonably foreseeable by an experienced contractor at the date of tender, the relevant test under Clause 4.12. At first instance, and on appeal, the court found the existence of contamination, and that there was a substantial quantity of contaminated material, could have been foreseen. His Honour Justice Jackson (with whom Her Honour Justice Gloster and His Honour Justice Floyd agreed) makes some erudite comments about the Contractor's obligations under Clause 4.12 to take positive steps to inform itself about the likely physical conditions to be encountered, rather than accepting the information provided by the Employer for the tender:

"[90].The judge... [at first instance] held that an experienced contractor would make its own assessment of all available data. In that respect the judge was plainly right. Clauses 1.1 and 4.12 of the FIDIC conditions require the contractor at tender stage to make its own independent assessment of the available information. The contractor must draw upon its own expertise and its experience of previous civil engineering projects. The contractor must make a reasonable assessment of the physical conditions which it may encounter. The contractor cannot simply accept someone else's interpretation of the data and say that is all that was foreseeable." (emphasis supplied)

The Court of Appeal also affirmed the first instance decision that the Employer had lawfully terminated the Contract under both Clause 15.2 (a) (failure by the Contractor to comply with a Notice to Correct under Clause 15.1) and 15.2 (c) (failure to proceed with the Works with due expedition and without delay). Justice Akenhead at first instance (at paragraph [317] – [325]) discusses in detail an Employer's rights of termination under English law, comments that were not challenged on appeal (Per Jackson LJ. at [114]).

Justice Akenhead also made the following comments in relation to a Notice to Correct (i.e. notice to show cause) under Clause 15.1 (at [318]);

(a) Clause 15.1 relates only to more than insignificant contractual failures by the Contractor. It could be a health and safety failure, bad work, serious delay on aspects of the work or the like. It will need to be established as a failure to comply with the Contract. Something may have not yet become a failure; for instance the delivery to site of the wrong type of cement may not become a failure until the cement is or is about to be used.

(b) The specified time for compliance with the Clause 15.1 notice must be reasonable in all the circumstances prevailing at the time of the notice. Thus, if 90% of the workforce had gone down with cholera at that time, the period given for compliance would need reasonably to take that into account, even if that problem was the Contractor's risk. It may well be relevant to take into account whether the Clause 15.1 notice is coming out of the blue or if the subject matter has been raised before and the

Contractor has chosen to ignore what it has been told. What is reasonable is fact sensitive. (See for instance Shawton Engineering Ltd v. DGP International Ltd [2005] EWCA Civ 1359 [69])

(c) Clause 15.1 is designed to give the Contractor an opportunity and a right to put right its previous and identified contractual failure.

(d) Given the potentially serious consequence of non-compliance, Clause 15.1 Notices need to be construed strictly but they can be construed against the surrounding facts (see below, Mannai Investment Co Ltd v Eagle Star Assurance Company Ltd [1997] UKHL 19 per Lord Steyn)” (emphasis supplied)

As for clause 15.2 (c), In *Obrascon* His Honour Justice Akenhead sought no need to breakdown the term “due expedition and without delay” into a further test (other than to say it is objective test), it clearly means what it says. It is clear whether or not Clause 8 has been breached by the Contractor for failure to proceed with “due expedition and without delay” is a factual exploration based on the facts of the case. In *Obrascon* His Honour was wholly satisfied (at [357] – [359]) that the Contractor had failed to proceed with due expedition and without delay, the Contractor's inaction resulting in a 2 year delay on a 2 year project.

NH International (Caribbean) v National Insurance Property Development Company [2015] UKPC 37 (6 August 2015)

This decision involves an appeal to the Privy Council from a decision of the Court of Appeal of the Republic of Trinidad and Tobago, that decision an appeal from a decision of an arbitrator in the matter, after a prior appeal at first instance as well. The dispute arose out of the construction of the new Scarborough Hospital in Scarborough, Tobago. NH was engaged by NIPDEC to construct the hospital under the FIDIC General Conditions of Contract for Construction, First Edition 1999 (“the Red Book”). The decision involved an analysis of the arbitrator’s construction of two important clauses in the Red Book, Clause 2.4 [*Employer’s Financial Arrangements*] and Clause 2.5 [*Employer’s Claims*]. Why Clause 2.4 was an issue was the Contractor had terminated the Contract under Clause 16.2 [*Termination by Contractor*] on the grounds of the Employer’s failure to provide reasonable evidence of financial arrangements being in place to fund completion of the hospital. The Privy Council affirmed the arbitrator’s decision that the termination was valid on the basis of his findings of fact that the NIPDEC had failed to provide sufficient evidence, as the arbitrator had concluded Clause 2.4 “*required more than showing that “the employer is able to pay”, let alone that it was enthusiastic about the project. He said that what was required was evidence of “positive steps” on the part of the employer which showed that “financial arrangements” had been made to pay sums due under the Agreement.*” (at [22]).

What is of more significance is the Privy Council’s interpretation of Clause 2.5. Clause 2.5 of the Red Book concerns notice requirements for the Employer’s set offs and cross claims, and is the equivalent to Clause 20.1 [*Contractor’s Claims*]. Clause 2.5 requires the Employer to:

- Give notice with particulars to the Contractor of any claim for payment under any clause of the Contract or otherwise arising out of or in connection with the Contract;
- The notice is to be given as soon as practicable after the Employer becomes aware of the event or circumstance giving rise to the claim;
- The particulars in the notice must specify the Clause or other basis for the claim, including substantiation of the amount and any extension to Defects Notification Period claimed by the Employer.

Under the Red Book (CONS) and Yellow Book (P&DB) the Employer’s claim is determined by the Engineer, in the case of the Silver Book (EPCT) it is determined by the Employer itself.

In *NH v NIPDEC* the arbitrator had considered, after finding termination by NH was valid, NIPDEC’s counterclaims. He held that such counterclaims were not barred by Clause 2.5 because “clear words are required to exclude common law rights of set-off and/or abatement of legitimate cross-claims” and (by implication) the words of clause 2.5 were not clear enough (at [36]).¹¹ That decision was upheld at first instance and by the Court of Appeal in Trinidad and Tobago.

The Privy Council allowed the appeal and disagreed with the arbitrator and first instance and Court of Appeal judges’ interpretation of Clause 2.5. The Privy Council held (at [38]):

“[I]t is hard to see how the words of clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given “as soon as practicable”. If the Employer could rely on claims which were first notified well after that, it is hard to

see what the point of the first two parts of clause 2.5 was meant to be. Further, if an Employer's claim is allowed to be made late, there would not appear to be any method by which it could be determined, as the Engineer's function is linked to the particulars, which in turn must be contained in a notice, which in turn has to be served "as soon as practicable" (emphasis supplied)

The Privy Council went on to hold that " *where the Employer has failed to raise a claim as required by the earlier part of the clause, the back door of set-off or cross-claims is as firmly shut to it as the front door of an originating claim.*" (at [40]).

Finally, and correctly in my view, the Privy Council held Clause 2.5 did prevent the Employer from raising the defence of abatement¹², stating (at [41]):

"The reasoning of Hobhouse LJ [sic – Buxton LJ] in Mellows Archital Ltd v Bell Products Ltd (1997) 58 Con LR 22, 25-30... demonstrates that a provision such as clause 2.5 does not preclude the Employer from raising an abatement argument – eg that the work for which the contractor is seeking a payment was so poorly carried out that it does not justify any payment, or that it was defectively carried out so that it is worth significantly less than the contractor is claiming."

The decision in *NH v NIPDEC* again affirms the importance of both the Contractor and the Employer complying with notice procedures in Contracts and the fatal consequences to claims they would otherwise have for a failure to do so.¹³ It is submitted that on the reasoning of the Privy Council, the same bar to claims should also apply to the Contractor's Claims under Clause 20.1.

6 Advantages of Using FIDIC Contracts in Australia

The advantages to using the FIDIC Contracts for major projects in Australia include:

- **International standard:** FIDIC is a true international standard, familiar to Contractors throughout the world. Parties to a FIDIC Contract and their advisers are familiar with it;
- **Price competition:** foreign contractors may be more comfortable contracting under FIDIC than the AS contracts. This may allow increased bid lists, encourage more price competition amongst tenderers, and ultimately provide value for money for the Employer;
- **Lower bid time and cost:** Contractors unfamiliar with Australian Standards contracts do not have to engage specialist advice regarding the Australian Standards contracts, meaning preparing tenders should be at a lower cost and take a shorter period of time;
- **Practical clauses:** FIDIC contracts are already intended for use on major projects thus have practical clauses which are not contained in the AS contracts, for example: Clause 2.2 [*Permits, Licences and Approvals*](practical clause regarding Employer assistance to Contractor to obtain approvals), Clause 2.4 [*Employer's Financial Arrangements*] (enables the Contractor to request the Employer to provide reasonable evidence appropriate financial arrangements are in place to pay the Contract Price), Clause 4.6 [*Co-operation*] (express duty on the Contractor to co-operate with the Employer and other Contractors working on the project), Clauses 4.8 [*Safety Procedures*] and 6.7 [*Health & Safety*] (express contractual duty re safety obligations), Clause 4.10 [*Site Data*](express duty on Employer to make available site data on subsurface, hydrological and environmental conditions), 4.15 [*Access Routes*] (express duty on Contractor to satisfy itself regarding access routes to Site), Clause 4.18 [*Environment*] (express duty on Contractor re environmental protection), Clause 4.20 [*Employer's Equipment and Free Issue Material*] (express clause regarding risk allocation of Employer Equipment made available to the Contractor and care, custody and control of free issue material issued by the Employer), Clause 4.21 [*Progress Report*] (express progress reporting obligations on Contractor), 5.5 [*Training*], 5.7 [*Operation & Maintenance Manuals*], Clause 15.5 [*Employer's Entitlement to Termination*] (express right for Employer to terminate for convenience), Clause 17.6 [*Limitation of Liability*] (express indirect and consequential loss exclusion and cap on liability a Contract Price unless otherwise agreed), Clause 19 [*Force Majeure*] (force majeure clauses, rather than common law frustration), Clause 20 [*Claims, Disputes and Arbitration*] (staged dispute procedure including Contractor and Employer obligation to notify claims, DAB and then arbitration).
- **Multiple languages:** the FIDIC Rainbow Suite, any many of the other FIDIC standards, are published in up to 20 different languages including those of our major trading partners (Chinese, Bahasa Indonesian, Japanese, French and Spanish). This means lower translation costs where the Contracts need translation into the foreign language of the foreign contractor;

- Bankability: the FIDIC contracts are familiar to international banks including MDBs who use them as a standard. This eases obtaining approval of the Contract by banks and their advisers. Often a banking syndicate will be advised by a foreign law firm who may not be familiar with the AS contracts;
- Less Risk of Disputes: the FIDIC Guide, other FIDIC publications and published papers, provide extensive commentary on the FIDIC Contracts and the intended operation of each Clause. This means there is less disagreement about what a particular provision is intended to mean.

7 Disadvantages of Using FIDIC Contracts in Australia

The disadvantages to using the FIDIC Contracts for major projects in Australia include:

- Unfamiliarity by Local Contractors: local contractors may not be familiar with FIDIC and it may discourage them from tendering, reducing local competition and increase their bid time and costs. This may also advantage international contractors over local contractors;
- Limited Judicial Consideration / Precedent: as FIDIC contracts provide for arbitration there is little guidance from the courts as to the intended operation of particular clauses or precedent to follow. This compares to AS contracts where there are significantly more decisions about the operation of various clauses;
- Not tailored to local laws: FIDIC contracts are intended for international use therefore do not take into account legislation applicable in Australia (such as Security of Payment) or Australian laws and judicial precedent, for example, meaning of consequential loss in Australia;
- Parochialism: Australian Principals, Contractors and their employees and advisers may be wedded to use of the AS contracts through parochialism or a patriotic loyalty to use “our standard”. This means that there may be resistance to the use of FIDIC;
- DABs: Australia has limited experience with Dispute Adjudication Boards, although interest in and possibly experience of Australians being appointed to DABs, is increasing. The DAB process, followed by ICC Arbitration, is too expensive except for major projects.

8 Legal Considerations to Using FIDIC in Australia

FIDIC seeks to discourage amendment of their forms on the basis, in FIDIC’s view, the FIDIC Contracts are “deemed to be suitable in all cases, based on thousands of successful projects around the world”.¹⁴ However, FIDIC acknowledges that Particular Conditions (i.e. special conditions) may be required to address project specific issues on a case by case basis.

In the author’s experience, compared to most jurisdictions in the world, the Construction industry in Australia is highly regulated. Any project proponent should therefore do an appropriate and thorough review of applicable legislation before finalising any tender documents based on the FIDIC Contracts. To use the FIDIC Contracts in Australia most certainly requires Particular Conditions, in particular with respect to the impact of legislation. Some of those considerations include the following.

8.1 Security of Payment

The payment claim and certification procedures in the FIDIC Contracts, with the Engineer being the certifier of contractual claims under the CONS and P&DB Contracts, and the Employer under EPCT (Clauses 14.6 [*Issue of Interim Payment Certificates*], Clause 3.5 [*Determinations*] for determination of variation claims and Clause 20.1 [*Contractor’s Claims*] for determination of other contractual claims including EOT claims, in each FIDIC Contract) is subject to the application of the Security of Payment Acts, in particular the East Coast Model¹⁵ that operates as a separate progress payment regime to the terms of the Contract. As such, Particular Conditions are wise to deal with the mechanics of the Security of Payment legislation. The West Coast Model, that does not seek to usurp the parties agreed terms of Contract, will require less Particular Conditions. In any event, in the author’s experience, the FIDIC Contracts and in particular the Silver Book, require Particular Conditions with respect to the measurement of actual progress and breakdown of the Lump Sum Contract Price.

8.2 Contractor Licencing

Any foreign contractor seeking to perform construction work in Australia should ensure that prior to starting work they hold the appropriate licences. For example, in the author’s home state of Queensland, the performance of building work may only be undertaken by Contractors holding the appropriate licences with the Queensland Building and Construction Commission (QBCC). Sections 42 (3) and (4) of the *Queensland*

Building and Construction Commission Act 1991 (Qld) provide that an unlicensed building contractor may only claim reasonable remuneration which only includes subcontract costs but no profit or reward for their own labour.¹⁶ The requirement for the Contractor to be licenced is confirmed in the FIDIC Contracts by Clause 1.13 [*Compliance with Statutes, Laws and Regulations*], that includes an indemnity in favour of the Employer if the Contractor fails to do so.

8.3 Limitation of Liability

Clause 17.6 [*Limitation of Liability*] includes an indirect and consequential loss exclusion, with the meaning of “indirect and consequential loss” not otherwise defined. Because of the unsatisfactory state of the law in Australian jurisdictions regarding the meaning of indirect or consequential loss¹⁷, parties using the FIDIC Contracts in Australia would be wise to include an expanded definition of what they intend regarding the exclusion of indirect and consequential losses.

8.4 Tax Considerations Including Foreign Contractors Withholding Tax

Almost all major projects will involve overseas procurement of both goods and services and in some cases major parts of the Works itself, in particular if PAMs are used. Obviously both a project proponent and the Contractor have an incentive to minimise the amount of tax payable relating to the project, and as Australia is a high tax jurisdiction, to also lawfully minimise the amount of tax payable in Australia. As a result, on a major project it is prudent to consider whether the Contract should be split into two or more contracts depending on where the engineering, procurement and construction is performed, usually at least into onshore construction and offshore engineering and procurement contracts.¹⁸ Such an exercise necessarily involves splitting the scope of work in each contract to ensure a bright line division between on-shore Works and off-shore engineering and procurement. Consideration should also be given to the logical division of the Contract Price into on-shore and off-shore contract prices depending on where the work is performed.

For a foreign contractor, this necessarily and usually involves establishing a subsidiary in Australia (either a limited liability private company with an ACN or a registered foreign company with an ARBN) so that the subsidiary, and any profits made on the on-shore scope of work in Australia, is subject to the Australian tax regime. Also, in Australia, registration for Goods and Services Tax and the obtaining of an ABN will be important to ensure the onshore contractor can claim input tax credits for goods and services purchased in Australia for the project.

If a foreign contractor does not establish an entity in Australia but provides “works” or “related activities” in Australia, since 1 July 2004 the Principal is obliged (as it is the taxpayer subject to Australian jurisdiction) to withhold 5% from each payment under the Contract and pay it to the Australian tax authorities as withholding tax. The Principal pays such withholding via a PAYG assessment, with the Contractor still obliged to file income tax returns whereupon excessive amounts withheld will be credited. Tax Ruling TR2006/12 *Income tax: withholding on payments to foreign residents for works and related activities* contains detailed guidance about the operation of the foreign contractors’ withholding tax regime. To avoid the application of the regime and payment of Australian tax on overseas activities, it is often wise for a major project to have separate onshore contracts for Australian works and services and offshore contracts for non-Australian works and services. As many countries in the world have withholding tax regime, in the author’s experience, this same principle tends to apply in most jurisdictions.

8.5 Free Trade Agreements

Australia has existing Free Trade Agreements (FTAs) with the United States, Thailand, New Zealand, Singapore, Malaysia, Chile, the parties to the ASEAN-Australia-New Zealand FTA (South East Asian Nations), Republic of Korea (South Korea) and Japan. Consistent with both the cost and tax minimisation objectives of major projects, FTAs between Australia and foreign countries where services are performed can assist the Contractor to reduce project costs through performance of engineering, procurement and modularisation in lower cost countries and the reduction or elimination of tariffs on such goods and services when imported into Australia. This paper discusses by way of example three FTAs, the Thailand Australia FTA (TAFTA) (in force since 1 January 2005), South Korea (KAFTA) which entered into force on 12 December 2014 and the China Australia FTA (CHAFTA) (signed 17 June 2015), which while signed, implementing legislation is yet to be passed by parliament and it is therefore yet to come into force.

FTAs have the effect of reducing tariffs applicable to goods and services procured for a project, and where a zero tariff applies, have the effect of import taxes having no impact at all regardless where the goods and services are performed, effectively liberalising the location of the work without tax consequences. The author expects the FTAs with Korea (and China if implemented) will encourage contractors from those jurisdictions to become

more active in the Australian Construction Market, both in terms of works activities in Australia but also offshore procurement of goods and performance of services such as engineering and project management. The FTAs also have the effect of bilateral improved market access, improved labour market access including visas, and also offer protections against expropriation through ICSID¹⁹ arbitration via the Investor-State Dispute Settlement regime.

8.6 TAFTA

Thailand has significant fabrication capacity and contractors experienced in fabrication of PAMs. Many projects in Australia that have used modularisation techniques have sourced their PAMs from Thailand. Under Australia's commitments under TAFTA, by 2015 Australia has reduced all tariffs on goods of Thai origin to zero, meaning goods including PAMs imported into Australia from Thailand can be imported tariff free provided the procedures in TAFTA are complied. Generally, those procedures required for Thai exporters to obtain a registration from the Thai Department of Foreign Trade, Ministry of Commerce (DFT) and a preferential Certificate of Origin – Form FTA (as required by TAFTA) for the goods being exported.²⁰ TAFTA also includes improved rights of foreign investment of Australian companies in Thailand, permitting for example, 100% Australian ownership of Thai companies providing certain construction services to the public in utilities or transport requiring special tools, machinery, technology or construction expertise and in management consulting services through a regional operating headquarters or associated company or branch.²¹

8.7 KAFTA

South Korea is home to a number of large EPC Contractors including 6 of the 50 largest EPC Contractors by revenue.²² Korea is also Australia's fourth largest trading partner. As such, KAFTA has significance to the relationship between Australian Principals and any Korean contractor engaged for the purpose of a project. Parts of KAFTA relevant to construction projects include:

- Engineers: Mutual Recognition Agreement (MRA): pursuant to KAFTA, Engineers Australia and The Ministry of Science, ICT and Future Planning of the Republic of Korea (MSIP) signed a MRA on 05 May 2015.²³ This MRA when combined with KAFTA rules regarding the movement of natural persons (Chapter 10) will, for example, facilitate the granting by Australia of two year visas with extensions, to Korean specialist intra-corporate transferees with advanced trade, technical or professional skills and experience (see KAFTA – Annex 10A – Parts 5-7) and one year to equivalent contractual service suppliers (KAFTA – Annex 10A – Parts 10-11); and
- Korea itself has a large manufacturing industry and specialist fabrication industry both in PAMs and ship building. For example, in 2012-2013 Australia imported \$257 million dollars worth of pumps and parts from Korea. The reduction of Australian tariffs to zero on such pumps over time under KAFTA will significantly improve the project economics of importing pumps from Korea as opposed to other nations.

DFAT has usefully published a guide to using KAFTA that explains the procedure for applying KAFTA including certificate of origin requirements.²⁴

8.8 CHAFTA

Like Korean contractors, Chinese contractors are increasingly active in Australia, consistent with increased direct foreign investment (\$65 billion in 2014) by Chinese companies in Australia. China is Australia's largest trading partner and the author suggests that with increased direct foreign investment will come Chinese contractors into the Australian market, particularly for majority owned Chinese projects. This is also the experience elsewhere in the world, Chinese contractors follow Chinese money, for example the Coca Codo Sinclair hydroelectric facility in Ecuador, financed by the Export-Import Bank of China and being built by Sinohydro.²⁵

Australia signed an FTA with China on 17 June 2015 and implementing legislation was introduced into Parliament on 16 September 2015.²⁶ According to the Federal Government, CHAFTA is intended to be in operation by the end of 2015.

CHAFTA includes a reduction and eventual elimination of tariffs on imported manufactured goods. All of Australia's FTAs include arrangements with respect to the movement of natural persons, including the removal of labour market testing for intra-corporate transferees (see CHAFTA Chapter 10). Where CHAFTA goes further is a Memorandum of Understanding dated 17 June 2015 regarding "Investment Facilitation Arrangements" (IFAs).²⁷ An IFA will operate separately from Chapter 10.

An IFA will include the following key elements:

- An IFA is a project based deed of agreement between Department of Immigration and Border Protection (DIBP) of Australia, or its equivalent, and the project company, which must be a registered business in Australia (i.e. have an ACN or ARBN);
- a single Chinese enterprise must own 50% or more of the project company, or, where no single enterprise owns 50% or more of the project company, a Chinese enterprise must hold a substantial interest (15% if one enterprise or 40% jointly with other Chinese enterprises);
- there is a proposed infrastructure development project by the project company with an expected capital expenditure of A\$150 million over the term of the project;
- the project must be related to infrastructure development within the food and agribusiness; resources and energy; transport; telecommunications; power supply and generation; environment; or tourism sectors;
- the project company agrees to comply with all Australian laws and regulations;
- the China International Contractors Association (CHINCA)(<http://www.chinca.org>) and the Department of Foreign Affairs and Trade of Australia (DFAT) have recommended the project and the project company meet the criteria;
- the IFA will set out guaranteed occupations and the terms and conditions against which overseas workers can be nominated for a temporary skilled visa for the purposes of the eligible project, with no labour market testing to enter into an IFA, but labour market testing will apply to labour agreements under an IFA; and
- valid for 4 years with possible extension.

Each IFA will be subject to negotiation between DIBP and the project proponent²⁸ including:

- the occupations covered by the IFA project agreement (includes groups 1-4 in *ANZSCO - Australian and New Zealand Standard Classification of Occupations, 2013, Version 1.2* (ABS Publication 1222.0) (i.e. Major Group 1 (Managers), Major Group 2 (Professionals), Major Group 3 (Technicians and Trades Workers) Major Group 4 (Community and Personal Service Workers));
- English language proficiency requirements;
- qualifications and experience requirements; and
- calculation of the terms and conditions of the Temporary Skilled Migration Income Threshold (TSMIT) (currently Employers of 457 visa holders must pay above the TSMIT of \$53,900).

The grant of visas will be subject to meeting all other Australian nomination and visa requirements.

Separate to the IFA MOU, Australia has also agreed to a “side letter” dated 17 June 2015 with the intent to remove the requirement for mandatory skills assessment for Chinese applicants for 457 visas for 10 occupations immediately (including for example, carpenters and electricians) with the aim of removing all such tests in 5 years.²⁹

Once in place, separate to an IFA, each direct employer (including the project company) on the eligible IFA project can seek the endorsement of the project company to enter into a labour agreement under the IFA with DIBP to sponsor and nominate temporary skilled workers to be engaged on the project. A labour agreement will set out the number, occupations and terms and conditions under which temporary skilled workers can be nominated, consistent with the terms of the IFA, and the sponsorship obligations associated with the labour agreement, including any requirements for labour market testing (i.e. demonstration they have tested the Australian labour market and not found sufficient suitable workers). As such, labour market testing will apply not to the IFA, but to labour agreements under it.

All direct employers under an IFA and workers granted visas under an approved IFA labour agreement will be required to comply with applicable Australian laws, including workplace law, work safety law and relevant Australian licensing, regulation and certification standards.

8.9 Comments on IFAs

The agreement for the IFAs under CHAFTA has raised considerable controversy. The CFMEU is vehemently opposed. The Australian Government position is IFAs will not allow unskilled or underpaid Chinese workers to be brought in to staff major projects. The government position is IFAs will provide certainty that investors will be able to access skilled overseas workers, under Australian employment conditions, when suitable local workers cannot be found. The government position is labour market testing will apply.

While the implementation of IFAs remains to be seen, from a review of the MOU and the author's experience in other jurisdictions such as Saudi Arabia (where block visas apply), the author makes the following comments about IFAs:

- the Australian Government (through DIBP) still retains the discretion whether or not to agree to IFAs and also separate labour agreements with project proponents. As such, the extent to which IFAs are agreed and 457 visas are issued is up to a government discretion, although the exercise of that discretion may be subject to administrative review. The exercise of the discretion by DIBP may also be subject to political influence on policy;
- the immigration department (DIBP) rather than the trade department responsible for CHAFTA (DFAT) is administering the IFAs. DIBP is likely to be less enthusiastic about IFAs than DFAT and may take a strict approach to IFA implementation, in particular with respect to labour market testing;
- the threshold value of \$150 million is low and the sectoral application is wide, meaning IFAs could apply to a broad range of activities (hotel construction for example) rather than the narrow resources focus of Enterprise Migration Agreements;
- IFAs potentially apply to a very broad range of occupations, as Groups 1 – 4 of the Australian and New Zealand Standard Classification of Occupations includes hundreds of occupations;
- It is not correct that labour market testing is not required. Labour market testing is not required for IFAs (presumably because IFAs are a framework not an implementing agreement) but is required for labour agreements under an IFA. Potentially DIBP could however waive the requirement for labour market testing. The policy behind IFAs appears to be as a safety net so that Chinese project proponents are assured they can engage adequate labour if Australian labour is not available;
- payments to workers under IFA labour agreements need only comply with Australian law including minimum wages and standards, and project specific enterprise bargaining agreements (EBAs) do not need to apply. This may be subject to the TSMIT minimum of \$53,900. The CFMEU's position that workers on the same project the subject of an IFA may be paid different wages is, in the author's view, correct;
- based on experience in other jurisdictions, Chinese contractors follow Chinese money, hence in my view Chinese companies investing in Australia will be very keen on agreeing IFAs and labour agreements. I expect to see IFAs implemented.

9 Conclusion

The FIDIC Contracts are drafted for use on major projects and have been successfully used on thousands of projects across the world. Major projects in Australia are increasingly being performed by foreign contractors or by local branches of foreign contractors. These facts lead one to the logical conclusion that the FIDIC Contracts should become the standard starting point for construction contracts in Australia where foreign contractors are involved on major projects.

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