

# CONSTRUCTION LAW INTERNATIONAL

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Detailed reports from the ICP sessions in Sydney

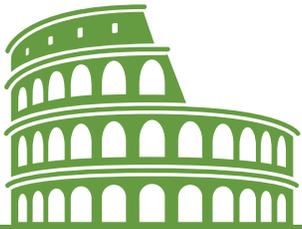


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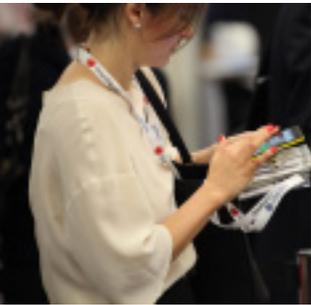


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### International Bar Association

4th Floor, 10 St Bride Street, London  
EC4A 4AD, United Kingdom

Tel: +44 (0)20 7842 0090

Fax: +44 (0)20 7842 0091

[www.ibanet.org](http://www.ibanet.org)

Editorial: [editor@int-bar.org](mailto:editor@int-bar.org)

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## FIDIC Initiative

In 2016, *Construction Law International* initiated a series in which local practitioners answer standard questions about how FIDIC works in their country. Our aim is to print two or three responses per edition, and gradually build up a database of answers to which members can refer easily.

Please send any contributions to [clint.submissions@int-bar.org](mailto:clint.submissions@int-bar.org) in the normal way. If we receive multiple contributions from the same jurisdiction, we will contact the authors as to the best way to combine contributions.

1	What is your jurisdiction?
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?
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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 Variations)?
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	If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?
11	Are there any notable local court decisions interpreting FIDIC contracts? If so, please provide a short summary.
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?



### DENMARK

Peter Fogh

*Plesner Advokatpartnerselskab,  
Copenhagen*

[pfo@plesner.com](mailto:pfo@plesner.com)

**F**or convenience, in this questionnaire, clause references are references to clauses in the 1999 FIDIC Red Book.

#### 1. What is your jurisdiction?

Denmark.

#### 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?

FIDIC forms are not used for domestic projects in Denmark. In Denmark, the contract forms used are the 'General Conditions for the Provision of Works and Supplies within Building and Engineering' (AB92), 'General Conditions for Turnkey Contracts' (ABT93) or 'General Conditions for Consulting Services' (ABR89), which are all considered 'agreed documents', that is, a contract form jointly drafted by representatives for contractors and employers, and for which the *contra proferentem* principle is not relevant.

A new version of these documents is presently being debated. A draft version will be released in late 2017 or early 2018. It is anticipated that it will be named 'AB18'.

For projects of an international nature (large infrastructure projects), the FIDIC forms may be an inspiration for the bespoke contract form used, but other forms, such as NEC3 forms, also inspire the drafting.

Generally speaking, however, the starting point is AB92, ABT93 and ABR89, with substantial modifications.

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

The FIDIC forms of contract are not printed in Danish. If used in Denmark, the English-language version is used.

#### 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?

The contract provisions set out in the FIDIC forms are generally in accordance with Danish law, where freedom of contract is the governing principle. Consequently, no clause needs to be amended in order to honour Danish mandatory law or make the FIDIC form effective under Danish law.

#### 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?

There are no general amendments that one would expect to see in order for the contract form to be used in Denmark. However, Sub-Clause 2.5 and Sub-Clause 20.1 are subject to hard negotiations, as in most other jurisdictions.

#### 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)?

There are no court decisions or (published) arbitration awards dealing with Sub-Clause 2.5. However, it is the general view in Denmark that Sub-Clause 2.5 would be accepted as a valid clause and treated as a condition precedent to claims. In the practical application of the clause, the court or arbitral tribunal looks closely at the specific circumstances, as the consequences may be severe.

#### 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)?

Courts and/or arbitral tribunals accept Sub-Clause 20.1 as valid, but also take the specific circumstances into consideration. The court or the tribunal may, for instance, require clear evidence that the Contractor was actually aware of the specific event leading to the claim, or that it is very evident that the Contractor should have been aware.

#### 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?

In general, we refer to our answer to question 7 above. However, it should be noted that a claim due to a Variation is less likely to be barred for lack of notice if it is obvious that the Variation was instructed and required additional time or money.

**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 major projects in Denmark, dispute boards are often considered and sometimes agreed.

**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?**

Mediation is being seen more often as a dispute resolution mechanism, but arbitration is by far the most common.

The standard contracts (AB92, ABT93 and ABR89) prescribe arbitration as the dispute resolution mechanism. These standard contracts refer to a specific arbitration institute (the Danish Building and Construction Arbitration Board), but sometimes other arbitration institutes, such as the Danish Institute of Arbitration, or ad hoc arbitration are agreed.

It is expected that the new standard contract (AB18) will include mediation as an option and possibly also include dispute review boards.

Domestic Danish courts are rarely used to resolve construction disputes, unless they are disputes between a private property owner and local contractor, with no detailed construction contract.

Arbitration pursuant to the International Chamber of Commerce (ICC) Rules may be referred to in some contracts, but rarely. In engineering, procurement and construction contracts within the energy sector, ad hoc arbitrations, possibly by reference to United Nations Commission on

International Trade Law (UNCITRAL) rules, have been seen.

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

FIDIC contracts have not been interpreted by any local court decisions. They have been considered in a few arbitration awards (published *Kendelser om fast ejendom*, in Danish only), but only in very general terms.

**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?**

FIDIC contracts could be used more extensively in the Danish jurisdiction, or at least serve as an important source of inspiration for bespoke contracts. Much will depend on the final version of the new standard contract, AB18.

**Peter Fogh** is a partner at Plesner Advokatpartnerselskab in Copenhagen in its Energy Law and Infrastructure Group. He specialises in litigation and arbitration, and can be contacted at [pfo@plesner.com](mailto:pfo@plesner.com).



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## NORWAY

**Mikal Brøndmo**  
Haavind, Oslo  
[m.brondmo@haavind.no](mailto:m.brondmo@haavind.no)

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

### 1. What is your jurisdiction?

Norway.

### 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?

FIDIC forms are seldom used for Norwegian construction projects, with the exception of wind farm construction projects, where FIDIC forms are used as a general rule. For wind farm projects, parties typically use the 1999 FIDIC Yellow Book.

In *onshore* construction projects, parties generally use Norsk Standard (NS) forms, which are developed by a committee that consists of representatives from employers, contractors and engineers. In *offshore* construction projects (mainly oil and gas projects), parties generally use Norwegian Fabrication Contract (NF)/Norwegian Total Contract (NTK) forms. These forms were last revised in 2015/2016 through negotiations between representatives from offshore

contractors, and oil and gas companies.

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

No. When FIDIC forms are used, the English-language versions are used.

### **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. Norwegian construction law requires an employer to include certain specific provisions on health, safety and environment and minimum salary in contracts with contractors. The content of these mandatory contractual provisions varies based on the specific project and its allocation of responsibilities and risks. The clauses are fairly standardised, but are still required in every contract.

### **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?**

No. There are no common amendments in the few projects where FIDIC forms are used in Norway.

### **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)?**

Generally, notification clauses with time bars are treated as conditions precedent for employer claims

under Norwegian law. Similar clauses are also included in the NS and NF/NTK forms referred to in question 2 above. However, there is no decisive case law regarding this specific FIDIC sub-clause under Norwegian law.

### **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)?**

Generally, notification clauses with time bars are also treated as conditions precedent for contractor claims under Norwegian law. Similar clauses are also included in the NS and NF/NTK forms. However, there is no decisive case law regarding this specific FIDIC Sub-Clause under Norwegian 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?**

See the answer to question 7 above.

### **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?**

Dispute boards are generally not used as an interim dispute resolution mechanism in Norway.

Both the NS forms (onshore construction) and the NF/NTK forms (offshore construction) include clauses for Project Integrated Mediation (PRIME), which can consist of either an arbitral or mediation panel. The main purpose of PRIME is to provide the parties with a forum for finding amicable solutions to disputes.

Furthermore, the NS forms

include a clause for the provisional decisions of an arbitrator, where either party, until taking over, may request that a dispute be determined by the arbitrator. The NF/NTK forms include a similar clause for requesting a provisional decision from an expert on whether the work in dispute is part of the scope of work. If such a decision has not been submitted to arbitration or court within a predefined time limit, the decision will normally be final.

### **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?**

For Norwegian offshore construction projects (oil and gas projects), arbitration is generally used as the final stage of dispute resolution. Traditionally, ad hoc arbitrations have been the preferred arbitration choice in Norway. However, institutional arbitration seems to be more and more popular, especially International Chamber of Commerce and Stockholm Chamber of Commerce arbitration. For Norwegian oil and gas projects, the Norwegian Government requires all disputes arising from such projects to be resolved through a mechanism with a venue in Norway; the parties may choose between ordinary courts or arbitration (ad hoc or institutional). The venue is normally Stavanger or Oslo.

For Norwegian onshore construction projects, ordinary courts are used more often as the final stage for dispute resolution than arbitration. The apportionment between the two is estimated at approximately 80/20 in favour of ordinary courts. All publicly owned employers use ordinary courts, including for projects where

international contractors are involved. For arbitration in Norwegian onshore construction projects, ad hoc arbitration with the venue in Oslo is the most common choice.

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

There are no notable decisions that interpret FIDIC contracts from Norway's courts of appeal or the Norwegian Supreme Court. With regard to decisions from the first instance courts in Norway, only a few of these decisions are published, and we are not familiar with any decisions interpreting FIDIC contracts from first instance courts.

**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.

**Mikal Brøndmo** is a partner at the law firm Haavind in Oslo. He can be contacted at [m.brondmo@haavind.no](mailto:m.brondmo@haavind.no).



**UKRAINE**

**Volodymyr Yaremko**  
*Sayenko Kharenko, Kiev*  
[vyaremko@sk.ua](mailto:vyaremko@sk.ua)

**F**or convenience, in this questionnaire, clause references are references to clauses in the 1999 FIDIC Red Book.

**1. What is your jurisdiction?**

Ukraine, a civil law jurisdiction.

**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?**

FIDIC forms of contracts are used for some projects constructed in Ukraine, including in particular large-scale infrastructure projects with funding from international financial institutions (eg, the European Bank for Reconstruction and Development, European Investment Bank and International Bank for Reconstruction and Development). Various FIDIC forms have already been used in Ukraine, including the Conditions of Contract for Construction (1999 Red Book), Conditions of Contract for Plant and Design-Build (1999 Yellow Book) and Conditions of Contract for Construction (Multilateral Development Bank Harmonised Edition). The industries in which FIDIC is most commonly used include transport, energy, municipal and port infrastructure.

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

There is no official Ukrainian translation of any of the FIDIC forms. In practice, the contracts are translated on an ad hoc basis for the purposes of each particular project. Bilingual English-Ukrainian or English-Russian versions of contracts are generally executed by the parties.

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

No. However, if there are any discrepancies between the contract and imperative provisions of Ukrainian law, the latter might supersede.

**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?**

It is common to amend FIDIC General Conditions by introducing provisions in the Particular Conditions concerning the details of the procedures of taking over and payment for work, as well as other provisions, to reflect local regulatory requirements.

**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)?**

There is a lack of established practice on this. Ukrainian State authorities,

which usually act as the Employer in FIDIC contracts, are likely to follow the procedure provided in Sub-Clause 2.5 of the 1999 suite of contracts in case of claims against the Contractor.

**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)?**

There is a lack of established practice on this issue. There is a risk, however, that, if the Contractor does not follow the procedure of Sub-Clause 20.1 of the 1999 suite of contracts, the respective claim will be dismissed in case of litigation in Ukraine.

**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?**

There is a lack of established practice on this.

**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?**

There is a practice of using dispute boards or an individual adjudicator's services under FIDIC contracts carried out in Ukraine. The decisions of the boards or an adjudicator might be enforced voluntarily; there is no procedure for their compulsory enforcement. Most likely, a party wishing to enforce such a decision would be required to seek recourse in arbitration or litigation and plead the merits of the dispute once again.

**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?**

It is common to choose arbitration for dispute resolution in cross-border construction projects in Ukraine. At the same time, in some FIDIC contracts, the parties exclude both dispute boards and arbitration in favour of litigation in the courts of Ukraine. In the case of arbitration, the most commonly used rules are the rules of the International Chamber of Commerce or London Court of International Arbitration, as well as the United Nations Commission on International Trade Law) rules for ad hoc arbitration. The rules of the local arbitration institution – the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry – are also chosen by the parties in some projects.

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

There is still a lack of established court practice in Ukraine in relation to FIDIC contracts.

**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?**

The participation of an engineer in the implementation of FIDIC contracts is very atypical for Ukrainian practice. The functions of a FIDIC Engineer overlap with the authorities of a number of State institutions. In order to fill in the legislative gap of the role

of a FIDIC Engineer in Ukraine, the Cabinet of Ministers adopted a resolution on 28 December 2016, No 1065, which introduced the notion of a 'consulting engineer' into the Ukrainian legal framework. However, the resolution exclusively concerns road construction and is the first step only, which generates more questions than answers on the role of a FIDIC Engineer under Ukrainian law.

Usually, an Employer under FIDIC projects carried out in Ukraine is a State authority. This means that public procurement rules apply to the Employer, and the contract is considered to be a 'State procurement contract'. Hence, the Employer might need to take into account, in addition to contract provisions, imperative public procurement rules, which differ significantly from FIDIC provisions, in particular on the adjustment of time or money. In the case of projects funded by international financial institutions, the procurement rules of the respective financial institutions supersede local procurement regulations in the case of any discrepancies.

**Volodymyr Yaremko** is a senior associate at Sayenko Kharenko, Kiev, specialising in multijurisdictional disputes in the national courts and international commercial and investment arbitration. He can be contacted at [vyaremko@sk.ua](mailto:vyaremko@sk.ua).