

## Barton Legal Seminar 26 November 2020: FIDIC – Grey Areas and the Governing Law

### Supplement to presentation: “FIDIC Contracts – International?”

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<b>1. FIDIC General Conditions are incompatible or inconsistent with governing law of the Contract</b>	
<b>Jurisdiction</b>	<b>Particular Conditions</b>
<b>Brazil<sup>2</sup></b>	<p><b><i>Exclude indirect damages</i></b></p> <p>Although there is no specific determination by law or by case law with regard to the possibility of parties agreeing on the inclusion of indirect damages, it is possible that a Court or arbitral tribunal would reject a claim for damages which it understands to be indirect, even if they are claimed to fit under the exclusions provided by FIDIC General Conditions of Contract.</p> <p><b><i>Time for notification of claims to be consistent with statutory limitations</i></b></p> <p>Although case law and the majority of scholars accept that it is feasible for Parties to agree on claim limitations, Article 209 of the Brazilian <i>Civil Code</i> does not allow Parties to reduce or waive statutory limitations. In this scenario, statutory limitations may apply to claims between the Parties, making the time limitations provided for in sub-clause 20.2 not applicable to such claims.</p>
<b>China<sup>3</sup></b>	<p><b><i>Subcontracting the main structure not permitted</i></b></p> <p>Although the Contractor is allowed to subcontract some parts of the construction Works, under Chinese law the main structure of the construction project must be carried out by the Contractor itself. Therefore, the Particular Conditions should contain a provision referring to sub-clause 5.1 of the Red Book or sub-clause 4.4 of the Yellow and Silver Books that subcontracting the main structure is not permitted.</p>
<b>Czech Republic<sup>4</sup></b>	<p><b><i>Replace liquidated damages with contractual penalty</i></b></p> <p>The obligation of payment of liquidated damages might be subject to dispute as its nature within the Czech legal system is unclear. It is therefore recommended that it is replaced with a contractual penalty according to section 2048 of the <i>Civil Code</i>, which serves as a lump-sum compensation for damage. That means that unless otherwise agreed by the parties, the creditor shall not be entitled to damages arising out of breach of duty to which the contractual penalty applies.</p> <p><b><i>Replace financing charges with contractual penalty or statutory interest</i></b></p> <p>The obligation of payment of financing charges might be subject to dispute as its nature within the Czech legal system is unclear. It is therefore recommended that it is replaced either with a contractual penalty or with statutory interest on late payment.</p>

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<sup>2</sup> Thiago Fernandes Moreira & Caio Gabra, ‘Brazil’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 77, 80.

<sup>3</sup> Yiwen Sun, ‘China’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 89, 95.

<sup>4</sup> Dr Lukas Klee, Vojtech Hradečný & Anastasia Jegorova, ‘Czech Republic’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 115, 120.

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<b>France<sup>5</sup></b>	<p><b><i>Payment of subcontractors by the Employer</i></b></p> <p>Sub-clause 5.2.4 of the 2017 FIDIC Red Book, which is contained in identical terms under the various FIDIC Books, is clearly in contradiction with the provisions of the <i>Law on Subcontracting</i>, which does not grant the Employer the power to decide whether to make a payment to the Subcontractor. The Employer is bound by virtue of this statute to pay the Subcontractor and cannot contract out. Therefore, any provisions or arrangements of any kind aimed at setting aside the provisions of the 1975 Act, shall be void and have no effect</p> <p><b><i>Termination of the construction contract by the Employer</i></b></p> <p>If the construction contract is being performed at the time when a judgment is issued declaring the Contractor to be in administration, the Employer will not be able to rely on sub-clauses 15.2.1(g) and 15.2.2 of the 2017 FIDIC rainbow suite in order to terminate the contract. In fact, the mandatory rule under French law is that "only the administrator has the right to require the debtor's contracting party to continue to perform contracts in exchange for the performance of the debtor's obligations".</p>
<b>Germany<sup>6</sup></b>	<p><b><i>Private International Law / Conflict of Law</i></b></p> <p>German legal provisions as well as foreign legal provisions may exceptionally override the applicable <i>lex causae</i>. Procurement law applies in accordance with the <i>locus regit actum</i> rule, i.e. the law of the place in which the facts (procurement decisions) are made.</p> <p><b><i>Standard Business Terms Law (AGB Recht)</i></b></p> <p>If a provision of a standard business form is invalid the law of the <i>Civil Code</i> applies in lieu of it (Sec 306 (2) <i>Civil Code</i>).</p> <p><b><i>Limitation of liability</i></b></p> <p>The approach in sub-clause 1.15 in the 2017 FIDIC rainbow suite may be invalid as it is likely to restrict the Contractor's liability for its general obligations and its liability amount. However, this discussion is only relevant if the Contractor is "user" of the FIDIC Forms, i.e. if the Contractor initiated the use of a FIDIC form by procuring subcontracts. This is not the case if the Employer already based its invitation to tender on a FIDIC form.</p> <p><b><i>Performance security</i></b></p> <p>Greatest care must be applied when drafting the security coverage regarding the transition period between the performance period (before acceptance of the Works) and the legal defects liability period (after acceptance of the Works). It must be ensured that the security of the Employer does not exceed the 5 % provided for in the German <i>Werkvertragsrecht</i>.</p> <p><b><i>Cessation of Employer's liability</i></b></p> <p>It may be argued that sub-clause 14.14 [Cessation of Employer's Liability] is likely to be invalid under German law due to its bar on Claims by the Contractor</p>

<sup>5</sup> David Brown & Michael Conrad, 'France' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 141, 148.

<sup>6</sup> Dr Götz-Sebastian Hök & Dr Henry Stiegelmeier, 'Germany' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 169, 181.

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<b>Italy<sup>7</sup></b>	<p><b><i>Acknowledgement that the contract has been completed by expert parties fully aware of the content and the implications</i></b></p> <p>Whenever a condition listed in article 1341 of the <i>Italian Civil Code</i> is placed in favour of one party against the other, a declaration confirming express approval of all relevant clauses is appropriate. A number of provisions in FIDIC Contracts come within the restrictions listed in <i>Italian Civil Code</i> Art. 1341 and require specific approval in writing.</p>
<b>Malaysia<sup>8</sup></b>	<p><b><i>Copyright</i></b></p> <p>Whilst copyright initially vests in the author, under the <i>Copyright Act 1987</i>, where work is commissioned under a contract of service or made in the course of the author's employment, the copyright is deemed to be transferred to the person who commissioned the work or the author's employer. Accordingly, on a construction project, copyright will ultimately vest in the Employer (or Contractor in the case of a Contractor – Subcontractor relationship in which the Contractor commissions the work). This is inconsistent with sub-clause 1.10 of the Red Book and Yellow Book General Conditions.</p>
<b>Peru<sup>9</sup></b>	<p><b><i>Implied terms</i></b></p> <p>If FIDIC contracts are used in Peru, there is a different set of rules regarding implied terms which shall be expressly included as such in the Peruvian <i>Civil Code</i>. Hence, the FIDIC General Conditions will be incompatible in Peru regarding the implied terms generally understood in the common law.</p> <p><b><i>Time-bar clauses are illegal</i></b></p> <p>According to Article 2004 of the Peruvian <i>Civil Code</i>, time-bar clauses cannot be part of an agreement, they can only be set by the law. It is not possible to include in the Particular Conditions a clause stating that Parties expressly agree on the application of time-bar clauses, because Article 2004 is considered as an <i>imperative rule</i>, hence, cannot be changed by agreement.</p> <p><b><i>Fitness for purpose – Yellow &amp; Silver Books</i></b></p> <p>For the FIDIC Yellow and Silver Books, where the Contractor also prepares the design and engineering of the works, it is recommended to include in the Particular Conditions a clause stating which kind of obligation is handed over to the Contractor regarding the design. Parties should make it clear that the Works will be fit for their intended purpose following the philosophy of such contracts. If not, there is a risk to consider the design part as a reasonable skill and care obligation which makes the Contractor not responsible nor liable for the results of the Works related to such design.</p> <p><b><i>Meaning and scope of liability for fitness for purpose</i></b></p> <p>It is important to incorporate in the Particular Conditions not only the purposes of the Employer for the project, but also the precise meaning and scope of liability of a fitness for purpose obligation.</p>

<sup>7</sup> Nicola Davide Romano, 'Italy' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 240, 247.

<sup>8</sup> Ben Bury & Julie-Anne Pemberton, 'Malaysia' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 256, 261.

<sup>9</sup> Jaime Gray & Jonnathan Bravo, 'Peru' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 296, 301.

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	<p><b><i>Liquidated or delay damages must be considered penalidades</i></b></p> <p>In the Particular Conditions, it is necessary to include a clause stating that wherever the Contract includes “liquidated damages”, “penalties” or “delay damages”, it must be considered as “<i>penalidades</i>” according to the article 1341° of the Peruvian <i>Civil Code</i>.</p> <p><b><i>Limitation period of liability</i></b></p> <p>Under Article 1784° of the Peruvian <i>Civil Code</i>, for private construction contracts the limitation period is 5 years counting from the acceptance of the Works. Under Article 40° of the <i>Public Procurement Act</i>, for public construction contracts the limitation period cannot be less than 7 years counting from the reception of the Works (totally or partially). In this case, the period of liability includes any kind of error, bad quality or deficiency of the Works. There should be a clause in the Particular Conditions stating the limitation period of liability according to such rules and considering if the nature of the Works is private or public.</p> <p><b><i>Defects Notification period is a timeframe of responsibility</i></b></p> <p>It is recommended to clarify in the Particular Conditions that the Defects Notification Period included in clause 11 of the General Conditions is a timeframe of <i>responsibility</i> different from the ones regulated under Article 1784° of the Peruvian <i>Civil Code</i> or Article 40° of the <i>Public Procurement Act</i> (which are periods of liability, not responsibility).</p> <p><b><i>Contractual waiver of liability is illegal</i></b></p> <p>Provisions relating to the extinguishing of the Employer’s liability will not apply in Peru. Article 1328° of the Peruvian <i>Civil Code</i> expressly prohibits any contractual waiver of liability in case of gross negligence or fraud.</p> <p><b><i>Definition of parties’ specific liabilities and scope of work</i></b></p> <p>Regarding liabilities arising from errors or defects in construction projects that employ new design methods and techniques such as BIM and new collaborative project delivery systems, it is recommended that Parties clearly establish in the Particular Conditions the scope of work or services and the specific liability each of them should bear.</p>
<b>Romania<sup>10</sup></b>	<p><b><i>Fit for purpose obligation</i></b></p> <p>If it is considered that the obligation provided by sub-clause 4.1 of the 2017 Yellow and Silver Books is a fit for purpose obligation in the sense of the obligation of result under Romanian law, as an effect of aggravated liability, then the validity of this obligation will depend also on the way in which the Employer defined and described the purpose(s) of the Works and on the real, objective possibility of executing such Works.</p> <p><b><i>Limitation period for liability</i></b></p> <p>Romanian law distinguishes between: (1) a contractual liability (warranty) period and (2) a legal liability period. The limitation period for liability in clauses 10 and 11 of the 1999 or 2017 FIDIC editions should be amended in order to observe the mandatory legal provisions. <i>Law no. 10/1995</i> by <i>Law no. 163/2016</i> provides for a mandatory minimum duration for the contractual warranty period of 1, 3, or 5 years depending on the category of the importance of the construction. This minimum duration regards exclusively the contractual warranty period (the Defect Notification Period in the case of FIDIC Contracts) and does not influence the legal liability.</p>

<sup>10</sup> Cremona Cotovelea, ‘Romania’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 311, 319.

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	<p><i>Law no. 10/1995</i> also provides for general and specific obligations of the investors, designers, certified design experts (design checkers / verifiers), specialists, authorised technical supervisors, certified experts, administrators and users of the constructions. All these persons shall be liable according to their obligations: (1) for hidden construction defects arising over a period of 10 years from the reception of the works; and (2) after the completion of this term, for defects in the load-bearing structure resulting from the non-observance of the design and execution rules in force at the date of its construction for the entire life of the construction.</p> <p><b><i>Bankruptcy, insolvency, liquidation</i></b></p> <p>The provisions in sub-clauses 15.2 and 16.2 should be revised in order to comply with the provisions of <i>Law no. 85/2014</i> on insolvency and insolvency prevention procedures and of the <i>Regulation (EU) 2015/848</i> of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.</p> <p><b><i>“Unusual clauses”</i></b></p> <p>“Unusual clauses” are defined by the <i>Civil Code</i> as the ‘standard clauses’ which provide only for the benefit of the person who proposed them. These clauses shall only have effect if expressly agreed in writing by the other Party.</p> <p><b><i>Specific requirements for public procurement contracts</i></b></p> <p>It is necessary to modify some of the FIDIC definitions, notions and contractual provisions in order to eliminate possible disputes over inconsistencies with the governing law. For example, the Accepted Contract Amount and the Contract Price.</p>
<b>South Africa<sup>11</sup></b>	<p><b><i>Unfair or unreasonable Particular Conditions unenforceable</i></b></p> <p>Parties should bear in mind that the inclusion of unreasonable or unfair Particular Conditions may place these provisions at risk of ultimately being declared unenforceable where these offend underlying constitutional values. If such unenforceable provisions are not severable from the remainder of the agreement, it may vitiate the contract as a whole. In addition, even if a particular clause is not <i>per se</i> unreasonable or unfair from a public policy perspective, reliance by a party on such a clause in the circumstances of a particular case may be found to be unreasonable and unfair, and thus impermissible.</p> <p><b><i>Builder’s lien</i></b></p> <p>A Contractor’s possession of the Site implies legal consequences in South African law that are not purely defined by the terms of the contract. A Contractor is protected against an unlawful disturbance of his possession of the Site, whether or not it has a contractual right to possess the Site, through the operation of the <b><i>mandament van spolie</i></b>, a possessory remedy. The Parties can exclude the accrual of such a lien in favour of the Contractor with appropriate provisions in the Particular Conditions.</p> <p><b><i>Innocent or negligent representation</i></b></p> <p>A Contractor may, in addition to its contractual remedies pursuant to a breach of sub-clause 2.5, in terms of South African law become entitled to extra-contractual remedies where the information provided by the Employer was materially incorrect, or where the Employer in breach of the legal duty failed to disclose such information. A misrepresentation within this context, may, depending on the facts, render the contract void as a result of an absence of consensus, or voidable (even if the misrepresentation</p>

<sup>11</sup> Johan Beyers, ‘South Africa’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 334, 339.

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	<p>was innocent). Parties may, through the inclusion of appropriate provisions in the Particular Conditions, exclude responsibility for innocent or negligent misrepresentation. However, responsibility for fraudulent conduct can never be contractually excluded.</p> <p><b><i>Election in case of breach of sub-clauses 8.7 &amp; 8.8</i></b></p> <p>It may be advisable for an Employer to include, in the Particular Conditions, for a right of election, in the case of a breach of clauses 8.7 and 8.8, between claiming the Delay Damages stipulated or the full extent of the actual loss suffered on account of the Contractor's breach. Where the Employer elects to enforce the latter, it would in principle be able to claim the full extent of the loss suffered in terms of clauses 8.7 and 8.8 but would then be disentitled from relying on the stipulated penalty.</p> <p><b><i>Termination for Contractor's default</i></b></p> <p>The application of sub-clause 15.2.1 in a particular case should be considered against applicable statutory provisions relating to insolvency and business rescue proceedings in South Africa. In principle, the creation of the <i>concursum creditorum</i> in insolvency or winding-up neither alters nor suspends the rights and obligations of the Parties in terms of an agreement and the Liquidator steps into the shoes of the insolvent and does not acquire any rights greater than the insolvent. The other Party can nevertheless not exact specific performance against the Liquidator and the Liquidator has a right of election whether or not to abide by the Contract. This does not, however, disentitle the other Party from cancelling the Contract on account of a breach by the insolvent, even if the right to cancel only accrues after the commencement of the <i>concursum creditorum</i>.</p>
<b>United Arab Emirates<sup>12</sup></b>	<p><b><i>Defects Notification Period</i></b></p> <p>Article 880 of the <i>UAE Civil Code</i>, a Contractor and an architect are jointly liable for a period of ten years from the date of handover to compensate the Employer for any total or partial collapse of a building or installation, and for any defect which threatens the stability or safety of the building (known as decennial liability). This should be borne in mind when the Parties are agreeing to a Defects Notification Period, and the indemnities and the limitations on liability in FIDIC contracts.</p> <p><b><i>No exclusion of gross negligence</i></b></p> <p>It is not permissible under the <i>UAE Civil Code</i> for parties to contract out of liability for their own harmful or unlawful acts,<sup>13</sup> deliberate breach or gross negligence. It may be prudent to add an express reference to gross negligence in the Particular Conditions.</p> <p><b><i>No contracting out of statutory prescription periods for bringing a claim</i></b></p> <p>It is not permissible under Article 487(1) of the <i>UAE Civil Code</i> to contract out of statutory prescription periods. A party might therefore face difficulties in relying on a failure to provide notice of a Claim under, for example, sub-clause 20.2 (Claims for Payment and/or an EOT) in the FIDIC Red Book 2017, to argue that the Contractor is not entitled to additional payment and the Employer is discharged from all liability in connection with a Claim not notified.</p>

<sup>12</sup> Erin Miller Rankin & Samantha Lord Hill, 'United Arab Emirates' Africa' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 386, 393.

<sup>13</sup> *UAE Civil Code*, Article 296.

## 1. FIDIC General Conditions are incompatible or inconsistent with governing law of the Contract

### ***Oppressive conditions***

If a contract is made by way of adhesion and contains oppressive conditions, it is permissible for the Court (or arbitral tribunal) to vary those conditions or to exempt a party from adhering to them.

### ***Exceptional circumstances***

Where exceptional events of a public nature, which could not have been foreseen, occur as a result of which performance of a contractual obligation become onerous, even if not impossible, such as to threaten the party obliged to perform the obligation with grave loss, the Court (or arbitral tribunal) has the power, in accordance with the circumstances and after weighing up the interests of the Parties, to reduce the onerous obligation to a reasonable level if justice so requires.

### ***Termination***

The termination provisions in each FIDIC contract should be reviewed very carefully to ensure that they are sufficiently clear to bring the Contract to an end automatically upon notice in certain circumstances, otherwise there may be arguments as to whether a Court order is necessary.

<b>2. FIDIC General Conditions are incompatible or inconsistent with the laws of the Site / Country</b>	
<b>Jurisdiction</b>	<b>Particular Conditions</b>
<b>Brazil<sup>14</sup></b>	<p><b><i>Defect notice period</i></b></p> <p>Article 618 of the Brazilian <i>Civil Code</i> provides that the Contractor is liable for the defects relating to the soundness and safety of the works for a period of five years. This warranty is considered to guard not only the interests of the Employer but of the whole community that may be exposed to structural defects of the project. For this reason, the five year term may not be waived or reduced by contract.</p>
<b>China<sup>15</sup></b>	<p><b><i>Construction contract cannot materially change the bidding documents and proposal</i></b></p> <p>Any sub-clauses in FIDIC General Conditions which deviate from any main clause of the bid invitation documents and the proposal shall be deemed to be incompatible or inconsistent with Chinese law. Generally speaking, price, liability for breach of contract, dispute resolution, etc., are the main clauses of the Contract in addition to those listed in Article 57. If there is any provision in the General Conditions deviating from the bidding invitation documents and the proposal, it should be modified in Particular Conditions in accordance with the bidding invitation documents.</p> <p><b><i>Defects Notification period cannot be more than 2 years</i></b></p> <p>If the Defects Notification Period is longer than 2 years the proportion which exceeds period is invalid, which the Contractor bears no liability for.</p> <p><b><i>Retention is limited to 5%</i></b></p> <p>If the retention money is higher than 5% of the total Contract Price, the proportion which exceeds this amount is invalid, which the Contractor bears no liability for.</p> <p><b><i>Commencement date of Defects Notification Period</i></b></p> <p>It is desirable to make sure that the commencement date of the Defects Notification Period are in accordance with the <i>Measures for the Management of Construction Project Quality Deposits 2018</i> in Particular Conditions.</p>
<b>Italy<sup>16</sup></b>	<p><b><i>Provisions relating to bankruptcy, insolvency and liquidation</i></b></p> <p>Local Italian provisions are incompatible with FIDIC contracts in relation to bankruptcy, insolvency and liquidation clauses (sub-clauses 15.2, 16.2) where, even in presence of an express approval, the related provision would be considered not binding being against mandatory rules.</p>
<b>Romania<sup>17</sup></b>	<p><b><i>Design</i></b></p> <p>The contractual provisions regarding the design should be amended in order to observe the relevant legislation. As the legal provisions regarding the design are usually mandatory, they do not need to be copied into the Particular Conditions as they are of automatic application, but the Parties should adapt and make the necessary modification</p>

<sup>14</sup> Thiago Fernandes Moreira & Caio Gabra, 'Brazil' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 77, 81.

<sup>15</sup> Yiwen Sun, 'China' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 89, 96.

<sup>16</sup> Nicola Davide Romano, 'Italy' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 240, 248.

<sup>17</sup> Cremona Cotovelea, 'Romania' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 311, 322.

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in order to coordinate the legal obligations with the contractual ones and to integrate them into the contractual procedures.

***Taking over the Works***

Taking-over of the Works under the General Conditions is used in both senses of the taking possession of the Works and the reception of the Works. The reception of the Works is a procedure regulated by special mandatory legal provisions and might seem similar but is essentially different from the one in the General Conditions which is often wrongly adapted to the legal one. Therefore, the relevant provisions of Clause 10 and Clause 11 should be amended in order to observe the mandatory provisions.

<b>3. FIDIC General Conditions are incompatible or inconsistent with the laws of the seat of the arbitration or relevant laws on dispute determination</b>	
<b>Jurisdiction</b>	<b>Particular Conditions</b>
<b>Brazil<sup>18</sup></b>	<p><b><i>Engineer’s decision not final and binding</i></b></p> <p>As a civil law jurisdiction, the Brazilian legal system is highly resistant to attributing final and binding force to decisions unless their nature derives from the provisions of law, such as with arbitral awards, which are expressly equivalent to a judicial award by virtue of Article 31 of the Brazilian <i>Arbitration Law</i>.</p> <p><b><i>DB decision not final and binding</i></b></p> <p>The Superior Court of Justice has expressed that it considers that an Adjudicator to which the parties have granted power to issue a final and binding decision to be acting as an Arbitrator, regardless of the title given to such third party. Although this could mean in the future that a Dispute Adjudication Board could have comparable powers to an Arbitrator, this could also mean that the Court does not see a Dispute Adjudication Board itself as having powers to issue a final and binding decision.</p>
<b>Czech Republic<sup>19</sup></b>	<p><b><i>DB decision not enforceable</i></b></p> <p>The decisions of any DAB or DAAB may not be enforceable unless they are contracted as an ad-hoc arbitration, as the contractual obligations can be subject to judicial review and are not the directly enforceable title with respect to a claim.</p>

<sup>18</sup> Thiago Fernandes Moreira & Caio Gabra, ‘Brazil’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 77.

<sup>19</sup> Dr Lukas Klee, Vojtech Hradecny & Anastasia Jegorova, ‘Czech Republic’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 115, 121.

<b>4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</b>	
<b>Jurisdiction</b>	<b>Issue</b>
<b>Australia<sup>20</sup></b>	<p><b><i>Misleading or deceptive conduct</i></b></p> <p>The strong policy underpinnings of the prohibition on misleading and deceptive conduct in the <i>Australian Consumer Law</i> mean that the parties' freedom to contract out of it, or to modify the statutory liabilities flowing from such conduct, are severely curtailed. This not only impacts the significance of behaviour prior to entering into a contract, it also limits the effect of certain types of contract clauses. For example, exemption clauses in contracts may not operate so as to negate the effects of misleading or deceptive conduct.</p> <p><b><i>Proportionate liability</i></b></p> <p>The concept of proportionate liability involves the apportionment by the court of liability between defendants or third parties for a plaintiff's loss or damage, which reflects the responsibility for that loss or damage. All Australian jurisdictions have passed proportionate liability legislation to encompass claims for damages for economic loss or damage to property arising from a failure to take reasonable care, and for breaches of the <i>Trade Practices Act</i> (now the <i>Australian Consumer Law</i>) and <i>Fair Trading Acts</i>.</p>
<b>Brazil<sup>21</sup></b>	<p><b><i>Deemed acceptance of Variations</i></b></p> <p>Provisions of the General Conditions of Contract requiring (i) express consent of the Employer, (ii) agreement of the Parties or (iii) a specific procedure for the submission and approval of Claims may be overruled in view of the specifics of the case, where the Employer could not deny its knowledge or awareness of the alterations to the original project by being constantly engaged in, or micromanaging, the works or by comparable events of acknowledgement.</p> <p><b><i>Termination for reorganization</i></b></p> <p>There is case law in Brazil establishing that clauses providing for the right of termination of the Contract exclusively due to one of the parties entering into reorganization are void in relation to those contracts which are essential to the maintenance of the business activity of the party under reorganization. In other words, Brazilian Courts consider that such provisions, if applied widely, would disable and stultify the functionality of the reorganization.</p> <p><b><i>Hardship</i></b></p> <p>Articles 478 to 480 of the Brazilian <i>Civil Code</i> provide a general rule regarding contract termination and revision due to excessively onerous obligations. In sum, if supervening, extraordinary and unpredictable conditions arise, which make the Contract more onerous to one of the Parties and extremely advantageous to the other, the aggrieved Party may request the termination of the Contract. Such termination may be avoided if the benefited party agrees to review the terms of the Contract.</p> <p>Due to its direct connection with the principle of good faith, it is possible that, on occasion, Brazilian Courts will allow for the review of the terms of the Contract based on Articles 478 and 625, straying from the exact words of the Contract.</p>

<sup>20</sup> Donald Charrett, 'Australia' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 49, 71.

<sup>21</sup> Thiago Fernandes Moreira & Caio Gabra, 'Brazil' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 77, 86.

<b>4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</b>	
<b>China<sup>22</sup></b>	<p><b><i>Chinese Engineer - Jian Li (the project supervisor)</i></b></p> <p>The Chinese engineer, the <i>Jian Li</i>, has some distinguishing characteristics from the Engineer in the FIDIC general conditions.</p> <p><b><i>Exceptional events</i></b></p> <p>Article 26 of the <i>Interpretation II of the Supreme People's Court of Several Issues concerning the Application of the Contract Law of the People's Republic of China</i>, provides that:</p> <p style="padding-left: 40px;">Where any major change which is unforeseeable, is not a business risk and is not caused by a force majeure occurs after the formation of a contract, if the continuous performance of the contract is obviously unfair to the other party or cannot realize the purposes of the contract and a party files a request for the modification or rescission of the contract with the people's court, the people's court shall decide whether to modify or rescind the contract under the principle of fairness and in light of the actualities of the case.</p>
<b>Czech Republic<sup>23</sup></b>	<p><b><i>Conduct departing from contractual requirements</i></b></p> <p>If parties depart by their conduct from the exact wording of the contract, Courts or Arbitrators might interpret such action as an amendment to the contractual obligations, even in the cases where the contract explicitly says that only written amendments are permissible.</p>
<b>Fiji<sup>24</sup></b>	<p><b><i>Competition and Consumer Commission Act 2010</i></b></p> <p>The Fijian <i>Competition and Consumer Commission Act 2010</i> has close parallels to the Australian <i>Competition and Consumer Act 2010</i>. This not only impacts the significance of behaviour prior to entering into a contract, it also limits the effect of certain types of contract clauses.</p>
<b>France<sup>25</sup></b>	<p><b><i>Rules of interpretation of contracts</i></b></p> <p>As a general rule, Judges are not allowed to interpret clear and unambiguous contractual terms, "as doing so would amount to distortion". However, when the clauses of a contract are ambiguous, then courts will be bound to apply rules of interpretation set out in the <i>Civil Code</i>.</p> <p><b><i>Principle of good faith</i></b></p> <p>In 2016 the principle of good faith was extended to pre-contractual negotiations and formation stages. Hence, the new rule is that "Contracts must be negotiated, formed and performed in good faith", this provision being "a matter of public policy". It is generally admitted that good faith will imply that the parties must behave 'loyally' with each other (<i>devoir de loyauté</i>).</p>

<sup>22</sup> Yiwen Sun, 'China' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 89, 109.

<sup>23</sup> Dr Lukas Klee, Vojtech Hradečný & Anastasia Jegorova, 'Czech Republic' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 115, 127.

<sup>24</sup> Nicholas Barnes & Melvin Chand, 'Fiji' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 129,

<sup>25</sup> David Brown & Michael Conrad, 'France' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 141, 166.

<b>4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</b>	
<b>Germany<sup>26</sup></b>	<p><b><i>Customary practice</i></b></p> <p>As a rule, customary practice may complement the Contractor's scope of service by certain services which are not expressly mentioned in the specifications or drawings, including such services which are in the view of the relevant public part of the services. Reference is made to local practice. The aim is to close gaps and to limit the extension to merely minor or insignificant extra services.</p> <p><b><i>Collapse of the basis of the contract</i></b></p> <p>As an exception from the general rule of <i>pacta sunt servanda</i>, the (restrictively applied) doctrine of the "collapse of the basis of the contract" allows courts to "adapt" contractual terms to new circumstances to reflect as fairly as possible the original contractual wording because such remedy seemed preferable to discharging all obligors on the ground of <i>force majeure</i>. Section 313 <i>Civil Code</i> establishes this doctrine in express terms.</p>
<b>Hong Kong<sup>27</sup></b>	<p><b><i>Misrepresentation Ordinance (Cap 284)</i></b></p> <p>Under the <i>Misrepresentation Ordinance</i> (Cap 284), and at law, a party who has been induced to enter into a contract by a false statement of past or present fact or law is entitled to rescind the contract and/or, depending on the circumstances, claim damages for any loss or damage suffered. In the case of an innocent misrepresentation, the <i>Ordinance</i> confers a broad discretion on the court or tribunal to declare that a contract is subsisting, award damages in lieu of rescission and to do what is equitable.</p> <p><b><i>Supply of Services (Implied Terms) Ordinance (Cap 457)</i></b></p> <p>By this <i>Ordinance</i>, the following terms are implied into a contract for supply of services, specifically, that the supplier will carry out the service with reasonable care and skill and within a reasonable time; and the recipient of the services will pay a reasonable charge.</p> <p><b><i>Sales of Goods Ordinance (Cap 26)</i></b></p> <p>This <i>Ordinance</i> implies the following conditions, inter alia, into a contract: the seller has a right to sell the goods; the goods are free from encumbrances; the goods are of merchantable quality (including that the goods are free from defects, safe and durable); the goods are reasonably fit for purpose; and the goods correspond with the description or sample.</p>
<b>Italy<sup>28</sup></b>	<p><b><i>Deemed acceptance of Variations</i></b></p> <p>In Italy, the general rule concerning Variations is that where no express written authorization or instruction has been given by the Employer, the Contractor shall have to justify all extra costs. Implicit approval has been recognized by the Courts and can be inferred from the behaviour of the Employer in cases where the Employer visited, inspected or acted in a way showing his willingness to accept the Variations.</p>

<sup>26</sup> Dr Götz-Sebastian Hök & Dr Henry Stiegelmeier, 'Germany' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 169, 206.

<sup>27</sup> Ben Bury & Julie-Anne Pemberton, 'Hong Kong' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 223,237.

<sup>28</sup> Nicola Davide Romano, 'Italy' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 240, 252.

<b>4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</b>	
	<p><b><i>Termination for reorganization</i></b></p> <p>In the event of judicial reorganization (when Directors are under judicial supervision), the provisions giving the right to terminate the Contract, even if very common in contracts, might turn out to be fully or partially not applicable.</p> <p><b><i>Hardship</i></b></p> <p>In the light of general principles applicable to contracts and of a specific provision dedicated to procurement contracts, the performance of one of the parties cannot become excessively burdensome. When one Party would suffer a great disadvantage due to extraordinary and unforeseeable events, the aggrieved party has basically two options: 1) ask for termination of the Contract (reimbursing the other Party for the work done) or ii) ask the other Party to modify the conditions of the Contract equitably.</p>
<b>Malaysia<sup>29</sup></b>	<p><b><i>Misleading or deceptive conduct</i></b></p> <p>Section 9 of the <i>Consumer Protection Act 1999</i> provides that no person shall engage in misleading or deceptive conduct in relation to goods. Whilst this <i>Act</i> is intended to apply to consumer contracts, the scope of its application to contracts for the supply of construction products and services is unclear.</p> <p><b><i>Terms implied by statute</i></b></p> <p>Terms commonly implied in construction contracts include terms as to non-interference; adequate possession of the Site; that require the work be completed within a reasonable time; terms that require the Employer to not hinder the Contractor from performing the Contract; and terms that oblige the Employer to cooperate or to do all that is reasonably necessary for the performance of the Contract. Terms might also be implied by statute such as the <i>Sale of Goods Act 1957</i> and the <i>Construction Industry Payment and Adjudication Act 2012</i>.</p> <p><b><i>Gross negligence</i></b></p> <p>Malaysia does not recognise a concept of "gross negligence" as distinct from negligence.</p>
<b>Papua New Guinea<sup>30</sup></b>	<p><b><i>Fairness of Transactions Act 1993</i></b></p> <p>Where the <i>Act</i> applies, the National Court is able to review a transaction, on application by a party, if it is satisfied that the transaction was not genuinely mutual or was manifestly unfair to a party. The <i>Act</i> imposes a burden of proof on the party alleging the unfairness of a transaction. The <i>Act</i> is peculiar in that it imposes a mandatory duty on the Court to refer parties to mediation where it is satisfied that a transaction was manifestly unfair or not genuinely mutual.</p> <p><b><i>Claims against the State</i></b></p> <p>A statute peculiar to PNG is the <i>Claims By and Against the State Act 1996</i>. Its relevance insofar as claims pertaining to contracts with the State is the time limitation imposed on parties intending to sue the State for breach of contract. The <i>Act</i> imposes a mandatory requirement of notice of intention to sue the State within six months after the claimant became aware of the alleged breach, if the claim is one for breach of contract.</p>

<sup>29</sup> Ben Bury & Julie-Anne Pemberton, 'Malaysia' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 256, 273.

<sup>30</sup> Joseph Barbaro, Andrew McCormack et al, 'Papua New Guinea' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 278, 290.

<b>4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</b>	
	<p><b><i>Prevention principle</i></b></p> <p>Although there is authority that contracts can be varied by consent of the parties, as in the case of an extension of time, the prevention principle has been applied by Courts where right to an extension of time exists. With this context in mind, it is reasonable to anticipate that the prevention principle may be considered in the context of delays in completion of work, variations of contracts and damages.</p> <p><b><i>Penalties</i></b></p> <p>The Supreme Court has considered the distinction between a penalty and liquidated damages in that a penalty may be distinguished from a genuine pre-estimate of damages for breach of contract. In drawing a distinction between a penalty and damages, the Supreme Court has further held that it can make inquiry into whether clauses in contracts provide for penalties or genuine pre-estimates of damage.</p>
<b>Peru<sup>31</sup></b>	<p><b><i>Determination by the Engineer</i></b></p> <p>Although sub-clause 3.7 differentiate between the activities of the Engineer as representative of the Employer and duties carried out neutrally when determining any matter or claim, in Peru an Arbitrator or Judge may understand that such duty (determination of any matter or claim) is not possible nor legal because of bias and lack of independence. Even if by agreement Parties made it clear that the Engineer shall act neutrally, Arbitrators and Judges may consider it illogical and any determination made by the Engineer may be deemed as null.</p> <p><b><i>Delay Damages</i></b></p> <p>Arbitrators and Judges may understand clause 8.8 of the FIDIC Red Book (as an example) as a clause of “<i>penalidades</i>” pursuant to article 1341 of the Peruvian <i>Civil Code</i>.</p>
<b>Romania<sup>32</sup></b>	<p><b><i>Adhesion contracts</i></b></p> <p>One of the issues that must be established is if the FIDIC forms of contracts, when used in the private sector, are or are not <b>adhesion contracts</b>. Whenever a contract is considered to be an adhesion contract there are several special rules, which derogate from the ordinary ones that would otherwise apply. For example, modification of the statute of limitation terms is restricted, and the stipulations are interpreted against the Party who proposed them.</p> <p><b><i>Claim notices</i></b></p> <p>Unclear provisions in respect of Notices of Claim could eliminate the application of a very strict, express contractual provision - the requirement and sanction to issue a Notice of Claim or a fully detailed Claim within 28 or 84 days, respectively.</p> <p><b><i>Reference of a Dispute to the DAAB</i></b></p> <p>Is the 42-day time bar term (calculated from the moment of giving or receiving a Notice of Dissatisfaction against the Engineer’s Determination) is long enough to allow the Parties to refer their dispute to the Dispute Avoidance/Adjudication Board? If the term will make it excessively difficult to act or exercise the right, the clause will be null and</p>

<sup>31</sup> Jaime Gray & Jonnathan Bravo, ‘Peru’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 296, 309.

<sup>32</sup> Cremona Cotovelea, ‘Romania’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 311, 331.

<b>4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</b>	
	void pursuant to the <i>Civil Code</i> (the same is valid for all those terms considered to be a time bar term).
<b>South Africa</b> <sup>33</sup>	<p><b><i>The Constitution</i></b></p> <p>The South African courts will not enforce obligations imposed by a different governing law which offend fundamental constitutional values.</p> <p><b><i>Good faith</i></b></p> <p>In keeping with its Roman-Dutch roots, good faith has always been recognized as a cornerstone of the South African law of contract. Good faith is considered to be constituted by the concepts of justice, reasonableness and fairness.</p> <p><b><i>Right of access to the Site</i></b></p> <p>A Contractor's possession of the Site implies legal consequences in South African law that are not purely defined by the terms of the contract.</p> <p><b><i>Site data</i></b></p> <p>A Contractor may, in addition to its contractual remedies pursuant to a breach of sub-clause 2.5, in terms of South African law become entitled to extra-contractual remedies where the information provided by the Employer was materially incorrect, or where the Employer in breach of the legal duty failed to disclose such information.</p> <p><b><i>Ownership of Plant and Materials</i></b></p> <p>Whilst sub-clause 7.7 creates enforceable personal rights <i>vis a vis</i> the Employer and the Contractor, the breach of which may entitle the Employer to claim specific performance or damages from the Contractor, the actual real right of ownership would only vest in the Employer and be enforceable against the world at large if the requirements of the law of property for the transfer of ownership have been met.</p> <p><b><i>Limitation of liability</i></b></p> <p>Whilst provisions such as sub-clause 1.15 are enforceable in South Africa, these are usually restrictively interpreted. In addition, these would not be enforced to exclude a claim for loss or damage attributable to the fraudulent conduct of the defendant.</p> <p><b><i>Delay damages</i></b></p> <p>Whilst a claim for Delay Damages is in principle enforceable, a court may reduce the extent of the penalty claimed on equitable grounds in accordance with section 3 of the <i>Penalties Act</i>.</p> <p><b><i>Proportionate liability</i></b></p> <p>South African law affords a plaintiff who has suffered damage as a result of the wrongful, negligent conduct of a defendant with a remedy in terms of the law of delict. Where the plaintiff's loss was caused partly by its own fault and partly by the fault of the defendant, or where the plaintiff's loss was caused by more than one defendant, the <i>Apportionment of Damages Act</i>, 34 of 1956 <i>inter alia</i> provides for the apportionment of this loss between the plaintiff and the defendant, or amongst the defendants, in proportion to their respective degrees of fault. It should be noted, however, that these provisions do not apply to contractual liability for damages.</p>

<sup>33</sup> Johan Beyers, 'South Africa' in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 334, 351.

<b>4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</b>	
	<p><b><i>Limitations of action/prescription</i></b></p> <p>The rights of Parties to payment in terms of a construction contract, whether in terms of a payment certificate or otherwise, represents a “debt”, the prescription of which is regulated by the provisions of the <i>Prescription Act</i>, 68 of 1969. In terms of the provisions of this <i>Act</i> a debt shall be extinguished by prescription after the lapse of a period of three years from the date upon which the debt became due.</p>
<p><b>Switzerland</b> 34</p>	<p><b><i>Contract interpretation</i></b></p> <p>If Swiss law is the governing law of a contract, its rules on contract interpretation will apply. These may lead a court or tribunal to construe the terms of a FIDIC contract differently than what might be expected from the terms of the FIDIC General Conditions.</p> <p><b><i>Enforcement of Notice requirements</i></b></p> <p>Notice requirements are generally enforced under Swiss law and the failure to issue notices in a timely fashion may therefore lead to the loss of a right to claim. However, notice requirements are subject to the overriding principle of good faith (Article 2(1) of the <i>Civil Code</i>). Depending on the specific circumstances of the given case, the application of this principle can save claims from being barred for failure to comply with notice requirements.</p> <p><b><i>Duty of loyalty</i></b></p> <p>Under Swiss law, a Contractor has a broad obligation of diligence and loyalty towards the Employer. This obligation includes a duty to inform the Employer of any important circumstances that may affect the performance of the Works and to take the necessary steps to avoid causing the Employer any harm. The Federal Supreme Court has made clear that the duty continues to exist after termination, regardless of the grounds of termination.</p> <p><b><i>Role of the Engineer</i></b></p> <p>Swiss law does not contemplate the role of such an independent or impartial contract administrator. However, there is a broad freedom to contract under Swiss law. While the Swiss courts do not appear to have addressed the issue, “[t]here would seem to be no <i>fundamental inconsistencies</i>” that would prevent Parties to a Contract from agreeing to give the Engineer such a role.</p>
<p><b>UAE</b><sup>35</sup></p>	<p><b><i>Notice Provisions</i></b></p> <p>While parties are permitted to include notice provisions in their contracts, the UAE (like many other civil law jurisdictions) takes a more lenient approach to their enforcement, in particular where the consequences prescribed in the Contract for failure to provide notice are that the Party is no longer entitled to make its Claim and the guilty Party is discharged from liability. The maxim underpinning the more lenient approach is the view that “a just claim never dies” but there are certain specific provisions of the <i>UAE Civil Code</i> that are commonly relied upon to argue against the strict application of a time bar provision</p>

<sup>34</sup> Sam Moss, Tino Schneider & Jean-Rodolphe Fiecher, ‘Switzerland’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 366, 383.

<sup>35</sup> Erin Miller Rankin & Samantha Lord Hill, ‘United Arab Emirates’ Africa’ in Donald Charrett (ed), *The International Application of FIDIC Contracts in Asia Pacific* (Routledge from Informa Law, 2020) 386, 403.

**4. Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom**

***Liquidated damages***

Article 390(2) of the *UAE Civil Code* permits a Court (or arbitral tribunal) to adjust the agreed amount of liquidated damages to reflect the actual loss suffered by the Party asserting the right to liquidated damages. Either Party may apply for the amount to be adjusted and the Court (or arbitral tribunal) has the power to increase or decrease the agreed amount commensurate with the loss actually suffered.

***Proportionate liability***

Article 290 of the *UAE Civil Code* permits a Court (or arbitral tribunal) to reduce the level of damages, or not to order damages at all, if it finds that the person suffering harm participated by his/her own act in bringing about or aggravating the harm. Where a number of parties are responsible for the breach, each of them shall be responsible in their proportionate share and the Court (or arbitral tribunal) may make an order against them in equal shares or by way of joint or several liability.

***Suspension***

While the FIDIC General Conditions provide the Engineer with the right to instruct the Contractor to suspend the works, the *UAE Civil Code* also conveys independent statutory rights on a Party to suspend performance of its obligations under the Contract if the other Party has failed to perform its corresponding obligations.

<b>FIDIC General Conditions are incompatible or inconsistent with governing law of the Contract</b>	
<b>Jurisdiction</b>	<b>Particular Conditions</b>
Korea	<ul style="list-style-type: none"> <li>• Payment liability of the Employer to the Contractor's personnel</li> <li>• Termination of the contract after Completion</li> <li>• Subcontracting the entirety of the Works to a Subcontractor</li> </ul>

<b>FIDIC General Conditions are incompatible or inconsistent with the laws of the Site / Country</b>	
<b>Jurisdiction</b>	<b>Particular Conditions</b>
Korea	<ul style="list-style-type: none"> <li>• <i>Ipsa facto</i> termination clauses</li> </ul>

<b>FIDIC General Conditions are incompatible or inconsistent with the laws of the seat of the arbitration or relevant laws on dispute determination</b>	
<b>Jurisdiction</b>	<b>Particular Conditions</b>
Korea	<ul style="list-style-type: none"> <li>• Optional arbitration clause</li> <li>• Multi-tiered dispute resolution clause</li> </ul>
Philippines	<ul style="list-style-type: none"> <li>• Seat of arbitration is Philippines and CIAC has jurisdiction</li> </ul>

<b><i>Issues that a Court or Arbitrator may construe differently to that expected from the words of the Contract, because of local law or custom</i></b>	
<b>Jurisdiction</b>	<b>Issue</b>
<b>Australia</b>	<ul style="list-style-type: none"> <li>• Misleading or deceptive conduct</li> <li>• Proportionate liability</li> </ul>
<b>China</b>	<ul style="list-style-type: none"> <li>• Chinese Engineer - <i>Jian Li</i> (the project supervisor)</li> <li>• Exceptional events</li> </ul>
<b>Fiji</b>	<ul style="list-style-type: none"> <li>• <i>Competition and Consumer Commission Act 2010</i></li> </ul>
<b>Hong Kong</b>	<ul style="list-style-type: none"> <li>• <i>Misrepresentation Ordinance</i> (Cap 284)</li> <li>• <i>Supply of Services (Implied Terms) Ordinance</i> (Cap 457).</li> </ul>
<b>India</b>	<ul style="list-style-type: none"> <li>• Subject matter arbitrability</li> <li>• Enforcement of foreign judgments</li> </ul>
<b>Korea</b>	<ul style="list-style-type: none"> <li>• Third party supervisor – <i>Gam-li</i></li> <li>• Indirect or Consequential Loss or Damage</li> <li>• Reckless misconduct</li> </ul>
<b>Malaysia</b>	<ul style="list-style-type: none"> <li>• Misleading or deceptive conduct</li> <li>• Terms implied by statute</li> <li>• Gross negligence</li> </ul>
<b>Nepal</b>	<ul style="list-style-type: none"> <li>• Court can correct Arbitrator's error of law</li> </ul>
<b>Pakistan</b>	<ul style="list-style-type: none"> <li>• Limitation period for claims</li> <li>• Proof of actual loss for liquidated damages</li> <li>• Frustration</li> <li>• Misrepresentation</li> </ul>
<b>Papua New Guinea</b>	<ul style="list-style-type: none"> <li>• <i>Fairness of Transactions Act 1993</i></li> <li>• Claims against the State</li> <li>• Prevention principle</li> </ul>

	<ul style="list-style-type: none"><li>• Penalties</li></ul>
<b>Philippines</b>	<ul style="list-style-type: none"><li>• Disputes relating to non-contractual claims may not be arbitrable</li></ul>