FIDIC

An Analysis of International Construction Contracts

Edited by
Robert Knutson

KLUWER LAW
INTERNATIONAL
and
International Bar Association

the global voice of
the legal profession

International Bar Association Series

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To Virginia, Olivia,
Christopher and Annabelle Knutson

INTRODUCTION

Many years ago now I was involved in negotiations with a German engineer over the final construction cost of a hydroelectrical project in South Asia. The contract used was a slightly modified version of FIDIC Red Book 3rd edition, 1977. We were discussing the fact that the total value of variations amounted to about 10% of the original contract price. Our client had added a certain percentage for overhead and profit to the "on-cost" of the variations, but the Engineer refused to recognise what we said was our client's entitlement to overhead and profits. When the argument was explored during discussion the Engineer finally pointed to clause 52(3) of the FIDIC third edition referring to adjustments for the cost of overhead and profit and stated that this clause meant that unless the contract price had changed by 15% or more no additional variations were entitled to be valued or added to the original price.[1] I found that argument quite inexplicable and began to look for its source.

The German VOB contract did not to my knowledge exist in translated form at that time so on a hunch I had some professional translators translate certain provisions including the variations provisions. Then it all became clear: the Engineer interpreted the FIDIC provisions found in clause 52(3) in the manner he did, because that was the way the VOB worked, and works, as can be seen from the analysis later in this book of FIDIC under German law by Dr Wolfgang Rosener and Gerhard Dornher.

I had then one of those (in my case extremely) rare insights. If you could understand the approach of other legal cultures and national construction communities to their own contracts you could gain an important advantage understanding your opponents approach, and/or – when in international construction contract negotiations you might gain an important advantage. If you view the work/issue through the filter of the other parties own knowledge and experiences and knew their approach at least on a basic level, you might be able to take advantage of or use matters that they assumed to be axiomatic and/or make arguments which would not work in your own culture but would work in theirs.

A simple example is *bouleversement.* The notion of "overthrowing the fundamental economic bases of the contract" is well embedded, at least as far as I understand, in French construction culture, but does not exist in common law systems. It would be so much easier to argue that there had been a *bouleversement* than to attempt to show that the contract had been "frustrated" within the strict terms of the English Common Law, especially if there is a civil law party on the other side of the table.

The FIDIC suite of contracts, as is well known, was originally derived from the English ICE fourth edition of engineering contract. That fourth edition was

[1] We can see that in Egypt (and certain other countries) this type of misunderstanding could very easily arise because of the operation of local laws relating to government contracts.

conceived of and developed for many years in the English Common Law context of the early 20th century. Thus an obvious question naturally arises – what happens when FIDIC is taken out of that English context and subjected to examination under different national laws?

This is the question this book seeks partially to answer. I did not intend for the book to be definitive with any particular answer – rather it is meant as a guide for in-house counsel or junior lawyers who are asked during the hectic pre-tender or initial argument period to give a thumb-nail sketch of the consequences of having the contract subject to the law of country X. If country X is found in this book it is hoped that our hypothetical lawyer will find some indicators and even the name of an expert capable of expanding on particular aspects of the law of that country. I would now like to turn to some of the aspects of the reception of FIDIC in non-English law jurisdictions that I have encountered over the years.

The English language v. English Law

Obviously the ICE 4th edition was intended by English engineers and lawyers to be interpreted under English law. If the contract was used outside of England, it would have been a natural product of the application of the principles of conflict of laws (private international law) to apply, in all likelihood, the law of the place of performance. This would have different implications for different parts of the contract. For example, recently while I was at the ICC in Paris, a very eminent French lawyer arbitrator told me that he had been called upon to interpret the concept "due diligence" as found in a construction contract under the laws of a civil law jurisdiction, with civil law parties on both sides. He said he had been greatly helped by an English QC serving on his panel, who had provided him with various English reported judgments on the topic. My own view was that this was not necessarily the best approach. "Due diligence" has meaning in ordinary English usage, and one does not have to go beyond that – it means "the proper amount of diligence", not too much and not too little. It is not at all clear to me that English cases, putting a particular legalistic gloss on that phrase, and embedded as they are in the English tradition of precedents and the binding authority of judgments from higher courts, would assist in understanding this issue. My acquaintance agreed.

What if my acquaintance had asked about the phrase "act of prevention"? If an educated native English speaking Londoner were asked what this means, he or she would very likely say that it means something like – an act which has or can prevent (something). In fact, under English law (and probably the law of New Zealand, Australia and Hong Kong, but not necessarily Canada) it has a specific meaning – equating to an act or omission, or series of acts or omissions by the Employer or attributable to him, which have the effect of preventing the contractor from completing the project within the contractually specified time for completion.[2]

This understanding cannot easily be arrived at by simply reading the words –

[2] *Peak Construction v Mckinney Foundations* (1971) 69 L.G.R. 1 (English C.A.)

English law has to be examined. It would be a question for argument, I assume, in many jurisdictions as to whether or not arbitrators deciding under non-English law, could simply import the English legal definition to arrive at the English understanding.

One can readily appreciate that terms such as "Performance Security" (as opposed to Guarantee or On Demand L/C) may have different nuances when translated into another language. Certainly the FIDIC phrase "Defects Liability Period" caused legal havoc for years in jurisdictions (again see Germany) which allow parties to contract out of the legislated limitation period. This is apparently not an isolated possibility in civil law systems, and may apply to all sorts of areas, such as termination, force majeure and the obligation to complete with a certain result. I hope that this book will clear up some of these areas for our readers.

FIDIC in England

Not only was the FIDIC First Edition Red Book Contract for international works of civil engineering derived from the English Institution of Civil Engineers 4th edition form, the ICE and FIDIC forms have tracked each other through successive editions for a number of years.

The second FIDIC edition followed the first by only 3–4 years and was very similar. The third edition (1977) benefited from the changes that had been made to the ICE 5th edition, and it was only until the FIDIC 4th edition that the International Contract began to look and feel like a contract unto itself, and not an adaptation of the English form. Nonetheless, some of the key phrases in FIDIC remain identical to the key phrases in the English forms, and parties looking for informed interpretations of, for example, the adverse physical conditions clause in FIDIC can look to the English cases on the ICE form for precedents.

FIDIC in the Context of International Construction – The Contract Rules – OK

It is important to bear in mind that while all systems of law emphasise the principle of "*pacta sunt servanda*" (agreements must be observed), some systems have different focuses. It is commonly said in summary that Common Law systems will place greater relative importance on the literal written word and civil law systems will place more emphasis on the parties underlying intentions and less on the literal meaning of what was written. This is of course a gross oversimplification and does damage to those systems in the common law that look at the parties intentions (for example Ontario) and probably overemphasises the degree to which civil lawyers are willing to bend the plain wording of contracts, even when applying the notions/maxims associated with the doctrine of good faith.

Lawyers sell ideas. Parties to international contracts work on (often different) legal theories and fundamental/cultural notions. The fact is that the contract

language will solely govern the parties' rights most of the time and any theories more exotic than those relating to measurement of damages for contract breach will not normally be needed. I do not wish to suggest that it is not useful to know about the finer points of delictual theory, or for example, theories about joining non-signatories to the contract to the arbitration, it is simply that most of the time, those types of theories are not needed, and if they are the sole foundation for a claim, caution should be exercised.

Contract Law Rules

All of the world's legal systems focus on the sanctity of contracts, and damages as the remedy for breach of contract. While it may seem like an impossible task to understand or appreciate even a handful of different legal systems, the fact is that it is not all that difficult. We have colonialism and imperialism to (thank?/acknowledge) for this fact.

A Short History of World Law

Even then, people will look at the same contract language and actually understand different things. This could be, and often is, because we all look at the world through our specific cultural and historical perspectives.

Given that the same wording will be interpreted across systems and cultures, the move in the 1999 Suite to uniform and relatively "international" language has to be greeted favourably, but there are still linguistic issues which can confidently be predicted to cause problems on many contracts, whichever version of the Suite is used. One obvious example is the requirement to put disputes to the Engineer/Employer under Clause 3.4/5. The strict "flow chart" system for sending disputes first to the Engineer, who has to decide "fairly" and then on to the DAB, then to arbitration, is bound to be misunderstood and misapplied by parties, and will create even more problems than the previous requirements to put disputes first to the Engineer.

Some of the (non-headline) elements of the allocation of risk in each and any of the 1999 Suite contracts will conflict with either the practice or the law or both in some legal systems. Obvious examples include legal systems where direct payment to subcontractors will extinguish the Owner/Employer's debt, and systems dealing with the post completion responsibility of the parties, such as those systems making the employer, contractor and architect all jointly and severally liable for total or partial collapse of buildings for years after the completion took place.

In some jurisdictions the health and safety provisions of FIDIC are inadequate. England is an example. The allocation of ground risk in FIDIC is not consistent with some of the systems in which the contracts are going to be used. The provisions relating to the payment of penalties are clearly liable to adjustment in some jurisdictions.

The provisions relating to the extinguishing of the Employers' liability will

not apply in jurisdictions which do not allow contractual waiver of liability in cases of gross negligence or fraud (such as California).

In some systems, despite the careful use of the words "or otherwise" in the disputes provisions, disputes relating to non-contractual claims will be held to be not arbitrable. Pakistan and fraud are an obvious example.

Despite careful wording of the payment provisions, Employers around the world will withhold payment claiming rights of "set-off", "abatement" or similar rights.

The FIDIC fraud provisions will mean that parties caught up in kick-backs will face the prospect of termination of the contract even though they did not particularly wish to be caught up in the situation in the first place. Solicitation of bribes is not uncommon in this field.

In short, despite the standard form there are many potential traps for the unwary.

Crossing Legal Systems for a Living

It is not particularly difficult learning about and arguing about different legal principles in foreign legal systems. This is particularly so in the context say, of an international commercial arbitration, where one is often paid to do just that. Anyone reflecting on the process will realise that the argumentation is normally quite structured, and once the dispute has arisen (normally about an alleged underpayment), the scope for discussing and applying the relevant principles is quite restricted in fact, to any pleaded and relevant principles of law which have to be learned, construction of the contract, and the finer points of establishing and proving the damages claimed.

What is difficult, indeed very difficult to do, is to know somehow magically in advance about the principles of law, or the peculiarities, found in almost every legal system, which can make a difference to the parties' rights, and which not everyone will know about. Examples might include the greater rights in Malaysia in respect of misrepresentation, and the fact that under American law (see the relevant chapters) when the responsibility has been impossible to determine in cases of delay and disruption, the contractor will normally receive time, but not money, for the extended period. In English law, the doctrines relating to acts of prevention, frustration and particularising cause and effect are probably outside the international norms for construction contracts. In many civil law jurisdictions, an argument that the arbitration clause is invalid will often be defeated simply by showing it is an international contract with a commercial purpose – this is a relationship quite unknown in Common Law systems.

A Potted History of World Law

I commonly encounter lawyers of any given system who feel it is next to impossible to contemplate dealing with disputes under any governing law other than their own law. No doubt for all of us dealing with the familiar is easier than attempting to learn the intricacies of a foreign law, but I would assert that

it is not as difficult as you might think. The reasons for this are many and varied, but I will attempt in this section to indicate why this is the case.

First of all, the principle of *pacta sunt servanda* (already mentioned above) is universal to all legal systems. In practice that means that the vast majority of construction disputes are fought and won or lost primarily over the wording of the contract (and alleged facts).

Secondly, the principles of law likely to be alluded to in construction cases are often broadly similar across many legal systems. For example, the obligation to mitigate ones loss/damage (l'obligation de minimiser le dommage) is apparently often found to exist in ICC construction arbitrations, including civil law arbitrations.

Thirdly, in all non-common law countries, the law is found in the civil code and tendering laws, and if you can find readable copies of these, you will often have all that you need on a particular point. If you need more, you can go to doctrine or local counsel/experts (which you should probably have engaged in any event).

Finally, you can thank colonialism (a bit of a funny notion), and latterly the United Nations for making most legal systems both accessible and relatively easy to understand. All of the former English and French colonies have legal systems. If you can develop a working knowledge of the most important construction related principles in French, English and German/Swiss law, you will have a good entry into the legal systems of most of the rest of the world.

In particular, few English lawyers seem to be aware that virtually every ex-British jurisdiction[3] passed, around the time of the retreat of the British, an Act variously called "the English law Act" or something like that, which incorporates the then current state of English Common Law, and normally statutory law, as at the date of the Act. Even the Hong Kong Basic Law of 1997 does this. Of course English law continues to develop, and this leads to interesting legal debates about whether there is one "Common Law" or many, but for practitioners, the point to note is that if you know the law, say of arbitration, as it stood in England in 1698, you will be able to navigate your way around Sudanese arbitral law, which has not changed much since the adoption of the English rules on the topic. Similarly, Company law in my home province of British Columbia, Canada, is largely the English 1890 Act, with a few bolt-on US style extras since then. It took me a period of residence in England to realise that the English Law Act in British Columbia was not unique, but one of perhaps dozens around the world.

Marc Frilet, the author of our French chapter, has told me that much the same process took place in ex-French colonial possessions, and one might reasonably look for similar examples in ex-Portuguese places, such as Brazil (treated here in the Brazilian chapter) and Mozambique or Angola.

Naturally, you will have to add, at times, appreciation of local variations – *Shari'a*, post colonial developments, and particular laws, so it is always best to verify your observations with local counsel.

[3] I think with the exception of America, although this makes little practical difference. As is shown in our American chapter, America developed from English law while adding a few enlightened improvements from civil law thought along the way.

Specific Examples

The Indian Contract Act 1872, is in my opinion one of the better legacies of the British in India, and applies in India, Pakistan, Sudan and Malaysia, and could be used to inform the law in places such as the Maldives and Nepal. It is a straightforward and easily readable codification of the Common Law of Contracts with some enlightened improvements. The chapter from Fox Mandal introduces how it works in relation to Indian law construction contracts. Note that the law of misrepresentation under Indian law is more workable and useful in some ways than its English counterpart.

Let us tackle a more difficult example, Middle Eastern law. Viewed geographically it is a hotchpotch of different colonial and local traditions and culture. It seems different, however, if one knows that in the late 1920s or early 1930s, an Egyptian jurist named Sanhouri took a doctorate in law in Lyons. I have been told he went back to his native Egypt and (relatively speaking) failed in politics. His consolation prize was to rewrite the Egyptian Civil Code,[4] which he did, basing it on the French Civil Code of the time. It is also explained in great length in his great works, including "Al Waseet". Sanhouri went on to rewrite, I believe, the civil codes of Kuwait, Iraq and Syria. If you understand classical French law principles therefore, you will have no problems with the commercial law in those countries (or Cote D'Ivoire, Senegal, Togo etc).

What about *Shari'a* law? Here again, the Koran being the guide, you do not have to look much beyond the *Koran* – al-Maidah: 1, "O ye who believe! Fulfil your agreements". That having been indicated, the civil codes of the Middle East, with the exceptions of Jordan and Pakistan, are transpositions of European civil law.[5] See also the learned description of the principles of *Shari'a* law in Saudi Arabia, as the chapter by Charles Hammond sets them out in a remarkably clear fashion. One must reflect on how different and refreshing the prohibition on risk and uncertainty is in Saudi law. In the context of construction contracts, this must give hope to contractors faced with unexpected costs.

The acts of historical borrowing go on around the world. Russian civil law borrowed strongly from German law. Japan borrowed from either Switzerland or Germany.

The approach does not always work perfectly, but if you know the origins of legal systems, you can guess a lot about its laws. Check your guesses against a good local lawyer, and you will soon know all you need to for your particular dispute.

These great historical currents are reflected naturally in the descriptions of the national systems found in this book. We have, as the main imperialistic forbearers, chapters on English and French law. In the French law chapter, Marc Frilet, who has done and is doing very valuable work in the countries of Francophone Africa, sets out the broad outlines of the classical underlying principles of French law; including the broad responsibility of the Contractor, decennial liability, good faith and administrative law principles, as well as the

[4] In this book, see the review by Borham Atallah of Egyptian law.

[5] Hilary Lewis Ruttley and Chibli Mallat, *Commercial Law in the Middle East, Introduction*, second edition (from the SOAS website – soas.ac.uk)

limits to the validity of the FIDIC valuation of variations provisions. The need for a clearly defined scope of the contract is touched upon, as well as the grand theories of "sujetons imprevues", "imprevision", and "immixion".

Marc Frilet concludes with an important warning to those who think that EPC contracts with too radical of a shifting of the risk (**the FIDIC Silver Book**) can be running the risk that such contracts may be difficult to uphold in countries with a French or French civil or administrative law tradition.

However, the chapter by Dr Wolfgang Rosener and Gerhard Dorner on German law shows that this issue is not confined to countries of the French tradition. In Germany, the law on the allocation of risk in construction contracts directly calls into question certain of the more radical aspects of GC 17 and the Silver Book allocation of risk.

Similarly, our Swedish authors show that the Silver Book, at least, departs from the norms found in Swedish contracting, in an area of the World that has never been too strongly affected by Imperialism (other than its own and Russian expansionism at the gate).

Common law countries and traditions are reflected in the book in chapters on India, America, England and Malaysia.

The United Nations contribution has helped in many different ways to assist in international commerce, including construction. This is through the promotion of uniform procurement laws, and treaties covering a lot of related areas, including the sale of goods, limitation (prescription) periods, carriage of goods by sea and of course the enforcement of arbitral awards.

Various other "gaps" are provided for by NGOs, including standards for the treatment of documentary credits and guarantees, the potential content of *lex mercatoria*, and, of course, through the World Bank and other development banks, guidance on the potential interpretations of the FIDIC and other standard forms. The ICC itself publishes sanitised legal precedents in the form of awards in real cases on numerous construction topics from jurisdictions around the world. We have also seen important developments in the treatment of fraudulent and criminal behaviour through the OECD. UNCITRAL and its guides are also worth special mention. Perhaps a future edition of this book will deal with these topics. Authors are always welcome! Despite all of this, the existence of a "Common Construction Law" remains speculative, as the differences outlined here show.

Vive la difference

When it comes to arguing about specific local laws, the areas of local flavour and difference are likely to include the following: limitations (three years in India), proof of loss (the US and UK are among the most stringent), proving entitlement to extension of time (many people, not yet converted, are sceptical about the black box mysticality of the CPM).

Tortious/delictual responsibility (and criminal behaviour) are the areas of greatest difference between jurisdictions, apart from different local customs themselves. Cases are not often fought and won on the basis of alleged torts, but they can make interesting differences to the way the case unfolds.

Examples here (from my Canadian point of view) might include the tort and crime of business libel/defamation found in a number of civil law jurisdictions, laws concerning the registration and effects of non-registration of local agents (the penalty can be death) and companies, decennial liability, and liability generally for the total or partial collapse of structures, the responsibility of contractors to implement changes instructed by the Employer, and the corresponding duty of Employers, past a certain point, to pay for changes.

While the principles relating to lump sum contracts[6] and the obligation to produce a result versus the obligation to apply the means sound as though they would make great differences between civil and common law jurisdictions, not to mention the obligation to act in good faith, I have not observed many substantial differences in the final decisions of arbitral tribunals.

Finally, deep in the night, with no one else around, most lawyers in their heart of hearts will admit – the Contract usually decides the issues, despite what the law is. That is not to say there are not some pretty unusual interpretations of FIDIC put forward from time to time!

The Interaction between the FIDIC Conditions and the Governing Law/Law of the Arbitration

The 1999 FIDIC Suite simply requires the parties to state the governing law in the Appendix. If it is not stated, then it ends up being argued on by the parties' lawyers. If it is stated, the problems do not end there as the exact boundaries of the governing law may not be clear. If the procedural law of any arbitration, and the law of the site is the same, then you will have fewer problems. It may be worthwhile to note at this point that I have never noticed any radically different approaches to conflicts of law issues in non-European parts of the world. There may be a tendency in some places to assert that the local law governs for this or that reason,[7] but once the scope of or application of any particular is called into question the lawyers will normally call upon familiar reasons to justify their arguments – the imperatives of local law, god, public policy and so on. To the extent that more sophisticated conflicts theories are used, they normally look like variations on the closest and most real connection or place of performance tests.[8]

If the governing law of the contract is different from the law of the Site, a whole host of complex issues could arise. Imagine a contract in India with French governing law. Do the Indian contractors benefit from the French law concerning direct payments? Do they have the right to plead *l'exception de l'inexecution* (the right to stop work for non-payment) even if Clause 16 is not adhered to?

Similarly, the standard FIDIC clauses all require compliance with the local laws. What if those laws are in conflict both with the governing law, and the

[6] See the Malaysian discussion of the meaning of "lump sum" in that jurisdiction.

[7] See for example the Hub Arbitrations in Pakistan or *National Power v Singer* in India.

[8] All international lawyers should know about the Rome Convention and its tests, but it is debatable how often one needs to go beyond that. US methods, which de-emphasise "characteristic performance" are easy to learn as needed.

contractual obligations of the parties. An example might be various Treasury regulations, which require Government parties/departments to follow certain rules in relation to, for example, Variations, which directly contradict the contract and the contractor's rights. On the other hand differences in local laws may appeal to contractors – see the Malaysian Chapter for an enlightened (in my opinion in any event) approach towards liquidated damages/penalties. Many jurisdictions have similar problems which can arise in relation to the mandatory nature of local laws, although they may not be thought of as such, including England (mandatory Health and Safety regulations).[9]

An interesting variation arises when arbitration (or DAB proceedings) take place in a jurisdiction other than that of the Site. The procedure of that dispute, and to be followed by the DAB, will be the law of the place where the dispute resolution takes place. This rule was consecrated by the Geneva Protocol of 1923, and finds echos in the New York Convention of 1958. Summary determinations such as those undertaken by the DAB could very well be open to challenge. They will be attributed the legal aspects of an "expertise or expertise legale" in civil law countries, and may or may not be assimilated to experts or arbitrators in Common Law countries. They will probably be liable to challenge in the place of the dispute resolution procedure, whatever other law governs the other parts of the Contract.

The Interaction between the FIDIC Conditions and the Mandatory Law of the Site

This is a problem that arises in those countries where there are mandatory provisions of local law, for examples in relation to securing payments to subcontractors/suppliers by the use of liens, local procurement or labour laws. Unwary contractors sometimes find by way of illustration that their (foreign) nationals cannot work in a given trade, because for example, they are not in the appropriate local union. While professional bodies such as Architects Associations may not think of themselves as trade unions, the same restrictions often apply.[10]

Should a dispute arise, the Contractor may find that it has to go before some local board, despite the clear DAB/Arbitration provisions in the contract, or that the local party has gone to the local judiciary and obtained an order which is intended by the local authorities to be binding. A good example of this is the right to appoint a *juge referee* in France, despite the existence of the ICC arbitration provision.[11] These days in England foreign contractors may be equally surprised by a Notice of Adjudication.

Further, in many countries, if parties apply to the local courts for some form of interim or provisional relief, the local laws may dictate that they lose the right to arbitrate altogether. This problem arises often in international arbitration.

[9] See the English chapter.
[10] See the Malaysian chapter for descriptions of the rules as they apply there.
[11] This is a device that was used with good effect in both the Channel Tunnel and Euro Disney cases.

Although the problem is quite easily identified, it is difficult to deal with in the abstract. "Early warning" provisions, such as ones which give a positive duty to warn, may help avoid the impact of this type of problem, as may DABs, but the simple FIDIC provisions requiring "point blank" compliance with local laws, and no indication of what those laws are or how they are observed, leaves the contractor in a weak position.

The next section of this Introduction seeks to identify some of the more universal and commonly encountered problems one might experience when contracting under the FIDIC 1999 conditions.

UNIVERSAL/COMMON PROBLEMS ARISING UNDER ANY OF THE FIDIC CONDITIONS

There are aspects of these contracts that are going to give rise to potential problems, almost regardless of the governing law. As most of these are not dealt with globally by the individual authors in their national reports, I will deal shortly below with some of the ones I am familiar with.

The Employer's Claim Provisions

These provisions are new to the 1999 Suite and may add a new element to the longstanding and world wide arguments about the scope of the arbitration clause in the FIDIC Suite. There are Awards from all over the world deciding all sorts of things about the scope of those provisions. For example, I have seen time bar arguments defeated simply by the finding that they could not apply to legal as opposed to technical arguments. The addition of a specific, and weak but apparently all-embracing provision for Employer's claims may take away one of the arguments available to Employers lawyers who argue that their client is entitled, despite the wide wording of arbitration clause, to "self help" remedies such as withholding payments and calling bonds as a type of commercial pressure.

FIDIC has, since the 4th edition Red Book in 1987, been expanding the use of the phrase "or otherwise" in various places,[12] and a word search will show that it is used in the 1999 Suite to describe claims everywhere. It remains to be seen if this will mean that claims under the contract or for breach of contract are both susceptible to time bars, to the extent that they are allowed under the governing law. Many civil law arbitrators will simply not allow them, as to do so would violate the rules relating to good faith.

Payment Provisions

It can now clearly be argued, purely as a matter of contractual intention, that it must have been intended by the Employer's claims provisions and the addition

[12] It was first found in the 1987 *Red Book* clause 53.1 "Procedure for Claims" although it does not appear in the 1987 E&M form (the *Yellow Book*).