

# CONSTRUCTION LAW INTERNATIONAL

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Detailed reports from the ICP sessions in Sydney



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clauses under  
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### DENMARK

Peter Fogh

*Plesner Advokatpartnerselskab,  
Copenhagen*

pfo@plesner.com

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

#### 1. What is your jurisdiction?

Denmark.

#### 2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?

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

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

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

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

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

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

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

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

#### 5. Are any amendments common in your jurisdiction, albeit not required in order for the FIDIC Conditions of Contract to be operative in your jurisdiction? If yes, what (non-essential) amendments are common in your jurisdiction?

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

#### 6. Does your jurisdiction treat Sub-Clause 2.5 of the 1999 suite of FIDIC contracts as a precondition to Employer claims (save for those expressly mentioned in the Sub-Clause)?

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

#### 7. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money (not including Variations)?

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

#### 8. Does your jurisdiction treat Sub-Clause 20.1 of the 1999 suite of FIDIC contracts as a condition precedent to Contractor claims for additional time and/or money arising from Variations?

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

**9. Are dispute boards used as an interim dispute resolution mechanism in your jurisdiction? If yes, how are dispute board decisions enforced in your jurisdiction?**

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

**10. Is arbitration used as the final stage for dispute resolution for construction projects in your jurisdiction? If yes, what types of arbitration (ICC, LCIA, AAA, UNCITRAL, bespoke, etc) are used for construction projects? And what seats?**

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

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

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

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

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

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

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

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

**12. Is there anything else specific to your jurisdiction and relevant to the use of FIDIC on projects being constructed in your jurisdiction that you would like to share?**

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

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



**NORWAY**

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

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

**1. What is your jurisdiction?**

Norway.

**2. Are the FIDIC forms of contract used for projects constructed in your jurisdiction? If yes, which of the FIDIC forms are used, and for what types of projects?**

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

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