

The Role of the FIDIC Observer in ICC Arbitrations on FIDIC Contracts

Written by Edward Corbett

The ICC informed the FIDIC Conference in November 2022 that draft awards dealing with FIDIC Contracts were routinely passed to the FIDIC Observer for comment. The role of FIDIC Observer has been occupied since 2015 by Chris Seppälä of White & Case in Paris. The comments would be passed to the Court and, if the Court so decided, to the Tribunal. The purpose, the conference was informed, was for consistency of awards on FIDIC.

The FIDIC Observer

Chris Seppälä has had the title FIDIC Observer since he stepped down from the ICC Court in 2015. What was not previously understood, at least by the author and the arbitrators and lawyers spoken to by the author at the conference, was that Mr Seppälä's role includes providing comments on some draft awards to the ICC Court.

Mr Seppälä has been FIDIC's Contracts Committee's legal adviser for many years. He is a well-known and respected figure, having spoken at many FIDIC conferences and having published many articles. He has expressed views on various issues, including the enforcement by arbitrators of the decisions of Dispute Adjudication Boards (DABs).

Is this practice permitted by the ICC Rules?

The Rules allow the President of the ICC Court to invite persons to attend sessions of the Court and to see Court papers only in "exceptional circumstances". This raises the question of whether the involvement of the FIDIC Observer in the consideration by the Court of draft awards satisfies this test. On the one hand, some readers may think that it would be remarkable if circumstances could be exceptional in all the cases which have been subject to this process. On the other hand, it might be said that it is exceptional on the basis that the process is limited only to awards dealing with FIDIC contracts.



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Article 34 of the Rules says:

"The Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance".

The central purpose of the Court's scrutiny of awards is to support the enforceability of ICC awards. Whilst it might be said that consistency can be held out as a factor in favour of enforceability, there is also a risk that the existence of the practice of inviting comment from the FIDIC Observer is used as a ground for questioning the enforceability of an award, by an unhappy losing party.

Other considerations

In considering the appropriateness of the FIDIC Observer's role in considering draft awards, the following points might be made to argue that there is no cause for concern:

- It is permitted by the ICC Rules



- It is the Court members that decide what comments to pass to the Tribunal
- The Tribunal will make the final decision
- It is not part of the scrutiny process
- It makes little difference

To examine each of these points briefly:

- It is permitted by the ICC Rules

Article 1 of Appendix II to the Rules seems clear:

"2. The sessions of the Court are open only to its members and to the Secretariat.
3. However, in exceptional circumstances, the President of the Court may invite other persons to attend". Further understanding and consideration of the precise mechanism of the FIDIC Observer's role would be needed to reach a concluded view, but there is a concern that the Rules as they stand do not appear to provide a clear basis for the process.

- It is the Court members that decide what comments to pass to the Tribunal

No doubt that this is true. Court members rightly decide what matters they should include in their feedback to the Tribunal following scrutiny. Given that they have this veto, it might be said that is enough to protect the integrity of the process. However, the Court members will no doubt take into account the FIDIC Observer's experience, expertise and knowledge of past awards on FIDIC, and that may influence whether the Court passes any comment to the Tribunal.

- The Tribunal will make the final decision

Again, it is right to acknowledge this. All arbitral processes involve a level of trust that Arbitrators have not been influenced in their substantive decision by extraneous or inappropriate matters. However, it does seem likely that arbitrators will take seriously points of substance drawn to their attention by the Court.

- It is not part of the scrutiny process

As things stand, it is difficult to understand how the role of the FIDIC Observer falls outside the scrutiny process. As described by the ICC, the Court considers the comments from Mr Seppälä as well as those from the Secretariat in deciding whether to approve or return draft awards. It may be that some further clarity regarding the process could address this concern. At this stage it is difficult to reach a confident conclusion.

- It makes little difference

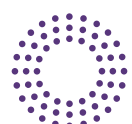
The stated purpose of the role of the FIDIC Observer is to improve consistency of awards relating to FIDIC. Since we cannot know exactly what has happened in each case, it is difficult to judge how much difference has been made in any given case. But it seems clear that under the process as described, the authors of awards that were thought not to be consistent would be given an opportunity to revise their awards to better achieve consistency.

Is consistency of FIDIC awards desirable?

Consistency in FIDIC-related arbitration awards seems, in any event, an objective which does not necessarily represent the nature of the process. Consistency requires a system of precedent or at least information about preceding awards being made available to parties. Neither exists. Arbitration remains a private matter and parties prefer it that way. Recent efforts to persuade parties to allow redacted publication of their awards have mostly failed. The ICC Bulletin published very occasional articles by Mr Seppälä with his selection of extracts from awards.

In any event, circumstances vary, legal jurisdictions and approaches vary, arbitrators mostly chosen by the parties also vary. This may mean that awards are not always consistent.

The ICC no doubt felt that the quality of awards would benefit from the input of an expert such as Mr Seppälä. However, as things stand there are concerns about the precise mechanism of the practice which give rise to potential arguments that it is not consistent with the ICC's Rules. In light of these concerns, the ICC may wish to undertake a review of



the role of the FIDIC Observer and, if it is to be retained, to consider whether more precise guidance for this process should be published to their users and/or incorporated into the Rules.

The views expressed in this article are the author's own.

