

VESTING AND OWNERSHIP OF PLANT ON DREDGING PROJECTS: A FAIR REMEDY OR A RELIC OF THE PAST?

ABSTRACT

Vesting of Plant refers to the transfer of ownership or title of the Contractor's Equipment from the Contractor to the Employer for the period the Equipment remains on the Site. It may even include the right to sell the Equipment to recover monies as a debt due. The intention of a vesting provision is that in the event of Contractor default or insolvency the Employer can retain the Contractor's Equipment in order to complete the Works. Vesting of Plant clauses originated from the Institution of Civil Engineers (ICE) Conditions of Contract and its use has spread around the world. Despite it falling out of favour in the United Kingdom, under FIDIC contracts and in other jurisdictions it can still be seen in a number of countries' standard conditions of contract most notably in parts of the Middle East, Malaysia, Hong Kong and Australia.

Although there has been lobbying to remove draconian vesting provisions from international contracts such as FIDIC, these provisions have not been abandoned. The question remains: Are such provisions a workable contract solution for clients in economically uncertain times or should they be consigned to history?

INTRODUCTION

The right of vesting or right to claim title of ownership is generally used in construction contracts when it applies to materials and goods supplied and delivered by the Contractor for incorporation into the Work. This is to enable the Employer to complete the Works by using the materials and goods supplied in the event that the Contractor's employment is terminated. It is generally accepted that the materials and goods change ownership when they are clearly identified as the property of the Employer upon delivery to the Work Site or upon payment by the Employer when they are incorporated into the permanent works, whichever comes first.

However the position regarding the Contractor's Equipment deployed on the Work Site is different. The Employer whilst gaining title to materials and goods

Above: International Contractors often work on projects far from home. FIDIC Blue Book's Notes for Guidance suggest that the Employer's right to retain a Contractor's equipment may clash with the liquidator's right if insolvency arises. Referencing applicable laws in both the country of the project and the Contractor's country will be necessary.

supplied for the permanent works will not have the right to use the Contractor's Equipment following termination unless there is a "Vesting of Plant" clause.

Vesting of plant refers to the transfer of ownership or title of the Contractor's Equipment from the Contractor to the Employer for the period the Equipment remains on the Site. It may even include the right to sell the Equipment to recover monies as a debt due. The intention of a vesting provision is that, in the event of termination of the contract by the Employer for Contractor default or insolvency, the Employer can retain the Contractor's Equipment in order to complete the Works.

A BALANCED PERSPECTIVE

There are opposing interests with respect of a vesting of plant clause. In the event of the Contractor's default and the subsequent termination of the contract then the Employer will wish to secure the completion of the Works by the quickest and most economically advantageous method. If the Employer is able to use it, then the Contractor's Equipment is essential for this. The Employer would then

not be liable to pay the Contractor and the additional expenses incurred by the Employer in completing the Works would be chargeable to the Contractor. If the costs of execution and other expenses incurred by the Employer were to exceed the amount otherwise due to the Contractor, then the Employer would be entitled to recover such excess amount as a debt due.

In a vesting of plant situation, as the Employer has title in the Contractor's Equipment, the Employer would be able to sell the Contractor's Equipment to recover the debt. One of the obvious and immediate problems of this arrangement is that the Employer often does not have the expertise or insurance cover to operate marine equipment and would more than likely have to employ another contractor to use the dredging equipment.

The Contractor on the other hand has a significant capital investment in this equipment which may be several times the value of the work to be undertaken. Two questions are often asked: Should the Contractor be required to complete the Works when the contract has been terminated for default? And should the equipment be sold to recover a far minor debt?



Figure 1. Major port infrastructure projects require the deployment of marine and land based equipment, such as the various trailers seen here at work and the vertical drains being installed for the development of a new port. These may be owned, subcontracted and/or hired equipment. Should an Employer be entitled to sell the Contractor's equipment to settle any debt due?

In the *Dredging Handbook for Engineers* 2nd Edition, the authors question whether the Employer would not be better advised to increase the value of the performance bond instead of resorting to a vesting of plant clause. In practice, a more important provision is the Employer's right not to release a vessel from the work site until the work related to that vessel has been completed.

VESTING CLAUSES AROUND THE WORLD

The vesting of plant provision was first used in the Institution of Civil Engineers (ICE) Conditions of Contract as far back as 1945 and its use has spread around the world, particularly in Commonwealth Countries. Use of the ICE Contracts was slowly replaced by the FIDIC (Fédération des Ingénieurs-Conseils) Contracts which were largely based on the ICE 4th Edition.

FIDIC Red Book versus ICE Contracts

The first edition of the FIDIC Red Book for Construction was issued in 1957, the second in 1969 and the Red Book 3rd Edition was issued in 1977. The latter drew heavily on the experience of the ICE 5th Edition issued in 1973. The FIDIC Red Book 3rd Edition largely took over as the basis for use in international dredging and reclamation projects. The FIDIC Red Book 3rd Edition departed from the ICE Contracts upon which it was based by including an optional Part III set of particular conditions. This Part III was solely meant for dredging and reclamation works and excluded the vesting of plant provisions and the right for the Employer to sell the Contractor's Equipment (Figure 1).

A typical Vesting of Plant Clause would be as follows:
 "All Contractor's Equipment owned by the Contractor, or by any company in which the Contractor has a controlling interest, shall, when on Site, be deemed to be the property of the Employer. Provided always that the vesting of such property shall not prejudice the right of the Contractor to the sole use of the Contractor's Equipment for the purpose of the Works nor shall it affect

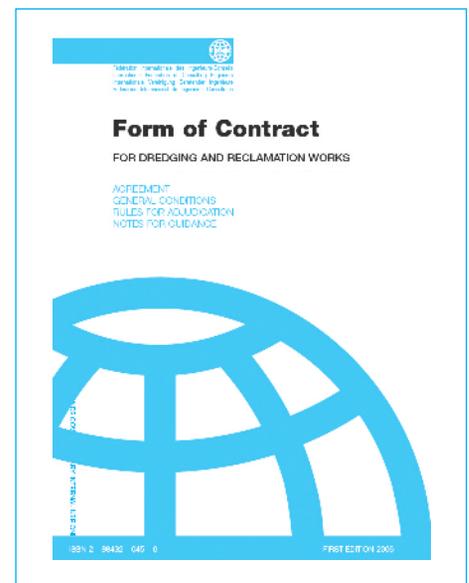


Figure 2. Since the "rainbow suite" of contracts was never intended for dredging, the FIDIC Form of Contract for Dredging and Reclamation Works was developed, tested and published in 2006.

the Contractor's responsibility to operate and maintain the same. Upon removal, with the consent of the Engineer, the Contractor's Equipment shall be deemed to revert in the Contractor".

International Applications

Some countries such as Oman and Bahrain took the FIDIC 3rd Edition and used it as the template for their standard conditions of contract but without including the Part III amendments for dredging and reclamation works. This had the unfortunate result of re-instating the vesting of plant requirements. Dredging contractors working in these countries are faced with the potential of the vesting of plant provisions being enforced in event of contractor default and would be expected in all cases to qualify such tenders.

Other countries such as Malaysia, which used the former ICE Contracts as their template, incorporated the vesting of plant clause in their Public Works Contracts. However, with the privatisation of the port and infrastructure market, Employers increasingly turned to either FIDIC or their own drafted contracts and the vesting of plant provisions were for the most part largely discarded.



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It is of interest to note that in Australia the Australian Standard General Conditions of Contract both the AS 2124-1992 and the later AS 4000-1997 have incorporated a vesting of plant procedure. In the event of default of the Contractor, the Employer may take work out of the hands of the Contractor and perform that work and take possession of such Contractor's Equipment in order to do so. If the Contractor is indebted to the Employer then the Employer may retain the Contractor's Equipment until the debt is satisfied, or, if the Contractor fails to pay the debt, the Employer may sell the Contractor's Equipment. Similar provisions also exist in the Hong Kong General Conditions of Contract for Civil Engineering Works 1999.

The principle of title and vesting of plant has undergone considerable transformation under the UK's ICE Conditions of Contract. The pure vesting of Contractor's Equipment included in the ICE 5th and 6th Editions has been discarded and was not used in Clause 54 of the 7th Edition published in 1999.

UK Legal Judgment

It has been held that the wording stating that the Contractor's Equipment is deemed to be property of the Employer does not

create a legal change of ownership in the Contractor's Equipment, rather that the Employer has a floating charge on the Contractor's Equipment if the Contractor becomes insolvent.

In the absence of registration in accordance with Part XII of the Companies Act 1985, such floating charge will be void against the Contractor's administrator. The relevant case is *Smith (as Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58; [2002] BLR 160) which went to the Court of Appeal and was finally decided in the House of Lords in 2001. The case demonstrates that whilst the right of the Employer to use the Contractor's Equipment to complete the Works following contract termination may be legally enforceable, any right to sell the Contractor's Equipment to recover debt is likely to fail.

Increasingly in the United Kingdom the Engineering & Construction Contract (ECC) is being used for civil engineering projects. This provides that on termination of the contract, the Employer may use any Equipment to which the Contractor has title to complete the Works. Title in equipment refers to a legal right of possession or control. The ECC Guidance Notes indicate that the Employer can only use Equipment to which the Contractor has title, so that Equipment from, for instance, subcontractors or hired equipment would be exempted.

FIDIC'S USE OF THE VESTING OF PLANT PROVISION

In 1987 FIDIC updated its 3rd Edition Red Book contract with the issue of the Red Book 4th Edition. Part III of the 3rd Edition was discarded and the title and vesting of plant clause, although watered down, was brought back as an optional provision. In the 4th Edition Part II Particular Conditions where vesting of the Contractor's Equipment is required, Clause 54 recommends wording similar to that of the earlier ICE Contracts.

The wording of FIDIC Red Book 4th Edition Clause 54.1 provides that all Contractor's

Equipment shall, when brought on Site, be deemed to be exclusively intended for the execution of the Works and the Contractor shall not remove the same without the consent of the Engineer.

FIDIC Red Book 4th Edition Clause 63.1 provides that on termination the Employer or another contractor employed by the Employer may use for completion so much of the Contractor's Equipment as the Employer may think proper. Clause 63.2 provides that the Engineer shall on termination certify the value of the Contractor's Equipment. Dredging contractors working with FIDIC 4th Edition Part II Particular Conditions Clause 54.2 are faced with the potential of the more onerous part of the vesting of plant provisions being enforced in event of Contractor default.

FIDIC 4th Edition Part I General Conditions Clause 54.5 provides that, in the event of termination for Contractor's default, the Employer may then take over any hired equipment agreements and agrees to pay the hire charges from the date of termination.

This gives some degree of protection to the dredging vessel owner, as quite often the registered vessel owner is a different entity to that of the Contractor. This clause thus ensures that payment will be made to the owner if the Contractor's Equipment is to be used to complete the Works.

The Rainbow Suite

In 1999 FIDIC introduced the new "rainbow suite" of contracts which included:

- a new Red Book Contract for Construction,
- a Yellow Book for Design-Build and
- a Silver Book for EPC/Turnkey Work.

The rainbow suite of contracts all follow the same formatting and include identical termination clauses. The rainbow suite was never intended for dredging contracts. Consequently, shortly thereafter in 2001 a test edition blue form for dredging was issued, with the first Blue Book edition subsequently issued in 2006 (Figure 2).

Since the issue of the vesting of plant in relation to marine dredging vessels was no longer an issue to the writers of the rainbow suite, not unexpectedly, vesting of plant crept back into the new rainbow suite. In addition, there were no provisions which dealt with the Employer being able to take over hire agreements. Clause 15.2 provides that following termination the Employer may complete the Works and/or arrange for any other entities to do so.

Although it does not clearly state that the Employer or other entities may use the Contractor's own or hired equipment, it does say that the Employer shall then give notice that the Contractor's Equipment will be released to the Contractor at or near the Site. The presumption is that the Employer only releases the Contractor's Equipment when the Works are completed.

There is no express right regarding Employer's use of the Contractor's Equipment, and if the Employer did use the Equipment there is no provision for payment by the Employer for such use of the Contractor's Equipment after termination. It then goes on to provide that if a payment due is not made to the Employer then the Employer may sell the Equipment to recover the payment.

The Blue Book for Dredging

In 2006 FIDIC issued the long awaited Form of Contract for Dredging and Reclamation Works (the Blue Book in the rainbow suite). In it Clause 12.1 provides that in event of Contractor's default the Contractor shall demobilise from the Site, but leave behind any Contractor's Equipment which the Employer instructs is to be used until the completion of the Works.

There is no provision that the Employer can sell the Contractor's Equipment in order to recover a debt due nor is there any arrangement to pay hire charges from the date of termination.

In the Blue Book Notes for Guidance (12.3) it states in respect of insolvency (FIDIC 2006, p. 33):

"The right of the Employer to retain the Contractor's Equipment may clash with the

right of the liquidator or receiver to realize the assets of an insolvent Contractor.

Reference to the applicable laws, both in the country of the project and in the insolvent Contractor's country, would be necessary".

CONCLUSIONS

Vesting of Plant provisions have come a long way since their initial use in the ICE Conditions of Contract and their later adoption by FIDIC. *Smith v. Bridgend County Borough Council* demonstrates that whilst the right of the Employer to use the Contractor's Equipment to complete the Works following contract termination is a contract requirement and is legally enforceable, any right to sell the Contractor's equipment to recover debt is likely to fail.

The dredging industry has urged the removal of the more draconian vesting provisions from international contracts such as FIDIC. Nonetheless, dredging contractors should remain vigilant that vesting provisions still exist in the construction market and that payment for use of Contractor's Equipment following termination is not dealt with in either the new FIDIC rainbow suite nor included in the more recent *Form of Contract for Dredging and Reclamation Works*.

Employers who are concerned as to the possibility of contractor default or insolvency are advised to review either their own or standard termination clauses and consider recourse to other forms of contract security as they will not be entitled to sell the Contractor's equipment in order to recover a debt due.

Employers are also advised to consider wording similar to FIDIC 4th Edition Clause 54.5 to secure that any hired equipment may be used to complete the Works following termination of the Contract for contractor's default. Contractors will also benefit from such wording as there is an arrangement whereby the Contractor's Equipment will be paid for should the Employer use it.

REFERENCES

- Australian Standard AS 2124-1992, *General Conditions of Contract*. Standards Australia Publishers.
- Bray, R N, Bates, A D and Land, J M (1995). *Dredging A Handbook for Engineers 2nd Edition*. Arnold Publishing. p. 323.
- Corbett, E C (1991). *FIDIC 4th: A Practical Legal Guide: a Commentary on the International Construction Contract*.
- Dolmans, Constantijn (2001). *Terra et Aqua*, "A Contract for 'Just Digging a Hole'", pp. 3-10.
- Eggleston, Brian (2001). *The ICE Conditions of Contract, Seventh Edition*. Wiley-Blackwell Publishers.
- FIDIC (1987). *Conditions of Contract for Works of Civil Engineering Construction, Fourth Edition*.
- FIDIC (2006). *Form of Contract for Dredging and Reclamation Works. Agreement, General Conditions, Rules for Adjudication and Notes for Guidance*.
- Glover, Jeremy, Thomas, Christopher and Hughes, Simon (2006). *Understanding the New FIDIC Red Book: a Clause-by-Clause Commentary*. Sweet & Maxwell Publishers. UK.
- Goudsmit. JJ "A first impression of the 4th edition of the FIDIC Conditions of Contract". *Terra et Aqua*, No. 36.
- Institution of Civil Engineers (1973). *ICE Conditions of Contract*, Fifth Edition. London, UK.
- Institution of Civil Engineers (1995). *The Engineering and Construction Contract: a NEC Document: Guidance Notes*. London, UK.
- House of Lords Judgment Index* <http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011108/smith-1.htm>
- Murdoch, John and Hughes, Will. (2008). *Construction Contracts: Law and Management*. Taylor & Francis Publishers. UK, USA and Canada.