

CONTENTS

Energy and Climate Change

EU Environment and Energy Package	1
Third EU Energy Package	2
UK Climate Change Bill and Energy Bill	3
Renewables Update	3

Electronic Communications

European Commission Publishes Details of its Proposed Reforms of the Electronic Communications Regulatory Framework	5
---	---

Public Procurement

Significant Litigation Affects Public Projects in Northern Ireland	6
--	---

Construction

FIDIC releases DBO Conditions of Contract	8
---	---

In Brief 9**The Projects Group** 10

Welcome to our Winter 2008 edition of "On Track". In this edition, we examine significant recent developments in energy and climate change, proposed EU reform of the Electronic Communications Regulatory Framework, recent public procurement litigation in Northern Ireland and the new FIDIC DBO conditions of contract.

We hope that you find this newsletter interesting and informative and would be delighted to answer any questions that you may have about anything in it.

This document contains a general summary of developments and is not a complete or definitive statement of the law. Specific legal advice should be obtained before taking action.

■ ENERGY AND CLIMATE CHANGE

Recent months have seen enormously significant developments in relation to energy and climate change at a European level that will have far reaching consequences for businesses and consumers alike. In the corresponding period, energy and climate change has been high on the agenda in both Ireland and the UK, with the renewables sector emerging as a key beneficiary of these developments.

EU Environment and Energy Package

On 23rd January 2008, the European Commission unveiled proposals to fight climate change and promote renewable energy from 2013 onwards. EU leaders had previously endorsed Commission proposals to cut CO₂ emissions by at least 20% before end 2020, whether or not any global targets can be agreed. With global targets, the EU would commit to 30% reductions. A binding 20% target for the use of renewable energy sources has also been adopted. The overall goal is to cap global temperature increases at 2°C.

The new package of measures to be adopted this year includes:

- significant changes to the existing greenhouse gas emissions trading scheme;
- specific national emissions reduction targets for all greenhouse gas sources outside the trading scheme including transport, agriculture, housing and waste;
- legally enforceable targets for increasing the share of renewables in the energy mix of each Member State, with targets that reflect each Member State's individual needs and potential;
- new rules on carbon capture and storage; and
- revised guidance on state aids / environmental subsidies.

The Commission estimates its strategy to curb CO₂ emissions will cost €60 billion per year across the EU. This works out at an average of 0.5 per cent of EU gross domestic product, with Ireland facing an annual bill of about €950 million until 2020.

The climate change package is also likely to result in increases in electricity and fuel prices for Irish consumers, although the Commission suggests that the failure to take action would cost more in the long term. The Irish Government has maintained that any climate change strategy must take into account "national circumstances and competitiveness impacts" and that Ireland's infrastructural deficit, its projected population growth and the relatively large size of the agricultural sector must be considered before a plan can be agreed.

These proposals entail a major departure from current regulatory framework and will create significant and far-reaching challenges for governments, industry and consumers.

- **Revised Trading Scheme:** Under the proposals, from 2013, Member States will no longer prepare a national allocation plan. Instead, there will be one EU-wide cap on emission allowances. This annual cap will decrease along a linear trend line. There will be no free allocations to the powergen sector, so a greater proportion of allowances will be auctioned. This will limit perceived windfalls arising from free allocation to a sector that has demonstrated the capability to pass costs through to customers. The clawback mechanisms introduced in Germany and Spain, which are currently the subject of legal challenge, would no longer be required. For all other sectors, free allocations will be phased out by 2020. In the meantime, harmonised rules governing free allocation will be introduced, with the aim of ensuring that carbon-efficient technologies are promoted. The specific example given is that allocations may be based on EU-wide benchmarks, e.g., a number of allowances per quantity of historical output (as opposed to historical emissions, which has been the mechanism applied in Ireland to date). It is intended that such rules would reward operators that have taken early action to reduce greenhouse gases, would better reflect the polluter pays principle and would give stronger incentives to reduce emissions, as allocations would no longer depend on historical emissions.

In recognition of the risk that international competition could displace carbon-intensive industry to less regulated jurisdictions (so-called “carbon leakage”), the Commission will assess and determine the exposed sectors and installations in these sectors will receive up to 100% of their allowances for free. The scheme will be extended to include some other sectors and gases, with separate proposals to extend the scheme to aviation tabled last year. These measures must be approved by both the Council of the EU and the European Parliament before they become law.

- **Other Sources:** Emissions from sectors not included in the trading scheme - such as transport, housing, agriculture and waste - will be cut by 10% of 2005 levels by 2020. Each Member State will contribute to this effort according to its relative wealth. For this reason, the national emission targets of Ireland, Denmark and Luxembourg are the most strict - at 20% reduction.
- **Renewables:** The Commission proposes to establish national renewable energy targets that result in an overall binding target of a

20% share of renewable energy sources in energy consumption in 2020 and a binding 10% minimum target for biofuels in transport to be achieved by each Member State. Member States are free to decide on the mix of contributions from the main sectors: electricity, heating/cooling and transport. They will also have the option of achieving targets by supporting the development of renewable energy in other Member States and third countries. Unnecessary barriers to the growth of renewable energy are to be removed, including by simplifying the administrative procedures for new renewable energy developments and encouraging the development of better types of renewable energy (by setting sustainability standards for biofuels etc).

- **Carbon Capture and Storage (CCS):** The package seeks to promote the development and safe use of CCS, a suite of technologies that allows the carbon dioxide emitted by industrial processes to be captured and stored underground where it cannot contribute to global warming. Revised guidelines on state aid for environmental protection should allow governments to support CCS demonstration plants.

For further information please contact:

Brendan Slattery
brendan.slattery@arthurcox.com

Janse Rabie
janse.rabie@arthurcox.com

Third EU Energy Package

In September 2007 the European Commission published its Third Energy Package, an important first step in a process intended to deliver a new bundle of electricity and gas legislation comprising the third phase of reform of the European internal energy market. The Third Package - consisting of three draft Regulations and two draft Directives - represents a bold initiative to create a liberalised and transparent energy market across the EU as a whole. This represents an important shift in focus for EU policy from the previous legislative packages which focused on effecting liberalisation within separate Member States and facilitating cross border trade.

If effected in its current form, the Third Package would see establishment of a European Agency for Co-operation of Energy Regulators coupled with proposals to increase regulatory oversight at national level and record-keeping requirements for energy undertakings, a move that would almost

certainly result in increased powers for the Regulatory Authorities on the island of Ireland. A European network for gas and electricity transmission system operators is also proposed - and while development of the Single Electricity Market across the island of Ireland represents a first step in achieving this objective, significant further work is required to achieve integration with the British and French markets. There would be a greater drive towards unbundling of transmission system ownership, significant in an Irish context where ownership of the gas and electricity grids has not been unbundled. A further proposal to overhaul of the current rules for exemption from regulated third party access for major new infrastructure would be significant in the context of access arrangements for the planned 500MW HVDC interconnector between Ireland and Wales. It is also proposed to require greater clarity on the regulatory regime applicable to storage and LNG facilities.

For further information please contact:

Alex McLean

alex.mclean@arthurcox.com

Katrina Donnelly

katrina.donnelly@arthurcox.com

UK Climate Change Bill and Energy Bill

Following the Queen's speech on 6th November 2007, the long awaited Climate Change Bill, first proposed in 2005, was presented to Parliament with a view to becoming law by Easter 2008. Parliament also considered a new Energy Bill, implementing a number of the policies set out in the May Energy White Paper.

- **The Climate Change Bill:** The bill creates the legal framework to reduce the UK's CO₂ emissions by at least 60% by 2050 with an intermediate goal of achieving a 26-32% reduction on 1990 levels by 2020. It is the first legislation in the world to outline legally binding carbon reduction targets and demonstrates the UK's commitment to leading by example in creating a low-carbon economy. The bill also introduces a system of "carbon budgets" and sets the first five year "carbon-budget" to run from 2008 through to 2012 and requires the Government to publish a report, at the time of each new five-year budget, containing its proposals and policies for meeting the budget. In addition it introduces a system of annual reporting on the UK's greenhouse gas emissions and establishes the structure of an independent

advisory body (the Committee on Climate Change) to advise the government and devolved administrations on how to reduce emissions over time and across the economy. However, it has been suggested that the good news story of the Climate Change Bill have been used to push through major changes in the planning system which will introduce projects such as new airport runways and ultimately lead to increased carbon emissions.

- **The Energy Bill:** The Queen confirmed the introduction of an Energy Bill following on from the May Energy White Paper to provide clean, secure and affordable supplies of energy. The main elements of the bill are expected to cover decommissioning of offshore renewables and oil and gas installations; the funding of nuclear waste and decommissioning; diversifying and improving deployment of renewables in the UK by way of strengthening the Renewables Obligation, to enhance the reliability of energy supplies and help lower CO₂ emissions from the electricity sector; carbon capture and storage and improvements to offshore oil and gas licensing.

For further information please contact:

Kirsty Simon

kirsty.simon@arthurcoxni.com

Renewables Update

- **All-island Grid Study:** As part of the development of an all-island energy market, the regulatory authorities in Ireland and Northern Ireland commissioned a study on the electricity grid on the island of Ireland, with a particular focus on potential for renewable penetration. Said to be the most advanced and comprehensive of its kind in the world, the study looked at resource potential for different renewable technologies; technical feasibility, costs and benefits associated with various generation portfolios; and implications for the electricity grid. The results of the study, published in January 2008, exceeded expectations with the conclusion that it will be feasible by 2020 to generate 42% of the island's electricity from renewable sources. Generation portfolios requiring less imported fuels and cutting optimum levels of CO₂ emissions were identified. It is proposed to conduct further work in the area, including short-term dynamic studies, detailed network planning studies, interaction with real market

conditions and analysis of the impact of aggressive demand side management measures.

- **Intermediaries:** Appointment of an Intermediary under the Trading and Settlement Code (TSC) offer generators a straightforward mechanism of delegating TSC obligations and permits parties to retain physical power purchase agreements (PPAs) rather than having to enter into financial hedges in relation to Pool exposures. Initially, Intermediaries could only be appointed where a PPA pre-dated the publication of the CER “Decision Paper on the Criteria for the Approval of Intermediary Applications under the Trading and Settlement Code” and, save in certain limited circumstances including where the PPA was supported by a Public Service Obligation in Ireland, the Intermediary appointment was time limited to a period of 12 months. However, on 10th December 2007, the Regulatory Authorities published the “Decision Paper on Revisions to the Criteria for Approval of Intermediary Applications under the Trading and Settlement Code”, which provides that an Intermediary may be appointed at any stage in respect of a generator unit that is capable of being registered as a Price Taker Generator Unit under the TSC. As with all Intermediary appointments, the consent of the Regulatory Authorities is required. This is an extremely significant development as it permits future price taker generators, such as windfarms, to avail of the Intermediary mechanism and also has the effect of making the Intermediary mechanism available to Northern Ireland price taker generators.
- **Gate 3:** Since 2004, Ireland has implemented a group processing regime for connection applications for renewable generators, with each group offer being referred to as a “Gate”. Gate 1 processed applications equating to 373MW and a further 1,300MW are expected to receive connection offers under Gate 2. On 17th December 2007, the CER published its consultation paper on criteria for Gate 3, which proposed the date of the paper as the deadline for receipt of a completed connection offer in order to be eligible for Gate 3. The paper outlines three broad options for the criteria to be used in determining which projects should be included in Gate 3 to reach the Government target of 33% of electricity consumption from renewable sources by 2020 (estimated to be an additional 1,600MW). The options are a Date Order approach; a hybrid “queue and system optimisation” approach;

and a Grid Development Strategy approach, based on anticipated completion of deep reinforcement works. Planning permission is not intended to be a criterion for the application stage of Gate 3, nor is dynamic modelling, which is proposed as a condition precedent for connection on foot of the connection offer. Proof of access to the project site is proposed as a criterion. Comments on the paper and any other Gate 3 options are required to be submitted to the CER by 22nd February 2008, with a Proposed Direction on the approach currently expected from the CER in April and a Final Direction by the end of June.

- **Feed-In-Tariffs for Renewables:** A number of major support schemes for renewable energy in Ireland have been announced by Minister Ryan since the start of 2008. Targeted funding and 15-year feed-in-tariffs are proposed for the tidal and wave energy, energy from biomass and off-shore wind energy sectors. The Minister has pledged over €26 million to develop the ocean industry sector by means of an Ocean Energy Facility in UCC, a grid-connected wave energy test site near Belmullet, an Ocean Energy Prototype Fund for grants to developers, a new feed-in-tariff of €220 per MW hour and the establishment of an Ocean Energy Development Unit as part of Sustainable Energy Ireland. A new €11 million support scheme for CHP in Ireland will enable qualifying businesses, hospitals and schools to receive grants for the installation of biomass-fuelled and anaerobic digestion CHP Units. The Department expects take-up of the biomass element to be in the order of €8 million. Projects under the CHP scheme are expected to displace the equivalent of 36 million litres of heating oil. A feed-in-tariff of €120 per MW hour for the production of electricity from qualifying units has been announced. Minister Ryan has also launched new price support measures for offshore wind, with a guaranteed price of €140 per MW hour of offshore wind-power produced being promised. The feasibility of building new sub-sea transmission links along the Irish Sea to Scotland is also being examined. It is hoped that these new schemes will secure carbon savings of €170 million. These measures are significantly in excess of the level of support offered for any renewable technology under the last Renewable Energy Feed-in Tariff regime in 2006 and demonstrate the Government’s commitment to promoting renewable energy technologies.

For further information please contact:

Alex McLean

alex.mclean@arthurcox.com

Katrina Donnelly

katrina.donnelly@arthurcox.com

Geraldine Kearney

geraldine.kearney@arthurcox.com

■ ELECTRONIC COMMUNICATIONS

European Commission Publishes Details of its Proposed Reforms of the Electronic Communications Regulatory Framework

On 13th November 2007, the European Commission published its long-awaited proposals for further reform of the electronic communications sector. The proposals involve amending all five of the 2002 Directives by way of two new Directives, introducing a new Regulation and adopting a new Recommendation on Relevant Product and Service Markets.

The Recommendation was adopted and came into force on 13th November 2007. The two draft Directives and the draft Regulation were published on the same date but must yet proceed through the EU legislative machinery. They are not expected to be finalised before the end of 2009, with national implementation to follow in 2010.

Market Analysis and Imposition of Regulatory Obligations

One of the principal concerns of the Commission arising from the first round of regulatory reviews is the inconsistency in market analysis and regulatory measures adopted by national regulators (NRAs) across the EU. The Commission's proposals aim to resolve these differences and create a more harmonised regulatory environment. This is to be achieved in a number of ways.

Reduction in Recommended Markets

According to the Commission, certain markets have become more competitive since 2002 and it is no longer necessary to recommend them for analysis by national regulators, (although a case may still be made for analysing them where certain criteria are met). The markets now recommended for analysis are the following:

- Access to the fixed telephone market;

- Call origination on the fixed telephone network;
- Call termination on individual fixed telephone networks;
- Wholesale access to the local loop for broadband and voice services;
- Wholesale broadband access;
- Voice call termination on individual mobile networks; and
- Wholesale terminating segments of leased lines.

Save with one exception, all of these markets are wholesale markets.

'Article 7' Procedure

In order to deal with what the Commission considers is the inconsistent application of regulatory remedies to markets by NRAs across the EU, it is proposed that under a new 'Article 7' procedure the Commission will have the power to veto remedies proposed by NRAs, and to require an NRA to impose a specific remedy within a given time limit where re-notified measures from the NRA would still create a barrier to the single market or be incompatible with Community law.

Functional Separation

An additional regulatory remedy of 'functional separation' (i.e. splitting the wholesale and retail businesses of operators, while retaining common ownership) is to be made available to NRAs in circumstances where other measures have failed.

Direct Intervention by the Commission

It is also proposed that, in certain circumstances, the Commission would be able to take matters fully into its own hands.

- (a) When a NRA has not completed its market analysis within a two year period, the Commission may adopt a decision designating relevant undertakings with significant market power and imposing obligations directly on them.
- (b) The Commission may also issue decisions on the existence of significant market power and the remedies to be applied in respect of trans-national markets.

Electronic Communications Market Authority

The Commission has proposed the establishment of a new authority, the European Electronic Communications Market Authority (ECMA) to assist NRAs and the Commission in co-ordinating and harmonising regulatory measures. The ECMA is to play a role in the new Article 7 procedure by seeking

to ensure greater consistency in market definition and analysis and the application of remedies throughout the EU. The ECMA would be required by the Commission to issue opinions on all matters regarding electronic communications, including draft NRA proposals concerning market definition and the designation of SMP. Before the Commission would require the withdrawal of a remedy proposed by an NRA or its own specific remedy to be imposed on an undertaking, 'utmost account' would be taken of the ECMA opinion. The ECMA's views would also be sought on a range of other issues including number portability, the implementation of the European Emergency Number '112', the use of radio frequencies and the harmonisation of rights of use, and network and information security.

Spectrum Management

The scarcity of spectrum, a key economic resource, and the increasing requirements for access to bandwidth is a major concern of the Commission, which has prioritised the restructuring of the rules relating to spectrum allocation. Conscious of the 'digital dividend' which the switchover from analogue to digital TV is expected to create by 2012, the Commission has taken steps to promote technological and service neutrality, improve access to spectrum for operators and consumers, create a market for secondary trading and allow more unlicensed use of spectrum. The Commission wishes to ease access to frequencies and smooth the transition towards a future market in spectrum trading in which undertakings will be permitted to lease or transfer rights to use specified frequency bands to other undertakings.

Consumer Rights

The proposed changes to the Universal Services Directive include the following:

- (a) In advance of concluding contracts with subscribers (and regularly thereafter), providers of electronic communications services and networks will be required to inform subscribers of certain limitations on the services made available to them.
- (b) Porting of numbers between networks and their subsequent activation is to be executed no later than one working day from the date of the subscriber's initial request.

Conclusion

One senses in the proposals a shift in power, away from NRAs and towards the Commission. While it is true that national regulators' independence is to be reasserted under the new proposals and their powers will be increased in certain respects, the Commission appears to be seeking to exert more direct influence at a national level. The removal of

markets from the Recommendation, the new power of the Commission to dictate which regulatory measures are appropriate in national markets, the direct regulatory role the Commission will assume in certain circumstances and the establishment of the ECMA seem to point inescapably to this. The proposals are, in a number of respects, more radical than expected and are likely to encounter some opposition as the legislative process moves forward.

For further information please contact:

Peter Curran

peter.curran@arthurcox.com

■ PUBLIC PROCUREMENT

Significant Litigation Affects Public Projects in Northern Ireland

Introduction

A number of decisions in the Northern Ireland High Court have been handed down recently which illustrate the challenge in managing, especially from the Public Procurement perspective, major projects including PPPs.

While these decisions are generally interlocutory (interim and pending full trial) they nevertheless provide valuable insights into the significant challenges which can face awarding authorities and also as to the thinking of the Courts in applying relevant principles in these circumstances.

Sheridan Millennium Ltd. v. Department for Social Development and Laganside Corporation

In this case, the High Court (Gillen J, 18th April 2007) granted application for leave to bring judicial review against (i) a decision by the Department for Social Development (DSD) to terminate the applicant's appointment as a preferred developer for the Queen's Quay urban commercial development in Belfast and (ii) a decision of Laganside Corporation that it could not make a recommendation as to whether DSD should enter into a development agreement with the applicant. The Court was further satisfied that allegations in relation to the suitability of the applicant for the position were matters of Public Law and the fact that a due diligence examination had been prescribed did not remove the matter from the Public Law domain and accordingly the process was still subject to judicial review. The Court further held (Gillen J, 13th November 2007) that where the rigour of the due diligence exercise

was to be benchmarked by reference to that undertaken in another development (at Victoria Square in Belfast) then access to documentation (albeit, where appropriate, on a redacted basis) in relation to the earlier development was appropriate.

Natural World Products Limited v. ARC 21

This was a major waste project in which ARC 21, a consortium of local authorities in Northern Ireland, sought to award a contract for the provision of organic waste services including the construction of at least one waste compaction facility. It was held by the Court (Deeny J) that, in breach of both the duties of an awarding authority to consider fairly the bids of all tenderers in a project and in breach of the specific provisions of the Public Service Contracts Regulations 1993 (transposing the Services Directive 92/50/EEC in Northern Ireland), the awarding authority had decided that it would be inappropriate to take account of an alternative facility which was available to a bidder and which the bidder alleged would be available to it to afford support in the event that the facility to be constructed on foot of the contract in question might not have been able to cope with the relevant tonnages. On that basis, an injunction was granted requiring the awarding authority to reconsider on an appropriate basis the bid of the applicant company.

Partenaire Limited v. Department of Finance and Personnel

This concerned a project which involved the awarding of a very large contract for the refurbishment and rationalisation of a substantial part of the Northern Ireland Civil Service (NICS) properties. The key features of the contract (Workplace 2010) were the transfer to the private sector of approximately 77 buildings in the core NICS estate, the major refurbishment of a significant number of buildings, the construction of a new building on the Stormont Estate in Belfast and the provision of a range of accommodation and facilities management services. The competition was conducted under the Negotiated Procedure. It was envisaged that the direct running costs of the relevant part of the NICS estate to be transferred to a private sector operator would be approximately £17 million per annum and the value of the transfer payment, being the capital sum to be received by the Department on transfer of the estate, would be approximately £200 million.

Following a debriefing meeting to explain to the applicant why it had been excluded from the shortlist the applicant alleged that certain errors had been made in relation to its bid, being principally:

- (i) concerning decant issues (the provision of temporary space or “decant hubs” at two locations while offices were being refurbished);

- (ii) in the evaluation of the financial proposal;
- (iii) in not providing a fully comprehensive table setting out a timeline in the bid documents; and
- (iv) contrary to the Department’s position, the regional decant was fully detailed and properly explained in the bid of the applicant, in its view.

The Court in a preliminary judgment (Coghlin J, 23rd November 2007) held that:

- (i) the conditions for the grant of an interlocutory injunction were satisfied including a fair issue to be tried and the balance of convenience;
- (ii) an undertaking in damages as a condition of granting an interlocutory injunction would be required and that an undertaking offered by the principal shareholder in the special purpose vehicle which had been put in place by the applicant consortium was appropriate for the purpose; and
- (iii) the fact that a trial at an early date (early 2008) had been set was a further relevant factor in granting the injunction and stopping the project from proceeding pending the determination of these matters.

Conclusion

The cases illustrate that the Courts are assiduous in requiring all interested persons to adhere strictly to the terms of relevant tender documentation and further to have overriding regard fully to the EC requirements of fairness, equality and transparency which underpin all Public Procurement cases;

They also highlight the difficulties, and often conflicting risks, facing a contracting authority in deciding upon the most appropriate course of action when ambiguities or difficulties of interpretation arise in the course of evaluation of tenders.

Finally, the cases highlight the way in which a project is open to delay by a disgruntled bidder, who succeeds in obtaining an injunction at a preliminary hearing, notwithstanding that the issues have yet to be teased out and determined at full hearing.

For further information please contact:

Patrick McGovern
patrick.mcGovern@arthurcox.com

Jane Hollway
jane.hollway@arthurcoxni.com

Peter Curran
peter.curran@arthurcox.com

■ CONSTRUCTION

FIDIC Releases DBO Conditions of Contract

FIDIC has developed a design, build and operate ('DBO') Contract. In guidance published on the DBO Contract, FIDIC states that it is envisaged for use in a 'green field' type scenario with an operation period of 20 years. The requirement for a DBO Contract arose largely due to the extensive amendments required to the FIDIC Conditions of Contract for EPC/Turnkey Projects (the 'Silver Book') and additional drafting and negotiation required by a separate long term service type contract. Published as a 'Pre-Press Edition', FIDIC expects to publish a version for use in the short term. On Track will keep you advised as to developments on the roll out of the Contract.

Key features of the DBO Contract include:

- The Contractor's obligations are to design, execute and complete the Works and provide for Operation Service (being the operation and maintenance of the Works);
- Finance falls outside the remit of the Contractor, though the Employer is obliged to put the Contractor on notice of its financing arrangements in the 'Financial Memorandum' to be included in the 'Employer's Requirements';
- Other than finance, the Contractor assumes the risk of design and completing the works during the Design-Build Period;
- The Contractor's indemnity includes an indemnity for the Contractor's design and other professional services;
- The 'Design Build Period' runs from the Commencement Date until the issuing of the Commissioning Certificate;
- Once the Employer's Representative has issued the 'Commissioning Certificate', this certifies that the Design-Build has been completed having satisfactorily passed the 'Tests on Completion of the Design-Build' and the commencement of the 'Operation Service Period'. A Commissioning Certificate may issue for Sections of the Works. The 'Contract Completion Certificate', signifies the end of the Operation Service Period;
- During the Operation Period (being the life of the project, 20 years as suggested by FIDIC), the Contractor retains all risk arising from the design and/or construction of the Works or Materials used, notwithstanding that the Works and/or Materials passed Tests on Completion of the Design-Build Period;

- While FIDIC has developed the DBO Contract based on an Operation Service Period of 20 years, the DBO Contract may be used for service periods of a shorter duration with some amendment;
- Provision has been made for an independent auditing body, defined as 'Independent Compliance Audit' to carry out an audit of the services during the Operation Service whose function is to monitor the performance of the Employer and the Contractor and their compliance with the Operation Management System put in place for the Operation Service;
- The inclusion of an 'Asset Replacement Fund' in respect of items of plant which require replacement during the Operation Service Period. The Contractor is entitled to include in its application for an Interim Payment Certificate, payment from the Asset Replacement Fund for items of plant it has paid for in accordance with the Asset Replacement Schedule;
- The DBO provides for a 'Schedule of Payments'. This concept has often been included by way of Particular Conditions to the EPC Contracts; and
- The cost of routine maintenance, spares and items of Plant and Materials not on the Asset Replacement Schedule must be borne by the Contractor;

Key concepts including changes to defined terms familiar to most practitioners from usage of the Silver Book and other FIDIC Contracts include:

- Replacement of the 'Engineer' with 'Employer's Representative'. The Employer is obliged to appoint the Engineer's Representative prior to the signing of the Contract. The DBO Contract contains an express provision that the Employer's Representative is not entitled to amend the Contract;
- A new definition of 'Cost Plus Profit' reflects practitioners inclusion of this concept as required by amendment to EPC Conditions. The DBO Contract defines it as "Cost plus the applicable percentage agreed and stated in the Contract Data";
- 'Contract Data' which is defined as the 'pages completed by the Employer entitled Contract Data' replace the reference to 'Tender' as it appears in the EPC/Turnkey Conditions. Users of the DBO should therefore pay particular attention to what is included in 'Contract Data';

- 'Exceptional Risks' replaces 'Force Majeure', with the qualification to natural catastrophes which are 'Unforeseeable' or against which an experienced contractor could not reasonably have been expected to take adequate preventative measures;
- The introduction of a concept of 'Commercial Risk' being a loss which results in the loss of time or money to either party.

While FIDIC envisages that the DBO Contract would be used by Employers in awarding a DBO Project to a 'single entity', that single entity will more than likely comprise members of a consortium having requisite expertise and technical capability to deliver the Project. Having regard to the distinct

certification procedures provided for in the DBO Contract (as opposed to that provided for in EPC and traditional design and build forms) and the continuing obligations of the Contractor during and up to the conclusion of the Contract Period (the Design-Build Period plus the Operation Period), consortium members are advised to align their consortium agreement with the obligations imposed by the DBO Contract.

For further information please contact:

Niav O'Higgins

niav.ohiggins@arthurcox.com

Rachel Lee

rachel.lee@arthurcox.com

In Brief

- Arthur Cox is delighted to announce that the National Conference Centre PPP, where separate Arthur Cox teams acted for the sponsors and the lenders, has been named as the *2007 European Leisure Deal of the Year* by Project Finance Magazine.
- We are also delighted to announce that Arthur Cox has recently won the Financial Times/Mergermarket Irish Law Firm of the Year 2007. This award rounds off a highly successful 2007 for Arthur Cox which also saw the firm being named European winner of the 'Best Managed Firm' and 'Best Corporate Citizen' at the Managing Partners' Forum 2007, the International Financial Law Review's Irish Law Firm of the Year 2007 and being named Irish Tax Firm of the Year 2007 by the International Tax Review.
- Arthur Cox is pleased to announce the following recent appointments to the Projects Group:

Jane Hollway joins Arthur Cox as a partner in our Belfast office, having completed a secondment at the Northern Ireland Strategic Investment Board. Jane has particular expertise in PPP and Procurement law and joins from another Dublin firm where she was a partner.

Kirsty Simon has joined as an associate in our Belfast office from a leading international firm in London, where she practised in energy and international project finance.

Janse Rabie (a South African attorney) joins our Dublin office as an associate. Janse has considerable international regulatory expertise in planning, environmental and development law, including major projects, energy and resources.

Geraldine Kearney, Danielle Conaghan and Tristan Conway-Behan have joined the Projects Group as solicitors having previously trained with Arthur Cox.

THE PROJECTS GROUP

The Arthur Cox Projects Group comprises all-Ireland legal experts from our Dublin, Belfast and London offices in Public Procurement, Project Finance, Environment & Planning, Construction, Health & Safety, Energy, Transport, Infrastructure, Waste, Water and Telecommunications. We represent Irish and multi-national corporations, State and semi-State bodies, private developers, contractors, consultants and financiers in many of Ireland's largest projects. The Arthur Cox Projects Group provides a dynamic, client focused and comprehensive service to those at the forefront of development on the island of Ireland.

For further information please contact any of the following members of the Projects Group or your usual Arthur Cox contact:

Aaron Boyle, Partner (Dublin)
Tel: +353 1 618 0568
aaron.boyle@arthurcox.com

Tim Kinney, Partner (Dublin)
Tel: +353 1 618 0300
tim.kinney@arthurcox.com

Patrick McGovern, Partner (Dublin)
Tel: +353 1 618 0545
patrick.mcgovern@arthurcox.com

Garrett Monaghan, Partner (Dublin)
Tel: +353 1 618 1103
garrett.monaghan@arthurcox.com

Mark Saunders, Partner (London)
Tel: +44 20 7213 0451
mark.saunders@arthurcox.com

Alan Taylor, Partner (Belfast)
Tel: +44 28 9026 2671
alan.taylor@arthurcoxni.com

Barbara Linehan, Consultant (Dublin)
Tel: +353 1 618 0000
barbara.linehan@arthurcox.com

Jane Hollway, Partner (Belfast)
Tel: +44 28 9026 2676
jane.hollway@arthurcoxni.com

Andrew McCluggage, Partner (Belfast)
Tel: +44 28 9026 2678
andrew.mccluggage@arthurcoxni.com

Alex McLean, Partner (Dublin)
Tel: +353 1 618 0546
alex.mclean@arthurcox.com

Niav O'Higgins, Partner (Dublin)
Tel: +353 1 618 0314
niav.ohiggins@arthurcox.com

Deborah Spence, Partner (Dublin)
Tel: +353 1 618 0444
deborah.spence@arthurcox.com

Niamh Burke, Consultant (Dublin)
Tel: +353 1 618 0355
niamh.burke@arthurcox.com

Dr. Yvonne Scannell, Consultant (Dublin)
Tel: +353 1 618 0409
yvonne.scannell@arthurcox.com

DUBLIN

Earlsfort Centre
Earlsfort Terrace
Dublin 2
Ireland
T: +353 1 618 0000
F: +353 1 618 0618

mail@arthurcox.com
www.arthurcox.com

BELFAST

Capital House
3 Upper Queen Street
Belfast BT1 6PU
Northern Ireland
T: +44 28 9023 0007
F: +44 28 9023 3464

LONDON

29 Ludgate Hill
London EC4M 7JE
England
T: +44 20 7213 0450
F: +44 20 7213 0455

NEW YORK

570 Lexington Avenue
28th Floor
New York NY 10022
USA
T: +1 212 759 0808
F: +1 212 688 3237