

# International Arbitration Alert

**Akin Gump**  
STRAUSS HAUER & FELD LLP

## Oral Variations and the Right to Payment in International Construction Contracts: a Strict Approach in Singapore

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FIDIC (“International Federation of Consulting Engineers”) Contracts do not exclude a right to time and money if the Employer or Engineer instructs a Variation only orally. The FIDIC Red Book for example at Clause 3.3 allows “instructions” that are given orally but if such instruction is a Variation, the Contractor will need to give notice under Clause 20.1 to get additional time and/or money. Bespoke amendments to the FIDIC forms of contract typically seek to exclude rights to additional time and money by making it express that only Variations instructed, notified or requested in writing by the Engineer allow recovery of time and/or money. The High Court in Singapore has endorsed this tough approach. *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63, will now be cited by many in International Construction Arbitration to support the proposition that where a contract expressly provides that a variation shall be carried out “only” pursuant to written instructions, a contractor’s claim for payment in respect of varied works instructed orally inevitably fails.

### Vim Engineering

The case involved modest sums of money and a relatively common contractual matrix: Vim was sub-subcontractor to Deluge who in turn was subcontractor of the main contractor. Clause 16 of the sub-subcontract stated that:

“[a]ny variation work such as [additions] or [omissions] or [modifications], shall be on a back-to-back basis with the Main Contract. **Such variation shall be carried out only with written [instructions] from [Deluge’s] Project Manager** ... [Vim] shall be entitled to ninety percent (90%) ... or shall allow a discount of 10% (Profit & Attendance) for [Deluge], on any approved variation claim for additional work orders” [emphasis added]

The Court asked where a construction contract stipulates that variation works shall be carried out only with written instructions from a designated person, can a contractor nevertheless get paid on his variation claims because he trusted that he would be paid notwithstanding what the contract said? Vim argued that “a gentleman’s word is his bond”, and so its “employer” Deluge should pay for variation works that had been orally requested, although the contract between the parties stipulated that variation

### Contact Information

If you have any questions concerning this alert, please contact:

**Hamish Lal**

Partner

[hamish.lal@akingump.com](mailto:hamish.lal@akingump.com)

London

+44 20.7012.9740

**Brendan Casey**

Counsel

[brendan.casey@akingump.com](mailto:brendan.casey@akingump.com)

Geneva

+41 22.888.2049

**Léa Defranchi**

Associate

[ldefranchi@akingump.com](mailto:ldefranchi@akingump.com)

Geneva

+41 22.888.2044

works shall be carried out only with written instructions from Deluge's project manager (and there were no such written instructions).

Vim argued that Deluge was estopped from denying its claims because Deluge had: (i) waived the requirement for "written instructions"; (ii) verbally instructed Vim to carry out the variation works; (iii) assured and/or represented to Vim that Deluge would pay for variation works; and/or (iv) accepted Vim's invoices for variation works by signing on them. The Singapore High Court dismissed Vim's claims for two key reasons:

- The express contractual conditions for a variation claim were not satisfied: on the evidence, there were no written instructions to vary the work issued by Deluge's Project Manager.
- On the evidence, there was no waiver or estoppel of the requirement set out in Clause 16.

### **The Lack of Written Instructions**

The Court applied *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 where the court had dismissed the right to payment for variations carried out pursuant to oral instructions. Put simply, as in *Vim* the contract in *Mansource* contained an express term precluding variation claims unless variation works were authorized and approved by the main contractor. The main contractor had not authorized or approved any of the variation works for which the subcontractor claimed payment and so it concluded that the contractual conditions for payment for varied works was not satisfied. The Court found that the same reasoning applied in this case: the Clause 16 (above) was clear and expressly provided that variation works were to be carried out only pursuant to written instructions from Deluge's Project Manager. Vim asserted that some of the variations were in writing since it had received shop drawings from the main contractor but the Court noted that Clause 16 required written instructions from "Deluge's project manager", not the main contractor.

### **No Waiver or Estoppel of the Requirement for Written Instructions**

*Alleged verbal instructions.* Vim argued that "a gentleman's word is his bond" and said that it had acted on Deluge's oral instructions, such that Deluge was estopped from relying on the requirement for written instructions. The Court took the opposite view and said that by not paying for such works, Deluge was honoring the parties' agreement in Clause 16.

*Signature of designated person on invoices.* Vim argued that the signatures of Deluge's project management team on various invoices for varied works meant that Deluge had accepted that Vim had carried out variation works and it would pay for them. The Court found that the evidence showed only that Deluge was acknowledging that the works had been carried out and telling Vim that it would submit Vim's invoices to the main contractor for approval—Deluge did not confirm acceptance of variation claims.

*Lack of authority to waive a contractual requirement.* The Court found that in any event, Deluge's project management had no authority to waive the requirement of written instructions under Clause 16. The Court highlighted that the requirement for written instruction in Clause 16 served two main objectives: (i) it provided for a written record, thus obviating disputes as to what was allegedly said; (ii) it focused the parties' attention to agreeing additional time and/or money. The Court found that these

objectives would be defeated if the designated person could dispense with written instructions which the parties had contractually stipulated for.

*Deluge's alleged promise to pay.* Vim also asserted that during several meetings Deluge had promised payment “upon Deluge receiving payment from [the main contractor]”. However, the Court found that it made no commercial sense for Deluge to have made such a promise. The evidence actually showed that Vim had sent invoices for the variations but Deluge did not certify the invoices for payment and so “it was incongruous and unlikely for Deluge to have done a U-turn”.

## Practical Implications

*Vim Engineering* provides another compelling reminder that bespoke amendments restricting payment for varied works to circumstances where only a written instruction is given are enforceable and can have significant commercial consequences for the contractor. There are three important points to keep in mind:

- In *Vim Engineering* there was a “back to back” provision linking payment for variations to payment for variations under the main contract and this “inflammatory marker” may have had a material influence on the Court’s reasoning. The fact that Deluge did not get paid from the main contractor in respect of the “varied works” appears to have cut out the unjust enrichment argument made by Vim.
- The Court has indicated that drawings can provide evidence of written instructions if the drawings isolate or identify the varied works. This is naturally a fact-sensitive exercise (akin to waiver and estoppel arguments) and may be relevant and material in other cases.
- The lens through which facts are viewed can vary. Should a court find that a particular contract requires parties to act in good faith or in a co-operative manner, it may take a more relaxed view around waiver and estoppel (such that a clause like Clause 16 (above) can, on the precise facts, be circumvented). Similarly, the impact and application of civil codes can also be used to get around strict requirements.

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