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FIDIC

An Introduction to the 2017 FIDIC Suite



INTRODUCTION

The FIDIC conditions of contract have been in widespread use internationally for decades and are the contract of choice for many international process plant and infrastructure projects particularly in Europe, the Middle East and Asia.

In December 2017, FIDIC published the second edition of the Red Book (Conditions of Contract for Construction), Yellow Book (Conditions of Construction for Plant and Design Build) and Silver Book (Conditions of Contract for EPC Turnkey Projects) ("2017 FIDIC Suite"). This set of documents is intended to update the previous editions which were published in 1999.

The 2017 FIDIC Suite is stated by FIDIC to continue FIDIC's fundamental principles of balanced risk sharing while seeking to build on the user experience and to modernise the contracts. The amendments are extensive with more detailed contractual provisions, new definitions which are now contained in alphabetical order, and changes in terminology, all of which have led to the contracts becoming considerably longer than the previous versions.

Taylor Wessing has many years of experience in advising on FIDIC contracts on projects in Europe, the Middle East and Asia.

This briefing provides commentary on some of the more important changes to the 2017 FIDIC Suite. If you require further explanation or assistance please contact your usual Taylor Wessing contact, or one of our experts listed at the back of this briefing.

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Overview and new structure

On 5 and 6 December 2017 in London the International Federation of Consulting Engineers (*commonly known as FIDIC, fr. Fédération Internationale Des Ingénieurs-Conseils*) launched its long-awaited 2017 FIDIC Suite.

At first glance 2017 FIDIC Suite appears to be more prescriptive but at the same time more proactive than its predecessor FIDIC 1999. The primary aim of the newly launched 2017 FIDIC Suite is to introduce increased clarity and certainty for the purposes of reducing the risks of disagreements between the parties on the one hand and to further increase the probability of a successful project on the other. Broadly speaking the new 2017 FIDIC Suite is also intended to: (i) encourage more active contract management, (ii) reflect international best practice, (iii) remodel and emphasize dispute avoidance.

The structure of 2017 FIDIC Suite remains largely the same as the earlier 1999 edition. The contract consists of an Optional Contract Agreement, General Conditions and Particular Conditions. The Particular Conditions have been split into Contract Data (formerly called the "Appendix to Tender"), the project specific information which is to be completed by the parties and Special Provisions which are specific contractual provisions agreed between the parties.

In terms of structural amendments, there are now 21 clauses (as opposed to the 20 clauses in the 1999 edition) and this is due to the split of former clause 20 to separate 'day-to-day' parties' claims (Employer's and Contractor's Claims) from parties' disputes (Disputes and Arbitration). New definitions, now in alphabetical order, have been added, i.e. among others "Claim", "Delay Damages", "Extension of Time", whilst some have been renamed, i.e. "Force Majeure" to "Exceptional Events".

More detailed contract management obligations have been imposed on both parties through: (i) introduction of the cocalled concept of "Advance Warning" of any future events which may have an adverse effect on performance of the Works, increase of the Contract Price or delay in execution of the Works (Sub-Clause 8.4), (ii) significant extension of details concerning the Contractor's programme, e.g. start and end dates for each activity, the float and critical path (Sub-Clause 8.3), (iii) new management meetings (Sub-Clause 3.8) and an updated quality management system (Sub-Clause 4.9).

Undoubtedly, the significant increase of the rights and obligations of the parties which are based on the principle of reciprocity can be found throughout the text of the new 2017 FIDIC Suite, e.g. obligation to assist the Employer in obtaining its permits

(Sub-Clause 1.13 (c)), obligations not to poach staff (Sub-Clause 6.3), advance warning obligations (Sub-Clause 8.4). This further provides a fair and balanced approach to risk allocation.

An enhanced, strengthened and clarified role of the Engineer has been marked in the 2017 FIDIC Suite (Sub-Clause 3.7), pursuant to which the obligation of the Engineer's neutrality has been confirmed and details of the Engineer's role in dealing with parties' claims through a step-by-step procedure has been re-introduced.

Considerable modifications have been incorporated to the design provisions in relation to the so-called Fitness for Purpose (FFP) requirements (Sub-Clause 4.1), under the new version of which "*if no purpose is stated in the Employer's Requirements, then the Works must be fit for their ordinary purpose*". The foregoing modification is further backed up by: (i) the indemnity clause, according to which the Contractor is required to indemnify the Employer for failures of the Works or any Section or any major item of Plant not being FFP (Sub-Clause 17.4), and (ii) the Contractor's obligation to hold professional indemnity insurance against its liabilities for failure to achieve FFP requirements (Sub-Clause 19.2.3).

Best practice provisions have also been incorporated in the new 2017 FIDIC Suite, e.g. Sub-Clauses 2.3 and 6.9, pursuant to which individuals engaged in fraud, corruption and similar practices can be removed at the request of one of the parties. Similarly, safety provisions (Sub-Clause 4.8) and quality assurance provisions (Sub-Clause 4.9) have been expanded and updated.

There are new Procedural Regulations for DAB Dispute Avoidance/Adjudication proceedings (now called DAAB proceedings), and templates of other contract documents such as the Letters of Tender, Performance Security documentation (such as Parent Company Guarantee and Performance Bonds) and an advisory note to users about Building Information Modelling. A new dispute avoidance role has been assigned to DAAB (Dispute Avoidance and Adjudication Board), whereby it can also provide 'informal assistance' to the parties. DAAB is thus now intended to have a more prominent role to attempt to resolve any disputes between the parties. Also, the standing DAAB is now to apply in all three of the contracts as opposed to FIDIC 1999, wherein ad-hoc DABs were provided in the Yellow and Silver Books.

Extensions of time

The extension of time (EOT) provisions are largely unchanged in respect of which events of delay entitle the Contractor to an extension of time, although the provisions are now contained in Sub-Clause 8.5 rather than Sub-Clause 8.4. Note, however, that the exceptionally adverse weather provision has been altered so that the Contractor's entitlement to an extension of time is limited to Unforeseeable adverse climatic conditions at the Site which may place an increased burden on a Contractor when making a claim.

Another notable addition is with regards to claims during periods of concurrent delay (being circumstances where a Contractor's delaying event and a separate Employer's delaying event are running in parallel). In these circumstances, Sub-Clause 8.5 provides that the Contractor's entitlement to an EOT shall be assessed in accordance with any rules or procedures provided for by the parties in the Special Provisions of the Particular Conditions, or if none are so stated *"as appropriate taking due regard of all relevant circumstances"*. Concurrent delay is a contentious area and the subject of increasing debate in the Courts, but it is unclear what these words actually mean in practice or the extent to which this will clarify matters when claims arise. What happens if, for instance, the delay for which the Employer is responsible commences or occurs a week prior to the delay for which the Contractor is responsible but both events in fact cause delay to completion. It is unlikely that this clause will prevent disputes in such circumstances.

Parties should note that Sub-Clause 8.5 must also be viewed against the FIDIC's increased focus on contract management, risk sharing and administration, particularly in respect of claims notification (dealt with separately in this briefing) and the increased duties towards programme updates and "early warning" notifications in Sub-Clauses 8.3 and 8.4. The emphasis of the 2017 FIDIC Suite is to enable contemporaneous identification and management of delays. In terms of Sub-Clause 8.3, 2017 FIDIC Suite replicates the previous burden on a Contractor to issue revised programmes *"whenever any programme ceases to reflect actual progress or is otherwise inconsistent with the Contractor's obligations"* but increases the amount of detail a programme must contain.

At Sub-Clause 8.4 each party now has the responsibility of providing an advance warning of matters which might, for instance, adversely affect the work, delay the execution of the work, or result in an increase to the Contract Price. These provisions can be seen as both a positive amendment to FIDIC (in that it will hopefully lead to more efficient management of a Contract, and because proper notification may have the effect of limiting the rejection of valid claims), but can also be seen as an administrative burden which provides an easy excuse for claims being rejected if the Engineer was not provided with sufficient warning or contractually-compliant programme updates.

Variations

The Variation procedure itself at Sub-Clause 13.3 is much more detailed under the 2017 FIDIC Suite. Now there is a specific procedure dealing with variations initiated by the Engineer namely, Variation by Instruction and Variation by Request for Proposal, and how the Contractor must respond to this. The procedure for instructed variations is not entirely new but the update is much more prescriptive as to what the Engineer and Contractor have to do than was previously the case. An instructed Variation must also now be clearly stated to be a “Notice” and comply with the provisions of Sub-Clause 1.3 regarding its communication.

If the Engineer does instruct a Variation, the Contractor must within 28 days of receiving the Notice (or other period agreed) submit certain information to the Engineer. The introduction of this time period is new. The information which must be provided by the Contractor is more detailed. For example, the Contractor must provide details of the resources and method to be adopted and proposal for adjustment to the Contract Price with supporting particulars for any change to the Contract Price (including details of any omissions). Parties (i.e. the Employer and the Contractor) can now agree to the omission of any work which is to be carried out by others and in such case, the Contractor’s proposal may also include the amount of any loss of profit and other losses and damages suffered (or to be suffered) by the Contractor as a result of the omission. The updated clause clarifies that if the Contractor complies with this procedure, the Engineer must proceed in accordance with Sub-Clause 3.7 to determine any extension of time (EOT) or adjustment to the Contract Price and Schedule of Payments, if any. Sub-Clause 3.7 introduces new procedures and time limits for determining the EOT and price adjustment. The Engineer is to encourage the parties to reach agreement and give a Notice of Agreement within a time limit of 42 days (or within such other time limit agreed by both parties), and if the parties fail to agree, the Engineer then has a further time limit of 42 days (or within such other time limit agreed by both parties) to make a fair determination and give a Notice of Determination. Where the Contractor is dissatisfied with the determination, the Contractor has to give a Notice of Dissatisfaction with the Engineer’s Determination within 28 days after receipt of the Engineer’s determination, failing which the determination is final and binding.

There are also two methodologies set out for valuing Variations, namely, Cost Plus Profit when no Schedule of Rates and Prices is included in the Contract, and rates or prices specified in the Schedule of Rates and Prices when such a schedule is included in the Contract.

At Sub-Clause 13.1 there are more grounds for the Contractor to object to a Variation. These include that the work was Unforeseeable having regard to the scope and nature of the Works, the proposed variation will adversely affect the Contractor’s ability to comply with health and safety and environmental protection obligations, and that it may adversely affect the Contractor’s obligation to complete the works so that they are fit for purpose under Sub-Clause 4.1. The Engineer can cancel, confirm or vary the instruction, but if it is confirmed or varied it is then treated as an instructed Variation. There are however, no time limits given save for the provision that the Contractor must give notice promptly and the Engineer must respond promptly.

There is a new procedure stipulating how the Engineer must respond to a proposal for value engineering from the Contractor at Sub-Clause 13.2. It is left to the Engineer to determine the adjustment to the Contract Price, taking into consideration the sharing of “*any benefit, costs and/or delay*” between the parties as may be stated in the Particular Conditions (although there is no relevant reference to Sub-Clause 13.2 in the Contract Data section of the Contract Particulars).

There is now new provision for the Engineer to require the Contractor to produce quotations from suppliers in relation to Provisional Sums.

The process for dealing with quotations for Daywork is set out in more detail. There is also provision for the determination of disagreement relating to statements under Sub-Clause 3.7.

The change in law provisions have been expanded to include a change in any permit, permission, licence or approval obtained by the Employer or the Contractor under Sub-Clause 1.13 or changes in the requirements for any such permits, permission, license or approval. There is now also a process whereby the Employer can request a reduction in the Contract Price as a result of any change in laws.

Sub-Clause 3.5 now includes a mechanism by which the Contractor can give a Notice to the Engineer with its reasons when the Contractor considers an instruction constitutes a Variation (or involves work that is already part of an existing Variation) or does not comply with applicable Laws or will reduce the safety of the Works or is technically impossible. The Engineer has 7 days to respond upon receipt of the Notice by giving a Notice confirming, reversing or varying the instruction, failing which the instruction is deemed to be revoked. There is however, no guidance on what happens if the Contractor does not give such notice.

Liability and indemnities

Liability

The limitation of liability clause has been given greater prominence in its relocation to the front of the Contract at Sub-Clause 1.15. There are now more carve outs to the exclusion of liability for loss of profit, loss of use, loss of contract or any indirect and/or consequential loss e.g. delay damages. Parties should pay close attention to the carve outs to ensure that they are appropriate for the project. In relation to the total cap on liability of the Contractor, provisions have been inserted to make it clear that limitations of liability will not apply in the case of fraud, gross negligence, deliberate default or reckless misconduct. So, for example, delay damages will not be capped in these circumstances.

There has been a clarification in respect of the fitness for purpose obligation at Sub-Clause 4.1. The works must now be fit for the purpose as defined in the Employer's Requirements rather than the Contract. Where no purpose is specified, the works must be fit for their "ordinary purpose". Employers should take care to specify the purpose prescriptively if they have particular requirements in mind.



Liability and Indemnities

Indemnities

The indemnity provisions in the 2017 FIDIC Suite differ in some material respects. Although the old Sub-Clause 17.1 did include indemnities given from both the Employer and the Contractor, the indemnities were more favourable to the Employer. The new forms include more indemnities going back to the Contractor so as to introduce more reciprocity.

However, there is also a significant and controversial new indemnity given by the Contractor to the Employer in respect of all acts, errors and omissions by the Contractor in carrying out the design obligations that results in the Works, when completed, not being fit for purpose. Although, Sub-Clause 1.15 makes it clear that the Contractor is not liable for loss of profit, loss of use, loss of contract or any indirect and/or consequential loss which arises as a result of such breach, and as noted above there is an overall cap on the Contractor's liability, this is still an onerous new obligation. Contractors will need to discuss this provision with their insurers and watch out for attempts to amend the exclusion at Sub-Clause 1.15.

In summary, the other key indemnity provisions are

- **Bodily injury, sickness, disease or death**
There are no substantive changes. The Contractor is still responsible and indemnifies the Employer for such claims unless they are attributable to any negligence, wilful act or breach of the Contract by the Employer, the Employer's Personnel or their respective agents, and this is matched by a reciprocal Employer's indemnity as before.
- **Damage to or loss of any property (other than the Works)**
This indemnity remains substantively the same to the extent given by the Contractor. The substantive changes to the Employer's indemnities in respect of damage to or loss of any property (other than the Works) include new provisions for:
 - i) Interference with certain rights e.g. rights to light, which are the unavoidable consequence of the Works.
 - ii) Any operation of the forces of nature which is "Unforeseeable" or which an experienced contractor should have taken adequate preventative precautions other than those allocated to the Contractor at the Contract Date. This was in the 1999 forms, however, the ability to now allocate risk for certain forces of nature at the Contract Date is a change. The parties should carefully consider who ought to bear such risks.

iii) Exceptional Events – these replace the old form of "Employer's Risks" (and it should also be noted that some of these events are now consolidated with what was "Force Majeure"). The list of Exceptional Events is broadly similar to the 1999 form but there are some significant differences. A notable change is that previously certain risks/events were expressly stated as having to be "within the Country". This wording has now been omitted, taking into account, for example, that a riot in another country may have a potential impact for which the Contractor. New inclusions in the list include strikes not solely involving the Contractor's Personnel etc. and natural catastrophes.

iv) Any act or default of the Employer's Personnel or the Employer's other contractors. This is a new addition which now mirrors the equivalent indemnity given by the Contractor.

■ Shared indemnities

The 2017 FIDIC Suite includes a provision which effectively states that each party's liability to the other shall be reduced proportionately to the extent that any event is contributed to by a risk for which the other party is responsible.

■ Intellectual and Industrial Property Rights

The indemnities in respect of infringements in respect of intellectual and industrial intellectual property rights are broadly unchanged.

Parties may want to amend the indemnities to reflect what has been priced. However, any such modifications or adjustments need to be made with due care and it is suggested, to reflect the insurance arrangements applicable to the project. Ideally, the parties' insurance advisors would review the indemnity provisions and confirm any inconsistencies and/or gaps prior to the contract being entered into.

Claims Procedure

Material changes have been made to the claims procedure under the 2017 FIDIC Suite. While through these changes a rather detailed and elaborated new claims procedure is established, it also imposes significant additional administrative requirements on the parties and reliable and diligent contract management becomes even more important. Failure to strictly comply with these requirements may result in a loss of claims within very short period (the consequences, however, may significantly differ depending on the applicable law).

One of the most significant changes in the 2017 FIDIC Suite is that the entire claims procedure has become mutual, i.e. the same procedure now applies for claims of both, the Contractor as well as the Employer. The former rather large gap between the respective claims procedures in the 1999 FIDIC Suite (Sub-Clause 2.5 for Employer's Claims versus Sub-Clause 20.1 for Contractor's Claims), imposing a strict procedure on the Contractor while the Employer was not required to comply with such procedure, has often been an issue resulting in heavy disputes when negotiating Particular Conditions. It will be interesting to observe whether such disputes will now decrease and Employers will accept the new strict requirements.

If one party considers itself to have a claim for payment and/or extension of time (EOT), the new Sub-Clause 20.2 requires such party to submit a "Notice" latest within 28 days. Failure to give such "Notice" in time will generally result in a loss of such

claims. While this seems to be more or less identical to the former procedure applicable to the Contractor, the new definition of "Notice" and the requirements in Sub-Clause 1.3 can become a contractual monster which may quite easily destroy the prospects of a claim. According to these new provisions, a "Notice" must be identified as such, i.e. a valid "Notice" cannot be given within any other communication not expressly identified as "Notice" and may thus not be "just" a paragraph in a general letter or in minutes of meeting any more. Even though the risk of losing claims increases, this new requirement ensures that claims have to be clearly communicated and potential disputes are discovered when they arise which is a useful improvement for all parties involved.

While the further procedure once a "Notice of Claim" is made still requires the Engineer to agree or determine a matter or claim, the respective provisions in Sub-Clause 3.7 of the 2017 FIDIC Suite (Sub-Clause 3.5 in the Silver Book) are far more detailed and formalistic. Failure to comply with the respective requirements may – again – result in a loss of claim. Thus, Contractors as well as Employers may want to modify the new claims procedure by agreeing changes in Particular Conditions or adjusting it due to major inconsistencies with the applicable law. However, any such modifications or adjustments need to be made with due care in order to prevent material disadvantages or the imposition of substantial risks under

Disputes and Arbitration

Clause 20 of the 1999 FIDIC Suite which covered the multi-tier dispute resolution provisions has been divided into two parts in the 2017 FIDIC Suite. Clause 20 is now solely dealing with Claims whereas Clause 21 covers Disputes and Arbitration.

Major principles of dispute resolution already known from the 1999 FIDIC Suite can still be found in the 2017 version. First of all, a claim has to be filed with the Engineer (with the Employer's Representative in the Silver Book) which – if not settled and a party disagrees with the Engineer's determination – may be referred to Dispute Adjudication again attempting an amicable settlement and thereafter to ICC Arbitration.

However, the 2017 FIDIC Suite also contains a number of major changes and deviations compared to the 1999 version: The Dispute Adjudication Board (DAB) of the 1999 FIDIC Suite has been changed into a Dispute Avoidance/Adjudication Board (DAAB), the latter now being a standing (!) DAAB in the Yellow and Silver Book, as already stipulated in the Red Book, rather than an ad-hoc DAB. The DAAB shall now be appointed within 28 days following contract signature unless the parties agree otherwise.

Learning from the 2008 Gold Book, the 2017 FIDIC Suite now puts more emphasis on amicable settlements by allowing the parties to ask the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement. In this context it is worth mentioning that the procedural rules for the DAAB have been tremendously expanded and have become more complex. Most remarkably there is the obligation of the DAAB to convene with the parties on a regular basis even if formal proceedings are not pending. This will undoubtedly lead to additional cost of the dispute adjudication process.

In statutory law provisions of some civil law countries, reference of a dispute to the DAAB shall now be deemed to interrupt the running of any applicable limitation periods. However, in light of the 28 days amicable settlement period to be observed prior to commencement of an arbitration, it remains unclear, if such limitation periods might start running again in the meantime.

Further, any amount decided upon by the DAAB or the Arbitral Tribunal as being payable from one to the other party shall now become immediately payable without the necessity of any further certification or notice and the Engineer is bound by DAAB decisions.

As in the 1999 FIDIC Suite, a Notice of Dissatisfaction (NOD) may be issued with respect to a decision of the DAAB. However, the new 2017 FIDIC Suite now allows to only partially contest such decisions. The parts defined in the NOD as being disputed (and any parts affected by such statement) shall then be deemed to be contested whereas the rest of the decision will become final and binding upon the Parties.

If one party does not adhere to a binding (even still not final) decision of the DAAB, the other party may refer the decision directly to Arbitration under the 2017 FIDIC Suite. The Arbitral Tribunal is then empowered to hand down an interim or provisional measure or an award enforcing the decision of the DAAB. However, the before described provisional measures of the Arbitral Tribunal are of course subject to the final and binding decision on the merits of the matter.

Finally, it should be noted that the arbitration clause has been amended with respect to the number of arbitrators to be appointed, now providing for "one or three arbitrators" instead of formerly three

Building Information Modelling

There is no specific reference in the General Conditions of the 2017 FIDIC Suite to Building Information Modelling (or “BIM” as it is commonly known). BIM is described as not being a set of contract conditions but a mechanism to provide an environment to access information relevant to respective parties’ roles.

The 2017 FIDIC Suite does include however Advisory Notes which provides some guidance for projects in relation to the use of BIM and for the parties involved with the same. The Advisory Note includes summaries of the following matters:

1. Background and use of BIM, as well as benefits.
2. Reference to co-ordination and goals typically being achieved by a BIM Protocol and a BIM Execution Plan. Protocols tend to regulate obligations and rights whereas Execution Plans and similarly named documents set out deliverables and allocate responsibilities for the same.
3. Risks in working with BIM including:
 - Scope of service matters, presumably where the BIM model does not correlate with the services being performed, individually or possibly more widely
 - Use of data and reliance issues
 - Poor quality data and/or management of the same
 - Security matters
 - Deliverables and approval mechanisms
4. Transition from a design or construction phase to an as-built phase.

Looking ahead, FIDIC state that there are to publish “Technology Guidelines” and a “Definition of Scope Guideline Specific to BIM” in due course which will provide support and guidance to those using BIM and FIDIC forms. That suggests that further working groups and possibly consultation will be undertaken, with the intent that future FIDIC forms will have provision for BIM obligations to be included in the suite of contracts for not only contractors but consultants and subcontractors as well.

There remain profound issues that need to be considered, for construction legal documents to be harmonised and include the following queries and matters:

- Which BIM service provider is preferred?
- Contingency planning to deal with technology advances, BIM Protocol changes or even service providers ceasing to operate or exist.
- Are all designers and other participants enabled to participate with the BIM Protocol? This seems a condition precedent to selection.
- What resources will be required from all designers and other participants?
- What cost will this resource involve? Further what ongoing costs after the design and construction phase ought to be allocated for maintaining the data?
- What copyright and other rights may exist in respect of designs or other data?
- Are there inconsistencies between any BIM Protocol and the suite of building contract(s), sub-contract(s) and consultant appointments? From experience this occurs frequently and can be problematic.

In our view, the construction industry will need to continue to deal with innovation and technology advances. BIM is part of the current evolution in the digital world but the industry has already navigated through earlier technological change with computer-aided design, electronic data interchanges and digitisation. Together with increasingly available smart technology, artificial intelligence and global connectivity, the construction industry is already an industry of tomorrow.

Your Taylor Wessing Contacts



Dr. Janina Pochhammer
Partner, Germany
+49 40 36803 105
j.pochhammer@taylorwessing.com



Dr. Niels L. Lange, LL.M.
Senior Associate, Germany
+49 40 36803 368
nl.lange@taylorwessing.com



Mathew Jones
Partner, United Kingdom
+44 20 7300 4636
m.jones@taylorwessing.com



Dr. Alfred Fink
Partner, France
+33 172 74 18 17
a.fink@taylorwessing.com



Huub Stroom
Partner, Netherlands
+31 88 02 43 125
h.stroom@taylorwessing.com



Mag. Peter Solt, LL.M.
Partner, Austria
+43 1 71655 0
p.solt@taylorwessing.com



JUDr. Jakub Adam, Ph. D.
Partner, Czech Republic
+420 224 81 92 16
j.adam@taylorwessing.com



Erwin Hanslik, MRICS
Partner, Czech Republic
+420 224 819216
e.hanslik@taylorwessing.com



Dr. Dániel Ódor, MRICS
Partner, Hungary
+36 1 32 70 407
d.odor@taylorwessing.com



JUDr. Andrej Leontiev, LL.M.
Partner, Slovakia
+421 2 5263 2804
a.leontiev@taylorwessing.com



Borys Strukov
Senior Associate, Ukraine
+380 44 3693 244
b.strukov@taylorwessing.com

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