



## DREDGING IN SOUTH EAST ASIA

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## INTRODUCTION TO THE SOUTH EAST ASIAN DREDGING MARKET

1. Capital and maintenance dredging works have found traction in developing economies in South East Asia owing to their vast infrastructure needs in the water resources sector. Several economies like India, Bangladesh, and Indonesia have taken considerable steps to enter into the dredging industry.
2. Bangladesh has introduced a rigorous long-term water resource policy named Bangladesh Delta Plan 2100 to ensure long term water and food security, economic growth and environmental sustainability. The Delta Plan 2100 is envisioned to create significant opportunities for dredging works under its Investment Plan. The Investment Plan has envisioned around 80 projects for water development in the country wherein about US\$ 37 billion worth of investment will be required.
3. Indonesia is another country in the region with thousands of kilometers of navigable waterways, resulting in the demand for several infrastructure projects involving dredging works in river banks, dams and ports. In the recent decades various dredging projects like the Sibolga Port Expansion, Patimban Port Project, the five-phase expansion of Indonesia's main port New Priok Container Terminal have been initiated and completed in Indonesia by several Indonesian as well as international dredging companies.
4. The Indian dredging industry is about 6.85 per cent of the global dredging market, but for long the dredging industry in India had experienced a hard time with very little fresh investment pouring into the sector.<sup>i</sup> However, the Indian dredging market is witnessing significant developments. The Indian Ministry of Shipping has introduced the Dredging Policy, 2007, wherein all major Indian ports (apart from Kolkata) will invite open competitive bids for dredging works, giving Indian companies owning Indian flag dredgers right of first refusal.<sup>ii</sup>
5. Further, as part of the Sagarmala project, the Indian government is giving impetus to port modernization and new port development, as well as developing inland water transport and coastal shipping.<sup>iii</sup> Both these components will inherently involve a large number of dredging works.
6. Although so far, the Indian dredging market has been dominated by the state-run Dredging Corporation of India ("DCI") and a limited number of domestic private vendors, the government is set to change this status quo. Quite recently, the NITI Aayog (India's policy planning body) stressed on the need to attract international players and increase competition.<sup>iv</sup> Earlier this year, the government also sold 73% stake in the DCI to four major port trusts.<sup>v</sup>



7. With these opportunities changes on the horizon for the major shipping hubs in South East Asia, it is pertinent to examine important legal issues which typically surround dredging works. In this document, we have attempted to explain these issues for our readers.

### SCOPE OF DREDGING WORKS

8. Dredging works are diversified in nature, and are commissioned to fulfill different scope of works. Two major kinds dredging activities undertaken by companies are capital and maintenance dredging.

9. Dredging is carried out in many different locations and for many different purposes, but the main objectives are usually to recover material of value or use, or to create a greater depth of water.

10. Dredging in and of itself is a process that involves the excavation of material or substances from a water environment, including water bodies like rivers, seas and oceans, for the purpose of improving existing water features; reshaping land and water features to alter drainage, navigability, and commercial use; construct dams, dikes, and other controls for streams and shorelines; and to recover valuable mineral deposits or marine life having commercial value.

### UNIQUE ISSUES

11. Before we delve into the legal issues typically surrounding dredging works, it is pertinent to examine the unique and specialized nature of dredging from other construction activities.

12. The dredging industry is a specialized and capital-intensive sector of the construction industry. The execution of a dredging project not only necessitates technical knowledge associated with civil engineering construction projects but also maritime expertise about the operation of a dredging vessel and compliance with international maritime shipping law. The logistics of ensuring continuous sufficient work for the specialized fleet coupled with massive capital investment and high operational costs inevitably mean higher than normal risks in the event of a change or variation in a project.

13. The very nature of dredging activities, i.e. construction at various depths underwater, created difficulties in obtaining accurate information regarding sub-soil conditions. Climatic and physical operating conditions such as wave height have a higher impact than on most other construction operations, particularly with regard to safety of workers.

14. Therefore, contracts for dredging works take into account the unique issues encountered in the course the construction project.



## REGISTRATION OF DREDGERS

15. In order to operate dredgers in India, Bangladesh and Indonesia, it is imperative to have registered vessels. Vessels in these countries are registered as per their respective national legislations. A brief overview of the ship registration process including the relevant authorities and basic requirements for the vessels and the owners of the vessels has been enumerated below.

### A. IN INDIA

16. Dredgers operating and conducting construction activities in India, are either owned and registered under the Indian flag, or non-Indian vessels that are not registered in India.

17. An Indian registered dredger essentially carries an Indian flag, and is subject to the regulatory authority of the Indian Director General of Shipping (“**DG Shipping**”) and is subject to the relevant Indian mercantile laws, principally the Merchant Shipping Act, 1958 (“**MS Act**”) and the rules enacted under the MS Act.

18. Dredgers are registered in India with the DG Shipping and the Marine Mercantile Department (“**MMD**”) as per the amended Merchant Shipping (Registration of Indian Ships) Rules, 1960. Permanent registration of an Indian vessel with the DG Shipping involves a number of steps including:

19. that the vessel should be owned by an Indian company or body that is registered with the DG Shipping and MMD,

- a. the vessel has to apply for name approval to the relevant port authority,
- b. apply for a carving or marking note for the vessel,
- c. sign a declaration of ownership of the vessel,
- d. the DG Shipping or MMD is to then carry out a survey of the mark or carving, and
- e. then award a permanent or provisional registration certificate.<sup>vi</sup>

20. For vessels or dredgers not registered in India, and not carrying the Indian flag are governed by the Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities) Rules, 2012, wherein there are requirements for vessels other than Indian registered ships operating in India, including that the vessels:

- a. be in possession of insurance coverage for maritime claims,
- b. have a valid certificate of registration with a recognized Classification Society,



c. to give prior information to the relevant Indian authorities of the vessel's entry into Indian territorial waters.<sup>vii</sup>

21. In a recent development, foreign vessels have also begun registering vessels in India, under the Indian flag especially in order to gain access to India's vast coastline to transport cargo. More foreign vessels are expected to register under the Indian flag in the advent of several government projects, including Sagarmala.<sup>viii</sup>

## B. IN BANGLADESH

22. Bangladesh has very comprehensive maritime legislation. It is the Bangladesh Merchant Shipping Ordinance, 1983 ("**Ordinance**") that covers vessel registration and most of the maritime matters in Bangladesh. The Department of Shipping in Dhaka headed by the Director-General, which is the administering body of this Ordinance. The Director-General acts as the Registrar General of ships under the Bangladeshi flag, and it is the Mercantile Marine Office that is responsible for ship registration.

23. The Ordinance defines Bangladesh ships and condition of her ownership. "Bangladesh ship" means a ship belonging to a statutory corporation or a ship acquired and owned by a foreign national or company and leased out to the Government or a citizen of Bangladeshi or a Bangladesh company under such an agreement that the ownership of the ship shall be transferred after a specified period of time to the Government or such citizen or company in accordance with the terms of the agreement or a ship owned wholly by persons defined under the Ordinance.

24. Further, the Ordinance requires certain conditions to be fulfilled by vessels desirous of being registered in Bangladesh:

- a. Vessel age should not be over 25 years old (if the vessel is imported);
- b. Vessel should be verified under Bangladesh recognized classification society;
- c. Vessel is to be surveyed by a Surveyor or by any Surveyor of a Classification Society duly authorized by the Government of Bangladesh and complied with maritime legislation such as IMO convention, SOLAS, MARPOL etc.;
- d. Vessel should specify ship's tonnage and build, deliver certificate and such other descriptive identity ascertained in the prescribed manner to register.

25. For registering a vessel, ship owner/appointed agents have to face several authorities in Bangladesh. There is no automation, and simplified a service for registering a vessel. Presently, the vessels that are registered under Bangladesh



flag register do not enjoy significant incentive. However, the underlying reason for registering a vessel in Bangladesh is the Flag Vessel (Protection) Ordinance, 1982. Clause 3 of the said ordinance states that at least 40% of the seaborne cargoes relating to foreign trade of Bangladesh shall be carried by Bangladesh flag vessel.<sup>ix</sup>

### C. IN INDONESIA

26. In a move to increase investments in the Indonesian shipping sector, the Indonesian Ministry of Transportation in May 2017 issued Regulation no. PM 13 of 2017 regarding Ship Registration and Nationality ("**Regulation**"). The Regulation replaces the previous Regulation No. PM 13 Year 2012 by providing comprehensive requirements and timelines for the completion of applications on vessel registration, transfer of ownership, transfer of hypothec over the vessel as well as the vessels historical documents.<sup>x</sup>

27. Companies must register the ship ownership to the Officials for the Registration and Recording of Ship Transfers of Title ("**Officials**"), who are appointed by the Directorate General of Sea Transportation. Companies can only register their ships after they have received an official ship measurement letter.

28. Only ships which fulfill the following requirements need to be registered:

- a. The internal volume of the vessel is minimum seven gross tonnage
- b. The ship is owned by:
  - i. Indonesian citizens or by an 100% locally owned legal entity;
  - ii. Joint venture companies where the majority of the shares is owned by Indonesian citizens or legal entities. This share ownership must be proven by a recommendation from the Investment Board.

29. Generally, the ship ownership registration consists of the following steps:

- a. Submission of the application through the Electronic Ship Registration System. The application needs to attach the following documents:
  - i. Ship ownership certificate and measurement letter;
  - ii. Identities of the ship owners, and their tax ID numbers (NPWP);
  - iii. Safety assessment report;
  - iv. Customs payment receipt; and
  - v. Recommendation from the Ministry of Maritime Affairs and Fisheries
- b. The application will be assessed by the Officials. The assessment will take maximum 3 working days.



- c. The assessment result:
  - i. In case the application is incomplete, the application will be returned. The applicant can then complete the application within two business days.
  - ii. In case the application is complete, the Officials will issue ship-registration deed.<sup>xi</sup>

## ENTERING INTO DREDGING CONTRACTS

30. In majority cases, the most cost-effective way of carrying out dredging works is by entering into specialized contracts. The most effective contracting process involves the calling for competitive bids under international tendering procedures. The free and fair competition implicit in this process has the dual effect of providing a reasonable price for having the work executed and giving the successful contractor a satisfactory return on his investment in plant and personnel.<sup>xii</sup>

31. Internationally, dredging contractors are faced with a multitude of contract conditions that frequently are drafted locally on the basis of national laws, statutes, attitudes and usages. In many cases, however, where contractors are invited to tender for works in other countries, contract conditions are used which are partially or completely in conformity with internationally accepted standardised conditions such as the FIDIC Conditions.

32. In 2016, FIDIC released the *Form of Contract for Dredging and Reclamation Works* (Second Edition of the Blue Book) ("**Blue Book**"), which incorporates several revisions from the first edition of the blue book, to make it specialized for the dredging and maritime works industry. India and Indonesia are both countries where there is widespread use of the Blue Book as a standard contract for dredging works.<sup>xiii</sup>

## IMPORTANT CONTRACTUAL CONSIDERATIONS

33. When entering into contracts, the most important issues, apart from the specifications of the works, are the contract price and possible escalations (including the introduction of variations), the completion date, and the allocation of the risks and liabilities between the contractor and employer. In this connection, the role of the supervisory functionary, which in the case of FIDIC is the engineer, is also vital.

### A. ROLE OF ENGINEER OR SUPERVISOR

34. Under the general FIDIC conditions, the role for an engineer to act as the independent certifier, scrutiniser and general supervisor or administrator. In the



majority of cases, this is the same person (private or legal) who designed the works. In view of the powers given to the engineer, including quasi-arbitral tasks, it is also of extreme importance for the employer and the contractor that an experienced and capable engineer be appointed. Further, the FIDIC conditions are based on the assumption that the Engineer is notionally independent from both the employer and the contractor and must act fairly.

35. This allows the employer to decide who is responsible for design, clearly identify risks and put these risks where they can be properly dealt with. The employer has substantial control during the contract preparation timing to make this contract represent the risk balance that he requires.

## **B. SITE DATA**

36. The smooth running of a dredging and reclamation project more often than not depends on the quality of information provided at the outset. The most common dispute on a dredging contract relates to the contractor encountering soil conditions that were not reasonably foreseeable and whether the contractor should be paid for any additional costs that arise. It is often difficult and expensive to resolve such disputes. Normally, employers do not want the contractors to include the risk of unforeseen conditions in their original price, unless it is almost certain this risk will materialise.

37. Using a geotechnical base report as a reference (as generally done on tunneling contracts) is recommended, as is establishing what the expected soil conditions on a project will be. This in effect creates a specification for the soil in the same way other elements of construction are specified. In the event of the project running into difficulties caused by soil conditions, the geotechnical base report can be used to decide if the conditions were really unforeseeable.

## **C. VARIATIONS**

38. Variations in dredging contracts are almost inevitable, even with the best prepared contract. This need may arise during the performance of the works for the engineer or employer to direct the contractor to modify the scope or nature of the work. The variation usually results in extra or different or less work.

39. As an understood norm, when there is extra work, the contractor will fairly consider itself entitled to a commercial rate including profit and additional overheads for that extra work. To avoid disputes, many contracts set out guidelines as to how to value variations. Ultimately, the contract should provide for an independent valuation if the contractor and employer are not able to reach an agreement.



40. A variation clause is a key boilerplate provision to include in a contract. The clause in a contract caters to the contractor to perform additional or varied work. In its absence the contractor is not bound to carry out such additional work at the original contract rates and prices or indeed at all.

41. The engineer has an obligation under the contract to assess the valuation of any varied work and to apply the contract rates where the work under the variation is of a similar nature and performed under similar circumstances to that set out in the contract. When the work is not identical or similar, rates and/or prices for other work in the contract are used as a basis to form a new rate or price with suitable adjustments to reflect the difference.<sup>xiv</sup>

#### **D. DESIGN DEFECTS**

42. Problems may arise due to defects in the design. The parties responsible for the design, albeit the employer or the Engineer, will sometimes deny that problems are a result of defective design. It is therefore recommended and emphasized that the parties take care that the progress of the works, and any problems encountered, are regularly and timely documented as completely as possible in mutual agreement.

#### **E. DEFINED RISKS**

43. Contract forms, such as the general FIDIC conditions, as well as other standardized contract conditions allocate most of the risks and liabilities of the execution of works to the contractor (generally the only exception is the liability for defects in the design and to a certain degree for deviating soil conditions). Some other exceptions are categorised in the FIDIC conditions namely the "Defined Risks". Such risks are to be borne by the employer to a certain degree.

44. In the amended Blue Book, the employer's and contractor's liabilities are spelt out in detail, to include interruptions in work due to ship movements in excess of those specified in the contract data, climatic or hydrological conditions more adverse than specified, the risks of piracy are now recognized as a defined risk.

#### **F. LIQUIDATED DAMAGES**

45. Parties to dredging contracts must be aware of the function of a system for liquidated damages. Generally, such damages can be claimed by the employer if the works or sometimes specified parts of the contract are not completed within the contractual period. The levying of liquidated damages, however, does not always exclude the possibility that other damages can be claimed by the employer or third parties.



## G. DEFECT LIABILITY

46. A specific responsibility that may lead to liability of the contractor is a defect of the work. As under the other FIDIC Forms, the contractor has to remedy at no cost to the employer any defects due to the contractor's design, materials, plant or his (lack of) workmanship.

47. Normally, this obligation ends one year after taking over the project or the relevant part of the project. However, remedying defects after demobilisation of high value dredging equipment may lead to unreasonably high costs for the contractor if remobilisation of this equipment is required. Furthermore, natural processes may also have their effect on the completed dredging work which may lead to defects that could not have been foreseen.

48. Therefore, under the Blue Book, the contractor has no obligation to remedy defects in dredging works after the completion date of these works. This does not mean that the contractor will not be held liable for the defect after completion. When the contractor is liable, he may still have to indemnify the employer.

## H. COMPLETION AND ACCEPTANCE CONDITIONS

49. It is useful to define completion and acceptance procedures, as well as payment arrangements and final account procedures. In this respect, it is important to point out that the rules applicable to the submission and return of bank guarantees should be well defined. It is rather unusual to incorporate in dredging contracts a defects liability (formerly called maintenance) clause. In the majority of cases the contractor cannot be required to accept any liability for defects in the works after completion. The pattern of currents in the water, the phenomenon of siltation, and so forth, may change the works and often cannot be attributed to a shortcoming of the contractor but rather to a possibly defective design. Of course, special terms and conditions can be agreed in this respect but they should be adapted to the peculiarities of the work in question.

## I. ENVIRONMENTAL ASPECTS

50. Contamination and pollution problems are increasingly requiring the special attention of designers, employers, and contractors. Detailed knowledge of local laws, statutes and of international treaties relating to the environment is required. The parties to a dredging contract should carefully determine the responsibilities, risks and liabilities involved. Methods to avoid pollution must be defined as well as the costs thereof. Possible indemnifications should be considered as well as possibilities offered by insurance to cover ensuing risks. Developing an Environmental Management Plan (EMP) and engaging an Environmental Manager



with specific expertise about these issues may in some cases be prudent and worth specifying contractually.

## J. INSURANCE

51. In most dredging contracts, conditions are specified for the insurance of risks for various categories of events causing damages to the parties of the contract or to third parties. Apart from the allocation of risks and liabilities between the parties, careful consideration of joint insurance possibilities and the cost thereof may offer benefits to both parties.

52. A typical insurance program for a dredging operation would include, commercial of marine general liability, automobile, workers' compensation, contractor's pollution liability, protection and indemnity, vessel pollution, hull and machinery.

## K. DISPUTE RESOLUTION

53. As dredging contracts go underway, there are several stages in which potential disputes are likely to arise between the employer and the contractor. The FIDIC suite of contracts provides a toolkit for dispute resolution, the same has evolved from the FIDIC suite of contracts of 1999, to the recent editions of the contracts released by FIDIC in 2017.

54. If disputes or differences between the employer and the contractor, including dissatisfaction with decisions of the engineer, cannot be settled amicably, the FIDIC Dredging Form provides for resolution of the dispute. The new suite of contracts considered the importance of dispute boards as means of avoiding disputes, now called DAAB, i.e. Dispute Adjudication/Avoidance Board, and dedicated two separate clauses to address claims and disputes resolution.

55. Claims are inclusive of both the contractor and the employer's claims, with reciprocal obligations. A claim may arise if, (a) the reduction of the contact price, as well as an extension of the defect notification period or an extension of time, respectively or (b) to any other relief against any other party, (c) or as a result of disagreement of any other entitlement or relief from either party whatsoever.

56. Should the decision of the DAAB not satisfy one or both parties to the contract, the Blue Book provides for international arbitration under the Rules of Arbitration of the International Chamber of Commerce.



- <sup>i</sup> Changing Dynamics of the Dredging Industry; Maritime Gateway; <http://matiyimegateway.com/changing-dynamics-dredging-industry/>
- <sup>ii</sup> Policy of Ports and Port Management in India; <https://shodhganga.inflibnet.ac.in/bitstream/10603/193946/5/chapter%2020.pdf>
- <sup>iii</sup> India's Mega Port Development Project 'Sagarmala': An Explainer for Investors, India Briefing, 31 August 2018; <https://www.india-briefing.com/news/sagarmala-developing-india-ports-aid-economic-growth12980-12980.html>
- <sup>iv</sup> Chapter 16: Ports, Shipping and Inland Waterways, in Niti Aayog, Strategy for New India@75 (November 2018).
- <sup>v</sup> Although this may be a mixed blessing for the industry, as these ports would likely now shift their dredging works to DCI. See P Manoj, 'Four major port trusts buy DCI for Rs. 1056 crore in a rationale-defying deal' (The Hindu Business Line)
- <sup>vi</sup> Indian Mercantile Department, Mumbai, Steps for the Permanent Registry of a Ship.
- <sup>vii</sup> Merchant Shipping (Regulation of Entry of Ships into Ports, Anchorages and Offshore Facilities) Rules, 2012
- <sup>viii</sup> P. Manoj, Foreign ship owners decide to fly the Indian flag, Live Mint, 11 January 2016, <https://www.livemint.com/Companies/mdn7TMwVAFEPmgDoLAWKeL/Foreign-ship-owners-decide-to-fly-the-indian-flag.html>
- <sup>ix</sup> Mohd. Mostafa Shaheen, Ship Registration in Panama, Singapore, Bangladesh Flag: A Comparative Study Approach, International Journal of Science and Research, March 2019.
- <sup>x</sup> Hanim Hamzah; Indonesia- New Regulation on Registration and Nationality of Vessel; Coventus Law; 8 September 2017; <http://www.conventuslaw.com/report/indonesianew-regulation-on-registration-and/>
- <sup>xi</sup> Ship Registration Procedure Reregulated by Ministry of Transportation; Indonesia Investments; 5 September 2017; <https://www.indonesia-investments.com/business/business-columns/ship-registration-procedure-regulated-by-ministry-of-transportation/item8169>
- <sup>xii</sup> Dredging for Development, 2010, IADC
- <sup>xiii</sup> Facts About, An Information Update from the IADC, FIDIC Blue Book (Second Edition).
- <sup>xiv</sup> David Kinlan, Valuing Variations in Dredging Contracts



## About Us

Singularity is an Asia and Africa focused international disputes boutique, established in August 2017. Since then, we have handled over US\$ 2 billion in cross-border disputes across jurisdictions and industries.

These disputes were in various parts of the world including Egypt, India, Israel, Indonesia, Kazakhstan, Nigeria, Malaysia, the Philippines, Turkey, UK, UAE, Sierra Leone, Singapore and Somalia.

In the first 1000 days, we are already recognized as market leaders.

- Legal 500- Tier 2 in Asia-Pacific - India for arbitration;
- Benchmark Litigation- Tier 3 in Asia Pacific - India for international arbitration;
- Financial Times - Top 5 in Asia-Pacific for innovation in dispute resolution;
- India Business Law Journal and Asian Legal Business -Rising Law Firm of the Year;
- RSG Consulting - Top 50 law firms in India.

## About Expert Talk

The Expert Talk initiative seeks to provide quality continued digital education to professionals, through freely accessible webinars, and a digital library of blogs, alerts, insights and talks, on dispute resolution and litigation finance.

## About Our Shipping and Insurance Practice

We advise across the full spectrum of the shipping, offshore, ports dredging, and marine insurance market on high value and complex commercial and regulatory disputes. Our key engagements include:

- Advising an Indian shipping and dredging company in an insurance litigation against an Indian state-owned underwriter (UK High Court, English law)
- Advising a Singaporean company for its disputes under a charter party settlement agreement with a shipping company based in Bahamas (LMAA Rules, London seated, English Law)
- Advising a Singaporean company in charter party dispute against an Italian company (Singapore High Court, Singapore law)
- Representing an Indian company in an ad hoc arbitration concerning a charter party dispute against an Indian state-owned entity for a dredging project (Indian law)
- Advising an Indian company in an insurance dispute for oil pollution and wreck removal (Indian and international maritime law)



## About Our Construction & Infrastructure Practice

We serve the construction industry globally in some of the highest value, complex international projects for building industrial plants, civil infrastructure, mining infrastructure, real estate, and ships and port. Our key engagements include:

- Representing two Indian companies in an arbitration under a joint-venture agreement for construction of a thermal power plant against a Korean sovereign company (SIAC Rules, Singapore seated, Indian law)
- Representing a Singaporean and an Indian company in an ad-hoc arbitration and associated litigation concerning termination of a contract for conversion of a mobile offshore drilling unit to a mobile offshore production unit, against an Indian state-owned enterprise (India seated, Indian law / Bombay High Court)
- Representing two Singaporean upstream oil and gas companies in an arbitration for their disputes under a joint venture agreement (SIAC Rules, Singapore seated, Singapore law)
- Representing an Indian company in an arbitration concerning the termination of a contract for the construction of an ethanol and power plant in Philippines against an Australian employer and Filipino co-contractor (SIAC Rules, Singapore seated, English law)
- Representing a Singaporean and an Indian company in an arbitration concerning breach of a consortium agreement for a rig conversion project against an Abu Dhabi shipyard (SIAC Rules, Singapore seated, Singapore law)
- Advising Singaporean companies in several civil and criminal disputes against local partners and directors of an Indonesian coal mining and logistic operations concerning fraud and diversion of business (Singapore High Court and Indonesian courts)



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