

MDA CONSULTING



FIRST AID FOR CONTRACTS



Tenth Edition - October 2017

FIDIC: TIME BARRING & THE “DAB”

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In December 2016, at a FIDIC Users Conference held in London, FIDIC pre-released a proposed new edition of its Yellow Book (Conditions of Contract for Plant and Design Build). The new (second edition) is set to be published during December 2017 at the next FIDIC User’s Conference.

The yellow book is typically used for projects where the employer protects his interests and limits his responsibilities by appointing a contractor who assumes the overall responsibility for the construction works as well as the design.

In the proposed new edition, FIDIC aims to proactively address one of the key elements that is predominantly seen in the execution of construction contracts – dispute avoidance and resolution. Disputes are a fundamental element of construction

projects as they occur regularly and can have severe impacts on the project, as such, it is imperative that disputes are dealt with, managed and resolved, in a cost and time effective manner.

Some of the relevant changes that FIDIC have made in the new edition are discussed hereunder:

CLAUSE 20 – [CLAIMS, DISPUTES AND ARBITRATION]

Clause 20 has been split into two separate clauses, distinguishing “Claims” independently from “Disputes and Arbitration”. Clause 20 is now titled “Employer’s and Contractor’s Claims” and a new separate Clause 21 has been included as “Disputes and Arbitration”.

In terms of the current edition of the yellow book, Clause 20.1 requires the contractor to submit its notice for, “...any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract...not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance...”. This is a condition precedent and as a result if the Contractor fails to comply with the time limits imposed, he will automatically lose his right to make a claim. The 28-day time limit has remained the same in new edition, however Clause 20 in the new edition now creates reciprocity between the Employer and Contractor when submitting claims, as the Employer is now similarly subjected to the 28-day time limit as the Contractor when submitting his claim.

Some of us have argued that the terms of clause 2.5 of the First Edition Red Book did impose a time bar on Employers claims and this was supported by a Privy Council ruling. FIDIC’s intentions have now been made clear in this second edition.

DISPUTE ADJUDICATION BOARD

The description of the Dispute Adjudication Board has changed to the Dispute Adjudication/Avoidance Board (“DAB”). This change indicates FIDIC’s intention to ensure that disputes are rather avoided or resolved as soon as possible, without the need to enter into costly and time-consuming adjudication or arbitration proceedings. The DAB is required to be a standing DAB which is to be formed from the commencement of the project, as opposed to the ad hoc DAB in the current edition. (the first edition Silver Book also had an ad hoc DAB, the Red Book a standing DAB. All the second

edition Rainbow Suite contracts will now have standing DAB’s).

In addition, the DAB can resolve matters that may be unrelated to claims and/or disputes and provide their assistance before they become disputes. The DAB can also involve themselves in disputes or potential disputes, by informal discussions, the outcome of which, the Parties will not be bound by, if the matter is later formally referred to the DAB. As the DAB is more involved from the outset of the project, they can assist and ensure that disputes are properly managed, and that the project runs more efficiently. The DAB can also refer potential disagreements to the Parties and invite them to jointly request assistance on the matter.

CLAUSE 20.3 - [WAIVER OF TIME-LIMITS]

FIDIC have also introduced an entirely new clause, Clause 20.3 [Waiver of Time-Limits], which allows the DAB to waive the clause 20.1 time bar in certain circumstances.

Clause 20.3 in the proposed Yellow Book, second edition states:

“If the claiming Party receives a Notice from the Engineer under Sub-Clause 20.2.2 [Engineer’s preliminary response] or Sub-Clause 20.2.4 [Fully detailed Claim], and if the claiming Party considers there are circumstances which justify late submission of the Notice of Claim or particulars under subparagraph (b) of Sub-Clause 20.2.4 as the case may be, he may apply to the DAB for a ruling under this Sub-Clause.

This application to the DAB shall:

- a) be made within 14 days of receiving the Engineer's Notice;*
- b) be in writing, with a copy to the other party and the Engineer; and*
- c) shall include supporting particulars, including details of why such late submission is justified.*

If the claiming Party fails to apply to the DAB within this period of 14 days, he shall be deemed to have accepted finally and conclusively that the Notice of Claim is not valid and the Engineer shall have no obligation to proceed under Sub-Clause 20.2.5 [Agreement or determination of the Claim] ...”.

Accordingly, under Clause 20.3, if the circumstances are fair and reasonable regarding the late submission of the claim, the DAB will have the authority and be entitled to waive the time limits under sub-clause 20.2.1 or 20.2.4. When considering whether to waive the above time limit, the DAB will consider, but not be limited to the following:

- Whether the other Party would be prejudiced by acceptance of the late submission;
- Whether the other Party had prior knowledge of the event in question or basis of claim; and
- The extent to which, if at all, the Engineer may already have proceeded to make a determination, or more likely sought to negotiate an agreement.

In recent case law courts have adopted a similar approach, as described above, when dealing with time bar clauses, and whether they are seen to be reasonable and enforceable in light of the surrounding circumstances.

In *Barkhuizen v Napier*¹, the Constitutional Court held that when dealing with time bar clauses, the right to freedom to contract (*pacta sunt servanda*) and the right of access to court must be weighed up against each other, as well as, the fact that enforcing a clause which limits one's right to seek judicial redress, is not contrary to public policy, and is fair, reasonable and just in the circumstances.

In *Botha v Rich*², the constitutional court held that “*it is an accepted principle of our law that where a contract creates reciprocal obligations, own performance or tender of own performance by a claimant is a requirement for the enforceability of her claim for counter-performance. This is an instance of the principle of reciprocity.*”.

The court further stated that the obligations of the parties must also be reciprocal, and performance of one party cannot be enforced without the performance of the other party, in order to ensure that the principle of reciprocity is followed. Bilateral contracts are contracts where two parties have cooperatively contracted with each other, in order to benefit both parties and they must have regard to the other party's interests. The law of contract includes the concepts of justice, reasonableness and fairness³.

In addition, the courts, in further cases, stated that the law of contract must be “infused” with constitutional values⁴. Parties need to act in good faith towards each other when contracting and contracts must be entered into and executed in a manner that benefits both parties and is reciprocal. The courts will further take into account constitutional values, ubuntu, good faith and fairness in the circumstances of each case.

In Clause 20.3, it is evident that FIDIC have incorporated the principles of good faith and reciprocity by allowing a party to have recourse to submit his claim, even where it may be time barred, the DAB can then assess his submission, in light of the circumstances. This creates reciprocity and fairness between the parties. Therefore, if the Employer, were to be the cause of the claim and the Contractor was time barred, the Contractor, in light of the circumstances, may not lose his entitlement to submit his claim, as the Employer should not benefit from his own breach and vice versa.

CONCLUSION

The new edition, by revising Clause 20 and giving the DAB the right to waive time limits, attempts to create a balance between the rights and obligations of the employer with those of the contractor, making them have equal contracting obligations and responsibilities in terms of their submission of claims. It also allows for the DAB to be more involved from the outset of the

project, with the requirement of it being a standing DAB as opposed to an ad hoc DAB, allowing them to prevent disputes from occurring as a result of claims being made, and leading to adjudication or arbitration.

Conclusively, the new edition, seems to engage all parties involved in the project by “dishing out” more responsibilities to the parties, thereby enhancing project management and ensuring that the project runs more efficiently and smoothly with less disputes. However, it is nevertheless, unclear as to what may arise out of the new edition, and whether the changes will be welcomed by those in the construction industry.

Certainly, the new forms are more complex than their predecessor and this would appear to be fertile grounds for more rather than less conflict.

¹ 2007 (5) SA 323 (CC).

² *Botha and Another v Rich N.O. and Others* 2014 (4) SA 124 (CC) at para 43-46.

³ *Tuckers Land and Development Corporation (Pty) Ltd v Hovis* 1980 (1) SA 645 (A).

⁴ *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) and *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2017 (4) SA 243 (GJ).