

MDA PRESENTS



FIRST AID FOR CONTRACTS



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THE DISPUTE AVOIDANCE PROCESS: FIDIC 2017 SECOND EDITION

+ Author: Tsele Moloji

Disputes are a common feature on construction projects and can result in cost increases and delays. As a result, standard form contracts recognise the need to incorporated mechanisms to deal with such disputes. The NEC4 Fourth Edition and FIDIC 2017 Second Edition, are two contracts which have incorporated dispute avoidance mechanisms into their suite of contracts as opposed to the old dispute resolution process of referring disputes to a dispute adjudication board.

The updated second edition FIDIC suite of contracts were recently published. This article considers the changes to the old subclause 20.1 - by splitting it into two separate subclauses dealing with claims and disputes under subclause 20.1 and 21 respectively, and analyses the general application of the subclause.

The FIDIC Conditions of Contract for Construction (*“the Contract”*) now provides for the use of an ‘avoidance of dispute’ process under clause 21.3.

Internationally, dispute avoidance is considered a safety umbrella to describe positive dispute avoidance mechanisms in construction contracts. There are a number of models which fall under this umbrella. Dispute resolution adviser (*“DAR”*), dispute adjudication boards (*“DAB”*) and dispute review boards (*“DRB”*) are the main dispute avoidance mechanisms which have gained popularity in different jurisdictions around the world¹.

¹ Dispute Avoidance Procedures (*“DAPs”*) – The Changing face of Construction Dispute Management, Paul A Gerber

In terms of new FIDIC subclause 21.3 the process is initiated by a request by the parties (engineer on behalf of the employer/ and contractor or the contractor and subcontractor) to the dispute avoidance/dispute adjudication board (“the DAAB”) to provide assistance and/or informally discuss an issue to attempt resolve it. Alternatively, the DAAB can approach the parties to make a joint request for its involvement. Clause 21.3 states that:

“If the Parties so agree, they may jointly request (in writing, with a copy to the Engineer) the DAAB to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the Contract. If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request.

Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise.

Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions. The Parties are not bound to act on any advice given during such informal meetings, and the DAAB shall not be bound in any future Dispute resolution process or decision by any views or advice given during the informal assistance process, whether provided orally or in writing”.

Unlike the incorporation of a dispute avoidance mechanism under the NEC4 suite of contracts which direct a party to refer all “potential disputes” to the dispute adjudication board (dispute avoidance process) prior to referring the matter to arbitration, under the FIDIC process, a request to involve the DAAB is voluntary, and both parties must agree to request the DAAB’s assistance/involvement, failing which the issue or disagreement cannot be dealt with by the DAAB. Furthermore, the subclause is also explicit on the function of the DAAB. Its function is to provide advice and/or informally discuss issues or disagreements which have arisen, with the parties present, unless they agreed otherwise. The DAAB’s recommendation/advice is not binding, and as such the parties are free to continue with the dispute and refer it to dispute resolution, notwithstanding the advice given by DAAB.

In addition, the decision not to use the dispute avoidance process does not preclude the parties from referring the dispute to the DAAB for its decision, which is formal and binding, under subclause 21.4. This clause states that:

“If a Dispute arises between the Parties then either Party may refer the Dispute to the DAAB for its decision (whether or not any informal discussions have been held under Sub-Clause 21.3 [Avoidance of Disputes] and the following provisions shall apply: ...”

It is clear that the benefit of subclause 21.3 is to encourage and support parties to prevent and/or resolve potential disputes as early as possible, consensually, and without the need to arbitrate and incur unnecessary legal costs and delays.

A 2012 survey conducted by the Chartered Institute of Arbitrators showed the shortfalls of traditional dispute resolution proceedings such as arbitration, that the average legal costs for a United Kingdom claimant are £1.54m – R24,640,000.00 (£1.69 million for claimants in the rest of Europe), with proceedings lasting on average between 17 and 20 months, of which a quarter were based on construction or engineering disputes. We can see why there is a continuous effort to find a more flexible and less expensive way to resolve issues and disagreements².

Although subclause 21.3 is an informal process and not a mandatory contractual requirement, if employed, it nevertheless adds a further layer of administrative burden, which may be disregarded by the unsuccessful party. A futile exercise if a party elects to continue with the dispute. This could be exploited by an intransigent party to a dispute and the process converted to one of attrition.

There is a plethora of writing on the purpose and intention of resolving issues or disagreement expediently and without delay. At the centre of this commentary is the importance of protecting the contractor/subcontractor in an otherwise unequal contractual relationship.

A well-recognised principle in construction is that cash flow is the lifeblood of a contract/subcontract. The inability to receive payments, as and when they fall due, and further delayed by a non-binding mechanism of dispute avoidance further prejudices the 'small' guy in the contractual relation.

Advice/recommendation which is not binding creates a bottle-neck to the flow of cash and ultimately impacts the contractor/subcontractor.

Our courts also recognise this dilemma and frame it as 'justice delayed is justice denied'.

The delays to attaining a settlement/resolution of a dispute may be extensive and could exceed and overrun the construction period³.

Disputes that arise during the construction period must be resolved immediately and the advice/recommendation must be binding to ensure that cash flow is maintained. This will also benefit the employer/contractor as it receives the benefit it contracted for at that start of the project⁴.

There is a need to ensure that construction contracts incorporate positive dispute avoidance mechanisms, to prevent and/or limit the propensity of disputes on construction projects.

The FIDIC suite of contracts has incorporated a dispute avoidance mechanism which intends to address this. The inclusion means that parties have an alternative avenue, prior to the formal and rigid dispute adjudication board process, to prevent and/or resolve an issue or disagreement without the need to be involved in costly and lengthy arbitration.

²<http://constructionblog.practicallaw.com/trends-in-icc-arbitration-construction-and-engineering-disputes/>

³http://www.cic.hk/cic_data/pdf/about_cic/publications/eng/V10_6_e_V00_Guidelines_DisputeResolution.pdf

⁴https://repository.up.ac.za/bitstream/handle/2263/57493/Mewomo_Requirements_2016.pdf?sequence=1&isAllowed=y

It is generally accepted that dispute avoidance mechanism have a positive benefit given the propensity of disputes on construction project. However, the less formal the dispute resolution process, the more important it is that the parties are willing settlers. There is a real danger that these dispute avoidance clauses could be used to frustrate the settlement process. Notwithstanding these good intentions (a contractual mechanism to settle disputes quickly and cheaply) an unprotected and unwary contractor/subcontractor may still be left with a sour taste in their mouths. As the saying goes, 'cash is king' in the hands of the contractor and or the subcontractor.