

Claims, Disputes and Arbitration

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1. Introduction

In addition to the "consolidation" of these topics, formerly dispersed in various Clauses of the earlier Edition, FIDIC has introduced significant substantive changes on the topics of Claims, Disputes, and Arbitration.

Also, this Technical Session 5 of this contracts seminar will note certain aspects of Disputes as treated under the international development banks.

2. Claims

Those who have been working with the FIDIC Conditions for a long time will recall that under the 3rd Edition, 1977, the subject of claims was covered in nine lines of the last Sub-Clause of Clause 51, "Alterations, Addition and Omissions". Apart from some different notice provisions in some other Clauses, such as Clause 44, the claims provision required only a monthly account of "all claims for additional payment to which the Contractor may consider himself entitled"

A decade later, in the 4th Edition, FIDIC gave more attention to the subject of Claims. As explained in its "Guide", the aim was "To set out a disciplined manner of dealing with claims... Frequently in the past claims have been made when the project has been completed and the workforce has been dispersed and then both the Employer and the Contractor are dependent upon incomplete records and inevitably regard their memories of the event as being indisputable. As their memories were rarely identical it is understandable that they were both dissatisfied with the outcome".

A new Clause, 52 "Procedure for Claims" was introduced for the 4th Edition, featuring: a 28 day notice period (which was harmonized with other notice provisions in other Clauses); a requirement to keep contemporary records to support any claim, and a limitation on claims recovery to sums which can be substantiated from those records; and, a timetable for submissions of details of notified claims.

In 1996, following the introduction of Dispute Review Board provision into The World Bank's Standard Bidding Document, "Procurement of Works" as a substitute for an Engineer's Decision under Clause 67 of the 4th Edition, FIDIC published a Supplement to the 4th Edition, Section A of which introduced the Dispute Adjudication Board ("DAB") as the final adjudicator of disputes, subjects, only to arbitration. Each of FIDIC's three 1998 Test Editions of the new major forms adopted the DAB technique for dispute resolution. However, in the First Editions of 1999, only the *Construction* conditions retained the DAB as originally conceived, as a "standing" DRB appointed at the outset of the Contract. In the other two major sets of Conditions, for reasons which have been the subject of learned disagreement since 1999, the General Conditions prescribe an "ad hoc" DAB, appointed only after a dispute has arisen, instead of being appointed at the outset of the Contract. (Of course, the Parties can, in the Particular Conditions, amend the General Conditions to provide for a "standing" DRB, if they wish.)

So much for the evolution of the Construction provisions regarding claims, disputes and arbitration. Let us note some of the important changes which the First Edition, 1999, introduced. Perhaps because the 4th Edition provision aimed at timely notification and substantiation of claims did not succeed, for First Edition introduces a "sanction" for failure to meet the notice requirement. Such failure is a bar to any entitlement to additional time or money in respect to the event given rise to the claim. Further, the new Clause provides that if the post-notice provisions requiring substantiation of claims (including maintenance of contemporary records) are not met, any

determination of entitlement to additional time or money in respect of those claims must take into account "the extent (if any) to which the failure has prevented, or prejudiced proper investigation of the claim". So, even if timely notification is made, the post-notice requirements must be met or there is a likelihood of forfeiture of any entitlements in respect of the claim.

Also appearing for the first time is a provision governing claims by the Employer. It is important to note that it is not incorporated into the Clause 20 procedure, but instead is found in Sub-Clause 2.5. Also, it is interesting to see that there is a more lenient attitude toward claims by the Employer than is taken toward claims by the Contractor. Sub-Clause 2.5 requires the Employer to give notice "as soon as practicable after the Employer became aware the event of circumstance giving rise to the claim." This is to be compared with Sub-Clause 20.1 where the wording is "as soon as practicable, and not later than 28 days after the Contractor became aware or should have become aware..." The Contractor is constrained (but not the Employer) by both the 28 day limit, and the application of an objective standard to knowledge of the event and circumstances giving rise to the claim.

3. Disputes

Disputes are adjudicated by a DAB, which is to be established by the date stated in the Appendix to the Tender. It is to be comprised of either one or three "suitably qualified" members, who are to be agreed by both Parties. Clause 20 contains "fail safe" provisions to deal with delay or failure to act in establishing the DAB.

Appended to the Conditions are an Appendix, "General Conditions of Dispute Adjudication Agreement", and an Annex, "Procedural Rules", and these two documents detail the arrangements for, and operation of, the DAB.

Before examining those arrangements and operation, it should be noted that the DAB provisions (in both the 1996 Supplement to the 4th Edition and the new First Edition) omit potentially important words which were in Sub-Clause 67.1 of the 4th Edition, relating to the "Scope" of the disputes provisions. Those words were "whether before or after repudiation or other termination of the Contract". To date, one has not seen any official comment explaining FIDIC's thinking in deleting these words, which with some alterations, had been in these Conditions since initial Edition. It is interesting to contrast this deletion with the new Conditions' distinctions between and terminating the Contractor's employment, discussed during Technical Session 3: it would seem that there is a need for harmonization on dealing with the effects of termination on pre-termination Contract rights and obligations.

The Appendix, "General Conditions of Dispute Adjudication Agreement" is the document to be signed by the Employer, the Contractor, and the DAB Member. In it, the DAB Member warrants and agrees that he is and shall be impartial and independent of the Employer, the Contractor, and the Engineer, and he effectively reconfirms that he is experienced in the work which the Contractor is to carry out under the Contract, experienced in the interpretation of contract documentation, and fluent in the language for communications defined in the Contract. In paragraph 4 of the document the DAB Member undertakes 11 particular obligations towards the Contractor and the Employer.

The Appendix also covers the remuneration of the DAB Member, which is borne in equal shares by the Employer and the Contractor, and includes a monthly retainer fee (reduced at the time of the Taking-Over of the Works) Plus a daily fee for time spent working on DAB matters, and reimbursement of expenses. Unless otherwise agreed, the fees are fixed for 24 months, then adjusted annually as may be agreed.

The relationship may be terminated by the Member by resignation following 70 days' notice, or by simple notice if either the Employer or the Contractor have breached the agreement. The Member may be terminated by joint action of the Employer and the Contractor following 42 days' notice.

It should be noted that there appears to be a conflict between two paragraphs in the Appendix, regarding the extent of the liability of the DAB Member: see, paragraphs 5(c) and 8. No doubt this will be clarified in future Editions of the Conditions.

The Annex, "Procedural Rules", foresees the DAB visiting the Site at agreed intervals even if there are no disputes. This is to give the DAB familiarity with the progress of the Works from their inception. Additionally among the documents which the DAB may request are the usual monthly progress reports. When disputes are referred to it, the DAB has great latitude in its proceedings, which typically include hearings held at Site. The DRB is to issue a reasoned decision on a dispute within 84 days of referral of it to the DAB.

After receipt of the DAB decision, the Employer and the Contractor have 28 days after receipt in which each may give notice to the other of dissatisfaction with the decision; if no notice is given within that time limit, the decision becomes final and binding.

If a notice of dissatisfaction is given, Sub-Clause 20.5 requires an attempt at amicable settlement, during a period of not less than 56 days after the date of the notice of dissatisfaction. After 56 days, the amicable settlement attempt may continue, but either Party is free to commence arbitration.

Before leaving the topic of DAB's it should be noted that FIDIC is conducting a series of Adjudicator Training and Assessment Workshops for persons who wish to qualify for listing in FIDIC's "List of Adjudicators": details can be found on FIDIC's website at www.fidic.org/dab.

4. Arbitration

The provisions for arbitration will be familiar from the 4th Editions. Sub-Clause 20.6 effects a stipulation by the Parties that the decisions of the DAB are admissible in evidence in the arbitration: this provision clearly gives then parties a strong incentive to accept the DAB decisions rather than to refer them to arbitration and attempt to persuade the arbitrator) that the DAB was wrong.

The section of "Guidance" on preparation of Particular Conditions includes approximately two full pages of suggestions regarding the appointment of the DAB, the effort at "amicable settlement", and Arbitration, and should be given careful study prior to preparation of a Contract using the *Construction* Conditions.

In closing, it should be noted that the international development banks have not yet adopted the 1999 Edition of the Construction Conditions. It is expected that they will, but it may be some time before they do, especially as The World Bank (which typically takes the lead on such changes in Procurement documents) published a new edition of its "Procurement of Works" document just last May. Also, experience indicates that The World Bank is likely to require its Borrowers to adopt at least some particular Conditions prepared by the Bank. Thus, for some time, we are apt to encounter contracts financed by international development banks but employing different Editions of the FIDIC Conditions; further (and unfortunately), Employers themselves often "adjust" the FIDIC Conditions. The consequence of all this is that one must never assume that just because the format, Clause titles, and Clause numbers are the same as FIDIC's, the Clause texts are the same as FIDIC's.

Finally, please note that FIDIC's Guide to the new suite of 1999 Editions now can be purchased from FIDIC.

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