

CLAUSE 20, DISPUTE RESOLUTION

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Introduction

Before looking at the provisions of Clause 20 in the 1999 FIDIC Conditions, let us remind ourselves of the system used prior to the introduction of the Dispute Adjudication Board.

In the pre-1999 documents (for example, in Clause 67 of the old Red Book), the procedure for handling claims and disputes involved principally the Engineer making a fair and impartial determination and decision which was binding on the parties unless and until either party was dissatisfied with that decision and chose to take the matter one stage further - and that was arbitration.

This procedure worked well for many years until some people - notably lawyers and the World Bank - began questioning whether the Engineer (as a Party paid by the Employer) could realistically be expected to act in the manner required by Clause 67 -that is "impartially".

After much debate on the subject, the World Bank in the early 1990's, took the step of requiring Borrowers who were carrying out work based on the old 1987 Red Book, to amend Clause 67 to replace the Engineer's Decision with a totally independent Dispute Review Board (DRB) as a pre-arbitral attempt to reach agreement on potential dispute situations. The DRB would make a 'recommendation' which it was hoped the parties would accept, but they were free to reject and refer the matter to arbitration if they so wished. In 1996, FIDIC decided to publish a supplement to the Red Book providing a revised text to Clause 67 to be used if the parties decided to adopt an alternative form of dispute resolution along the lines of the Bank's DRB.

FIDIC felt that for such a procedure to be effective, the decision of the dispute board should be binding rather than just a recommendation, and thus introduced the Dispute Adjudication Board (DAB). The purpose and role of the DAB was covered in the 1996 Supplement and formed the basis of the procedures described in Clause 20 of the 1999 documents.

More recently, the WB, whilst retaining the name DRB, have made the findings of the

DRB binding on the parties (similar to FIDIC's DAB).

It is also interesting to note that, historically, the process of adjudication as we now find it in the FIDIC documents, is very similar to the process of arbitration as it was when it was first introduced as a means of solving disputes several hundred years ago (12th Century). At that time (for example), two tradesmen with a difference of opinion about the price of potatoes, would put the matter before a 'commercial court' (rather than a court of law), consisting of other tradesmen with similar experience to make a decision. Then God invented lawyers and the whole process became a completely different ball-game. In 1697, the first Arbitration Act was passed in an attempt to regulate arbitration proceedings, and since then the process has become more and more based on legal principles rather than on common sense. But now, common sense is prevailing again and we are re-inventing the process (and calling it adjudication) to protect ourselves against legal nightmares surrounding the arbitration process today.

The procedures I am going to run through are those found in Clause 20 of the new Red Book - Conditions of Contract for Construction.

Clause 20 - Claims, Disputes and Arbitration

So let us move on to Clause 20 as it appears in the new FIDIC documents.

This is very similar to the Supplement to the 1987 fourth edition issued in 1996 whereby the Engineer's Decision under Clause 67 (which is very similar to Clause 66 of the Irish Conditions) was replaced by a DAB.

In this presentation I will be referring to the 1999 FIDIC Clause 20.

In the old documents, there were different clauses dealing with Claims and Disputes, so let us just clarify what is what.

A **Claim** is essentially a request from one party (usually the Contractor) for something which he considers is due to him under the terms of the Contract - and a **Dispute** arises when the other party disagrees with the Claimant either on fact or quantum, and the parties cannot reach an amicable solution.

So Clause 20 is there to allow Contractors their basic right to claim additional compensation (money or time) in the event that they (the Contractors) feel they have an entitlement under the Contract to such compensation. And it goes on to provide a

mechanism for handling those claims and any disputes which may arise as a result.

As compared to the provisions of the old Red Book (apart from the introduction of the DAB), the 1999 documents have tried to tighten up the rules and procedures concerning all claims and remove some of the weaknesses and loopholes found in the earlier documents.

20.1 Contractor's Claims

This sub-clause has been written to give a precise procedure which Contractors must follow if they wish to submit a claim - either for extra cost or extra time. In the past there has often been disagreement as to how to act in the event that a Contractor has failed to submit a claim within the given time limit. Does the Engineer look at the claim or does he not? Or is he empowered to or indeed does he have a duty to? Or indeed, what are his rights according to the law?

Remember also that when the Contractor submits a claim, the burden of proof lies with the Contractor. It is the Contractor's job to prove his case - it is the Engineer's job to evaluate the evidence and decide whether the case is proven.

The first step is for the Contractor to give Notice. This he must do within 28 days of becoming aware of the event. This Notice is important because:

- everyone involved becomes aware that here is an event or circumstance where extra time or payment may be due to the Contractor
- proper records can then be kept and agreed, to avoid future argument
- alternative measures may also be possible to reduce the effects
- maybe the matter can be resolved at an early date
- if the event or circumstance turns out to be of insignificant effect, then it is not necessary to follow up the Notice with a formal claim.

There are many individual Sub-Clauses which give the Contractor (or the Employer) entitlement to claim extension of time or additional payment. In the various Sub-Clauses the Contractor's entitlements to claim are expressed similarly, e.g. 'If the Contractor suffers delay and/or incurs Cost ... the Contractor shall give notice ... and shall be entitled subject

to SubClause 20.1 to: (a) an extension of time ... (b) payment of any such Cost...' Thus ALL claims from the Contractor have to follow the procedure set out in Cl. 20.1. It is a procedural clause.

The Notice must also give basic details

- describing the event or circumstance
- the notice need not state time or amount claimed or contractual basis of claim
- notice shall comply with Cl 1.3, i.e. in writing and properly delivered
- progress reports - Cl 4.21(f) - must list notices given
- no response required from Engineer (Employer) - but a simple acknowledgement is normal.
- **NB. if Contractor fails to give notice within 28 days he loses entitlement to his claim**

The Notice starts the claims procedure:

- contemporary records to be kept which may be inspected by Engineer
- fully detailed claim to be submitted within 42 days of event (or other agreed time)
- importance of good record keeping cannot be over-emphasised
- provision for on-going claims and submittal of their details
- *within 42 days of receiving the claim with details 'the Engineer shall respond with approval, or with disapproval and detailed comments. He may also request any necessary further particulars, but shall nevertheless give his response on the principles of the claim within such time'.*
- Thus there is a time limit imposed on the Engineer to reply to a claim
- each payment certificate shall include such amounts for any claim as have been reasonably substantiated'.
- the Engineer shall determine under **Clause 3.5** any time extension or additional

payment to which the Contractor is entitled under the Contract.

- any other specified requirements must also be satisfied.

So let us remind ourselves of **Clause 3.5** (as it appears in the 1999 FIDIC documents) as this will be a good indication as to whether or not the Engineer has acted correctly in making his determination - especially if the matter is later referred to Adjudication. In many clauses in the Conditions, especially relating to claims or entitlement for extra time or money, there is a reference to Clause 3.5 with respect to the Engineer making his determination.

For example: Clause 4.24:

".....the Engineer shall proceed in accordance with Sub-clause 3.5 ... to agree or determine these matters."

The important elements of Clause 3.5 are:

"....the Engineer shall consult with each Party in an endeavor to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances."

Thus before making a determination the Engineer must consult, and his determination must be fair.

A further difficulty with claims in the past - from the Contractor's point of view - has been the Engineer who sits on claims without answering, or who `stonewalls' claims by asking for more and more details, and generally delays giving a definite answer. It is hoped that the introduction of a time-limit within which the Engineer has to give a definitive answer will help reduce this problem.

In the Old Red and Yellow Books, if the Contractor was not happy with the Engineer's response to his claim, then he could ask for the `Engineer's Decision' (Red Book Cl 67.1). In the New Books, the Engineer no longer has this pre-arbitral decision. This task is now taken over by the DAB (but, as an option, if agreed, the Engineer may still be given this task).

2.5 Employer's Claims

In the past Employers or their Engineers have often summarily withheld payment of monies which they considered were - for one or another reason - not due to the Contractor. Sometimes they have similarly de facto extended the Defects Liability Period. To try to prevent unfair withholding of monies or extensions of the 'guarantee' period, the New Books - in an entirely new Sub-Clause 2.5 - prescribe a procedure which *has* to be followed by the Employer if he considers himself to be entitled to *any* payment under or in connection with the Contract, or considers himself to be entitled to an extension of the Defects Notification Period (the new, more correct, term for the Defects Liability Period).

Thus, Cl. 2.5 requires notice and particulars:

- Employer shall give notice as soon as practicable after becoming aware of event or circumstance giving him entitlement to any payment from Contractor
- notice relating to extension of DNP to be given before expiry of such period
- particulars to specify Clause or other basis for claim, with substantiation
- extension of Defects Notification Period as Cl 11.3 for defect or damage preventing use
- notice shall comply with Cl 1.3, i.e. in writing and properly delivered
- progress reports - Cl 4.21(f) - must list notices given
- no response required from Contractor
- particulars may be given at any time
- claim then subject to Cl 3.5, i.e. Engineer endeavors to agree and settle the claim, failing which he makes a fair determination
- any amount so determined is deducted from Payment Certificates
- any extension so determined is added to DNP
- by Cl 14.7 Employer has to pay the amount certified
- if the DAB decides that Employer has paid less than the amount due, Contractor would be entitled to financing charges under Cl 14.8

Cl. 2.5 therefore imposes a claims procedure on the Employer and *prohibits him from*

making deductions from payments due to Contractor until claims procedure has been followed which is a new requirement.

Conclusion re Clauses 2.5 and 20.1:

It is hoped that the new stricter rules, with the requirement for both the Contractor and the Employer to follow a specified procedure, will reduce some of the difficulties currently being met with regarding claims. For the Contractor, a strict time limit has been introduced for notification of his claim, so that all parties are made aware that a claim exists and can keep proper records and perhaps avoid unnecessary consequences. For the Engineer, he is now required to give his response, at least on the principles of the claim, within a set time (which was not the case before). For the Employer, he now is not entitled to deduct any monies, nor extend the Defects Notification Period, unless he has followed the set procedure of notification, and then determination.

Dispute Adjudication Board (DAB)

- DAB can have 1 or 3 members
- A 'standing' or 'full-term' DAB is recommended for construction projects where much work takes place at Site (e.g. CONS)
- An 'ad-hoc' DAB is recommended where most of the work is done off-site, e.g. manufacture, transport, etc of Plant (e.g. P&DB and EPCT)
- Appropriate arrangement to be included in Contract
- Standing DAB appointed within 28 days of Commencement Date
- Ad-hoc DAB within 28 days after a Party refers a dispute to the DAB
- All DAB members shall be independent of the Parties, and be paid 50:50
- Standing DAB shall follow progress of the Works, visit Site 3-4 times per year
- Both Parties may jointly - but not individually - ask DAB's opinion, often remove a potential conflict
- Appointment can only be terminated by both Parties, not only by one

20.2 Appointment of the Dispute Adjudication Board

'Pre-arbitral decisions' - i.e. final decisions, unless the matter is taken to arbitration - are to be made by a Dispute Adjudication Board, and not by the Engineer as in the Old Books.

- The DAB shall be appointed (and agreed) jointly by the Parties and set up at the commencement of the Contract (e.g. within 28 days after the Commencement Date). The DAB is thus in place for the duration *of* the project and is often called a 'standing' or 'full term' DAB. This can be compared to an 'ad hoc' DAB which is appointed as and when a dispute arises, and is disbanded as soon as it has given its decision on that dispute.

The 'standing' DAB remains in place until the end of the project whether or not any disputes are referred to it.

- The DAB can comprise 1 or 3 members.
Personally, I prefer a Board of 3 members except in the simplest of projects. The World Bank gives certain guidelines which have to be followed on WB funded projects. They say for projects valued in excess of USD 50m, a 3-man Board is mandatory, and below that value, either a 3-man or 1-man Board is acceptable.
- With a 3-man Board, each Party nominates one member who has to be approved by the other Party, then those members and the Parties agree on a third member who shall be chairman.

There are alternative ways *of* selecting and agreeing members - for example, if the Contract contains a list of potential members, the parties can select (and agree upon) three members from that list.

- Unless agreed otherwise, selection of the members means that the members and the Parties will adopt the General Conditions of Dispute Adjudication appended to the Red Book.
- Terms of remuneration shall be agreed and each Party is responsible for paying one half.
- Replacement *of* any or all members *of* the DAB can only be made with the agreement of both Parties, but not by one Party acting alone.
- The appointment of the DAB shall expire when the Discharge (Clause 14.12) has

become effective - i.e. when the Final Statement is issued, and when it is paid, and when the Contractor has received the Performance Security back from the Employer.

General Conditions of Dispute Adjudication Agreement

Included in Book as Appendix to General Conditions, and includes Annex - Procedural Rules

- Form of Agreement between the Employer, the Contractor and the DAB Member
- Member warrants that he is impartial and independent
- That he is experienced in the work, in contract interpretation and fluent
- Obligations set out- independent, available, etc
- Procedural Rules require the DAB to act fairly and impartially between Parties

20.3 Failure to Agree Dispute Adjudication Board

If Parties fail to nominate a member or to agree on DAB then the 'appointing entity' named in Appendix to Tender shall, at the request of either or both parties, and after consulting with them, make the necessary appointment(s). The appointing entity should be a body with the knowledge and experience to make appropriate appointments - e.g. the President of the Institution of Engineers of Ireland, or the Association of Consulting Engineers of Ireland, or FIDIC.

I would suggest that the chosen body is an engineering rather than a legal body.

20.4 Obtaining Dispute Adjudication Board's Decision

- Any dispute may be referred to the DAB at any time. However any such referral must be copied to the other Party and the Engineer, and make it clear (by reference) that it is a formal referral to the DAB.
- However, it must be based on a 'dispute', i.e. not just a difference of opinion that is still under discussion. The key to the door to Clause 20.4 lies in Clause 3.5 - i.e. non-acceptance of an Engineer's determination.

- Either Party may refer the dispute to the DAB (the chairman) in writing referring to Cl. 20.4
- Both Parties make available all relevant information in support of their respective cases - the Claim and the Response.
- **DAB** decides on its procedures - however the DAB must note that it is not empowered to act as 'arbitrators'. The procedure to be adopted must be 'inquisitorial' rather than 'adversarial'.
- DAB shall give decision within 84 days (or other agreed time)
- Decision shall be reasoned
- The decision of the DAB becomes immediately binding on the parties and must be put into immediate effect (even if one of the parties intends to contest the decision)
- Either party then has 28 days in which to give a 'notice of dissatisfaction' if he is not happy. Such notice is his key to proceed further to arbitration.
- Unless a notice of dissatisfaction is issued within 28 days, the decision is final and for ever binding on both Parties.

20.5 Amicable Settlement

Where notice of dissatisfaction with DAB's decision has been given, the Parties must attempt amicable settlement prior to the matter being referred to arbitration. If settlement not reached by 56 days, then the dispute may be referred by either party to arbitration.

It has been argued that this mandatory period for the parties to try to settle is a waste of time - they are already so far apart, that there is now no hope of any voluntary settlement. I disagree with this line of thinking.

In practice this period gives the parties time to consider the potential costs and consequences of what they are about to embark upon - and in many cases, where a party is considering arbitration, this time gives an opportunity to cool down and think about things before taking the final `step'.

20.6 Arbitration

The last resort is international arbitration - a long, complicated and expensive process!

The parties are free to agree on rules and procedures, however, if they accept the provisions of Clause 20.6, then:

- Arbitration shall be according to the ICC (International Chamber of Commerce) rules and procedures.
- There will be 3 arbitrators appointed according to ICC Rules
- The arbitration will be conducted in the language for communications (Clause 1.4)
- Arbitrators have power to open up, review and revise any certificates, decisions, etc
- Engineer may be called as a witness
- Neither Party is limited to evidence or arguments put before DAB
- Arbitration may be commenced before or after completion of Works

20.7 Failure to Comply with Dispute Adjudication Board's Decision

If DAB's decision has become binding, but a Party does not comply with it, then that failure to comply can itself be referred to arbitration without the need for a DAB decision under Clause 20.4 or Amicable Settlement under Clause 20.5.

20.8 Expiry of Dispute Adjudication Board's Appointment

If - for any reason - there is no DAB in place, then requirement for amicable settlement will not apply, and the dispute may be referred directly to arbitration.

Introduction of the Dispute Board

Can the Engineer realistically be expected to act in the manner required by Clause 67 - that is "impartially"?

In the early 1990's the World Bank, amended Clause 67 to replace the Engineer's Decision with a totally independent Dispute Review Board (DRB)

In 1996, FIDIC introduced the Dispute Adjudication Board (DAB) as an alternative to Clause 67. This formed the basis of the procedures described in Clause 20 of the 1999 documents.

Clause 20 - Claims, Disputes and Arbitration

- **to allow Contractors their basic right to claim additional compensation (money or time)**

- **It provides a mechanism for handling those claims and any disputes which may arise as a result.**
- **It has tightened up the rules and procedures concerning claims and removed some of the weaknesses and loopholes found in the earlier documents**

20.1. Contractor's Claims

This covers the procedure which Contractors must follow if they wish to submit a claim - either for extra cost or extra time.

The burden of proof lies with the Contractor.

It is the Contractor's job to prove his case –

It is the Engineer's job to evaluate the evidence and decide whether the case is proven.

The first step is for the Contractor to give Notice within 28 days of becoming aware of the event.

This Notice is important because:

- **everyone becomes aware of the event**
- **proper records can then be kept and agreed**
- **alternative measures may also be possible**
- **the matter may be resolved at an early date**
- **if insignificant, then it is no need to follow with a formal claim.**

ALL in Cl. 20.1. It is a procedural clause claims from the Contractor have to follow the procedure set out.

More about the Notice

The Notice must also give basic details

- **describing the event or circumstance**
- **notice shall comply with Cl 1.3, i.e. in writing**
- **progress reports - Cl 4.21(f) - must list Notices given**
- ***NB. if Contractor fails to give notice within 28 days he loses***

entitlement to his claim

The Notice starts the claims procedure:

- **contemporary records to be kept**
- **fully detailed claim to be submitted within 42 days**
- **provision for on-going claims**
- *within 42 days of receiving the claim with details `the Engineer shall respond with approval, or disapproval....*
- **each payment certificate to include agreed amounts**
- **the Engineer shall determine under Clause 3.5**

For example: Clause 4.24:

“..... the Engineer shall proceed in accordance with the Sub-clause 3.5... to agree or determine these matters.”

Clause 3.5

The important elements of Clause 3.5 are:

- **I'the Engineer shall consult with each Party in an endeavour to reach agreement.**

- **"...If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances."**

Thus before making a determination the Engineer must consult, and his determination must be fair.

2.5 Employer's Claims

If the Employer considers himself to be entitled to *any* payment, or considers himself to be entitled to an extension of the Defects Notification Period then:

- **He shall give notice as soon as practicable after becoming aware of event with particulars and substantiation**
- **notice shall comply with Cl 1.3, i.e. in writing**
- **progress reports - CI 4.21(f) - must list notices given**
- **then according to Cl 3.5, i.e. Engineer makes a fair determination**
- **any amount so determined is deducted from Payment Certificates**
- **any extension so determined is added to DNP**

Cl. 2.5 therefore imposes a claims procedure on the Employer and *prohibits him from making deductions or payments due to Contractor until the claims procedure has been followed.*

20.2 Appointment of the Dispute Adjudication Board

- **The DAB shall be appointed (and agreed) jointly by the Parties**
- **Set up within 28 days after the Commencement Date and remains in place for the duration of the project ('standing' or 'full term' DAB).**
- **The DAB can comprise 1 or 3 members.**
- **With a 3-man Board, each Party nominates one member who has to be**

approved by the other Party,

- **Those members and the Parties agree on a third member who shall be chairman.**
- **the members and the Parties will adopt the General Conditions of Dispute Adjudication appended to the new Red Book.**
- **Terms of remuneration shall be agreed and each Party is responsible for paying one half.**
- **Replacement of the DAB can only be made with the agreement of both Parties, but not by one Party acting alone.**
- **The appointment of the DAB shall expire when the Discharge (Clause 14.12) has become effective - i.e.**
 - ❖ **when the Final Statement is issued, and**
 - ❖ **when the money due is paid, and**
 - ❖ **when the Contractor has received the Performance Security back from the Employer.**

Key Issues from the

General Conditions of Dispute Adjudication Agreement

- **Form of Agreement between the Employer, the Contractor and the DAB Member**
- **Member warrants that he is impartial and independent**

- **Experienced in the work, in contract interpretation etc**
- **Obligations set out - independent, available, etc**
- **Procedural Rules require the DAB to act fairly and impartially**

20.3 Failure to Agree Dispute Adjudication Board

If Parties fail to nominate a member then they can refer to the 'appointing entity' named in Appendix to Tender. The appointing entity should be a body with appropriate knowledge and experience - e.g.

- **the President of the Institution of Engineers of Ireland, or**
- **the Association of Consulting Engineers of Ireland, or**
- **FIDIC.**

20.4 Obtaining Dispute Adjudication Board's Decision

- **Any dispute may be referred to the DAB (chairman) at any time. Any such referral must be copied to the other Party and the Engineer.**
- **Both Parties make available all relevant information in support of**

their respective cases - the Claim and the Response.

- **the DAB is not empowered to act as `arbitrators'. The procedure must be `inquisitorial' rather than `adversarial'.**
- **DAB shall give decision within 84 days**
- **Decision shall be reasoned**
- **The decision of the DAB becomes immediately binding on the parties and must be put into immediate effect**
- **Either party has 28 days in which to give a `notice of dissatisfaction' if he is not happy.**
- **Unless a notice of dissatisfaction is issued within 28 days, the decision is final and for ever binding on both Parties.**

20.5 Amicable Settlement

Where notice of dissatisfaction with DAB's decision has been given, the Parties must attempt amicable settlement prior to the matter being referred to arbitration. (56 days)

20.6 Arbitration

The last resort is international arbitration. Unless the parties agree otherwise:

- **Arbitration shall be according to the ICC rules and procedures.**
- **3 arbitrators appointed according to ICC Rules**
- **The arbitration will be conducted in the language for communications (Clause 1.4)**
- **Arbitrators have power to open up, review and revise any certificates, decisions, etc**
- **Engineer may be called as a witness**
- **Neither Party is limited to evidence or arguments put before the DAB**
- **Arbitration may be commenced before or after completion of the Works**

20.7 Failure to Comply with Dispute Adjudication Board's Decision

If DAB's decision has become binding, but a Party does not

comply with it, then that failure to comply can itself be referred to arbitration without the need for a DAB decision under Clause 20.4 or Amicable Settlement under Clause 20.5.

20.8 Expiry of Dispute Adjudication Board's Appointment

If - for any reason - there is no DAB in place, then requirement for amicable settlement will not apply, and the dispute may be referred directly to arbitration.