

## **FORMAL ADJUDICATION**

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### Introduction

1. Applications to the Dispute Adjudication Board (DAB) may be either informal or formal. An informal adjudication is one where both parties join in seeking the DAB's advice on a question or questions the formulation of which they have agreed. In dealing with such applications the DAB has greater freedom to adopt cost-effective procedures (for example, in meeting one party in the absence of the other) which can often resemble those of mediation. On the other hand, a formal adjudication is one where one of the parties refers a dispute to the DAB without the agreement of the other party and such formal applications have to be dealt with according to more or less strict adversarial procedures.

2. This paper is concerned only with formal adjudications, and with the procedures leading up to but not including a Hearing, which will be the subject of another paper.

### The Contract

3. Formal references will normally arise either under the I.E.I. Conditions of Contract (Third edition as re-printed in January, 2002) where the new Clause 66 is incorporated as a Special Condition, or under Clause 20 of the new F.C.I. Conditions of Contract (First Edition, 2002). While the relevant provisions differ slightly in detail, such differences do not materially affect the subject-matter of this paper. Attention is also drawn to the I.E.I. draft Conciliation Procedure 2002 and to the Conciliation Procedure B and the guidance notes thereto. (For the purposes of this paper, the Conciliator under the said Procedure is taken as synonymous with a DAB).

### Commencement

4. F.C.I. Clause 20.4 provides that : -

"If a dispute (of any kind whatever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the Conciliator for his recommendation, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause."

I.C.E. Clause 66.4 uses the same words, save for replacing "Conciliator" and "recommendation" with "DAB" and "decision" respectively and inserting a proviso that such reference shall take place after the DAB has been appointed. Both Clauses then require the Conciliator or DAB to give his or its recommendation or decision within a fixed period (42 days under Clause 20.4; 84 days under Clause 66.4) :-

" ...after receiving such reference, or within such other period as may be proposed by the Conciliator/DAB and approved by both Parties.... ' "

Clause 66.4 adds an alternative start-date, being the receipt of an advanced payment "referred to in Clause 6 of the Appendix", a provision which is absent from Clause 20.4.

5. Both Clauses imply that the reference in writing shall contain all the basic information about the dispute as the Conciliator/DAB will need, since both require that :

"Both Parties shall promptly make available to the Conciliator/DAB all information, access to the Site, and appropriate facilities, as the Conciliator/DAB may require for the purposes of making a decision on such dispute...."

but experience indicates that the initiating reference in writing may often be sketchy in the extreme, yet time will start running against both the Tribunal and the other Party forthwith.

Clearly, fair play (or the "rules of natural justice") requires that the other party must know the case it has to meet before it can be expected to formulate its response. It is suggested that, where the initiating reference is little more than a bare statement of intent to refer and/or is virtually devoid of relevant detail, the Tribunal should demand a full submission as soon as possible and then propose for the Parties' approval that time should be extended to restore the 42 or 84 day period following receipt of the full submission, Alternatively, the Parties could be encouraged to agree in advance (e.g. where the Tribunal has already been appointed) that the stipulated time should not start to run until an adequate and complete submission has been delivered,

6. It is interesting to note that, in the United Kingdom, a distinction is drawn between a notice of intention to refer (known in the I.C.E, Adjudication Procedure 1997 as a Notice of Adjudication) and the "Referral", or delivery of a complete statement of the Referring Party's case. Time does not start to run until the Referral is received, with the preceding period between Notice of Adjudication and Referral (which by Statute is strictly limited) being used to secure the appointment of an Adjudicator if one is not already in post. However, this has in practice given rise to other problems - particularly where both Parties are represented by professional lawyers - including arguments that the Notice of Adjudication discloses no matter in dispute or that, if it does, they are not the same ones as appear in the Referral (or that the disputes set out in the Referral are outwith the scope of those disclosed in the Notice of Adjudication). All these arguments are concerned with the Adjudicator's jurisdiction and - since the U.K. Courts are loath to refuse enforcement of a decision even if it is demonstrably wrong - have latterly become the main means of challenging a decision in Court. Fortunately, Clause B.1.8(b) of the I.E.I. Conciliation Procedure 2002 empowers the Conciliator/DAB to decide upon his own jurisdiction and as to the scope of any dispute referred to him, so, hopefully, such legal shenanigans should be rare in Ireland.

#### Submissions required

7. Both I.E.I. Clause 66.4 and F.C.I. Clause 20.4 are silent as to the way in which the proceedings are to be conducted, save only that the written notice to refer must state that it is

given under the relevant sub-clause and that it must be served upon the Tribunal, with copies to the other Party and to the Engineer. However, the I.E.I. Procedure empowers the Tribunal, among other things, to establish the procedures to be followed, suitable to the dispute and avoiding unnecessary delay or expense (Clauses B.1.7(b) and B.1.8(a)); to take the initiative in ascertaining the facts and matters required for a decision, including making use of his own specialist knowledge, if any (Clauses B. 1.8(d) and - (e)); to adopt (unless the parties otherwise agree) an inquisitorial procedure (Clause B.1.10); and in general to issue such directions as he considers appropriate (Clause B.1.11). The Tribunal's discretion in such matters is very wide, and Clause B.1.12 requires that : -

"The Parties shall in good faith co-operate with the Conciliator and, in particular, shall endeavour to comply with requests by the Conciliator to submit written materials, provide evidence and attend meetings."

In practice, however, the submissions will normally be confined to the Referring Party's written notice to refer (or Statement of Case), followed by the other Party's Response and finally a Reply to the Response from the Referring Party,

8. Taking these three submissions in turn, the Statement of Case should comprise a full (but concise) statement of the matters said to be in dispute; details of the circumstances giving rise to the dispute; a statement of the issues of fact and of law which need to be considered; particulars of the redress or remedy sought and the reasons said to justify entitlement thereto; and the evidence (including, where appropriate, witness statements and/or experts' reports) relied on. The evidence should be attached to the Statement, either in the same cover or in an accompanying file, or be identified by appropriate cross-referencing. In addition, if the Tribunal is newly-appointed or is otherwise unfamiliar with the project, the Statement should include a copy of the adjudication agreement (whether as part of the Contract or not) and, if there has been an earlier notice of intention to refer, a copy of that notice.

9. In its turn, the Response should take the same form and should preferably deal with each paragraph or item of the Statement of case by way of admission, denial or qualification. As with

pleading a defence in litigation or arbitration, care should be taken to leave no averment in the Statement of Case unanswered, although in suitable cases a "general traverse" of the minor or less important averments may suffice. With regard to the redress or remedy sought, it may well be appropriate to "counterclaim" a "reverse" remedy but, unlike litigation or arbitration, "counter-disputes" must not be raised; if they exist, they must be the subject of a completely separate notice to refer and cannot be dealt with in the same proceedings unless both Parties and the Tribunal agree. On the other hand, issues relevant to the dispute(s) already referred but not raised in the Statement of Case can always be introduced into the Response, and any dispute as to their relevance or admissibility will be resolved by the Tribunal. Finally, any evidence not already made available as part of the Statement of Case must be attached to or otherwise included in the Response.

10. Unlike the Response, any Reply must be strictly limited to matters raised in the Response, or by way of amplification (but not extension) of matters already raised in the Statement of Case. Should a Reply contain "fresh" issues or matters, they are, strictly speaking, inadmissible and should be ignored (it will normally be unnecessary formally to "strike out" such extraneous material). The danger is that, if such extraneous material is allowed to stand, the other Party will be entitled to submit a "rejoinder" thereto, with the possibility of a potentially unending succession of further submissions. It is far better to keep that particular can of worms firmly shut. For the rest, a Reply should follow the same format and have the same kinds of attachments as the Response.

#### Steps from the Referral to the Hearing

11. The foregoing paragraphs indicate the usual steps which must take place between the Reference and any Hearing or, if there is to be no Hearing, the Decision, namely the submission of a Response and (usually, but not necessarily always) a Reply. However, in individual cases there may be a need to make provision for other matters, and those most likely to be encountered may be summarised as follows:

- (a) If, upon receipt of the Statement of Case, it is clear to the Tribunal either that something is missing or that the treatment of some issue or matter is wholly inadequate, the Tribunal (at its sole discretion) may question the Referring Party in

an attempt to persuade that Party to remedy such omission or inadequacy. However, such enquiry should not challenge the substance of the Statement of Case, since that is the function of the Responding Party, and the objective is to ensure so far as is practicable that the latter is left in no doubt about the case which he has to answer, but no more. In particular, any perceived inadequacy in the supporting evidence offered should not at this stage be questioned.

However, the Tribunal should not at a later stage carry out any similar enquiry with regard to the Response, since by then the issues should be clear, and any remaining questions will be for the Referring Party to raise by way of a reply.

- (b) On a similar topic, and where the Parties are legally represented, they may try to serve requests for "further and better particulars" by analogy with procedure in litigation. Such attempts should be strongly resisted, since any question of substance should be put by the Tribunal. Court procedures are simply too long and complicated to be appropriate for the strict time limits prevalent in conciliation or adjudication.
- (c) Where a site visit or other inspection is deemed appropriate (by the Tribunal - the Parties may suggest, but it is for the Tribunal to decide), this should normally take place after the Response has been delivered since, until then, all aspects of the case which could benefit from such a visit or inspection may not have been spelled out. However, prevailing circumstances may necessitate an earlier visit or inspection (for instance, where the formation is about to be concealed by concrete).

Such visits or inspections should normally be attended by representatives of both Parties, or alternatively by the Tribunal alone, so as to avoid any perception of possible bias. However, if both Parties agree (for their own convenience) or if one Party chooses not to participate or to be actively obstructive, the Tribunal after due warning in writing to the defaulting Party may proceed to visit or inspect with only

one Party represented.

The Parties' legal representatives may attend, but only as observers; it is the "engineering" which is to be examined and not the law. However, if lawyers for only one Party should appear, they should be sent away.

- (d) Once the Response has been delivered, the Tribunal may find it necessary to seek further information, in which case questions put to one Party must be copied to the other, as must the answers received. Such questions should be carefully worded so as to avoid any risk of misunderstanding and should if at all possible be both concise and short. In addition, the Tribunal may see a need to investigate some aspect of the case of its own motion, in which case both the objective and the result must be copied to both Parties in sufficient time for them to be able to comment thereon.
- (e) Finally, should there be a challenge to the Tribunal's jurisdiction, whether on the basis of some alleged defect in the dispute(s) as referred or to the Tribunal's power to deal with any matter, the Tribunal has the necessary power under Clause B.1.8(b) of the I.E.I. Procedure to resolve the challenge. It is for the Tribunal (and not the Parties) to decide whether to deal with such a challenge at once and resolve it by an appropriate Ruling at the earliest opportunity or to reserve it until the Hearing or even to the Decision. Needless to say, in any event the Parties must be given a reasonable opportunity to address the Tribunal on the jurisdictional challenge, preferably in writing but, where it seems both appropriate and convenient, orally.

The foregoing is not an exhaustive list of what might be encountered in any particular Reference, but should suffice to establish the principles of how such matters should properly be dealt with.

#### Organisation and Case Management

12. It is essential to the success of any Reference in satisfactorily resolving the matters in issue

(satisfactory, that is, in the objective sense and not in the subjective opinion of either Party) that the various procedures be properly organised and the case managed by the Tribunal. Such organisation and case management cannot be left to the Parties, since each has its own axe to grind and will naturally seek tactical or procedural advantage if they can. This need for the Tribunal to maintain control is equally important whether the Parties are ignorant of what is required of them or are represented by competent lawyers or lay advocates, in the latter event even though such lawyers or advocates have an overriding duty not to mislead the Tribunal.

13. The first bone of contention will usually be the timetable. Taking Clause 20.4 as an example, the DAB has only 42 days from delivery of the Statement of Claim in which to deliver a Decision. If there is to be a Hearing, and working back from the Decision, the DAB may well need of the order of 7 days after the Hearing in which to consider the evidence and submissions, reach a decision and write and publish the Decision. Again, a Hearing - even (or one might say especially) if confined to a single day - needs proper preparation both by the Parties and by the DAB. Allowing (say) 7 days for such preparation and the Hearing, one is left with a mere 28 days - of which the Responding Party will promptly demand three weeks in which to respond "properly and in full" to the Statement of Case, while the Referring Party will similarly be demanding a fortnight in which to prepare a Reply. It can easily be seen that the 42 days allowed by the Contract is already in danger of being exceeded and, while the DAB can propose an extension, both Parties must agree. And it must be remembered that a Decision which is delivered out of time is not merely late - it is in law a nullity.

14. It thus behoves the Tribunal to take early and firm control of the timetable. Admittedly, the Parties may already have agreed one which suits their mutual convenience, but the Tribunal is not bound to accept it. In awkward cases it may well be prudent to invite the Parties to an early procedural meeting at which these and other procedural matters can be discussed and determined and, if agreement cannot thereby be obtained, it may be necessary for the Tribunal to issue a formal Order for Directions. However, time presses and such matters are almost always better resolved informally. In this connection it is at least arguable that the Tribunal may communicate on such procedural matters by telephone with one Party or its lawyer, provided that the gist of such conversation is immediately reported by the Tribunal (by telephone or otherwise) to the

opposing Party or lawyer and, preferably, later confirmed in writing. But matters of substance in the Reference must never be so discussed.

15. The next most usual problem may be epitomised as "the Bundles". Ideally, both the Statement of Case and the Response (and the Reply, if any) should be simple, straightforward, concise and short and should be accompanied by a carefully chosen file of relevant documentation. However, no doubt because of the pressure of time, a Party may frequently throw in "everything but the kitchen sink" or, what is even worse, include incomplete copies of the Contract, Specification etc. For its part, the opposing Party follows suit, resulting in massive duplication on the one hand or, on the other hand, their own selection of parts of the Contract Documents. The result all too often is the delivery of massive documentation which the Tribunal is then left to sort out, sieve, compare and cross-reference in whatever minimal time is left to him before the deadline for delivering his Decision.

16. What should happen, of course, is that the Parties or their advisers should cooperate (cf. Clause B.1.12 of the I.E.I. Procedure) in assembling a "core bundle" of necessary Contract and other documentation, to which they can both refer and in the light of which their own documentation can be reduced to a minimum. This may, of course, not be necessary if the DAB has been in post for some time and has been following progress. But, if not, the Tribunal should take immediate and early action to persuade the Parties to act sensibly with regard to "the Bundles" since, if not, the Tribunal under pressure of time may well - quite involuntarily and in good faith - miss some vital piece of paper to the detriment of one Party or the other.

17. A further problem with "the Bundles" is often pagination. Each file cover contains a plethora of unrelated or, at best, loosely-related documentation with no easy means of location or identification. The Parties should be required to number the pages in each file and the files themselves so that any particular piece of paper can be found quickly and with certainty, and such file and page references should be freely employed in the submissions themselves. All this takes time, but it is time well spent, and the Tribunal should direct that this be done.

18. Finally, a totally different problem arises when the submissions reveal a mixture of issues going variously to facts, liability or quantum. To attempt to deal with the whole Reference in one operation may well prove both extremely difficult and counterproductive. The Tribunal should therefore take an early opportunity to consider whether and, iff so, to what extent it would be both feasible and appropriate to separate consideration of fact and of liability and/or whether to postpone questions of quantum until fact and liability have been established. If such separation (in whole or in part) appears desirable, then the Tribunal should so rule (after consulting the Parties or their advisers) and order such provision in the timetable and as to other aspects of procedure as to him seems appropriate. Such separation could even be taken as far as the issuing of "partial" or "interim" Decisions (to be incorporated in due course into the final, definitive Decision) even though neither the Contracts nor the I.E.I. Procedure has any mention of such options. However, should there be any doubt as to the legality of any such partial or interim Decision, it should suffice to achieve the same objective by the issue of appropriate "Rulings", with the advantage (or disadvantage, depending on one's point of view) that a Ruling is in principle open to challenge by one or both Parties before the final Decision, whereas a partial or interim Decision is not.

#### Tailpiece.

19. It will be clear from the foregoing discussion that, in resolving the matters referred to him, the Tribunal - be he Conciliator or DAB - should from the very outset be, if not "bloody", then certainly "bold and resolute" in taking complete charge of the proceedings before him. Provided that he thoroughly understands the legal and organisational bases of what he is doing (and a Conciliator or DAB must have more, rather than less, understanding of such matters than - say - an arbitrator), no Court is likely to fault him for procedural misconduct. Nor is the Tribunal necessarily bound by every aspect of the principles of natural justice, since his Decision (or at least the disputes which it purports to determine) can always be referred on to arbitration or litigation, and it has been established by judicial authority, at least in the U. K., that the giving of such more-or-less rough justice is not a breach of the Convention on Human Rights.

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