



International Federation of Consulting Engineers
The Global Voice of Consulting Engineers

Alternative Dispute Resolution

FIDIC Briefing Note

June 2019



Contents

Background	2
Alternative Dispute Resolution	3
Rationale	3
FIDIC recommends:.....	4

Background

The international engineering federation FIDIC (the International Federation of Consulting Engineers) believes that its member associations and their members should strive to achieve the highest degree of quality and standards.

FIDIC has always had policy statements that it expects its members to follow to ensure high standards of service in the infrastructure industry. These standards are reflected in FIDICs contracts, policy work, events and committees.

Alternative Dispute Resolution

As development projects have become larger and more complex over the last three or four decades, the incidence of disputes and their complexity have both increased. Whether the disputes flow from inadequacies in briefing, the procurement processes or in the management of the construction process itself, they are often so complex that few, if any, individuals can comprehend a dispute entirely.

The fact that a dispute arises indicates that the parties to the dispute are in conflict. Attempts to resolve the dispute which strengthen the conflicting positions of the parties are likely to be counter-productive, especially if they become excessively legalistic. Difficulties flow from the inherent complexity of the documentation and from the inevitability that no documentation can ever be absolutely complete and unambiguous, and from the behaviour of advocates and experts. These difficulties tend to delay the execution of remedial measures, often leading to increased cost and the waste of resources, to the detriment of both the client and society.

In the adversarial mode, hardening of attitudes occurs very quickly. It is by then often too late to use ADR methods if they have not already been written into the contract as a compulsory procedure. Even then it can be too late to soften entrenched positions.

There are a number of models for dispute resolution designed to diminish adversarial behaviour. They go by the collective description of Alternative Dispute Resolution, and include Negotiation, Adjudication, Mediation, Conciliation, Dispute Review Board, and Mini-trial. There is some variation in definition, so that what might be termed Mediation in one country might be termed Conciliation in another, but the difference is not important to the principle. In this context, both Litigation and Arbitration are, in contrast, adversarial.

All the alternative methods can be described as consensual, as opposed to the judicial nature of litigation and arbitration. They also readily permit resolution of multi-party disputes.

There are cases in which judicial methods may be more appropriate than consensual, such as a case where a legal or engineering impasse has been reached. Whilst, litigation and arbitration are methods which provide a final and binding result, it should be emphasised that the outcome of mediation or conciliation may be more compelling if a settlement agreement can be reached between the parties which can be enforced by the courts in the event of subsequent default. The outcome of litigation or arbitration on the other hand is uncertain — one of the parties, who is convinced otherwise, will turn out to be 'wrong'. There may be no 'correct' legal answer.

In many countries, leading jurists are actively encouraging the use of Alternative Dispute Resolution processes for the resolution of complex disputes and discouraging both litigation and arbitration. In particular, disputes arising from the construction of development projects lend themselves to Alternative Dispute Resolution procedures.

Rationale

If all attempts at dispute avoidance fail and a dispute arises, then adversarial behaviour in resolving the dispute is usually counterproductive, especially when it is complex. It usually delays the execution of remedial measures, increases legal costs, creates adversaries and thus wastes resources unnecessarily. It also saps the energies of the parties in dispute unnecessarily, diminishing their

ability to function effectively in the future. Both outcomes are detrimental to the parties, in particular, and to society, in general.

FIDIC recommends:

- Member associations support the development of Alternative Dispute Resolution procedures which diminish the adversarial environment procedures arising from disputes.
- Whatever the procedure for resolution, the consultants' professional indemnity insurers must be fully informed and their participation in negotiations accepted by all parties.

**International Federation of Consulting Engineers (FIDIC)**

World Trade Center II, Geneva Airport P.O. Box 311 CH-1215 Geneva 15 - Switzerland

Tel. +41 22 799 4900 - Fax +41 22 799 4901

Arthur: Graham Pontin, Head of economic and strategic policy

Email: fidic@fidic.org www.fidic.org

Disclaimer

This document was produced by FIDIC and is provided for informative purposes only. The contents of this document are general in nature and therefore should not be applied to the specific circumstances of individuals. Whilst we undertake every effort to ensure that the information within this document is complete and up to date, it should not be relied upon as the basis for investment, commercial, professional or legal decisions.

FIDIC accepts no liability in respect to any direct, implied, statutory, and/or consequential loss arising from the use of this document or its contents. No part of this report may be copied either in whole or in part without the express permission in writing.

Endnotes