

The 2017 FIDIC dispute resolution procedure: Part 1 - the new dispute resolution mechanism

Introduction

In December 2017 FIDIC released its second edition of the Conditions of Contracts for Plant and Design Build (“the 2017 Yellow Book”), the Conditions of Contract for Construction (the “2017 Red Book”) and the Conditions of Contract for EPC/Turnkey (the “Silver Book”), together the “2017 Contracts”. As expected, FIDIC has made substantial amendments to the dispute resolution provisions from the 1999 Red, Yellow, and Silver Books (together the “1999 Contracts”), and it has addressed the provisions relating to “binding but not-final” Dispute Adjudication Board (“DAB”) decisions which have been the cause of persistent dispute since the 1999 Contracts were released.

However, rather than scale back following the controversy caused by the binding but not-final DAB decision, and the severe consequences to contractors that have in many instances resulted, FIDIC has chosen to affirm this direction. The 2017 Contracts therefore retain the same core structure of the DAB as a mandatory pre-condition to arbitration (albeit it is now a “Dispute Avoidance / Adjudication Board”, or “DAAB”), including that non-final DAAB decisions must be promptly complied with, and it has expanded this concept through the inclusion of a similar mandatory procedure of binding but not-final Engineer determinations.

The 2017 Contracts offer a refurbished dispute resolution mechanism, which includes some helpful and much needed revisions to its predecessor, and introduces some useful new provisions. It is an ambitious dispute platform and will without question be subject to dispute and debate. At its best, it offers both parties the ability to obtain fast and inexpensive relief, with three tiers of binding determinations designed to prevent the need for arbitration. At its worst, it places two-tiers of mandatory determinations in the way before a party can begin to obtain a final binding decision in arbitration.

Parties will need to think carefully about whether a three-tiered system of determinations is suitable for their needs. Key issues are whether or not these provisions do in fact offer the system of relief promised, including how non-final determinations of the Engineer and DAAB are likely to be treated in the jurisdiction that the contract is based as well as under the governing law of the contract, and attempting so far as possible to agree in advance between the Parties and Engineer as to how this mechanism will work.

This paper will address the dispute resolution provisions in the 2017 Contracts in two parts, as follows:

- Part 1 sets out the key provisions of the new dispute resolution mechanism in the 2017 Contracts and assesses these against the 1999 Contracts.

- Part 2 addresses the merits of including a DAAB, and Engineer's determinations (the "other Party" under the Silver Book) in their new form, as a pre-condition to arbitration. In international context. That said, the increased emphasis on dispute avoidance, adopted by both FIDIC and the NEC is of considerable importance and something that needs to be adopted throughout the construction industry.

Part 1 – the new dispute resolution mechanism

Background

The dispute mechanism in the 2017 Contracts follows on from a worldwide trend of promoting dispute avoidance over arbitration.

The 1999 Contracts introduced the now infamous Dispute Adjudication Board into its contracts for the first time, which replaced the Engineer's binding decision in the 1987 FIDIC Conditions of Contract as a pre-condition to arbitration. The 1999 Contracts still require the Engineer to make a determination as the first step in the claims process, albeit under a reduced timescale.

In the 2008 Gold Book FIDIC expanded the role of the DAB further by defining it as a Dispute Avoidance / Adjudication Board, and including a new clause 20.4 "Avoidance of Disputes" which permits the parties to agree to request that the DAB provide informal assistance with any issue or disagreement between the parties, which shall not bind either party should they proceed to obtain a formal determination.

The 2017 Contracts go further again. Like the 2008 Gold Book, the DAB is defined as a "Dispute Avoidance / Adjudication Board", and it is empowered to provide informal assistance. In addition, the role of the Engineer has been increased to play a facilitative role and to issue binding determinations that will become final unless an NOD is issued

The dispute resolution mechanism compared

As described above, the 2017 Contracts follow the same core structure as the 1999 Contracts, which can be broadly divided into the following constituent parts:

- Making a claim;
- The role of the Engineer (not the Silver Book);
- Avoidance of disputes (new);
- The DAB;
- Amicable settlement; and
- Arbitration.

These are each discussed and assessed against the 1999 Contract provisions below.

Making a claim

The 1999 Contracts include separate provisions for the Employer and Contractor to make a claim, with a notable difference being that Contractors must make their claim within 28 days of becoming aware of the event giving rise to the claim, and provide a fully detailed claim within 42 days (Sub-clause 20.1), whereas Employers need only provide notice "as soon as reasonably practicable (Sub-clause 2.5)."

The 2017 Contracts include one consolidated clause for claims, Sub-clause 20.2, under which both parties must progress their claims within the 28 and 42 day periods under Sub-clause 20.1 of the 1999 Conditions. It also includes a new procedure enabling a waiver of these time-limits in certain instances¹, which is clearly designed to provide some clarity and a mechanism for determining when a claim will be time-barred.

The role of the Engineer

The Silver Book does not include any role for the Engineer, although the procedure outlined below for the Red and Yellow Books is more or less identical albeit the steps are carried out by each of the Parties rather than an Engineer.

The role of the Engineer has been expanded under the 2017 Contracts, including new functions and obligations. In relation to claims, the Engineer must²:

- Consult with the parties to attempt to reach agreement, and if no agreement is reached within 42 days;
- Make a “fair determination” within a further 42 days.

Under the 1999 Contracts³ the Engineer was required to consult and ultimately make a fair determination within just one 42 day period. Under both the 2017 Contracts and the 1999 Contracts the Engineer may request that further information be provided before making a determination.

The 2017 Contracts also include an express requirement that the Engineer act “neutrally” in discharging the above duties⁴. Although many would consider that neutrality is already encompassed as a matter of common sense in the obligation to issue a “fair determination,” and this has been confirmed to be the case as a matter of English law,⁵ the position is not so clear in all jurisdictions and the addition of an explicit obligation of neutrality is a helpful addition.

Furthermore, whether both the 2017 Contracts and 1999 Contracts provide that the Engineer’s determinations shall be binding on the parties unless and until revised by the DAB or in arbitration⁶, the 2017 Contracts go further to state that unless either party issues an NOD with the agreement or determination issued by the Engineer within 28 days, that agreement or any part of that decision not expressly included in an NOD shall become final and conclusive,⁷ and immediately enforceable in arbitration. Parties will therefore need to be conscious of these time limits.

The 2017 Contracts have therefore extended the Engineer’s role in claim resolution from a minimum 42 days to 84 days, with the prospect of its determination becoming final if neither party issues a valid NOD. The new provisions do not state how a non-final Engineer’s determination is to be enforced, although we expect the intention is that a party would obtain a DAB decision on the failure to comply followed by an arbitral award pursuant to Sub-clause 21.7 (discussed further below).

Avoidance of Disputes

A new “Avoidance of Disputes” provision has been added which permits the parties

¹Sub-clause 20.3 of the 2017 Yellow Book.

²Sub-clause 3.7 of the 2017 Yellow Book.

³Sub-clauses 3.5 and 20.1 of the 1999 Yellow Book.

⁴Sub-clause 3.7 of the 2017 Yellow Book.

⁵Per the Court of Appeal in *Amec Civil Engineering Limited v Secretary of State for Transport* [2005] CILL 2288.

⁶Sub-clauses 3.7.4 and 3.5, respectively.

⁷Sub-clause 3.7.5 of the 2017 Yellow Book.

to jointly ask the DAB to informally discuss and/or provide assistance with any issue or disagreement⁸. The parties will not be bound to act on any advice given in this process. This provision is taken from the 2008 Gold Book⁹, and it is in keeping with FIDIC's promotion of dispute avoidance, but its practical effect is questionable.

The issue is that the DAB is by this clause being asked to act as a kind of mediator, whereas in the following clause it must act as adjudicator, and these functions are not usually compatible. A mediator will often become privy to confidential and other commercial considerations of the parties, and is there to facilitate settlement, and this is plainly not compatible with the role of adjudicator who must decide the parties' legal rights and obligations. This dual role scenario has already been met with some concern in the UK¹⁰.

The DAB

The DAB procedure under the 2017 Contracts retains its core aspects, namely that a DAB must issue its decision within 84 days of a dispute being referred to it, and that decision shall be immediately binding upon the parties who shall promptly give effect to it. However, the new provision includes a number of revisions designed to clarify and assist in enforcing these obligations, including¹¹:

- 1 DAB decisions are now expressly binding on the Engineer;
- 2 The Parties and Engineer must comply with the DAB's decision "whether or not a Party gives a NOD with respect to such decision under this Sub-clause"; and
- 3 If the DAB awards payment of a sum of money, that amount shall be immediately due and payable after the payer receives an invoice, without any requirement for certification or notice. In addition, the DAB may require an appropriate security to be issued for payment of the sum awarded.

Furthermore, Sub-clause 21.7 provides that if either party fails to comply with a DAB decision, whether final or not-final, the other party may refer the failure itself directly to arbitration pursuant to Sub-clause 21.6.

The above provisions were intended by FIDIC to have already been provided for in the 1999 procedure, but which as many contractors have painfully found out, the 1999 wording was not so clear and has been the subject of fervent debate since those conditions were released. This debate is captured in the Persero series of cases in Singapore, which ran for a eight years on the issue of whether a non-final DAB decision issued under Sub-clause 20.4 could be enforced summarily by an arbitral award.

Under both the 1999 and 2017 Contracts either party can prevent a DAB decision from becoming final by issuing an NOD within 28 days. However, the 2017 Contracts wording adds that if no arbitration is commenced within 182 days after the NOD is issued then that NOD shall be deemed to have lapsed and be no longer valid. This will allow DAB decisions to become final where arbitration is not pursued, and that is helpful, however where finality is relevant to enforcement this provision may also be subject to dispute. For instance, if a party commences arbitration but then allows it to lapse, will a new 182 day period commence or does that prevent a non-final DAB from ever becoming final?

Finally, the new wording includes a revised provision for when no DAB is in place, which now permits the parties to proceed directly to arbitration if a dispute arises and there is no DAB in place¹². This is a potentially important revision compared to its equivalent in the 1999 Yellow Book, Sub-clause 20.8, which is headed "Expiry of Dispute Adjudication Board's appointment"¹³.

⁸ Sub-clause 21.3 of the 2017 Yellow Book.

⁹The FIDIC Guide to the Gold Book states that: "Prevention is better than cure, and the DAB is entrusted also with the role of providing informal assistance to the Parties at any time in an attempt to resolve any agreement."

¹⁰For instance, in *Glencot Development and Design Co Ltd v Ben Barrett & Son (Contractors) Ltd*, HHJ Lloyd QC commented that the conduct of the adjudicator meant that this was a case of "apparent bias" in that he appeared to lack impartiality, having been privy to a number of without prejudice offers and some rather heated discussions in his capacity as mediator.

¹¹Sub-clause 21.4 of the 2017 Yellow Book.

The 1999 Contract wording was subject to debate before the Swiss Supreme Court¹⁴ and the UK Technology and Construction Court,¹⁵ and both courts found that the DAB was a mandatory pre-condition to arbitration, and that Sub-clause 20.8 would only apply in the exceptional situation where the mission of a standing DAB has expired before a dispute arises between the parties, or other limited circumstances such as the inability to constitute a DAB due to the intransigence of one of the parties. Although the Swiss Case ultimately permitted the DAB to be avoided after the Contractor had spent over 18 months attempting to have it constituted, the English case refused to allow the litigation to proceed until the DAB procedure was completed.

Under the 2017 Contracts parties will be able to skip the DAB procedure if it is not in place when the dispute arises, although once the DAB has been set up or once the parties begin the process of setting up a DAB, no matter how frustrating that process may be, the DAB will become mandatory and the process will not be able to be abandoned.

Amicable settlement

The mandatory amicable settlement period has been reduced from 56 days to 28 days under the 2017 Contracts¹⁶. Furthermore, where either party fails to comply with a DAB decision, that failure may be referred directly to arbitration and the amicable settlement period will not apply¹⁷. This clarifies that the parties' obligation to "promptly" comply with a DAB decision means in less than 28 days.

Arbitration

The arbitration provisions for non-final DAB decisions are effectively the same under both contracts, namely that where an NOD has been issued either party may refer the dispute to be finally decided in international arbitration¹⁸. The 2017 Contracts also expressly permit an arbitral tribunal to take account of any non-cooperation in constituting the DAB in its awarding of costs.

As noted above, the new wording includes an expanded Sub-clause 21.7 (Sub-clause 20.7 of the 1999 Yellow Book), which permits any failure to comply with a DAB decision, whether final or not-final, to be referred directly to arbitration. In relation to non-final DAB decisions, the right to enforcement by interim relief or award is subject to the fact that the merits of the dispute are reserved until resolved in a final arbitral award. Although this revised contractual clarification/position will be welcomed by contractors, there are still likely to be challenges in many jurisdictions as to whether the enforcement of non-final DAB decisions via an arbitral award is supported by the local or governing laws of the contract.

Conclusion

The new dispute procedure provides some useful revisions which address fairly well some of the problem areas of the 1999 Yellow Book, and which are aimed at promoting compliance with the pre-arbitration steps. These include better defined responsibilities and accountability for the Engineer, and revisions to the DAB and arbitration provisions which should avoid the perpetual 1999 Yellow Book disputes as to whether an NOD cancels the binding effect of a DAB decision, and whether a non-final DAB decision can be summarily enforced in arbitration.

¹⁴Decision 4A_124/2014

¹⁵Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC).

¹⁶Sub-clause 21.5 of the 2017 Yellow Book.

¹⁷Sub-clause 21.7 of the 2017 Yellow Book.

¹⁸In Sub-clause 20.6 of the 1999 Yellow Book and Sub-clause 21.6 of the 2017 Yellow Book.

The new procedure also expands the pre-arbitral steps, including a mandatory additional 42 day period in the Engineer's determination, plus a further 28 days to issue an NOD. To the extent that non-final determinations by the Engineer and DAB are able to be enforced, including under the governing law of the contract, then the new wording will be welcomed by contractors as providing for quick relief and something like the security of payment regime that were intended by FIDIC in the 1999 Yellow Book¹⁹.

However to the extent these non-final determinations are not able to be enforced then, except in limited circumstances for instance where no DAB is in place at the time of dispute, parties may be required to go through an even longer mandatory claims procedure than under the 1999 Yellow Book before they are able to commence an arbitration that will give them final and enforceable relief. Parties should therefore think carefully as to whether this mechanism, in whole or part, is suitable for their particular needs.

¹⁹See for instance, PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30 at paragraphs 70 and 71.

In Part II of this paper, I discuss the merits of including these mandatory pre-arbitral procedures.



Robbie McCrea
Senior Associate
Fenwick Elliott LLP

rmccrea@fenwickelliott.com
T +44 (0) 20 7421 1986
M +44 (0) 7799 872 103
www.fenwickelliott.com

London
Aldwych House
71-91 Aldwych
London
WC2B 4HN