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Contract Corner:

A review of typical contracts and clauses

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Dispute adjudication or dispute avoidance under the FIDIC form?

This issue's contract corner looks at avoidance of disputes.

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I recently attended the latest Dispute Resolution Board Foundation ("DRBF") Regional Conference in Doha, Qatar.[1] The theme of the conference was "Effective Use of Dispute Boards for Dispute Avoidance and Resolution on Major Projects". One of the more interesting themes to emerge from the conference was the increasing recognition of the value of "dispute avoidance" as a partner with "dispute adjudication". There are always going to be occasions when the best way to resolve a dispute is for an independent third party (be it a Dispute Board or Expert or some other body) to issue a formal decision, but there are other alternatives.

This is something that has been recognised by FIDIC. In 2008, FIDIC expanded the role of the Dispute Board when, in its Gold Book (for use on Design, Build and Operate Projects), it introduced a new sub-cl.20.5 headed "Avoidance of Disputes". This clause states as follows:

> *"If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. Such informal assistance may take place during any meeting, site visit or otherwise. However, unless the Parties agree otherwise, both Parties must be present at such discussions. The Parties are not bound to act upon any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute Resolution process and decision by any views given during the informal assistance process, whether provided orally or in writing.*
>
> *If a Dispute of any kind whatsoever arises between the Parties, whether or not any informal discussions have been held under this Sub-Clause, either Party may refer the dispute in writing to the DAB according to the provisions of Sub-Clause 20.6."*

There has been speculation that this concept would form part of the revisions of the FIDIC Yellow and Red Books when they are finally introduced and this was confirmed by Aisha Nadar[2] at the DRBF Conference in Doha. This clause has the potential to put the DAB at the heart of dispute avoidance.

Now, in England and Wales there has been some disquiet about asking someone who is tasked with adjudicating a dispute to undertake the dual role of formally trying to mediate a settlement. Ten years ago, in the case of *Glencot Development and Design Co. Ltd v Ben Barrett & Son (Contractors) Ltd*,[3] following the commencement of adjudication proceedings, a meeting was held between the parties. The parties reached some measure of agreement in relation to the dispute but a number of issues remained outstanding. The adjudicator was asked by both parties to mediate in order to try and finalise an agreement. Following a day-long mediation, complete agreement on all outstanding issues was not reached and the adjudicator therefore confirmed that the adjudication would have to

continue. However, HHJ LLoyd QC said that the conduct of the adjudicator meant that this was a case of "apparent bias" in

1. The conference ran from 5 to 7 November 2012. In part I was there to co-lead a workshop entitled "The Dynamics of Why Dispute Boards Work".
2. Aisha is a Research Fellow, Construction Contracts and Dispute Resolution at Queen Mary, University of London and a Member of the FIDIC Updates Task Group.
3. [2001] BLR 2007. This was an adjudication carried out in accordance with the Housing Grants, Construction and Regeneration Act 1996, not a FIDIC DAB determination. The main difference between the two is the speed with which the UK adjudication can be carried out, in 28 days as opposed to the 84 days for FIDIC.

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that he appeared to lack impartiality. The dilemma posed by this new clause can be demonstrated by reference to comments made by the Judge in his decision:

> *"There are clearly risks to all when an adjudicator steps down from that role and enters a different arena and is to perform a different function. If a binding settlement of the whole or part of the dispute results, then the risk will prove to be worth taking."*

One difficulty is that in any mediation process, a mediator will often become privy to confidential and other commercial considerations of the parties.[4] A mediator is there to facilitate a settlement. This role is clearly incompatible with that of an adjudicator who is there to decide upon the parties' legal rights and obligations.

Now, sub-cl.20.5 of the FIDIC Gold Book 2008 does not go so far as to talk about mediation, but the same point arises: will a party feel comfortable adopting this process in the knowledge that it might be asking the DAB later to make a formal adjudication on the issue? The DAB may not be bound by any views given during the informal assistance process, but it may be difficult for them to put these views to one side. The likely answer is that this approach will suit some parties more than others, but the important point is that FIDIC is offering the parties the services of the DAB in an alternative way to try and resolve or manage any potential disputes.

In many respects, this new option is a natural extension of the DAB's role. If you have a permanent DAB that is meeting on a regular basis this may already provide an opportunity for informal discussions. The 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 disagreement."*

This is an interesting proposal and it is clearly part of an overall trend to promote the resolution of disputes, which is to be encouraged. The likely position is that in time as more parties become familiar with such a concept, they will be more willing to explore alternative ways and approaches to resolving their differences. We all know that formal disputes, even at a Dispute Board level, can be very costly and time consuming.

The concept, too, should help promote the value of the Dispute Board. FIDIC are also going to replace the concept of the ad hoc Dispute Board, as currently provided for in the Yellow Book, with the standing Dispute Board, which is intended to be introduced at the beginning of a project. There are a number of reasons why this approach may well assist with dispute avoidance from the outset. These include the use of the Dispute Board to establish a common culture (which can be important on major international projects where the parties to the contract come from many different cultural backgrounds) and also to improve communications between the parties (poor relations often being the cause of many an unnecessary dispute. Where a Dispute Board is familiar with a project it can often take a proactive role in anticipating potential problems. The adoption of sub-cl.20.5 of the Gold Book throughout the FIDC suite of contracts may, in time, assist in promoting such an approach.

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4. In the *Glencot* case, the adjudicator was privy to a number of without prejudice offers and it would seem he was also privy to some rather heated discussions.