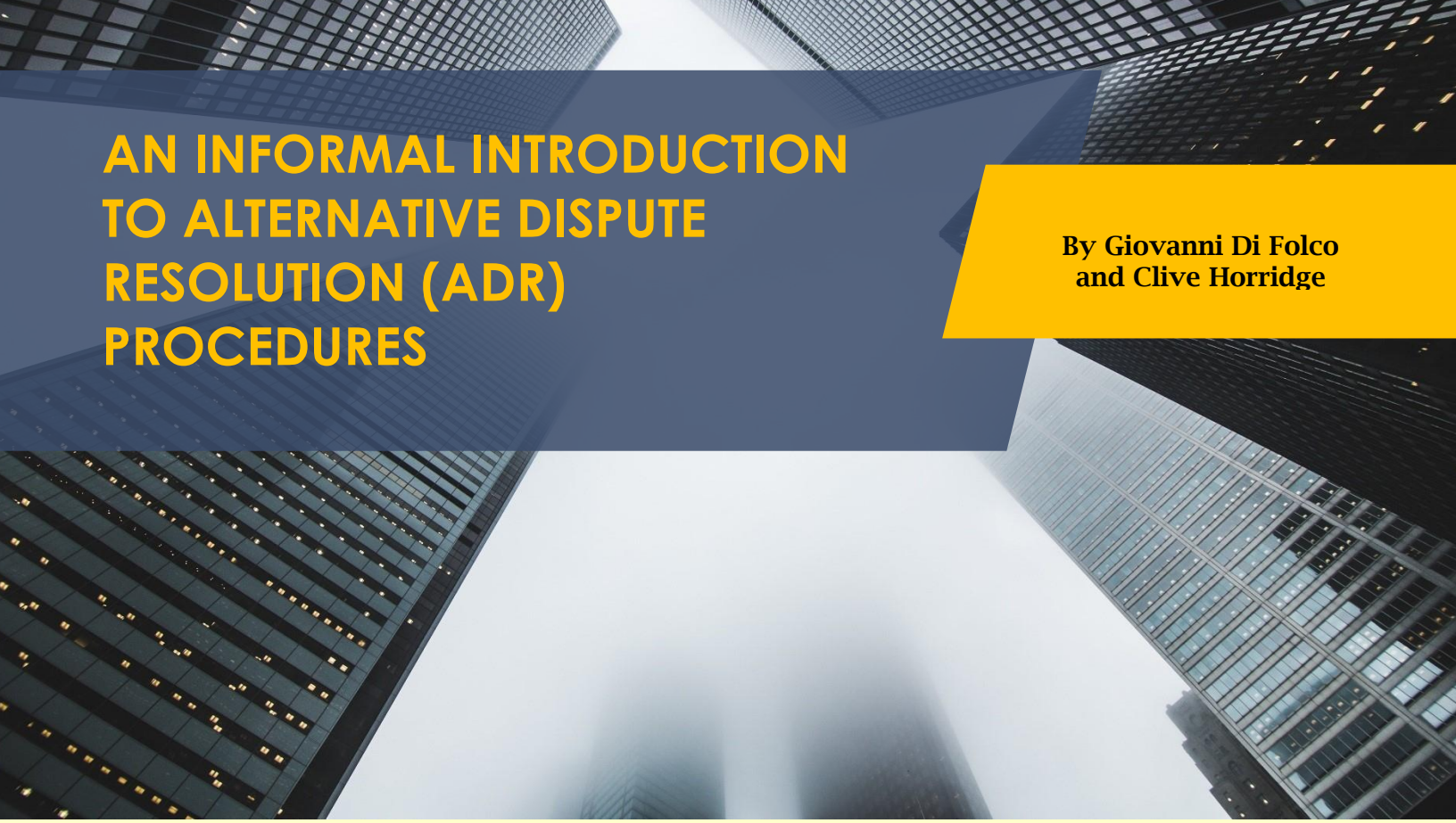

AN INFORMAL INTRODUCTION TO ALTERNATIVE DISPUTE RESOLUTION (ADR) PROCEDURES

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Introduction

At a glance through any of the range of contracts offered in the 1999 and the 2017 Editions of the FIDIC Contract Suites, one will soon be aware that following the submission of a claim by either of the parties, the Engineer's response and determination thereof is only the first step of the contractual and legal process of dispute resolution and final settlement. Should a claiming party be dissatisfied with an Engineer's determination, it should inform the Engineer that it disputes the findings and intends to pursue such dispute through the resolution procedures provided by the contract.

Herein, we have focussed on FIDIC contracts. However, our observations hereinafter may be applied to any form of contract containing ADR, yet as always with caution.

Practical application of ADR

Focusing more on contractor's claims for the purposes of this article, it would appear that in many cases, gone are the days when a contractor could sit with the Engineer and negotiate an amicable settlement of its claims. The reasons for this are widespread and diverse, yet often driven by the ever-increasing financial and political pressures on both parties.

In order for the parties to have an opportunity to reduce the potential for filing for protracted and expensive arbitration and/or litigations, all FIDIC contracts provide an Alternative Dispute Resolution ("ADR") procedure, whereby disputes of any nature under the contract or in connection with the contract can be referred to an independent body known as a Dispute Adjudication Board ("DAB"), often generally called a Dispute Board ("DB") and more recently from 2017, a Dispute Avoidance / Adjudication Board ("DAAB"), all serving the similar function of issuing a binding decision under the contract upon referral of a dispute by either party to the DB, which would supersede the content and the binding nature of the Engineer's determination that formerly prevailed, in an attempt to provide the parties a means to amicably settle such disputes by avoiding an immediate file for arbitration or local court process, as the case may be.

Although binding on the Parties, such Dispute Board's decisions will only become final, in the event that neither of the parties will issue a Notice of Dissatisfaction ("NOD") thereto, which if issued by either party, would retain the option for that party to file for arbitration which will issue a Final Award, which will be final and binding on the Parties at law.

In our experience over the years, the quality of Engineer's determinations under the contract have often been rather disappointing. In some cases, Engineers have not even responded to a contractor's claim within the time permitted, let alone having proceeded in accordance with the respective 'agreement or determination' clause. Both the processes of the Engineer of (i) responding to the principles of a contractor's claim with approval, or with disapproval and detailed comments within the period stated; and (ii) the subsequent process of proceeding with the 'agreement or determination' clause, are mandatory under FIDIC contracts.

Hence an Engineer's failure to respond within the time allowed will automatically constitute a breach of contract for reasons that such would deny the claiming party the process of natural justice, and thus would qualify as a mature dispute between the parties under the terms of the respective contract. Should the Engineer disapprove a claim, there would arguably be no requirement for the Engineer to proceed with a determination, yet it is often argued that such disapproval may itself constitute a determination, but such could only be considered to be valid if the mandatory requirements of the 'agreement or determination' clause had been complied with in full. These are matters of due process of ADR under the respective contract and indeed at law.

Once the Engineer/Employer has been informed that a mature dispute has arisen between the parties, a contractor who disputes an Engineer's response to its claims or lack thereof, should pursue the dispute resolution procedures under the contract without delay.

The aforementioned FIDIC contracts have structured the claims procedures with fairly stringent time-frames, which are subjected to time-bars at law. However, apart from the mandatory period within which a Notice of an event or circumstance is to be issued by a party to the other party, and the aforementioned mandatory period allowed for the Engineer to respond to the principles of a Contractor's claim, such other periods are not mandatory, unless there is express sanction provision that by exceeding them, entitlement or the means to proceed with ADR, are lost as a consequence, which is a prominent feature of the 2017 Editions of the FIDIC Suite of Contracts.

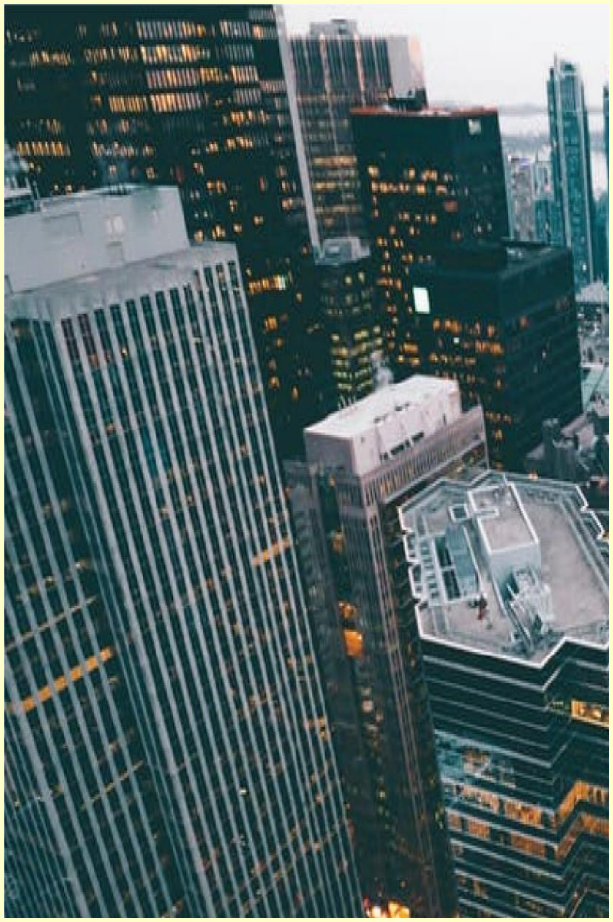
Another important aspect of the potential for the loss of entitlement often overlooked, is the Statute of Limitations regime ("SOL") imposed by the applicable law. In this regard, the law applicable to the contract can vary greatly from one country to another, and likewise the law's approach to the SOL will also vary. The difference can be extreme from a period of 10 years down to 3 years and even less is not uncommon, thus on major projects with a time for completion of 3 or more years, a claim may easily fall foul of a 3-year's SOL if not dealt with promptly and in compliance with any other applicable legal procedures. In any event, it is advised to have matters of the SOL thoroughly investigated by competent construction lawyers or law firms familiar with the specific applicable law.

Further, the applicable ADR specific to the respective contract must be investigated thoroughly. The General Conditions of Contract ("GCC") may have been revised by means of the Particular Conditions of Application ("PCC"), which in many cases vary significantly from the GCC, especially regarding the courts having jurisdiction to settle the disputes arisen in relation to the contract, where this may be arbitration or may be local courts of law. Such is important for many reasons, primarily with regard to appeals, where court proceedings include an appeal process, whereas international arbitral proceedings will not. In either case, adherence to procedure is vital, even arbitral Final Awards will require enforcement in a local court, and such are extremely vulnerable to breaches of procedure.

Unless a contractor has previously invoked a DB, DAB or DAAB procedure, it would likely be unaware of what is involved or even what a Dispute Board's true function and approach to a referral should be.

In this respect and common to all DBs, DABs or DAABs, such a Dispute Board will comprise of one or three members, each of which should be proficient in at least a basic knowledge of engineering, contract interpretation and a principle appreciation of the applicable law.

Dispute Board members do not necessarily need to be experts in their own right on specific matters such as delay analysis, quantum or the finer operations of the law, as they have full authority to appoint their own independent experts in any discipline, as the need may arise, subject to parties agreement to that effect.



At the time of selection, nomination and appointment, Dispute Board Members commit themselves to strict and transparent impartiality, fairness and diligence and the most favoured board members are those who have been trained for the responsibilities they assume, and the parties should prefer those who are listed by a range of institutions as suitably qualified, such as the FIDIC President List of Approved Dispute Adjudicators, the ICC, ICE or other similar reputable organisations.

Ideally, as recommended under the provisions of the FIDIC Red and Pink Book contracts 1st editions, Dispute Boards would be appointed as what is known as 'standing' Boards, meaning that they would be appointed from soon after commencement of the Works and they would periodically visit the construction site and meet with the parties to discuss issues of progress and concern.

This will permit the benefit in their role of dispute avoidance, whereby the FIDIC 2017 suite of contracts have embraced the concept of DAAB where the terms of engagement of the board focuses more intensely on dispute avoidance than the FIDIC 1999 Editions. However, since the onset of the use of dispute boards, their practice has often included an element of dispute avoidance, especially in the case of standing Dispute Boards who have been able to form a closer association with parties.

Alternatively, a Dispute Board may be appointed only upon a dispute arising, which in many cases is well after the commencement of the project and often under circumstances whereby the relationship between Engineer/ Employer and Contractor has already broken down and has often become highly antagonistic.

This is a situation that does not lend itself easily to amicable discussions, rational thinking and dispute avoidance. In the main, upon receipt of a referral, such 'ad-hoc' boards will initially be tasked with familiarising itself with the project, and it will be faced with unravelling the likely

biases developed by each party, in order to establish the true facts of events and circumstances leading to the dispute, and to adjudicate and issue its decisions accordingly, all within a fairly short period of 84 days, or extension thereto as and if agreed by both parties. It is natural that the more relationships between the parties have degraded, any aspect that need the agreement of the parties can easily prove difficult, and their failure to agree on procedural matters, such as the appointment of the Dispute Board, can even develop into disputes in their own right.

Costs are always a concern for both parties and clearly the cost of a 'standing' Board will be greater than that of an 'ad-hoc' Board. However, the service received from a 'standing' Board is highly likely to be far more beneficial to the parties than that received from an 'ad-hoc' Board, delivering a cost benefit to those with an interest in cost-effective expenditure or more simply put, value for money.

The process of a referral of a dispute to a Dispute Board will depend upon the procedures agreed between the parties and the board members within a tri-party Dispute Adjudication Agreement or Dispute Board Agreement, which is to be entered into by and between the parties and the DB Member or DB Members after the appointment of the Dispute Board and prior to a referral. The referral usually takes the form of a Statement of Case, often otherwise known as Statement of Claim, to which the responding party will have the opportunity to reply within a given period. Usually, the referring party would then have the opportunity to rebut that reply and the responding party would be allowed a rejoinder. For decisions required within the 84-day provisions, each exchange would usually be within 14 days following the previous submission.

Following these exchanges, the Dispute Board may request further information or clarification from either of the parties as necessary and when satisfied that sufficient information had been received in order to assess the case, the Dispute Board may call for a Hearing, unless the parties and the board agree that a Hearing will not be necessary.

In order to save costs, Employer's often invite the Hearing to take place at their premises, as most employer's on major projects are Government Departments or similar organisations with premises which may be considered as suitable. However, it is recommended that the Hearing venue should always be neutral to the parties, to avoid any interruptions or psychological bias.

Government Buildings can be somewhat intimidating for a contractor and a neutral venue would allow both parties to be more at ease when presenting their respective cases. Modern hotels usually have good facilities for conferencing and the like, providing suitably equipped rooms with options for separate break-rooms for each party and the board, should they be necessary. Hotels are also convenient for catering purposes and adequate bathroom facilities, as hearings can take up to 3 or 4 days or more, periodic refreshment breaks, and lunches, which will be essential.

Each party will be required to appoint a single spokesperson that would have full authority to take decisions on the party's behalf. This may be in the form of appointed Counsel or by an individual appointed by a party, and such would need to provide to the board and the other party a legally valid Power of Attorney to evidence such authority. The authors of this article strongly advise parties to appoint experience Counsel in these matters at all times.

There should be no communications, neither oral nor in writing, between either of the parties and the board, unless such are formally shared simultaneously between the board and the other party. At any meeting, it is essential that there should be no casual dialogue between any member of either party and any member of the board, unless the other party is present.

The board is charged with the control of communications and the parties are expected to strictly comply with any and all directions issued by the board.

Specifically, under the First Edition 1999 the referral of a dispute to the DAB and the binding nature of the DAB's decision are regulated under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board Decision], which reads, inter alia that:

'Within 84 days after receiving such reference ..., the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction.'

The DB, with the prior agreement of the Parties, may also give one or more decisions on the merits of a matter in dispute and a second or more decisions on the quantum of the same matter in dispute. However, the DB cannot give an interim decision regarding a dispute relevant to a Contractor's interim claim, for reasons that the claim is interim. That is so due to the fact that:

> ***"If the DAB has given its decision as to a matter in dispute to both Parties, and no Notice of Dissatisfaction has been given by either Party within 28 days after it received the DAB's decision, then the decision shall become final and binding upon both Parties."***

It is the referral to the DB that crystallises the matters in dispute and the jurisdiction of the DB. The DB is obliged to consider and issue a reasoned decision that deals with all of the matters (and nothing further) in dispute and referred to the DB.

As seen from the foregoing extract, if a party does not accept a DB decision, that party must serve a notice of dissatisfaction, which will prevent the binding decision from becoming final and binding and will open the pathway to arbitration under Sub-Clause 20.6 [Arbitration] in the FIDIC 1999 conditions.

Dispute Resolution Procedures under the contract, have been designed as a means of settling the disputes arisen between the contractual parties without resorting to arbitration and the courts of law. They comprise of a two-stage procedure, DB and arbitration or litigation, thus, by such proceedings, the parties are provided with an option to deploy the DB as a pre-arbitral mechanism for the purpose of avoiding arbitration or litigation.

Brief biographies of the co-authors

Giovanni Di Folco is an accomplished professional Civil Engineer and the co-owner and President of Techno Engineering & Associates Group ("TE&A"), a highly reputable international techno-legal consultancy firm specializing in the field of Contract, Claims Management and Dispute Avoidance / Resolution, representing international contractors Worldwide and assisting them through the whole process of Contract, Claims Management and Dispute Resolution through adjudication, arbitration, litigation and enforcement. Giovanni is an accomplished Counsel, Arbitrator, Adjudicator, DB, DAB, DAAB and Expert Witness in Delay and Quantum. He is a Member and President-elect of the DRBF Region 2 Board of Directors, a FIDIC Member, a FIDIC Accredited Trainer and is listed on the prestigious FIDIC President's List of Accredited Dispute Adjudicators.

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The views expressed by the authors in this paper are the authors' alone.

Clive Horridge is one of TE&A's Senior Contract Advisors and is a DRBF's Member. Clive has had a career in Civil Engineering Quantity Surveying and Contract Management spanning more than forty years. Most of his experience was gained on major Motorway projects in the United Kingdom when at Corderoy under the ICE 4th and 5th Edition and the various CESSM Conditions of Contract, more recently he gained specific experience on major projects in the Middle East while with Parsons Group and over the last fifteen years Clive has worked in Romania and internationally with Techno Engineering & Associates Group on Motorway and Road Rehabilitation projects under the FIDIC Conditions of Contract, in its various forms. Over the years, Clive has developed an in-depth knowledge of Construction Contract generally, not only the Forms of Contract mentioned, but an understanding of the working practice, interpretation and of course, project specific application.