MDA CONSULTING

PRESENTS

FIRST AID FOR CONTRACTS

Prevention is Cheaper than Cure

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FIDIC

Introduction

In 1999 FIDIC published the Conditions of Contract for Construction, Conditions of Contract for Plant and Design-Build, Conditions of Contract for EPC/Turnkey Projects and Short Form of Contract.

The FIDIC Contracts Guide, published in 2000, deals with the first three of these (the FIDIC Conditions of Contract).

According to The FIDIC Contracts Guide [page 303], the FIDIC Conditions of Contract envisage two types of DAB procedures:

1. *"A "full-term" dispute adjudication board, which comprises one or three members who are appointed before the Contractor commences executing the Works, and who typically visit the Site on a regular basis thereafter."* (a standing DAB); or

2. *"An "ad-hoc" dispute adjudication board, which comprises one or three members who are only appointed if and when a particular dispute arises, and whose appointment typically expires when the DAB has issued its decision on that dispute."* (an ad-hoc DAB)

HUMPTY DUMPTY SAT ON THE DISPUTE ADJUDICATION BOARD'S WALL

(and other short and clumsy tales of woe)

The Conditions of Contract for Construction provide for a standing DAB, whereas, the Conditions of Contract for Plant and Design-Build and Conditions of Contract for EPC/Turnkey Projects provide for an ad-hoc DAB.

The Short Form of Contract, on the other hand, makes provision for the determination of disputes by a single adjudicator, without reference to a Dispute Adjudication Board.

The clause, which determines which type of DAB is applicable to the respective FIDIC Conditions of Contract, is Clause 20.2, which states:

*"Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*]."*

The word "shall" has been duly inserted in the correct place, creating *"notions of command and future …duty [or] obligation"* [The Concise Oxford Dictionary of Current English (6th Ed), Oxford at the Clarendon Press, 1976, page 1046] and gives this clause a definite mandatory ring to it.

Clause 20.8, on the other hand, states:

"If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

(a) *Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply, and*

(b) *the dispute may be referred directly to arbitration under Sub-Clause 20.6 [*Arbitration*]."*

At first glance, this appears to be a fairly straightforward exception to the provision that disputes must be adjudicated by a DAB i.e. where the DAB has not yet been put in place, the dispute may be referred directly to arbitration.

Note the use of the word "may" here as opposed to the use of the word "shall" above. While the word "shall" indicates something mandatory, the word "may", however, expresses a possibility only [The Concise Oxford Dictionary of Current English (6th Ed), Oxford at the Clarendon Press, 1976, page 675].

Thus even where there is no DAB in place at the time the dispute arises, the parties can still choose to refer a dispute to the DAB (once they have got their act together and put one in place) or they can just go directly to arbitration.

What makes this complicated (and handing over things like this to legal minds does have a tendency to make them complicated) is where the FIDIC Conditions of Contract make provision for an ad-hoc DAB.

By definition, as you, dear reader, will already have noted from the above, an ad-hoc DAB is only appointed "*if and when a particular dispute arises*". But if the ad-hoc DAB cannot be appointed until a dispute arises, then, in terms of Clause 20.8, the parties will have an automatic option whether to proceed to the DAB or straight to arbitration.

But, again, Clause 20.2 is still staring us grumpily in the face, with its very mandatory "shall" fixed firmly in place. This seems to create a conflict between Clause 20.2 and Clause 20.8 and unlike the tried and tested old riddle, the answer is not "an egg".

This seeming conflict has recently been dealt with in both the English and Swiss courts.

In the English case of Peterborough City Council v Enterprise Managed Services Ltd [2014] EWHC 3193 (TCC) (dealing with the Conditions of Contract for EPC/Turnkey Projects) Mr. Justice Edwards-Stuart held:

"It seems to me that sub-clause 20.8, which is in the same form in all three of the FIDIC Books, probably applies only in cases where the contract provides for a standing DAB, rather than the procedure of appointing an ad hoc DAB after a dispute has arisen…Not even Humpty Dumpty would suggest that a dispute could be referred to a DAB that was not in place.

… I reject the Council's submissions that sub-clause 20.8 gives it a unilateral right to opt out of the adjudication process, save in a case where at the outset the parties have agreed to appoint a standing DAB and that, by the time when the dispute arose, the DAB had ceased to be in place, for whatever reason."

Similarly, in the Swiss Case, 4A_124/2014, in the First Civil Law Court before Federal Judges Klett, Kolly, Hohl, Kiss and Niquille, it was held that (translated from the original French text):

"…by definition, a dispute always arises before the ad hoc DAB has been set up, in other words, at a time when "there is no DAB in place", however, such interpretation [a literal interpretation of Clause 20.8] *would clearly be contrary to the goal the drafters of the system had in mind…*

…That the mandatory recourse to the DAB may suffer certain exceptions does not suggest that resorting to this body would allegedly be voluntary but rather confirms the general rule making the recourse to this alternate dispute resolution mechanism compulsory before introducing a request for arbitration."

Although the South African courts have not yet considered this conflict between Clause 20.2 and Clause 20.8, foreign law has persuasive value. This is particularly the case where this foreign law is in accordance with our own.

It is submitted that using the South African common law rules of interpretation, one would arrive at the same conclusion as the two cases above.

In terms of the "Golden Rule" [Coopers & Lybrand v Bryant 1995 3 SA 761 (A) in RH Christie and GB Bradfield, Christie's The Law of Contract in South Africa (6th Ed), LexisNexis, 2011, page 213] "*the language in the document is to be given its grammatical and ordinary meaning, unless this would result in some absurdity or some repugnancy or inconsistently with the rest of the instrument*", such as the apparent conflict between Clause 20.2 and Clause 20.8.

If this is the case, then the classical rules of interpretation come into play, including the presumption against tautology or superfluity (that words or Clauses are not unnecessary/redundant/pointless)[RH Christie and GB Bradfield, Christie's The Law of Contract in South Africa (6th Ed), LexisNexis, 2011, pages 227, 229] i.e. making the referral of disputes to the DAB mandatory and then six clauses on, making such a referral optional.

Using the interpretation of Clause 20.8, advocated in the English and Swiss cases cited above, there would be no divergence from this presumption.

In conclusion, those whose contracts make provision for an ad-hoc DAB can breathe a sigh of relief. It is unlikely that you will be forced to proceed to an untimely arbitration.

Those of you, however, (and you know who you are!) whose contracts make provision for a standing DAB, but who have not yet appointed said DAB on the grounds of (most often) the expense or sheer apathy, be warned! You may find yourselves involved in expensive and lengthy arbitration proceedings at the behest of the other party to the contract.

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