

# FIDIC 2017 - DISPUTE RESOLUTION PROCEDURE

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An overall explanation of the procedures and mechanism for dispute resolution under FIDIC from a Danish perspective



# FIDIC'S DISPUTE RESOLUTION PROCEDURE EXPLAINED

## - THE THREE-TIERED DECISION SYSTEM

The provisions on dispute resolution under FIDIC are generally influenced by a global trend towards avoiding lengthy arbitration and seek disputes solved by other means.

In December 2017, FIDIC released its revised editions of the FIDIC Conditions of Contract (second edition<sup>1</sup>), introducing some amendments to the dispute resolution provision from the 1999-editions<sup>2</sup>. The “avoidance of disputes” regime under FIDIC has to some extent been expanded in 2017 FIDIC.

A notable change in the 2017 FIDIC was that the previous provision on claims and disputes were divided into two separate clauses. With this change it was made clear that a claim is not the same as a dispute and vice versa, i.e. a claim<sup>3</sup> is a request for an entitlement under the Contract, whereas a dispute<sup>4</sup> arises if such claim is rejected or ignored.

But naturally a claim must be made before a dispute can arise. After a claim has been made, the dispute resolution procedure under the 2017 FIDIC can generally be described as consisting of the following components (steps):

1. The Engineer's determination<sup>5</sup>
2. The DAAB's decision
3. Arbitration

FIDIC includes specific procedures and time limits applicable to making claims, which will not be discussed in this Plesner Insight<sup>6</sup>. But the other steps will be discussed in the following.



### The Engineer - First Step

The Employer shall appoint the Engineer<sup>7</sup> to carry out specific duties and/or exercising authority as specified or implied by the Contract.<sup>8</sup> The Engineer shall be deemed to act on behalf of the Employer when carrying out his/her duties unless stated otherwise and it will usually be the Employer that reimburses the Engineer.

However, the Engineer is also given authority to conduct claim resolution and the Engineer shall act as the first-tier of dispute avoidance between the parties. Accordingly, a Notice of Claim must

- 1 Conditions of Contract for Plant and Design Build, Second Edition 2017 (“Yellow Book - 2017”), Conditions of Contract for Construction, Second Edition 2017 (“Red Book - 2017”), and Conditions of Contract for EPC/Turnkey (“Silver Book - 2017”) - collectively referred to as the “2017 FIDIC”.
- 2 See also [Plesner's Insight on the major changes in the 2017 FIDIC](#)
- 3 As more specifically defined in Clause 1.1 of 2017 FIDIC and supplemented by Clause 20.1 of the 2017 FIDIC.
- 4 As more specifically defined in Clause 1.1 of 2017 FIDIC.
- 5 Not included in the Silver Book - 2017
- 6 See instead Plesner Insight on the FIDIC Claims Procedure
- 7 For the Red Book, FIDIC recommends that the engineer involved in the design of the works is appointed by the Employer to act as the Engineer. Generally, it is recommendable that the Engineer holds some project knowledge.
- 8 See Clauses 3.1 and 3.2 of the Red Book - 2017 and the Yellow Book - 2017. The Engineer is not part of the Silver Book



be given to the Engineer pursuant to Clause 20.2.1 (with copy to the other Party). When the

claim is mature<sup>9</sup>, it follows from Clause 20.2.5 that the Engineer shall proceed with his/her agreement or determination of such claim following the procedure of Clause 3.7.

Different from when the Engineer otherwise carries out his/her duties, the Engineer must act neutrally when determining claims.

Pursuant to Clause 3.7, the Engineer shall first consult with both parties and encourage discussions between the parties in an endeavor to reach an agreement on the raised claim<sup>10</sup>.

If no agreement is reached within the 42 days period<sup>11</sup>, or if both parties advise the Engineer that no agreement can be achieved within this time, the Engineer *shall make a fair determination of the matter or Claim* considering all relevant circumstances. The Engineer's determination must be given within a new 42 days period and shall be described *in detail with reasons and detailed supporting particulars*.

The Engineer's determination is binding on the parties (must be complied with), but if a party is dissatisfied with a determination of the Engineer, this party may give a NOD (Notice of Dissatisfaction)<sup>12</sup>. The claim is then an actual dispute as defined in FIDIC and either party may thereafter proceed under the dispute resolution procedure of Clause 21 - firstly by obtaining the DAAB's decision.

## The DAAB - Second Step

The main objective of the DAAB (Dispute Avoidance/Adjudication Board) is to settle disputes between the parties without having to go through often lengthy and costly arbitration procedure. There are different options for the constitution

of the DAAB, e.g. one or three members, "standing DAAB" or "ad hoc DAAB", etc.<sup>13</sup>

If the DAAB is in place (constituted)<sup>14</sup>, it is mandatory to obtain the DAAB's decision before commencing arbitration. It follows from Clause 21.4 that Disputes between the parties may be referred to the DAAB for its decision, e.g. a NOD to the Engineer's determination may be referred to the DAAB for its decision of the Dispute<sup>15</sup>.

The DAAB shall complete and give its decision within 84 days after a Dispute has been referred to the DAAB. The DAAB's decision is binding on the parties in the sense that the parties (and the Engineer) must promptly comply with the DAAB's decision *whether or not a party gives a NOD with respect to such decision*. This is often re-



9 FIDIC includes further steps between a claim is raised and then either agreed or determined by the Engineer - e.g. Clause 20.2.2 on the Engineer's initial response if the Engineer is of the opinion that time limits for raising a claim are not observed (within 14 days of receipt), and Clause 20.2.4 on the claiming party's duty to submit a fully detailed description and substantiation of the claim (within 84 days of becoming or should have become aware of the circumstances giving rise to the claim).

10 See Clause 3.7.1

11 See Clause 3.7.3 - note that the time limit will start to run from different point in times depending on the nature of the matter or claim, which is to be agreed or determined by involving the Engineer.

12 Within 28 days in accordance with Clause 3.7.5.

13 The provisions on the constitution of the DAAB and failure to appoint DAAB members are found in Clauses 21.1 and 21.2 of FIDIC.

14 If not in place, Clause 21.8 applies - a Dispute may be referred directly to Arbitration.

15 Within 42 days or otherwise such NOD shall be deemed to have lapsed and no longer valid.

ferred to as the DAAB's "*binding, but not final*" decision.

A party disagreeing with the DAAB's decision can prevent it from becoming final by giving a NOD within 28 days. If no NOD is given to a decision of the DAAB, the decision *shall become final and binding* on both parties.

If a NOD is given to a decision of the DAAB, the Dispute comprised by such NOD shall be finally settled by arbitration.

### Arbitration - Third Step

Before arbitration is commenced, FIDIC encourages the parties to amicably settle a Dispute comprised by a NOD as one last attempt to avoid arbitration<sup>16</sup>. This amicable settlement period is mandatory<sup>17</sup>. Unless the parties agree otherwise, 28 days must lapse after issuance of the NOD - a "cool off" period - before arbitration can be commenced (amicable settlement discussion or not).

If the parties have not agreed otherwise in their particular conditions, the arbitration will be settled in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC). When entering into the contract, the parties should therefore carefully consider if any deviation from this fall-back provision is needed, e.g. if another set of rules for international arbitration should apply (and is such compatible with FIDIC?); the number of arbitrators; the seat of the arbitration, etc.

The award of the arbitral tribunal will be the final and binding decision of the dispute between the parties. Arbitration decision are generally enforceable in Denmark by the regular enforcement courts and Denmark is a contracting state to the New York Convention.

### Conciliation and mediation

It is worth mentioning that the 2017 FIDIC has given the DAAB an additional role compared to the 1999 edition. Upon a joint request from the parties, the DAAB may provide assistance and/or informally discuss any disagreement arisen

between the parties. The purpose is to avoid disputes and the DAAB shall provide conciliation/mediation to the parties.

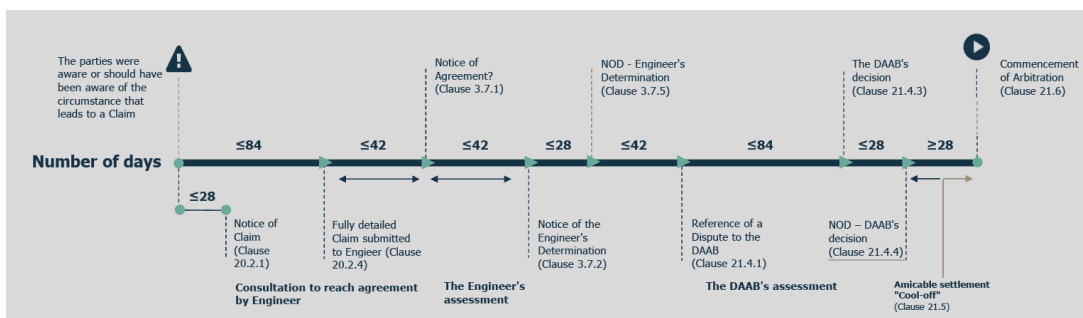
The popularity of this new clause is still uncertain. The concern of the parties may be that it is inconsistent for the DAAB to first act as a mediator - perhaps receiving compromising information in the unbound forum of conciliation/mediation - but if it does not result in an agreement between the parties, the same DAAB will then have to act as adjudicator on the same issue.



<sup>16</sup> Clause 21.5.

<sup>17</sup> But with some exceptions, e.g. in the event of a party's failure to comply with a DAAB decision, see Clause 21.7.

## Overview



FIDIC includes some critical time limits regarding the dispute resolution procedure, which is illustrated in the above figure.

As can be seen from the figure above, the parties must be conscious of the time limits within FIDIC to prevent a determination/decision - which the party disagrees with - from becoming binding and final.

Danish players within the construction sector may be used to a more lenient approach from arbitral tribunals towards agreed time limits and preclusion - as seen in Danish case law based on the general conditions widely used in the Danish construction sector (often referred to as AB). However, an arbitral tribunal making decisions based on FIDIC may not follow such lenient approach in contradiction with the wording of the contract.

## FIDIC'S "BINDING BUT NOT FINAL / FINAL AND BINDING" REGIME

From a Danish legal perspective, FIDIC's procedure for dispute resolution raises some questions with regards to enforceability. Particularly, whether decisions of the DAAB are enforceable if the losing party refuses to comply.

A DAAB is a contractual mechanism for adjudication of disputes and not governed by statutory rules. Therefore, DAAB decisions are not - by themselves - recognized as enforceable under Danish law. This creates an issue since a DAAB decision is agreed to be *binding* (final or not).

FIDIC includes provisions dealing with failure to comply with DAAB's decision. Clause 21.7 allows any failure to comply with the DAAB's decision, *whether binding or final and binding*, to be referred to arbitration (without a duty to seek amicable settlement). The arbitral tribunal is given the power to order the enforcement of such non-complied decision, by way of summary or other expedited procedure, interim measures or award.

But in case of a non-final DAAB decision, the power to order enforcement is subject to the express reservation that the parties rights as to the merits of the dispute are reserved until resolved in a final arbitral award.

The question is then; will an arbitral award enforcing a non-final DAAB decision comply with the requirements for an enforceable arbitral award when such award (i) does not review the merits of the dispute and (ii) will be followed by a final arbitral award reviewing the underlying merits of the dispute?



Further, if it is already given that a (later) final arbitral award will resolve the merits of the dispute, could enforcement of the “interim” award disregard the doctrine of *res judicata* (an already decided matter shall not be decided again) and be contrary to the agreed mechanism between the parties?

From a legal perspective, the uncertainties surrounding enforcement of DAAB decisions raise the question whether DAABs are efficient contractual instruments, if a losing party fails to comply with such.

## CONCLUSION

Whether FIDIC’s dispute resolution procedure is an efficient platform for resolving disputes will - not surprisingly - depend on the parties’ attitudes towards the decisions made.

At best, it offers the parties a platform to resolve their disputes in a time and cost-efficient manner, with different tiers of determination before actual arbitration. But in turn, the platform sets out mandatory steps before a final arbitral award can be obtained, which in the end may seem obsolete if the dispute is not resolved during these steps.

Compared to the usual standard conditions applied to Danish construction contracts, FIDIC’s procedure for dispute resolution is in many ways different, although the latest revision of the general conditions (AB 18) usually applied in Denmark is moving towards the dispute platform of FIDIC by implementing more detailed procedures for dispute resolution with the same intention of providing a platform that may avoid lengthy and costly arbitration.

From a Danish perspective, the Employer’s construction manager will normally assist with claim management and approving variations. This could cause Danish parties to compare such with the role of the Engineer in claim resolution under FIDIC. But in our view, the role of the Engineer is more extensive, which follows from the authority given to him/her and the formal procedure for determination of claims. It should also be noted that the

construction manager normally involved in Danish construction projects acts solely on behalf of the Employer, which could cause some skepticism towards the “neutrality” of the Engineer in claim resolution under FIDIC.

Compared to usual construction contracts in Denmark, the biggest difference in FIDIC’s dispute resolution procedure is probably the DAAB. Plesner has varying experiences with the use of review or adjudication boards under construction contracts (whether named DRB, DAB/DAAB, etc.).

For the construction of Øresundsforbindelsen, the bridge between Denmark and Sweden, the review board was very successful, and the project was finished within budget and time and without subsequent arbitration. But we have also seen the opposite outcome in other projects.

In our experience, the success of a review or adjudication board depends on the parties proactively investing and relying on the board, the project knowledge level of the board and the board members’ reputation.





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