Chapter 17
Construction Disputes

17.1 Introduction

Unexpected situations, leading to disputes, are a normal feature of every construction project because conditions encountered in practice are usually different from those planned or foreseen. Construction disputes arise due to a series of factors that combine in various ways to produce arguments, disagreements, and finally disputes. These disputes may be of varied nature like technical, financial or quality related, insurance related, duration related, or staff/labor related, etc.

Most disputes appear during construction and several techniques are available to help contracting parties to come to some form of settlement. A primary goal in any claim or dispute is to maintain control. One aspect, which is often controllable, is the choice of a claim or dispute settlement method. Knowledge about settlement options and their respective advantages helps to maintain that control. Typically, claims and disputes can be settled by one or more methods; however, we will address CCDC-2 [1] and FIDIC [2] conditions of contract approaches in this regard.

17.2 CCDC-2 Dispute Resolution Procedure

Dispute resolution between the parties to the contract is addressed under Clause-8 of CCDC-2 [1]. The suggested structure for dispute resolution is negotiation, mediation, and arbitration. In general, being the Contract Administrator of the project, the Consultant has traditionally been the primary Arbiter with respect to disagreements or disputes between the Owner and the Contractor. At the initial stage, as required by CCDC-2 Clause 2.2; the Consultant will interpret and investigate the dispute in an unbiased, fair, and professional manner, consistent with the intent of the Contract Documents and convey his decision to both parties in writing.

A. Surahyo, *Understanding Construction Contracts*,
DOI 10.1007/978-3-319-66685-3_17

17.2.1 Negotiation

If any one of the parties is unsatisfied with any particular finding made by the project Consultant, the unsatisfied party, within 15 working days of the receipt of the Consultant's findings, must send a notice in writing of the dispute to the opposing party and the Consultant. That notice must contain the particulars of the specific matter in dispute, as well as the relevant provisions of the contract. The sending of a notice serves to invoke the next formal step in the dispute resolution process, "negotiation." Within 10 working days of receiving the notice in writing of the dispute, the opposing party must send a notice in writing of reply to the dispute. The parties must then sit down and make all reasonable efforts to resolve their dispute by amicable negotiations before moving on to the next step of mediation in the process.

17.2.2 Mediation

If the dispute is still unresolved after the 10-working day process of negotiation has been exhausted, the parties must ask the Project Mediator to step in to assist them in resolving their dispute. CCDC-2 [1] provides that the mediated negotiation shall be conducted in accordance with the "Rules for Mediation of Construction Disputes" as provided in CCDC-40 [3]. It further suggests that the parties shall appoint a Project Mediator either within 20 working days of the date of the award of the contract or within 10 working days after either party makes a written request by notice in writing that a Project Mediator be appointed.

The Project Mediator will conduct mediation for resolution of the dispute, meeting with both sides individually prior to joint discussion on a "without prejudice" basis. The Mediator's decision is not binding on either party, because the Mediator's role is to motivate the parties to communicate with each other while keeping all disclosures, as well as any resultant settlement, confidential. If the dispute is not resolved within 10 days or within such a period agreed to by the parties, the Mediator will terminate the mediation by issuing notice to the Owner, the Contractor, and the Consultant.

17.2.3 Arbitration

Once the mediated negotiations are terminated, either party may refer the dispute within 10 working days to be finally resolved by the arbitration under the Rules for Arbitration of Construction Disputes as provided in CCDC 40 [3]. CCDC-2 [1] provides that the arbitration should be conducted in the jurisdiction of the "Place of the Work." After the expiry of 10 working days, the arbitration is not binding on the parties, and they may refer the dispute to the courts.

The procedures negotiations, mediation, and arbitration are further described under the following pages.

17.3 FIDIC Dispute Resolution Procedure

FIDIC [2] approaches the role of the Engineer in a different manner from that anticipated by the Canadian standard forms. While the Canadian standards include content addressing the role of the Consultant as an impartial administrator and arbiter in the first instance, FIDIC, the international suite of standard form contracts, expressly denies the impartial character of the role of the Engineer who is engaged by the Employer [4]. Accordingly, FIDIC, under clause 20.2, provides that disputes shall be adjudicated by an independent dispute resolution process employing a dispute adjudication board (DAB) in accordance with clause 20.4.

17.3.1 The Dispute Adjudication Board (DAB)

The DAB procedure is treated as a method of primary dispute resolution under FIDIC [2] conditions of contract. Detailed provisions and procedures for the DAB are included in Sub-clauses 20.2–20.4, the Appendix A1 "General Conditions of Dispute Adjudication Agreement," and the Appendix A2 "Procedural Rules."

The DAB is an independent panel of one or three suitably qualified people who are appointed at the beginning of the project so as to give decisions on any dispute. For the DAB to operate successfully, it is essential that the members:

(a) Should visit the site regularly so as to become familiar with the details of the project.
(b) Should keep themselves up to date with activities, progress, and problems at the site.
(c) Should be permitted access to all documentation and be allowed to attend such meetings as may be necessary to become and remain informed.
(d) Should encourage the parties to resolve the disputes mutually at the initial stage.
(e) Ensure decisions by DAB are implemented as early as possible.

As per general conditions for agreement under Appendix A1, a member is not permitted to be appointed as an arbitrator or to give evidence in any arbitration under the contract except it is agreed by the Employer, Contractor, and other members.

17.3.1.1 Appointment of DAB

As per the Sub-clause 20.2, the DAB is to be appointed within 28 days of the commencement date as stated in the appendix to tender. If the DAB comprises three members, each party shall nominate one member, for the approval of other party.

The chairman is then appointed or agreed by the parties with the consultation of selected two members or by the appointing authority named in the appendix to tender. Each party must ensure to nominate a truly independent expert with the ability and freedom to act impartially.

If the parties fail to agree on the nomination of DAB members, then the FIDIC [2] appendix to tender designates the president of FIDIC [2] as the appointing authority, who will nominate individual DAB members if requested to do so. The appendix to tender can be amended to designate a different appointing authority.

FIDIC [2] specifies that the DAB's decision must be implemented and shall be binding on both parties, but if either party is not satisfied with DAB decision, the original dispute can be referred to arbitration.

The members selected to a DAB must be suitably qualified, impartial, and accepted and trusted by both parties. They should have appropriate construction experience, including experience within claims and dispute resolutions and must be free from any prior relationships that could be seen to lead to bias or a conflict of interest. They should also carry the knowledge of contract interpretation with an understanding of the rights, obligations, and liabilities of the parties and knowledge of the DAB procedures.

Once the appointment of the members is accepted, each member of the DAB signs an agreement with both parties. Standard forms for the Dispute Adjudication Agreement for one person and three person DAB are included with the FIDIC conditions of contract [2]. The agreement refers to the "General Conditions of Dispute Adjudication Agreement" and the "Procedural Rules" which are attached to clause 20.

17.3.1.2 Termination or Replacement

FIDIC [2] Sub-clause 20.2 states that neither the Employer nor the Contractor can terminate the appointment of any member. The Sub-clause 20.2 further states that only by mutual agreement of both parties the appointment of any DAB member may be terminated. Additionally, in case any DAB member declines to act or is unable to act as a result of death, disability, resignation, or termination of appointment, then a replacement can be made with the mutual agreement of both the parties by appointing a suitable qualified person or persons.

The Sub-clause 20.2 also provides that the appointment of any member can be terminated by joint agreement of both the parties when the Contractor's discharge under Sub-clause 14.12 becomes effective that means when the Contractor's final accounts are settled and he receives back his performance security.

The General Conditions of the Dispute Adjudication Agreement under Appendix A1 provide that for termination of the Dispute Adjudication Agreement, the Employer and the Contractor jointly need to give 42-day notice to the member. Conversely, a member can also terminate the Dispute Adjudication Agreement, by providing such notice to the parties, if the Employer or Contractor fails to comply with any condition of the Adjudication Agreement.

17.3.1.3 Obtaining DAB Decision

FIDIC [2] Sub-clause 20.4 states that if a dispute of any kind whatsoever arises between the parties in connection with or arising out of the contract, it should be referred immediately in writing to the DAB with copies to the other party and the Engineer.

Having received the referral notice, the DAB is required to follow the procedural rules as stated in FIDIC Conditions. Both parties are obliged per the contract to make available to the DAB such items as further information, access to the site, and any appropriate facilities as the DAB may require for the process of making a decision. The DAB may conduct a hearing during dispute investigations from the Employer and the Contractor.

Sub-clause 20.4 further provides that the DAB shall give its decision within 84 days or other agreed period between all parties. The decision will be in writing and include an explanation of the reasons. The decision is required to be binding upon the parties unless it is revised by an amicable settlement or an arbitration award.

If either party is dissatisfied with the decision of the DAB, then it must issue a formal notice of dissatisfaction. The notice must be issued within 28 days of the DAB's decision and must state the reasons for the dissatisfaction. Any failure of the DAB to reach a decision by the due date will also be a valid reason for issuing a notice of dissatisfaction.

If no notice of dissatisfaction is served by either party within the 28-day period, then the decision will become final and binding on both parties. However, as per Sub-clause 20.7, if a party fails to comply with DAB decision, then the other party may refer the failure itself to arbitration.

17.3.1.4 Alternative to Sub-clause 20.4

The FIDIC guide for the preparation of particular conditions includes an alternative paragraph for Sub-clause 20.4, which enables the Engineer to be appointed as a member of the DAB. In this case the Engineer is required to follow the DAB procedures, acting fairly and impartially, and his fees will be paid by the Employer.

It is difficult to imagine that the Engineer can perform the DAB duties while still acting in his role on behalf of the Employer [5].

17.3.1.5 Payment to DAB Members

As per the General Conditions of the Dispute Adjudication Agreement, members shall be paid in the currency named in the agreement. The DAB member shall be paid on the basis of a fixed monthly retainer fee and a daily fee. The retainer fee will compensate each member for being available, for time spent reviewing, and for maintaining project documents, communications, and clerical work including all office and overhead expenses.

The daily fee covers payment for site visits including travel time of the member, the time involved in preparing decisions and reading submissions in preparation for a hearing, etc.

The payment made to the member should also cover any tax if applicable. In accordance with clause 20.2, the Contractor and the Employer each will pay one-half the payments made to the DAB member.

Payment for all fees and expenses, as specified in the Dispute Adjudication Agreement, are made by the submission of invoices by the member to the Contractor. The Contractor is obliged to pay all the member's invoices in full within 56 calendar days. The Contractor is reimbursed by the Employer by one-half of the invoiced amount. In the event of any failure of the Contractor to pay the amount required, then the Employer is required to pay the due amount. The Employer is thereafter reimbursed by the Contractor by one-half of the invoiced amount plus any collection costs and financing charges.

17.3.2 Amicable Settlement

Following issue of a notice of dissatisfaction under Sub-clause 20.4 as discussed above, FIDIC [2] Sub-clause 20.5 provides a 56-day period before either party can commence arbitration. This clause further recommends that the parties shall attempt to settle the dispute amicably prior to proceeding for arbitration but do not give guidance for any procedure to be followed.

Amicable settlement primarily involves three processes, such as negotiation, conciliation, and mediation and excludes arbitration or litigation, where a binding decision is imposed on the parties.

Under the amicable settlement, parties are brought to the negotiating table to discuss their problems, establish facts, clarify issues, and work out some settlement options. The goal is to reach an agreement based on shared understanding and joint efforts by the parties which is not imposed on them by the third party as is in arbitration.

Amicable settlement is more suitable for disputes within the construction industry, where all parties have worked hard to complete the project on time and within budget and usually hope to work together again in future.

17.3.2.1 Negotiations

Negotiation is the primary method of amicable settlement process and is probably the most flexible form of dispute resolution as it involves only those parties with an interest in the matter and their representatives, if any. Negotiation is the least costly and informal method of dispute resolution, allowing a high degree of control over issues and time factors.

Since negotiation is a voluntary process, the first and fundamental step to be taken is to confirm whether or not the other party or parties are interested in negotiations. In making such an assessment, it is important to take into account the following factors [6]:

1. The desire to resolve the dispute
2. Whether a negotiated solution is in the interests of any or all of the parties in question
3. The credibility of the other party
4. The willingness of the parties to establish or preserve a relationship
5. Whether or not there is a disparity between the parties to the extent that it would be impossible to bargain equally, i.e., there is a marked contrast between the parties in terms of the level of education or the resources of the parties
6. The desirability of using another form of alternative dispute resolution, such as mediation or arbitration
7. Proper authority to enter into negotiations and to reach an agreement or settlement

A successful negotiation requires each party to have a clear understanding of its negotiating mandate. If uncertainty exists regarding the limits of a party's negotiating authority, the party will not be able to participate effectively in the bargaining process. The dispute resolution should not be based on either winning or compromise criteria but should concentrate on satisfying as many as possible of the important needs and interests of the parties. During the negotiation, both parties need to remain cordial, tolerant, and patient. Each party has to leave some bargaining room and expect some give and take. The negotiations are considered successful when one party's best outcome is good for the other party. Former US Secretary of State, Henry Kissinger, said that each party to a negotiation has certain requirements and goals – and the art of negotiation is finding out what the other party's goals are and satisfy them.

The negotiations may be conducted between senior personnel of the parties; however, the presence of the Consultant is most important. The traditional role of the Consultant, as an impartial professional, includes interpreting and making initial decisions on disputes concerning the contractor and the Owner.

The most important item for a successful negotiator is adequate preparation and familiarity with the project. The negotiator must establish objectives before going to the meeting such as which item is to be compromised and to what extent and which items are not to be compromised or totally dropped. While starting discussions, it is always useful to start with the items which should be resolved easily, taking the heat off. Negotiations should be fair and honest. Detailed records of the negotiations must be kept.

17.3.2.2 Mediation

Mediation is basically a nonbinding dispute resolution process, where a neutral professional is requested to help the parties to reach a negotiated and acceptable settlement.

If the dispute cannot be resolved through negotiations, then the mediation procedures are implemented if the contract requires. For mediation, the parties select a sole neutral person/professional who encourages the parties to communicate, understand, and evaluate each other's viewpoint and agree to a settlement. The mediator basically helps the parties to discuss in detail the strengths and weaknesses of their cases and assists them in reaching their own mutually acceptable settlement of issues in dispute. The mediator does not decide for the parties but helps them make their own decision.

The South African Association of Consulting Engineers propose that the general philosophy of mediation should be that the disputes which arise in the execution of engineering works by contract can be settled by Engineer Mediators for other Engineers to avoid "mortal combat" resulting from arbitration or litigation [7]. Mediation is particularly useful when the disputing parties need or desire to maintain an ongoing relationship. Mediation allows parties to avoid the adversarial elements of litigation which often make it impossible to continue a productive relationship after the settlement.

The role of Mediator can be summarized as to [6]:

1. Encourage exchanges of information.
2. Help the parties understand each other's views.
3. Let the parties know that their concerns are understood.
4. Promote a productive level of emotional expression.
5. Lay out the differences in perceptions and interests.
6. Identify and narrow issues.
7. Help parties realistically evaluate alternatives to settlement.
8. Suggest that the parties take breaks when negotiations reach an impasse.
9. Encourage flexibility and creativity.
10. Shift the focus from past to future.
11. Shift the focus from one of blame to a creative exchange between the parties.
12. Hold caucuses with each disputant if there is deadlock or a problem.
13. Propose solutions that meet the fundamental interests of all parties.

Successful mediations result in a signed agreement or contract which is often called a memorandum of understanding and when signed becomes legally binding.

17.3.2.3 Conciliation

Conciliation is similar to mediation and both terms can be used interchangeably unless defined by contract. Even though the two terms have a number of similarities, there are also some differences between conciliation and mediation. In both cases, a neutral third party seeks to help the parties to settle their disputes amicably, the major difference between conciliation and mediation is determined by the amount of power the third party has. The conciliator, not the parties, often develops and proposes the terms of settlement between the parties, meaning a Conciliator usually

offers his opinion on the relative strengths of the case, whereas in mediation, the Mediator facilitates a discussion between the parties and does not offer an opinion on the strength of each side's argument.

In Canada, the conciliation process is more commonly used to resolve disputes or conflicts between Employers and unions and between families.

17.4 Arbitration

If the parties cannot resolve their disputes through DAB or amicable settlement methods, arbitration is the next step in the construction dispute resolution process. Arbitration may be commenced any time prior to completion of the works or after such completion. As per FIDIC [2] Sub-clause 20.6, arbitration will be under the International Chamber of Commerce (ICC) arbitration rules if no alternative system of arbitration is stated.

Unlike the less formal process of mediation, the Arbitrator does not discuss the case individually with either of the parties prior to the hearing. The Arbitrator conducts a hearing, like in court, and issues a decision, known as an "award" that binds the parties. During the arbitration hearing, both parties have the right to present evidence and to introduce witnesses for substantiation in support of their positions. The Arbitrator has full power to review or revise any decision made earlier, and the Engineer can be called as a witness on matters related to the dispute.

The award must be made in writing and within the terms of reference; otherwise it will be invalid and therefore unenforceable. In general, arbitration proceedings often take many months and are therefore expensive.

Under most arbitration rules, the number of arbitrators could be a single Arbitrator or three arbitrators; however, FIDIC [2] conditions suggest appointing three arbitrators. A sole Arbitrator could be an expert in the domain of the dispute, or an expert in the law, or an expert in both, whereas a three-member panel usually preferred in large or complex cases could consist of:

(a) Three experts
(b) Two experts with the consent of parties and a lawyer as presiding Arbitrator
(c) Two lawyers with the consent of parties and an expert as presiding Arbitrator
(d) Three lawyers

It is recommended to select a presiding Arbitrator who is an expert in the law. The other two persons shall be experts in the domain of the dispute.

In Canada, arbitration is regulated by statute. Every province and territory has its own separate arbitration legislation. Each province and territory, with the exception of Quebec, has two arbitration statutes: (1) commercial and domestic arbitration (2) international arbitration. At the federal level, commercial arbitration is governed by the "Commercial Arbitration Act" (CAA). For more details, the "Dispute Resolution Reference Guide" published by Department of Justice Canada can be referenced, (which can be found on DOJ web site). The guide also provides sample agreement

forms for parties requesting arbitration or mediation [6]. Some of the other organizations who have developed the arbitration rules are American Arbitration Association (AAA), ICC (International Chamber of Commerce) International Court of Arbitrators, ICC Canada Arbitration, ADR Institute of Canada, and Chartered Institute of Arbitrators.

17.5 Litigation

Litigation is usually the final procedure of a settlement and is utilized only when a construction claim cannot be resolved by a DAB or methods of amicable settlement or arbitration. Basically, a contract is a legally binding agreement; hence any disagreement or dispute can be referred to the courts of the country. Lawsuits are normally expensive and time consuming. Delays in settlement usually lead to heavy costs on daily basis. Claims litigation is very complex, and experience is essential. Good experienced lawyers and experts, however, also are very expensive.

Any party considering to pursue a delay or other claim should carefully evaluate the costs relative to any possible recovery. In addition, legal action can expose the parties to undesirable publicity. After a decision is rendered, the case is still subject to appeal or nonpayment that can result in additional time and cost.

Moreover, arbitration is conducted by technical people or legal people with experience in construction law and is generally conducted in the language of the project, whereas the courts may require that all the project paper work is translated into the language of the country.

References and Further Reading

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