Comparative Analysis of the Dispute Resolution Mechanisms in the *"FIDIC Red Book 2017"* and the *"AIAC Standard Form Building Contract 2019"*

1 Introduction

1.1 Earlier in the year the Asian International Arbitration Centre (**AIAC**) invited me to provide a Construction and Engineering Law training seminar at its headquarters in Kuala Lumpur (Malaysia).

1.2 We discussed potential topics for the seminar and, conscious that the "*International Federation of Consulting Engineers*" (**FIDIC**), one of the leading providers of standard form contracts to the international Construction and Engineering industry, had published the second edition of its "*Conditions of Contract for Construction*" in December 2017 (**2017 Red Book**) and that the AIAC had recently published its new "*Standard Form of Building Contract 2019*" (**2019 AIAC**), we decided that summarising and comparing the contracts' respective dispute resolution mechanisms (**DRM**) would provide members with genuine added value.

1.3 I delivered the seminar at the AIAC's headquarters on 3 October 2019 to a very receptive and inquisitorial audience. The seminar concluded with a long and interesting "Question & Answer" session focusing on several issues including the interpretation and application of the contract's DRM's together with several generic Construction and Engineering Law questions/problems to which I was delighted to provide answers/solutions.

1.4 We have posted the slides for the seminar within the "Insights" tab on our website (https://www.cels.global/insights/) and in the remainder of this article we provide a detailed summary of the contracts' DRMs together with our "Summary/Observations" in relation to the same.

2 2017 Red Book's DRM

2.1 The 2017 Red Book's DRM comprises several clauses (**Cl.**) and subclauses (**SC.**) which we categorise as follows:

(a) Claims (Cl. 20);

(b) The Engineer's Role/Determination (Cl.3);

(c) Dispute Avoidance/Adjudication Board (SC. 21.1);

(d) Amicable Settlement (SC. 21.5); and

(e) Arbitration (SC. 21.6).

2.2 We adopt FIDIC's defined terms and discuss each of the above in turn below:

Claims

2.3 Cl. 20 of the 2017 Red Book titled "***Employer's and Contractor's Claims***" is comprehensive and sets out the contract's Claim's procedure. Specifically, SC. 20.1 sets out three scenarios under which the Employer and/or the Contractor may raise a Claim against the other party to the Contract:

(a) First, the Employer may raise a Claim against the Contractor if it considers that it is entitled to an additional payment, a reduction in the Contractor Price and/or an extension to the Defects Notification Period (SC. 20.1(a));

(b) Second, the Contractor may raise a Claim against the Employer if it considers that it is entitled to an additional payment and/or an EOT (Cl. 20.1(b)); and

(c) Third, either Party may raise a Claim against the other party for any "*…entitlement or relief…of any kind whatsoever (including in connection with any certificate, determination, instruction, Notice, opinion or evaluation of the Engineer)…"* so long as the Claim may not be raised under either SC. 20.1(a) or SC. 20.1(b) (SC. 20.1(c)).

2.4 Further, the claiming Party under SC. 20.1(a) or SC. 20.1(b) is required to provide a Notice of the Claim to the Engineer no later than 28 days after becoming aware of the event giving rise to the Claim (SC. 20.2.1(a)) failing which it loses its right to Claim i.e. "*time barred*" (SC. 20.2.1(a)). In addition, the claiming Party must provide the Engineer with its "*fully detailed Claim*" no later than 84 days after becoming aware of the event giving rise to the Claim.

2.5 That said, if either party raises a Claim under SC. 20.1(c), and the other Party and/or the Engineer disagrees with the same, then the claiming Party is required to refer the Claim direct to the Engineer for its "*Agreement or Determination*" under SC. 3.7.

The Engineer's Role / Determination

2.6 The Engineer plays a fundamental role in the 2017 Red Book's DRM and is expressly required to *"…act neutrally between the Parties…"* when exercising its authority under SC. 3.7, titled "*Agreement or Determination*", of any "*matter*" or Claim. It should be noted, however, that generally the Engineer is "…*deemed to act for the Employer*…" when performing its duties under the Contract (SC. 3.2).

2.7 Specifically, the Engineer, following receipt of a Notice of Claim under Cl. 20, is required to consult with the Parties and attempt to reach agreement within 42 days (SC. 3.7.1) – the Parties should note that this time limit starts running on different days depending on whether the Parties' disagreement constitutes a "*matter*" or a formal Claim and the SC under which the Claim was raised (SC. 3.7.3). If the Parties fail to reach an agreement or both Parties advise the Engineer that they are unable to reach an agreement, then the Engineer is required to provide an "*Engineer's Determination*" (SC. 3.7.1).

2.8 The Engineer's determination must be "*fair*" (SC.3.7.2) and provided within 42 days - the Parties should note that this time limit starts running on different days depending on whether the Parties' disagreement constitutes a "*matter*" or a formal Claim and the SC under which the Claim was raised (SC. 3.7.3).

2.9 If either Party is dissatisfied with the Engineer's determination it must provide a NOD within 28 days after receipt of the same (SC. 3.7.5) – the Parties should note that this time limit starts running on different days depending on the SC under which the Claim was raised (SC. 3.7.3). Following raising a NOD either Party may invoke its right to obtain a decision from the DAAB under SC. 21.4 (SC. 3.7.5).

2.10 The Parties should note, however, that if neither Party provides a NOD within 28 days after the Engineer's determination then both Parties shall be deemed to have accepted the same which is deemed "final and binding" (SC. 3.7.5).

2.11 Finally, if either Party fails to comply with an "agreement" or an Engineer's determination, which is final and binding, then the other party may refer the "failure" direct to arbitration under SC.21.6 and the arbitrator/s may deal with the reference as if it relates to the DAAB's final and binding decision under SC 21.7(SC 3.7.5).

Dispute Avoidance/Adjudication Board (DAAB)

2.12 SC. 21.1 requires the Parties to constitute a DAAB in accordance with the Contract Data and refer all Disputes to the DAAB in accordance with SC. 21.4 "Obtaining DAAB's Decision".

2.13 Prior to the above, however, the Parties may at any time, save for during the period for an Expert's determination, jointly request in writing that the DAAB assists the Parties informally to attempt to resolve any issues/disagreements that relate to the Contract's performance. The Parties are not bound by the DAAB's informal advice nor does it affect any future Dispute resolution procedure (SC. 21.3).

2.14 That said, the Parties may refer a Dispute to the DAAB within 42 days of providing the NOD (SC. 21.4.1). The DAAB is required to provide its decision within 84 days of receiving the reference which shall be "binding" on both Parties who are required to promptly give effect to the same (SC. 21.4.3). If a Party fails to comply with the DAAB's decision then the other Party may refer the issue direct to arbitration, bypassing SC. 21.4 "*Obtaining the DAAB's Decision*" and 21.5 "*Amicable Settlement*", and the arbitral tribunal has the power to order enforcement of the DAAB's decision (SC. 21.7).

2.15 Either Party, however, has a right to provide a "*Notice of Dissatisfaction with the DAAB Decision*" to the other Party within 28 days after receiving the same. If neither Party provides a NOD, then the DAAB's decision becomes "…*final and binding*…" (SC. 21.4.4). Of note is that neither Party may proceed to arbitration of a Dispute unless a NOD has been provided for the Dispute in question in accordance with SC. 21.4.4.

Amicable Settlement

2.16 SC. 21.5 requires the Parties, following the provision of a NOD under SC. 21.4.4, to attempt to resolve the Dispute amicably for a mandatory period of 28 days from the date the NOD was issued. If the Parties fail to resolve the matter amicably then either Party may refer the Dispute to arbitration under SC. 21.6.

Arbitration

2.17 Either Party may refer any Dispute, which is not subject to a DAAB's "*final and binding"* decision, to arbitration under SC. 21.6. An arbitration may commence before or after completion of the Works and, unless the Parties agree otherwise, will be subject to the International Chamber of Commerce's Rules of Arbitration (**ICC Rules**).

2.18 The arbitral tribunal shall comprise 1 or 3 arbitrators appointed in accordance with the ICC Rules and the arbitrators will have the power to *"…open up, review and revise any certification, [engineer's] determination (other than final and binding determinations)…decision of the DAAB…(other than final and binding decision)…"* (SC. 21.6).

2.19 Article 35.6 of the ICC Rules states that "*Every award shall be binding on the parties*".

3 2019 AIAC's DRM

3.1 The 2019 AIAC's DRM requires the Parties to raise their initial claims under several clauses which we categorise as follows:

(a) Variation Claim (Cl.11);

(b) EOT Claim (Cl.23);

(c) Loss & Expense Claim (Cl.24);

(d) Construction Industry Payment and Adjudication Act 2012 (**CIPAA**);

(e) Mediation (Cl.35); and

(f) Arbitration (Cl.34).

3.2 We adopt the AIAC'S defined terms and discuss each of the above in turn below:

Variation Claim

3.3 Cl. 2 sets out the Contract Administrator/CA's "*powers, functions and instructions*", which includes the right to instruct the Contractor to complete a Variation to the Works at any time prior to the CA issuing the Certificate of Practical Completion (Cl.11.4). The Contractor, regardless of whether it disputes the CA's instructions/Variation, is required to complete the same (Cl. 11.4).

3.4 Further, the Contractor is required to provide the CA with its submission and supporting evidence relating to the Variation, to allow the CA to value the same in accordance with Cl.11.7, no later than 30 days after completing the Variation (Cl.11.6(a)). The CA may

request additional evidence/documents, if that provided was insufficient, no later than 14 days after receipt of the original submission. (Cl. 11.6(b)).

3.5 If the Contractor fails to provide the initial submission/documents within the 30 days' time limit set out in Cl. 11.6(a) then the Contractor may provide the submission/documents during CA's assessment of the "final account" under Cl. 30.10. This provides the Contractor with a second opportunity to raise its claim.

3.6 The CA, however, may value the Variation on the "*information available*" at any time prior to issuing the Certificate of Practical Completion (Cl. 11.6(d). In this context, the Parties may agree with the CA's valuation which becomes "*conclusive*" (Cl.11.6(d)) or dispute the valuation in which case either Party may refer the dispute direct to arbitration under Cl. 34 (Cl. 11.6(d)).

3.7 In addition, the Contractor may claim "*Additional Expenses Caused by the Variation*" (Cl. 11.9), which it would not be paid under Cl.11.7 "*Valuation* [of Variation] *Rules*" or Cl. 24 "*Loss and Expense*", no later than 28 days after completion of the Variation (Cl. 11.9(a)(iii)) failing which they would be deemed to have "*waived his rights*" to claim the same i.e. time barred.

EOT Claim

3.8 The Contractor may claim an EOT if the regular progress of the Works is delayed by any of the events listed in Cl.23.8 titled "*Time Impact Events*" (**TIE**) and the CA has the authority to "…*grant a fair and reasonable EOT for the completion of the Works*." (Cl. 23.1(a)).

3.9 Specifically, the Contractor must submit a "*written notice*", including stating its intention to claim an EOT together with describing the TIE, to the CA no later than 28 days after the event occurred (Cl. 23.1(b)). Subsequently, the Contractor must provide its "*relevant particulars*", which substantiate the EOT claim, to the CA no later than 28 days after the end of the "cause of delay" (Cl. 23.1(c)).

3.10 If the Contractor fails to comply with the above time limits it has a right to submit a "*fully detailed claim for an EOT*" to the CA, no later than 42 days after Practical Completion of the Works (Cl. 23.10(a)). The CA is required to provide its determination in relation to the same no later than 42 days following receipt of the fully detailed EOT claim setting out its reasons for the same (Cl. 23.10(b)). This provides the Contractor with a second opportunity to raise its claim.

3.11 We note that Cl. 23 does not include express wording which provides the Contractor with a means of disputing the CA's determination and the inference, therefore, is that if the Contractor disagrees with the CA's determination then it may refer the dispute direct to arbitration under Cl. 34.

Loss & Expense Claim

3.12 The Contractor may make a claim, under Cl.24.1, for "direct loss and expense" caused by an Employer's Event if it "…*could not be reimbursed by a payment under any other provision in the Contract*…" (Cl.24.1(a).

3.13 Specifically, the Contractor must submit a "*written notice*" to the CA of its intention to claim direct loss and expense under the above, which describes the issue and an estimate of the claim's value, no later than 28 days after the event occurred (Cl. 24.1(a)(i)), followed with its relevant particulars, substantiating the direct loss and expense claim, no later than 28 days after the "event ended" (Cl. 24.1(ii)).

3.14 The Contractor should note that if it fails to comply with the above time limits it shall be deemed to have "*waived his rights under this Contract and/or the law to any such direct loss and/or expense*" (Cl. 24.1(iii)) i.e. time barred.

3.15 The CA must provide its determination within 42 days of receiving the Contractor's "*relevant particulars*" of its direct loss and expense claim which sets out its reasons (Cl. 24.3).

3.16 We note that Cl.24 does not include express wording which provides the Contractor with a means of disputing the CA's determination and the inference, therefore, is that if the Contractor disagrees with the CA's determination then it may refer the dispute direct to arbitration under Cl. 34.

*Construction Industry Payment and Adjudication Act 2012 (**CIPAA**);*

3.17 The 2019 AIAC expressly incorporates the CIPAA within: (1) Cl. 23A "*EOT Pursuant to Section 29 of CIPAA*", (2) Cl. 24A "*Loss and Expense Incurred Pursuant to Section 29 of CIPAA*", and (3) 30A "*Direct Payment under Section 30 of CIPAA*".

3.18 The CIPAA was introduced to facilitate regular and timely payment in the Malaysian Construction and Engineering industry and provides either party to a "*construction contract*", as defined, with a statutory right to "*adjudication of payment disputes*". The adjudication decision is binding unless one of the three grounds in Section 13 of CIPAA are satisfied which means "*the dispute is finally decided by arbitration or the court*" and reflected in Cl. 23A.2 of the 2019 AIAC.

Mediation

3.19 Under Cl. 35.1 either Party may refer:

> *"…their dispute as to any matter arising under or out of or in connection with the carrying out of the Works and whether in contract or in tort…for mediation in accordance with the AIAC Mediation Rules."*

3.20 The Parties should note that referring a dispute to mediation is not an express mandatory precondition to referring the dispute to arbitration under Cl. 34.

Arbitration

3.21 The 2019 AIAC's DRM's final forum for dispute resolution is arbitration in accordance with Cl. 34.1 under which either Party may refer:

> *"Any dispute, controversy or claim arising out of or relating to this Contract…*[to arbitration] *in accordance with the AIAC Arbitration Rules."*

3.22 The seat of arbitration is Malaysia (Cl. 34.1(b)) and the arbitrators have the power as set out in the AIAC Arbitration Rules and the Arbitration Act 2005 (Cl. 34.2).

3.23 The arbitration award shall be "final and binding on the Parties" (Cl. 34.5).

4 Summary / Observations

4.1 In summary, the 2017 Red Book includes a comprehensive DRM which requires the Parties to follow three mandatory requirements prior to commencing Arbitration namely obtaining an Engineer's Determination, the DAAB's Decision and attempting Amicable Settlement. Consequently, it could be construed as providing Parties with the ability to avoid or resolve disputes amicably without proceeding to a potentially costly and time-consuming Arbitration.

4.2 Alternatively, however, the 2017 Red Book's DRM could be construed as a convoluted time-consuming mechanism which the Parties are obliged to follow to obtain a final and binding arbitral award. In this context, it could be argued that the above mandatory requirements merely delay access to Arbitration and a final and binding arbitral award which, in most instances, obtains the additional benefit of being enforceable under the Convention on the Recognition and Enforcement of Foreign Arbitral Award 1958 i.e. the New York Convention.

4.3 In contrast, the 2019 AIAC's DRM includes a claims procedure within several clauses (Variation/EOT/Loss & Expense) which, following the Parties' disagreement which crystallises a dispute, either expressly or implicitly provides direct access, without a requirement to satisfy any mandatory provisions, to Arbitration. Such an approach could be construed as providing the Parties with direct access to Arbitration to obtain a quick final and binding arbitral award which, in most instances, obtains the additional benefit of being enforceable under the New York Convention.

4.4 Conversely, however, the 2019 AIAC's DRM could be construed as encouraging Parties to enter formal Arbitration without exploring the alternative methods of resolving the dispute. On balance, however, such an analysis ignores the 2019 AIAC's DRM' provisions, including Mediation and Adjudication under the CIPAA, which encourage the Parties to resolve their disputes prior to commencing formal proceedings.

4.5 Both Contracts are of course structured differently and designed for different markets, however, both DRM's encourage Parties to resolve their disputes without recourse to Arbitration, which implicitly places emphasis on the project and completing the Works.

4.6 In our experience, the Parties to a Construction and Engineering contract would be wise to ensure that they understand and manage the “legal risk” in the same including its DRM, throughout a project’s lifecycle, which is fundamental to enhancing their prospects of successfully delivering a complex project in accordance with their initial expectations – a “win - win” outcome for the project’s stakeholders.

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