

OPPORTUNITIES FOR ATTEMPTING AMICABLE SETTLEMENT ALONG THE CLAIM/DISPUTE TIMELINE

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Claims and disputes are considered an inevitable consequence of the construction process, and project participants are becoming more aware of their costly and lengthy resolution process. The conditions of contract normally include procedures for the submittal, administration and resolution of claims, while it is widely recognized that attempting to resolve claims/disputes through amicable settlement as opposed to arbitration or litigation can save on a lot of time and money. This paper presents a critical analysis of the windows of opportunities offered under both the 1987 and 1999 FIDIC conditions of contract for attempting to resolve claims/disputes amicably. It first focuses on the 56-day period specifically dedicated for attempting an amicable resolution of disputes and highlights the possibilities of effectively stretching this period in more than one way. It further explores the opportunities available at the earlier stages of the claim/dispute timeline, before a claim is escalated to the level of a dispute.

Keywords: Construction, Claims, Disputes, Resolution, Amicable, Settlement.

1 CONSTRUCTION CLAIMS AND DISPUTES

Projects with complex designs and contract conditions are likely to result in extra costs and/or delays for the Contractor, which may cause claims to arise. Contractors resort to construction claims to recuperate the additional costs incurred during any construction project, and tend to argue that owners are not always fair when judging their entitlement to compensation (Fawzy and El-adaway 2012). The costly and lengthy resolution of these claims and disputes has become a matter of concern for the parties involved. If construction conflicts are not effectively addressed and managed, they can evolve into serious disputes, which may result in additional time-delay costs (Seifert 2005). Resolving disputes and managing claims in an optimal and timely manner (in accordance with the contract conditions) can minimize cost, time, and tension, which is why the claim-dispute resolution process is critical to any project and should allow the parties to rightfully achieve their objectives (Cheeks 2003). When submitting a claim, the contractor must closely follow the steps dictated in the contract conditions. The International Federation of Consulting Engineers (FIDIC) has prescribed in its standard contract documents a protocol to be followed by the parties to track and administer claims/disputes. It is expected that, after a claim has been notified and detailed particulars submitted, consultation discussions and various attempts at reaching an

agreement on the matter are to take place. At this point in time, the matter at hand is still considered a claim, and has not yet evolved into a dispute. As illustrated in Figure 1, the FIDIC's guidelines explain that a claim develops into a dispute if one or more of the following factors are fulfilled:

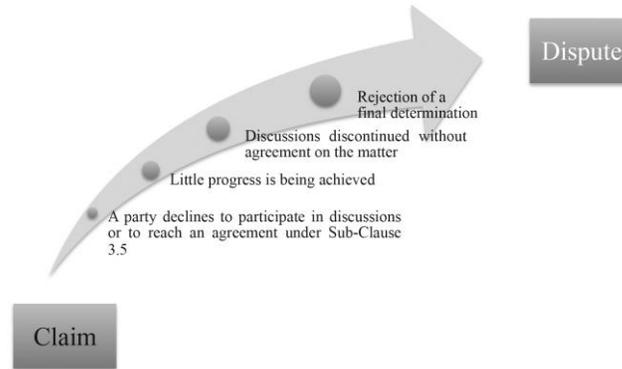


Figure 1. Claim escalating into a dispute.

The completed research work, being reported on in this paper, aimed at the identification of opportunities along the claim/dispute timeline that can be viewed as potential windows for attempting and achieving agreement/settlement of claims/disputes before any such unresolved matters are referred to arbitration/litigation. Five windows have been identified as such, and their candidacy for being explored by the parties for achieving amicable agreements/settlements has been verified through the analysis of claims/disputes administration on nine recent projects undertaken in the Middle East and North African (MENA) region. This paper focus only on the critical analysis part of the research which demarks the windows of opportunities offered under both the 1987 and 1999 FIDIC conditions of contract for attempting to resolve claims/disputes amicably.

2 AMICABLE SETTLEMENT

An amicable settlement of a dispute can be defined as an agreement that is reached to the satisfaction of all parties involved, by way of avoiding what may otherwise be lengthy and costly dispute resolution procedures. Such a settlement can occur at earlier stages along the claim/dispute timeline depending on the parties' attitudes, but it may also be delayed until after the issuance of a determination/decision in regard of any such claim/dispute. According to Sub-Clause 20.5 of the 1999 FIDIC conditions of contract, after a notice of dissatisfaction with a decision by the Engineer or the Dispute Adjudication Board (DAB) is issued, the conflicting parties are allowed a period of time to attempt to resolve the dispute amicably. Here, amicable settlement is required as a condition precedent to the commencement of arbitration, although this sub-clause does not prescribe any method/procedure for pursuing such a settlement. According to Booen (2000), no method is specified in order to give the parties the greatest flexibility in the choice of the procedure, including direct negotiation, conciliation, or mediation.

2.1 Motives for Amicable Settlement

Attempting to resolve disputes through amicable settlement as opposed to arbitration or litigation gives the parties on either end of the dispute the chance to exercise some degree of control over the way their disputes are administered and resolved. A number of factors may motivate a party to settle amicably before resorting to litigation or arbitration. These could include the desire to maintain good relationships with the other party, the concerns for the time and cost that might be spent if the dispute is to be settled arbitration/litigation, the weakness of one’s own case, and the concerns about the lack of assets of the opposing party, among others (Panov and Petit 2015).

2.2 The Claim-Dispute Phases

The 1987 and 1999 FIDIC conditions of contract stipulate requirements and their associated time bars for the administration of claims and disputes. As such, the claim-dispute timeline can be understood to involve four major phases, as illustrated in Figure 2. The interests and – correspondingly – the attitudes of the parties are expected to differ between any one phase and the next, depending on how the claim/dispute details and emanating discussions unveil and evolve, respectively. A critical aspect of this timeline is when the determination by the Engineer is challenged by either party, and the matter is subsequently referred as a dispute either back to the Engineer or – alternatively – to the DAB, depending on the contract’s stipulation, for the issuance of an Engineer’s Decision or a DAB’s Recommendation or Determination (as the case warrants), respectively.

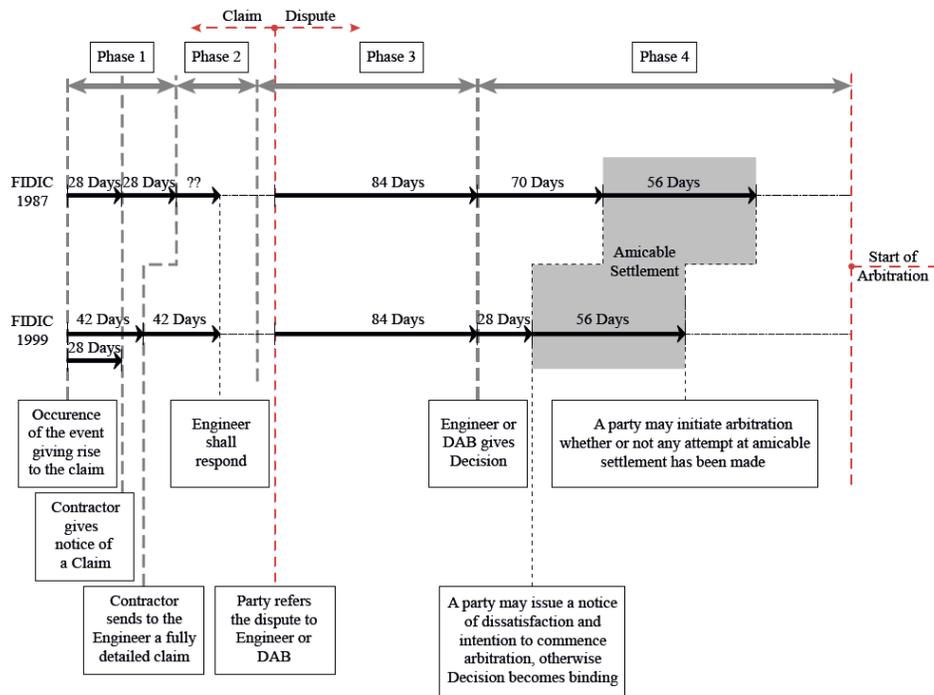


Figure 2. Claim-dispute timeline under the 1987 and 1999 FIDIC’s conditions.

2.3 Effective Length of the Amicable Settlement Period

Although Sub-Clause 67.2 of the 1987 and Sub-Clause 20.5 of the 1999 FIDIC conditions of contract both allocate a mandatory period of 56 days along the dispute timeline during which amicable settlement can be attempted and achieved, this period can effectively be construed in several ways, thus resulting in an extension of this stipulated period, as discussed hereunder.

2.3.1 Issuance of the notice of dissatisfaction

The disputing parties are allowed a 70-day period (1987 FIDIC) or a 28-day period (1999 FIDIC) following the date when an Engineer’s or a DAB’s decision is issued to give a notice of dissatisfaction; otherwise, the issued decision becomes contractually binding. This is followed by a 56-day period allowing for amicable settlement. It becomes evident here that the point along the dispute timeline when the notice of dissatisfaction is actually issued can allow for more or less time to attempt amicable settlement. That is, the 70-day or 28-day period given for the disputing parties to consider the issued decision and entertain accepting or rejecting it can be added to the 56-day period specifically stipulated for allowing amicable settlement attempts. It can therefore be argued that indirectly extending the effective period for amicable settlement in such a backward manner, as shown in Figure 3(a), by not rushing the issuance of the notice of dissatisfaction, can be considered advantageous for the disputing parties, as it allows them more time to try and resolve their differences as a last resort prior to arbitration or litigation.

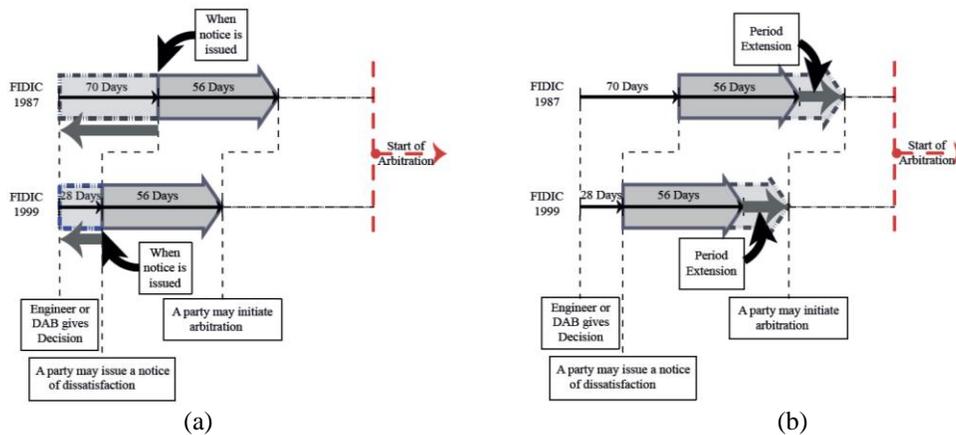


Figure 3. Extensions to the amicable settlement period.

2.3.2 Extension by mutual agreement

Sub-Clause 67.2 of the 1987 FIDIC and Sub-Clause 20.5 of the 1999 FIDIC conditions of contract state that “*unless the parties agree otherwise*, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.” It therefore follows that the originally stipulated 56-day period can be extended to allow

more time for attempting amicable settlement, provided that both parties mutually agree to any such extension. It is worth noting that the maximum number of days of any such extension can be contemplated at the onset of the project and can therefore be specified in the particular conditions of the contract. Alternatively, the number of days can also be extended at any time before the expiry of the 56-day period, if both parties feel they need more time to attempt settlement. This extension is shown in Figure 3(b).

3 DEMARCATION OF AMICABLE SETTLEMENT WINDOWS

As discussed above and seen in Figure 4, there already exist two windows for attempting amicable settlement following the issuance of a decision on a referred dispute: Window 1, which is demarked by the originally stipulated 56-day period and any extension to it, mutually approved by the parties, and Window 2, which is demarked by extending the originally stipulated 56-day period in a backward manner, to reflect not rushing the issuance of a notice of dissatisfaction by either party. A third window of opportunity can be further identified, which demarks the period extending between the expiry of the 56-day period (or any possible extension to it) and the date of initiation of arbitration. This could also include any further notice period required prior to the commencement of arbitration. Window 3 might extend considerably for various reasons, one of which, as verified by the project cases examined, can be the stipulation of the issuance of the taking-over certificate as a condition precedent to the initiation of arbitration. To be further noted is that while the FIDIC conditions stipulate the expiry of the 56-day period before arbitration may be commenced, an upper bound as to when such an initiation may take place is not prescribed.

The three windows discussed above fall along the dispute part of the claim-dispute timeline. However, additional windows exist on the claim part of the timeline that allow the parties to resolve their differences early on, when the matter has not yet developed into a dispute. To this effect, Window 4 extends from the moment when the Engineer responds with a determination, at least on the principle of the claim, until the matter is referred back to the Engineer, or to the DAB, for a decision. During this period, further particulars may be submitted and the issued determination deliberated. At this stage, the tension between the parties has not escalated, and communication between the parties can usually be attempted without the need for third-party assistance. It was verified through the project cases examined that this period can extend well into the construction duration as well as beyond the substantial completion of the works, due to the claiming party's concerns as to the consequences of potentially having to reject an Engineer's or a DAB's decision and, consequently, having to notify the other party of the intention to commence arbitration. The fifth window represents the first opportunity for reaching agreement on any matter in question. This is inherent in the language stipulated under Sub-Clause 3.5 of the 1999 FIDIC conditions, requiring the Engineer to consult with each party in an endeavor to reach agreement. At this early stage, the role played by the Engineer is expected to have a significant bearing on the way the differences concerning the matter in question may evolve.

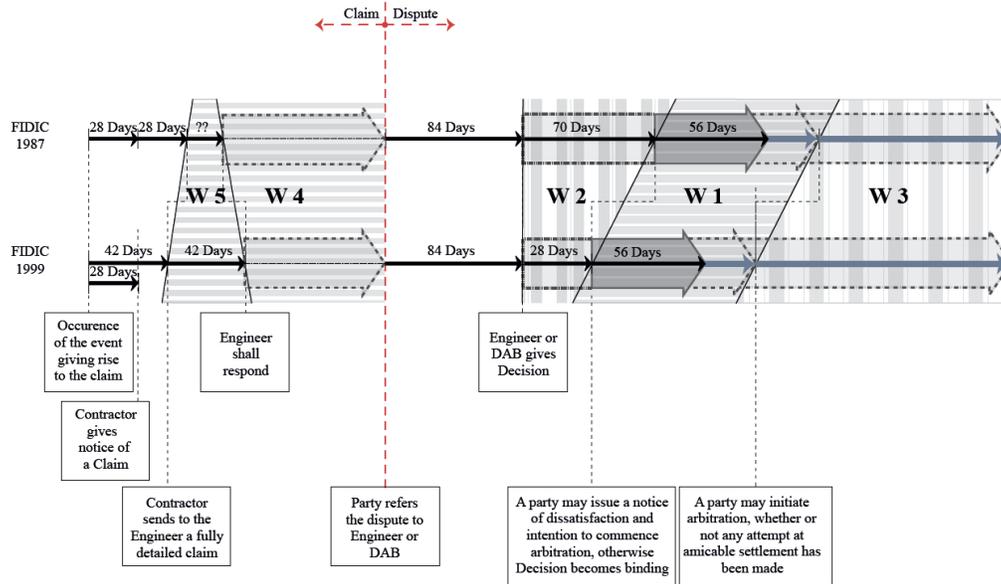


Figure 4. Demarcated windows for attempting agreement/settlement.

The above-demarcated windows should be considered as opportunities that – if not taken for granted – could help resolve claims/disputes expeditiously, save the parties time and money, and help maintain good relationships among them.

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