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The Guide to Construction Arbitration - Sixth Edition

Claims resolution procedures in construction contracts

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Claims resolution procedures in construction contracts

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Summary

INTRODUCTION

Claims in construction projects are normal and to be expected, but the success of a project may be measured by, among other things, how claims have been administered and whether the parties have managed to avoid claims becoming disputes.

Claims may arise under the contract pursuant to a clause that provides for specific relief in specific circumstances (e.g., additional time or money for changes in the scope of the works or late access to the site) or in connection with the contract (e.g., damages for breach of contract). Typical claims by the employer include damages for delay or poor performance and claims in respect of defective work or materials. Typical claims by the contractor include for extensions of time or additional payment. Incorrect, incomplete or late design is one of the top causes of claims and disputes.[1]

The governing law of the contract influences the interpretation or effect of contractual provisions (e.g., relating to notice requirements, the availability of delay damages and how to treat issues such as concurrent delay) and may provide extra contractual remedies (e.g., relating to good faith, ***force majeure*** and hardship).

For a claim to become a dispute, something more is required: the dispute must 'crystallise'. Whether and, if so, when a dispute crystallises depends on the facts, what the contract says about this (if anything) and what the law in the relevant jurisdiction says (if anything). For example, some contracts define 'dispute',[2] and in some jurisdictions a claim may have to be advanced and then ignored or rejected for it to crystallise into a dispute.[3]

Ideally, contractual procedures should be in place that encourage early and amicable claims resolution and, if disputes nonetheless arise, early and amicable dispute resolution. Both should ensure lower costs and fewer delays to the project overall.

This chapter addresses claims resolution procedures by reference (where relevant) to standard form conditions published by the International Federation of Consulting Engineers (FIDIC), specifically the FIDIC Conditions of Contract for Construction (the FIDIC Red Book) because these are indicative of current practice on international construction projects. There are important differences between the FIDIC Red Book 1999 (RB99) and the FIDIC Red Book 2017, reprinted in 2022 (RB17/22) in respect of the claims resolution procedure.

CLAIMS ADMINISTRATION

Claims may be submitted during execution or after completion of the works. This means that both the employer and the contractor must set up and maintain procedures to ensure that they keep on top of claims submitted or received, while continuing to ensure execution of the works and a working relationship with each other. This is also important for any third-party contract administrator (e.g., an engineer in FIDIC conditions) whose role is likely to include the determination of such claims.

EFFECTIVE CONTRACT MANAGEMENT

Contract management (i.e., the processes and procedures that an employer, contractor or engineer may implement to manage the execution and performance of the contract) is an important part of claims administration.

Effective contract management requires experienced and knowledgeable personnel, a clear communication and reporting structure, good record-keeping, submission of contractually compliant notices and claims, and the amicable resolution or determination of claims in a timely manner.

PERSONNEL

The employer, contractor and engineer should ensure that contract management tasks are carried out by those with the appropriate qualifications, experience and language skills. This means having mid-level and senior personnel with experience of similar projects, so that they can ensure a smooth-running operation, anticipate issues and problems before they arise and deal with these when they do arise. Personnel should be familiar with and understand the contract governing the works so that they can comply with and implement its terms. They should be conversant with any applicable standard form conditions and any special or particular conditions that may significantly change the standard form conditions and related risk allocation.

The contract may expressly provide for the level of qualification, experience and language skills required from the contractor or the engineer. For example, Clause 3.1 of RB99 requires that the engineer's staff 'include suitably qualified engineers and other professionals who are competent to carry out' the duties of the engineer. Clause 4.3 requires the contractor's representative and any replacement to be 'fluent in the language for communications'.

The corresponding provisions in RB17/22 go further. Clause 3.1 provides that the engineer (or, if a legal entity, the natural person appointed to act on its behalf) must be 'a professional engineer having suitable qualifications, experience and competence to act as the Engineer under the Contract' and 'fluent in the ruling language'. Similarly, Clause 4.3 provides that the contractor's representative must be 'qualified, experienced and competent in the main engineering discipline applicable to the Works and fluent in the language for communications'.

COMMUNICATION AND REPORTING STRUCTURE

The more transparent the communication and reporting structure, the better. Best practice includes kicking off with a pre-construction meeting to clarify contractual roles and responsibilities; align project objectives; review the programme and key milestones; discuss risk management and early warnings; establish communication channels and protocols; coordinate site access, logistics and safety; review payment procedures; and clarify the variations process. Once the project is under way, establishing regular reporting cycles, programme updates, progress and interface meetings and a clear hierarchy for approvals and decision-making are also recommended.

RECORD-KEEPING AND DOCUMENT MANAGEMENT

The employer, contractor and engineer should ensure their record-keeping and document management measures permit information to be identified, located and collated effectively and efficiently. This will help parties to comply with contractual requirements for the timing and content of notices and claims and will assist if the claim becomes a dispute.

Records should be well organised, searchable, accessible and centrally located and should include work carried out, materials and plant used, personnel and hours worked, progress of the works on and off site, and all cost and financial aspects of the project. Photographs and videos (e.g., webcam and drone footage) are particularly helpful records. 3D drawings

and digital modelling might also be relevant. Ideally the employer, engineer, contractor and subcontractors will use the same document management system.

The contract may expressly provide for the subject matter and type of records required to be kept. For example, Clause 6.10 of RB99 requires the contractor to submit each calendar month specified details of its personnel and equipment on site. Clause 20.1 requires the contractor to keep 'such contemporary records as may be necessary to substantiate any claim, either on the Site or at another location acceptable to the Engineer'. Similar provisions appear in RB17/22: Clause 6.10 requires the contractor to submit each month specified details not just of personnel and equipment but also of temporary works used, plant installed and materials used. Clause 20.2.3 defines 'contemporary records' as records that are 'prepared or generated at the same time, or immediately after, the event or circumstance giving rise to the Claim'.

The importance of producing and maintaining accurate and comprehensive records cannot be overstated. It is frequently said that cases are won or lost on the documents. The burden of proving a claim is generally on the claiming party. The best evidence is likely to be in contemporaneous records rather than witness evidence, since the evidentiary weight accorded to witness statements may be significantly less than that accorded to contemporaneous records.

ACCESS TO INFORMATION AND AUDIT RIGHTS

From time to time, the employer, the contractor or the engineer may need access to information or the right to audit records kept by another party, so that they can monitor or progress the works or administer claims.

Standard form conditions often contain provisions that impose an obligation to maintain specified information and grant the right to access or audit that information.

The contractor may be required to provide information about progress on a regular basis. For example, Clause 4.21 of RB99 requires the contractor to submit monthly progress reports, the content of which is specified to include detailed descriptions of progress, photographs, information about any plant or materials which are being manufactured, records of personnel and equipment, and quality assurance documents, among other things. Corresponding but slightly more prescriptive requirements appear in RB17/22 at Clause 4.20, which also provides that 'nothing stated in any progress report shall constitute a Notice under a Sub-Clause of these Conditions'.

The contractor may be required to maintain documents or systems regarding technical matters or the quality of the works which are subject to audit by the employer or the engineer. For example, in RB99, Clause 1.8 requires the contractor to keep on site a copy of the contract, publications named in the specification and the contractor's documents (which are essentially documents of a technical nature such as calculations and drawings) and gives the employer the right to access these documents 'at all reasonable times'. Clause 4.9 requires the contractor to institute a quality assurance system to demonstrate compliance with the contract and gives the engineer the right to 'audit any aspect of the system'. Corresponding (but more detailed) provisions appear in RB17/22 at Clause 1.8 and Clause 4.9[4] respectively.

The contract may also include the right to audit financial information if the project is supported by lenders.

EARLY WARNING AND NOTICES

Claims can be avoided if early warnings are given of potential or actual issues or problems relating to, for example, the work being carried out, the time it is taking or the related cost.

Some contracts require the parties to give an early warning notice in specified circumstances. This permits the party receiving the notice to investigate the issue in real time so that potentially it can be resolved or corrected before it becomes a problem. For example, Clause 1.9 of the RB99 requires the contractor to give notice to the engineer whenever the works 'are likely to be delayed or disrupted if any necessary drawing or instruction is not issued' within a particular time. Clause 8.3 requires the contractor to give notice to the engineer of 'specific probable future events or circumstances which may adversely affect the work, increase the Contract Price or delay the execution of the Works'. Similar (but more detailed) provisions appear in RB17/22 at Clause 1.9 and Clause 8.4 respectively.

In addition, some contracts require the parties to give a notice of claim in specified circumstances. Again, this permits the receiving party to investigate the issue purportedly giving rise to the claim in real time so that potentially it can be resolved or corrected, either before it becomes a problem or, if it is already a problem, before it becomes a bigger problem.

The requirement to give notice can therefore be an important tool for effective contract management and claims administration. It can encourage parties to address issues and problems as they arise, rather than storing them up, and it should promote a positive working relationship and collaboration between the parties.

CONDITIONS PRECEDENT TO CLAIMS

A condition precedent to a claim is a contractual requirement that must be met before a party can make a valid claim. In construction contracts, a common example is a requirement for a claiming party to give a notice of claim within a specified period, failing which the claiming party will not be entitled to certain remedies.

As the consequence of failing to comply with a condition precedent may be serious, parties should ensure from the outset that all those involved in contract management and claims administration are fully aware of the contractual (and any legal) requirements for early warnings, notices and claims. This will help to ensure (for the claiming party) compliance with those provisions and to avoid (for the receiving party) inadvertent failure to address notices or claims or inadvertent waiver of rights.

CLAIMS CULTURES

There can be a perception in some cultures that claims may create discord and should therefore be avoided. There may also be a tendency to store up claims until after completion of the works. In these cases, it is important to note that, where there are genuine claims, the giving of notice and the submission of claims are important case management tools. The making of a claim may be an essential step towards maintaining the contractor's cash flow and solvency in case of an unforeseen employer risk event. In any event, since the giving of a notice of claim may be a condition precedent to entitlement, the only safe option for a party with a claim is to give a contractually compliant notice, including regarding timing and content.

CLAIMS BROUGHT BY THE CONTRACTOR

Depending on the contract, the procedure for resolving claims brought by the contractor is likely to include one of, some of or all the following:

- the contractor giving a notice of claim;
- the contractor submitting a substantiated claim;
- the employer and the contractor attempting to agree the claim; or
- failing agreement, the employer or the engineer determining the claim.

If one or both parties are not satisfied with the determination, the claim may become a dispute to be resolved under separate dispute resolution provisions.

NOTICE OF CLAIM

If the contractor is required to give a notice of claim, the contract may contain provisions regarding any of or all the following:

- the trigger for giving the notice of claim (i.e., the event or circumstance the occurrence of which requires notice to be given);
- the timing of the notice of claim; and
- the content of the notice of claim.

Under Clause 20.1 of RB99, the trigger for the giving of a notice of claim is as follows:

If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer.

The requirements for the timing and content of the notice of claim are as follows:

[T]he Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance.[5]

Clause 20.1 of RB99 further provides the following:

If the Contractor fails to give notice of claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim.

Over the years there has been much discussion and commentary on this provision because it is viewed, in some common law jurisdictions at least, as a condition precedent to the contractor's claims for extensions of time or additional payment and is often referred to as a 'time bar' provision.

In *Obrascon Huarte Lain v. HM Attorney General for Gibraltar*,[6] the English Technology and Construction Court was required to consider the application of these provisions on claims for extensions of time under Clause 8.4 of the FIDIC Conditions of Contract for Plant and Design Build 1999 (also known as the Yellow Book). Clause 8.4 provides that the contractor is entitled, subject to Clause 20.1, to an extension of time if 'completion . . . is or will be delayed by any of' a number of listed causes suggesting, according to the judge, that an extension

of time can be claimed when it is clear there will be a delay (prospective delay) or when the delay has at least started to be incurred (retrospective delay).

The judge explained that the wording of Clause 8.4 is not 'is or will be delayed whichever is the earliest' and so the notice to be given under Clause 20.1 does not have to be given until there is an actual delay, although the contractor may give notice with impunity when it reasonably believes it will be delayed. Arguably, this runs contrary to Clause 20.1, which states that notice is to be given 'as soon as reasonably practicable' and not later than 28 days 'after the Contractor became aware, or should have become aware, of the event or circumstance'. On this, the judge said the following:

I see no reason why [Clause 20.1] should be construed strictly against the Contractor and can see reason why it should be construed reasonably broadly, given its serious effect on what could otherwise be good claims for instance for breach of contract by the Employer.[7]

That approach – a reasonably flexible approach for the contractor – was challenged by a decision of the Dubai International Financial Centre (DIFC) courts in ***Panther Real Estate Development v. Modern Executive Systems Contracting***.[8] In this case, the court found that the time for giving notice under Clause 20.1 of RB99 ran from the date when the contractor was aware, or ought to have been aware, of an event or circumstance that could give rise to a claim for extension of time, regardless of whether there was likely to be or had been any actual delay by that time. This was confirmed on appeal, and the appeal court refused to follow the reasoning in ***Obrascon***; however, many commentators have criticised this refusal of the appeal court, arguing that it appears to be based on a misreading of the decision in *Obrascon*.[9]

There are arguments under some common and civil laws that this provision in Clause 20.1 is not a condition precedent. Nonetheless, the only safe position to be taken by a contractor is to assume that a failure to comply may eliminate – or will at least seriously prejudice – the contractor's rights or entitlements in respect of any particular claim.

The approach taken in RB17/22 is considerably different and more detailed. 'Claim' is newly defined as:

a request or assertion by one Party to the other Party [with certain exclusions] for an entitlement or relief under any Clause of these Conditions or otherwise in connection with, or arising out of, the Contract or the execution of the Works.[10]

Claims by the employer and the contractor are addressed together in Clause 20.1, which addresses either party's claims for time or money, as well as for 'another entitlement or relief'. A detailed claim procedure is set out in Clause 20.2, pursuant to which the claiming party is to give notice of claim followed by a fully detailed claim.

Although Clause 20.2 of RB17/22 contains a requirement to give a notice of claim that is similar to the requirement in Clause 20.1 of RB99, Clause 20.2 of RB17/22 contains provisions under which the engineer may disapply the time bar provision and which do not appear in Clause 20.1 of RB99. It sets out the circumstances that the engineer may take into account (e.g., whether and to what extent the other party would be prejudiced by acceptance of a late notice) and the related procedure.

SUBSTANTIATED CLAIM

If the contractor is required to submit a substantiated claim, the contract may contain provisions regarding the time for submission of that claim and the content.

In RB99, provisions about timing are set out in Clause 20.1. The contractor is required to submit a claim within 42 days after it became or should have become aware of the event or circumstance giving rise to the claim or within a time that has been proposed by the contractor and agreed by the engineer. The requirement to submit the claim within 42 days does not operate as a time bar; instead, Clause 20.1 provides that if the contractor fails to comply with requirements relating to claims, the extent to which this non-compliance 'prevented or prejudiced proper investigation of the claim' will be taken into account when granting any extension of time or additional payment. The requirement to give a notice of claim is expressly excluded from this provision.

Regarding content, Clause 20.1 requires the claim to be 'fully detailed' and to include 'full supporting particulars of the basis of the claim and of the extension of time and/or additional payment claimed'. If the event or circumstance giving rise to the claim has a continuing effect, the fully detailed claim 'shall be considered as interim', and the contractor is required to submit further interim claims at monthly intervals, with a final claim within 28 days of the end of the effects resulting from the event or circumstance.

The approach taken in RB17/22 is considerably different and more detailed: claims by the employer and the contractor are addressed together in Clause 20.1, and a detailed claim procedure is set out in Clause 20.2. The claiming party is required to include in the fully detailed claim a detailed description of the event or circumstance giving rise to the claim, 'a statement of the contractual and/or other legal basis of the claim', all contemporary records on which the claiming party relies and detailed supporting particulars.

The claim must be submitted within 84 days after the claiming party became aware, or should have become aware, of the event or circumstance giving rise to the claim, or such other period as may have been agreed by the engineer. If the claiming party fails to submit the statement of the contractual or other legal basis of the claim within this time, the notice of claim will be deemed to have lapsed and will no longer be considered valid. Clause 20.2 contains provisions under which the engineer may disapply this time bar. It sets out the circumstances that the engineer may take into account (e.g., whether and to what extent the other party would be prejudiced by acceptance of a late notice) and the related procedure.

AGREEMENT OR DETERMINATION OF CLAIM

The contract should contain a procedure by which the claim, once submitted, will be resolved. Resolution may be pursuant to an agreement between the employer and the contractor, or a determination made by the employer or the engineer.

In the FIDIC forms of contract, the engineer, or the employer in FIDIC forms that do not include an engineer,[11] must try to facilitate an agreement between the employer and the contractor, failing which they must determine the claim. For example, Clause 20.1 of RB99 provides the following:

The Engineer shall proceed in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the extension (if any) of the Time for Completion (before or after its expiry) in accordance with Sub-Clause 8.4 [Extension of Time for Completion], and/or (ii) the additional payment (if any) to which the Contractor is entitled under the Contract.

Similarly, in RB17/22, Clause 20.2.5 provides that the engineer shall proceed under Clause 3.7 to agree or determine the claim. Unlike the equivalent clause in RB99 (Clause 3.5), Clause 3.7 of RB17/22 imposes a time limit within which the engineer is to give notice of any agreement or determination.

CLAIMS BROUGHT BY THE EMPLOYER

It is not just the contractor but also the employer who may wish to submit claims.

In RB99, the claims resolution procedure for employer claims differs from the procedure for contractor claims. Clause 2.5 sets out provisions relating to employer's claims. It requires the employer to give a 'notice and particulars' if the employer 'considers himself to be entitled to any payment under any Clause of these Conditions or otherwise in connection with the Contract, and/or to any extension of the Defects Notification Period'.

Regarding timing, Clause 2.5 requires the employer to give notice as soon as practicable after it becomes aware of an event or circumstances giving rise to a claim.[12] This is considerably less strict than the 28-day time limit within which the contractor must give notice according to Clause 20.1, and no time is stated within which the employer should give the particulars.

Regarding content, Clause 2.5 requires that the employer's particulars should specify the clause or other basis of the claim and include substantiation of the amount or extension to which the employer considers itself to be entitled.

Unlike Clause 20.1, Clause 2.5 does not specify a sanction if the employer fails to give notice to the contractor within the required time. Nonetheless, the employer should be aware of applicable laws, which may specify a period for notices in respect of payment and, in any event, may wish to give notice as soon as possible for effective contract management.

The final paragraph of Clause 2.5 provides the following:

This amount [agreed or determined under Clause 3.5] may be included as a deduction in the Contract Price and Payment Certificates. The Employer shall only be entitled to set off against or make any deduction from an amount certified in a Payment Certificate, or to otherwise claim against the Contractor, in accordance with this Sub-Clause.

This provision gives rise to a number of uncertainties and ambiguities, including the circumstances in which the employer has a right to set off against amounts certified for payment and whether compliance is a condition precedent to the employer's entitlement.[13]

The approach taken in RB17/22 is considerably different and more detailed. Claims by the employer and the contractor are addressed together in Clause 20.1, and a detailed claim procedure is set out in Clause 20.2.

The contract should contain a procedure for the resolution of an employer claim, just as it does for a contractor claim.

In the FIDIC forms of contract, the engineer, or the employer in FIDIC forms that do not include an engineer,[14] must try to facilitate an agreement between the employer and the contractor, failing which they must determine the claim. For example, Clause 2.5 of RB99 provides that the engineer shall proceed 'in accordance with Sub-Clause 3.5 [Determinations] to agree or determine (i) the amount (if any) which the Employer is entitled to be paid by the Contractor, and/or (ii) the extension (if any) of the Defects Notification Period'. Similarly, in

RB17/22, Clause 20.2.5 provides that the engineer shall proceed under Clause 3.7 to agree or determine the claim.

CLAIMS BEFORE THE ENGINEER

THE ENGINEER AS A THIRD-PARTY CONTRACT ADMINISTRATOR

Many construction contracts are administered by a non-signatory third-party, which may be called the 'engineer' (e.g., under the FIDIC forms of contract). The role and duties of the engineer will be set out in two separate contracts: first, the contract between the employer and the engineer under which the engineer is appointed, and second the construction contract between the employer and the contractor.

Although there may be limits on the engineer's authority, the engineer may nonetheless undertake important duties under the construction contract, including in relation to claims resolution. It is therefore important that the engineer has the correct qualifications, experience and language skills to undertake these duties.

The role of the engineer can be controversial; the engineer may be appointed by, deemed to act for and paid by the employer but, on many issues under the construction contract and as between the employer and contractor, may be required to act impartially or fairly depending on the wording of the relevant contract. Parties from a common law background may be relatively comfortable with this arrangement, which is a common law tradition. Parties from a civil law background, without such tradition, may be understandably uncomfortable with this arrangement.

THE ENGINEER'S ROLE IN CLAIMS RESOLUTION

The contract will set out the role of the engineer, if any, in the claims resolution procedure. The engineer may be required to receive notices of claim as well as the claim itself, to consider and comment on them, and to act on them, including by consulting with the parties to facilitate an agreement or by issuing a decision in respect of the claim.

Upon receiving notice of a claim from the contractor, the engineer may be empowered or required to monitor the contractor's record keeping or inspect the contractor's records. For example, Clause 20.1 of RB99 provides the following:

Without admitting the Employer's liability, the Engineer may, after receiving any notice under this Sub-Clause, monitor the record-keeping and/or instruct the Contractor to keep further contemporary records. The Contractor shall permit the Engineer to inspect all these records, and shall (if instructed) submit copies to the Engineer.

A similar provision appears in RB17/22 at Clause 20.2.3. This highlights the importance of record-keeping, as discussed above.

Upon receiving a claim, either from the contractor or the employer, the engineer may be empowered or required to comment, request further particulars, or proceed to facilitate an agreement between the employer and the contractor regarding the claim or determine the claim, all within specified time frames.

If the employer, contractor and engineer have effective contract management in place, they should be able to efficiently and effectively identify, collate and provide supporting particulars with the claim and any further particulars that may be necessary. If not, this aspect of the

claims resolution procedure may be difficult, lengthy and disrupt the execution of the works and the parties' working relationships.

Some contracts require the engineer to try to facilitate an agreement between the employer and the contractor regarding the claim, before proceeding to determine the claim, with the aim of early amicable resolution. For example, Clause 3.5 of RB99 provides that the engineer must consult each party to try and reach an agreement and that only if an agreement is not reached can the engineer proceed to determine the claim. A similar (but more detailed) provision appears in RB17/22 at Clause 3.7.

The scope of the duty to consult is unclear, and whether it has been fulfilled in any factual context may be subject to debate. This is an aspect of the engineer's role in which the qualifications, experience and language skills of the engineer are important.

If no agreement is reached, the engineer may be empowered or required to proceed to determine the claim. The standard to be exercised by the engineer in determining a claim is often set out in the contract. For example, Clause 3.5 of RB99 provides that if the engineer is required to determine any matter (e.g., a claim), the engineer must 'make a fair determination in accordance with the Contract, taking due regard of all relevant circumstances'. Clause 3.7 of RB17/22, provides that the engineer 'shall act neutrally between the Parties and shall not be deemed to act for the Employer' and that the engineer shall make a fair determination of a matter or claim.

The engineer should notify the employer and the contractor of its determination, once made. The contract may provide that the employer and the contractor should give effect to the determination unless and until it is revised by formal dispute resolution procedures. For example, Clause 3.5 of RB99 provides that '[e]ach Party shall give effect to each agreement or determination unless and until revised under Clause 20'. In RB17/22, Clause 3.7 provides '[e]ach agreement or determination shall be binding on both Parties (and shall be complied with by the Engineer) unless and until corrected under this Sub-Clause or, in the case of a determination, it is revised under Clause 21'.

If the employer or the contractor do not agree with the determination (e.g., if the contractor has submitted a claim which the engineer rejects), a dispute may have crystallised. At that point, the dissatisfied party will have to take steps to obtain a revision of the engineer's determination. The steps may include issuing a notice of dissatisfaction in respect of the engineer's determination within a specified time frame, referral of the dispute to a dispute board (for a non-binding opinion or a binding decision), attempts at amicable settlement and, ultimately, referral to arbitration or court litigation. RB99 and RB17/22 contain provisions relating to some of these steps, but they are more detailed in RB17/22.

CLAIMS AGAINST THE ENGINEER

The contractor or employer may be dissatisfied with the performance of the engineer, including its role in the claims resolution procedure. They will not usually be able to bring a claim against the engineer under the construction contract because the engineer will not be a party to that contract; instead, and always depending on the applicable contractual matrix, the employer will have to claim against the engineer under the engineer's contract, and the contractor will have to claim against the employer (rather than the engineer) under the construction contract on the basis that the engineer acts for the employer.

CONCLUSION

Claims resolution procedures vary between construction contracts. They may be relatively simple or lengthy and complex.[15] Every employer, contractor and engineer involved in any construction contract should ensure that they are fully aware of and completely understand the applicable claims resolution procedures. This will help to ensure not only good claims administration but also that the parties' respective positions on claims are fully protected.

Regardless of the specific provisions in any particular construction contract, however, the key elements for successful claims administration and resolution might be distilled into the following: maintenance by all parties of good records, alertness of all parties to claim events and notice requirements, and endeavour by all parties to create a project culture that recognises that genuine claims should be submitted and resolved in a fair and timely manner. Respect for these elements should make an important contribution to the overall success of the project.

ENDNOTES

[1] See, e.g., report 'Changing the narrative: Why engineering and construction projects continually lose time and money', HKA CRUX Insight (October 2024), www.hka.com/crux/crux (accessed 25 June 2025), p. 6.

[2] For example, in the FIDIC Conditions of Contract for Construction (FIDIC Red Book) 2017 (reprinted 2022 with amendments), Clause 1.1.29 defines 'dispute' to include where a party has made a claim, the engineer has issued a determination, and either party has issued a 'NOD' (notice of dissatisfaction) with the engineer's determination.

[3] See, e.g., ***AMEC Civil Engineering Limited v. Secretary of State for Transport*** [2005] EWCA Civ 291, paragraphs 25–36, 62–69; ***LJH Paving Limited v. Meeres Civil Engineering Limited*** [2019] EWHC 2601 (TCC), paragraphs 16–24; ***BDW Trading Limited v. Ardmore Construction Limited*** [2024] EWHC 3235 (TCC), paragraphs 18, 29–33.

[4] The quality management provisions in Clause 4.9 of the FIDIC Red Book 2017, reprinted in 2022 (RB17/22) are significantly more detailed than those in Clause 4.9 of the FIDIC Red Book (1st edn., 1999) (RB99).

[5] RB99, Clause 20.1.

[6] ***Obrascon Huarte Lain SA v. Her Majesty's Attorney General for Gibraltar*** [2014] EWHC 1028 (TCC).

[7] [2014] EWHC 1028 (TCC), paragraph 312.

[8] ***Panther Real Estate Development LLC v. Modern Executive Systems Contracting LLC*** [2022] DIFC CA 016.

[9] See, e.g., Victoria Tyson, 'Panther Pounces on Late Notice: Dubai court disagrees with Obrascon on time-bar under Sub-Clause 20.1 of FIDIC 1999', Howard Kennedy (5 July 2023), www.internationalconstructionknowledgehub.com/panther-pounces-on-late-notice-dubai-court-disagrees-with-obrascon-on-time-bar-under-sub-clause-20-1-of-fidic-1999 (accessed 25 June 2025).

[10] RB17/22, Clause 1.1.6.

[11] See, e.g., FIDIC Conditions of Contract for EPC/Turnkey Projects (FIDIC Silver Book).

[12] If the employer's notice relates to an extension of the Defects Notification Period, it is to be given 'before the expiry of such period'.

[13] There is case law that debates whether Clause 2.5 is a condition precedent to common law rights of set off or abatement. See ***NH International (Caribbean) Ltd v. National Insurance Property Development Company Ltd (Trinidad and Tobago)*** [2015] UKPC 37, paragraphs 36–42. See Victoria Tyson, 'The Dangers of Employer Set Off in your FIDIC Contract: Suspension and Termination', Howard Kennedy (13 November 2024), www.internationalconstructionknowledgehub.com/the-dangers-of-employer-set-off-in-your-fidic-contract-suspension-and-termination (accessed 25 June 2025).

[14] See, e.g., FIDIC Silver Book.

[15] Such as Clause 20 in RB17/22, which runs to almost five pages.