

# INSIGHTS

*Insights* is a monthly newsletter from CG Engineering Consults with news in engineering, contract management and dispute resolution.

**Issue 02 - May 2023**

# Dispute Resolution

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## Drafting effective Arbitration Clauses

### Introduction

A recent judgement delivered on 23 February 2023 in the High Court of Uganda in a case between **The Attorney General of the Republic of Uganda (Applicant) v Network Consult Co. Limited (Respondent)** went to the heart of discussing the nature of an arbitration agreement and what constitutes a pathological clause. As a result, this drives a conversation towards the drafting of effective arbitration clauses.

Dispute resolution clauses are often time referred to as “midnight/ champagne clauses”. This is because once the rest of the contract has been agreed upon, the parties are quick to celebrate and the dispute resolution clause becomes an afterthought, or a matter of “copy and paste” which more often than not results into unclear, incomplete, or contradictory clauses. The parties, often time, agree not to have a dispute resolution clause because there is an anticipation at the start of the performance of the contract that there will not be dispute and if it occurs, there is a

general feeling that the parties will always have an amicable settlement. This is always not the case as parties can disagree on legal or technical aspects of the contract and at such a time, the good will and good faith that existed at the agreeing of the contract does not exist anymore. The need for a clear clause to highlight the parties’ consent to settle their dispute under alternative dispute resolution cannot be overly emphasized.

### The Case

The Respondent filed Civil Suit 541 of 2022 [“main suit”] against the Applicant for breach of a consultancy contract and recovery of sums stated to be payable under that contract. The Applicant brought an application to the court, contending that the dispute between the parties was amenable to arbitration. Accordingly, the Applicant contended that the Respondent’s suit was barred by law.

The Applicant asserted that the parties had a binding and enforceable arbitration agreement

and procedures for arbitration of disputes arising from the agreement.

## The Judgement

The Judge in this case noted that he was aware of an ADR process called “Adjudication”. Furthermore, he noted that this process was most common in construction contracts but may exist in other contracts. This process involves the submission of a dispute to an expert who makes a determination often on technical grounds. Adjudication clauses typically have rules indicating how an adjudicator may be appointed and how adjudication may be undertaken. In this case, the contract was not a construction contract and therefore the learned judge concluded that the word “adjudication” was intended to refer to litigation since *“The parties could not have intended to have adjudication (as an alternative dispute resolution) as well as an arbitration before an expert arbitrator as this would have achieved the same thing. Still, there is nothing in the agreement that points to an agreement to undergo adjudication as an alternative dispute resolution process.”*

It is from this that he tackled a clause that provides for both litigation and arbitration. In **ISC Holding AG v Nobel Biocare Investments N.V 351 Fed. Appx. 480**, the US Court of Appeals held that an arbitration clause must exclude the involvement of state 15 courts (save for interim reliefs and/or recognition and execution) and an agreement that did not exclude them was ambiguous and therefore



and that as a result, the Respondent’s suit should be dismissed, and the matter referred to arbitration. The Applicant contended that there was a valid arbitration agreement to submit all disputes arising from the contract exclusively to arbitration. On the other hand, the Respondent contended that reference to arbitration was optional.

The Clause in dispute was Clause 45.1 of the Contract between the parties which reads as below.

*“Any dispute between the parties arising under or related to this contract that cannot be settled amicably may be referred by either party to the adjudication/arbitration in accordance with the provisions specified in the SCC.”* SCC in this case is an abbreviation for Special Conditions of Contract.

The special conditions at Clause 45.1 then proceed to spell out an elaborate set of rules

incapable of being enforced. In **X Holding AG and Ors v Y Investments NV 4A\_279/2010** where a similar clause was involved, a Swiss Court held that an agreement that does not clearly exclude state courts is ambiguous as it does not reveal a clear intention to arbitrate.

The court also considered whether the use of the phrase “may” was optional. In **Meshack Kibunja Kaburi & 3 others v Kirubi Kamau & 5 others; Central Highlands Tea Company Limited (Interested Party) [2021] eKLR** the court, considering a clause that provided that a dispute may be referred to arbitration, held that there was a clear intention to refer the matter to arbitration and thus the same had to be undertaken notwithstanding the use of the word “may”.

Another question was whether in this case, the plaintiff was obliged to submit to the arbitration proceedings initiated by the applicant from this clause. The Judge ruled that from reading the parties’ contract in full, *“it appears from the contract that the initiating party is at liberty to decide how to initiate the dispute. Once they had made their election, the other party was obligated to defend or counterclaim in the forum in which the proceedings had been begun.”*

He further added that *“in cases of this nature, the initiating party has the election to determine which mode to commence in, and the other party*

*has to defend in that forum. However, this does not mean that if another dispute arises, it should go to, say, court simply because a previous dispute went to court. The right of election exists in each case.”*

As such, it was not mandatory for the parties to go for arbitration as the clause had been constructed in such a way that the arbitration was another option to litigation in case a dispute arose. The Judge also noted that *“This is obviously a little bit disorganized and a clear clause that provided for one mode of dispute resolution would have been a lot more preferable.”*

In that case, the arbitration agreement between the parties was incapable of being performed within the meaning of **Section 5(1)(a)** of the Arbitration and Conciliation Act as the Respondent had already elected to commence proceedings before the court. As such, the dispute was no longer amenable to arbitration.



# Discussion

## 1. What are the hallmarks of an effective arbitration clause?

Ideally an arbitration agreement will enable the parties to choose the:

- Composition of the tribunal
- Language of the arbitration
- Rules by which the arbitration will be conducted.
- Institution, if any, which will regulate and administer the arbitral process
- Jurisdiction which will govern the procedural issues in the arbitration.
- Jurisdiction which will govern the merits of the dispute or issues between the parties.

Like any other contract, not all arbitration agreements are perfectly crafted. There will be defects sometimes whether by human error or because of lack of proper advice. There are certain characteristics which need to be satisfied for there to be an effective arbitration clause and failure to do so results into what is commonly known as a "pathological clause". A pathological clause is one, which fails to cover the disputes the parties want arbitrated, fails to identify the appropriate "seat" for the arbitration or identifies an inappropriate seat, or fails to identify the cor

rect set of rules or the correct institution to administer those rules. One can argue that for an arbitration clause to be effective, it is necessary that the agreement for the parties to solve disputes by arbitration and not court, should be clear and unequivocal.

## Conclusion

The existence of a valid agreement to arbitrate has several important consequences for the resolution of a dispute. If there is a valid arbitration agreement, the parties will be compelled to resolve their dispute through the arbitral process thereby keeping the dispute out of the national courts. A party who seeks to initiate a claim in the national courts despite the existence of an arbitration agreement will likely be restrained by the court upon application by the opposing party to stay the court proceeds in favour of arbitration. In this case's context, the judgement was to the effect that the Applicant filed an application for this restraint. However, the arbitration clause was not effective enough and as such the Applicant's application was dismissed. This case and the subsequent judgement highlight the importance of drafting of effective dispute resolution clauses.

# Engineering

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## Concrete: A story for widely used yet not well understood material.

### Introduction

**W**e have all been exposed to construction of buildings or roads or even compounds where concrete which is locally known as “*enkokoto*” is used. Concrete is arguably the most widely used construction material in Uganda and the world at large. It is estimated that the present consumption of concrete in the world is of the order of 55 billion tons every year. Of course, this matches with the increased urbanization and industrialization which are a function of the times we are in and population growth. However, we have all been witnesses to asking ourselves why most reinforced concrete buildings nowadays are not achieving the durability that was designed for and as such are due for maintenance almost as soon as construction is complete.

### Why is concrete the most widely used engineering material?

One would ask themselves : “*Concrete is neither as strong nor as tough as steel, so why is it the*

*most widely used engineering material?*”

Firstly, concrete possesses excellent resistance to water. Because of this unique ability and unlike wood or ordinary steel, the ability of concrete to withstand the action of water without serious deterioration makes it an ideal material for building structures to control, store and transport water. In fact, some of the earliest known applications of concrete consisted of aqueducts and waterfront retaining walls by the Romans. The durability of concrete to some aggressive waters from industries and natural environments like salty water is equally remarkable and important for structural elements such as piles which are exposed to moisture.

Secondly, structural concrete elements can be formed into a variety of shapes and sizes. This is largely because fresh concrete is of a plastic consistency which permits the material to flow into prefabricated formwork. This allows the concrete to assume the shape of any formwork.

Thirdly, concrete is the cheapest and most readily available material. This is largely because the principal ingredients for making concrete -cement and aggregates- are relatively inexpensive and are commonly available in most areas in the world.



## What are the components of modern concrete ?

Concrete is a composite material that consists essentially of a binding medium within which are embedded particles or fragments of aggregates.

The most common binding medium used for making concrete is Portland cement which essentially consists of hydraulic calcium silicates. The calcium silicate hydrates formed on the hydration of Portland cement are primarily responsible for its adhesive characteristic and are stable in aqueous environments.

Aggregates are granular materials, such as sand, gravel or crushed stone which is used with a cementing medium in order to form the concrete. Aggregates can be termed as coarse aggregates if the particle has a size

greater than 4.75mm, and fine aggregate if the particle is smaller than 4.75mm. Gravel is the coarse aggregate resulting from natural disintegration and abrasion of rock while sand is fine aggregate resulting from natural disintegration and abrasion of rock or processing of friable sandstone.

Modern concrete often includes admixtures. Admixtures are materials other than aggregates, cement and water which are added to the concrete batch immediately before or during mixing. Admixtures modify the performance of concrete for example. Chemical admixtures can modify the setting and hardening characteristics of the cement paste by influencing the rate of cement hydration. Water-reducing admixtures can plasticize fresh concrete mixtures by reducing the surface tension of water and mineral admixtures such as pozzolans can reduce thermal cracking in mass concrete.





## What then makes concrete a less understood material despite its wide use in the world?

Because concrete has been widely used since the times of the Romans until the present day, multitudes of developers assume that they know all about concrete and consider it to be a material that will always perform with little regard to quality and quality control. This has been stretched so much that most sites around Uganda do not have quality control checks for the concrete and employ unqualified personnel to man this very critical material. It should be noted that in fact, progress in the field of materials science has resulted from recognition of the principle that the properties of a material originate from its internal structure. Although concrete is a widely used material, its structure is heterogeneous and highly complex. The struc

ture-property relationships in concrete are not yet well developed and as such care needs to be taken while using concrete during and after construction in order to achieve the design strength, elasticity and prevent shrinkage, creep and cracking so as to ensure durability of the concrete.

At the macroscopic level, concrete can be considered to be a two phase material with the aggregate particles dispersed in the binding medium composed of an incoherent mass of the hydrated cement paste (hcp). At microscopic level, however, the complexities of concrete start to show up.

First, there is a third phase, **the transition zone**, which represents the interfacial region between the particles of aggregate and the hydrated cement paste. Existing as a thin shell, the transition zone is generally weaker than either of the main components of concrete and therefore exercises a far greater influence on the mechanical behavior of concrete. Have you ever wondered why :

- Concrete is brittle in tension but relatively tough in compression.
- The components of concrete when tested separately in a uniaxial compression remain elastic until fracture, whereas concrete itself shows inelastic behaviour?
- The compressive strength of a concrete is



higher than its tensile strength by an order of magnitude.

- At a given cement content, water/cement ratio, and age of hydration, cement mortar will always be stronger than the corresponding concrete? Also, the strength of concrete goes down as the coarse aggregate size is increased.
- The permeability of a concrete containing even a very dense aggregate will be higher by an order of magnitude than the permeability of the corresponding cement paste.
- On exposure to fire, the elastic modulus of a concrete drops more rapidly than its compressive strength

The answers to the above questions and many other enigmatic questions on concrete behavior lie in the transition zone that exists

between the large particles of aggregate and the hydrated cement paste.

Second, each of the three phases is itself multiphase in nature since aggregates for example can consist of multiple minerals in addition to microcracks and voids.

Third, unlike other engineering materials, the structure of concrete does not remain stable. This is because the hydrated cement paste, and the transition zone are subject to change with time, environmental humidity and temperature.

## Conclusion

In conclusion, concrete is a highly sophisticated material which has to be closely monitored on any construction site or process. Care has to be taken in order to achieve the design strength, elasticity and prevent shrinkage, creep and cracking so as to ensure durability of the concrete.

# Contract Management

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## The Role of the Engineer in FIDIC Contracts: Ugandan context

### Introduction to the FIDIC Suite of Contracts

The Fédération Internationale Des Ingénieurs-Conseils (FIDIC) was founded in Belgium in 1913. Since then, it has become the foremost representative body for the world's consulting engineers, with member associations in some 100 countries including Uganda. The first contract, known as the Red Book First Edition, was not actually drafted by FIDIC but was instead an authorised 're-badging' by FIDIC, of the ICE Conditions of Contract Fourth Edition, published by the Institution of Civil Engineers. This was itself an 'international' contract in the sense that it had been adopted by the Association of Consulting Engineers (ACE) as such.

The other long-established FIDIC contract is the Yellow Book, first produced in 1963 and with subsequent editions in 1980, 1987, 1999 and 2017 which is the design and build equivalent of the employer design Red Book.

The position of the FIDIC contracts, specifically in major development work, has been secured by the signing of a five-year agreement with the World Bank, with a commitment to use six FIDIC agreements for its projects, and on 10 May 2019 a five-year agreement with the Inter-American Development Bank, which will ensure the use of the same contracts for development-financed projects in Latin America and the Caribbean. In Uganda, majority of the infrastructure projects also run either with the FIDIC Red Book or the FIDIC Yellow Book.



One of the strengths of the FIDIC contracts has been consistency of structure. The 1999 Red, Yellow and Silver Books share the same 20-clause format and, so far as possible, the clause numbers correspond to their equivalents in each book. However, the individual contracts reflect quite different approaches to construction procurement, and these extend to divergences in detailed provisions. The single most important characteristic of the Red Book is contained in its full title: it is an employer design contract. The design, prepared by the Employer's staff or by consultants acting on its behalf, is provided to the Contractor in the form of Specifications and Drawings (and any Schedules). The payment mechanism is traditional measurement and valuation.

In the Yellow Book, the contract's most important feature is contained within the full title; it is FIDIC's principal contractor design contract. The design is prepared by the Contractor in accordance with the Employer's Requirements, which specify 'the purpose, scope and/or design and/or other technical criteria for the Works.' The Contractor accepts a fitness for purpose obligation for the Works, including the design. The payment mechanism for the Yellow Book is lump sum fixed price, with provision for progress payments on the basis of Engineer certification. Like the Red Book, the Yellow Book contract is administered by the Engineer.

The Yellow Book is largely used now in Uganda given that most procurement and disposal entities are opting for design and build contracts with contractors having the responsibility for the design and execution of the design.

## Who is the Engineer in FIDIC Contracts?

FIDIC Contracts are in essence triparty bilateral contracts where the principal parties to the contract are the Employer and the Contractor. The Contract provides for the appointment of a third party, known as the "Engineer" with a responsibility of administering the contract.

The Engineer is appointed by the Employer using Sub-Clause 1.1.2.4 Yellow Book 1999 or any replacement appointed under Sub-Clause 3.4 (Replacement of the Engineer) for the 1999 Yellow Book.

## Role of the Engineer in the FIDIC Forms of Contract

The Engineer in the FIDIC forms of contract has a duality of roles. On one hand the Engineer has a number of functions in which he acts, either expressly or impliedly, as the agent of the Employer. On the other hand, both parties to the contract agree, at the time of entering into the contract, that the Engineer is to perform certain determination/cer

tifier functions under the contract.

The Engineer (or Employer's Representative) is thus a very powerful person who is also referred to as a decision-maker, a function which requires a certain degree of impartiality and fairness from him. With this, the Engineer acts as the Employer's agent in incidences such as instruction of a variation under Sub-Clause 13 (*Variations and Adjustments*) and Sub-Clause 3.1 (*Engineer's Duties and Authority*) 1999 Yellow Book and notification of the Employer's claims. Furthermore, the Engineer acts as a quasi-judge or a decision maker where he exercises his judgement as to the entitlement due to the contractor for example in certifying payments due to the contractor and also determining an entitlement to an extension of time.

In this way, the Engineer is required to change their mindset and act differently under different circumstances during the administration of the Contract.

The question one would ask is that is it really possible to perform these functions or this merely legal fiction that does not reflect reality? Can the Engineer be free of conflict of interest and independent?

For example, a contractor would argue that the Engineer who is paid by the Employer and functions as the Employer's agent would not

give a fair determination of a contractor's claim as provided for by Sub-Clause 3.5 (Determinations) of the 1999 Yellow Book. Sub-Clause 3.5 applies whenever the Engineer is required to determine matters of value, cost and Extension of time. Sub-Clause 14.6 (Issue of Interim Payment Certificates) also requires the Engineer to issue to the Employer an Interim Payment Certificate which states, "the amount which the Engineer fairly determines to be due."

Majority of contracts in Uganda currently are based on the 1999 forms of Contract. How effective is the required standard under the 1999 forms of FIDIC Contract? Many Ugandan Contractors and Engineers have found themselves in these situations and there is a need to dispel of this issue.

## Clarification of the position under 2017 FIDIC Forms of Contract

Under FIDIC 2017 forms of contract, FIDIC introduced an amendment to clarify that while the Engineer is deemed to be acting for the Employer when carrying out his duties under Sub-clause 3.2 of the 2017 Yellow Book, if the duty is one that requires him to act as a decision maker, then under sub clause 3.7 "the Engineer shall act neutrally between the parties and shall not be deemed to act for the Employer."

*Is this however practical given that the Engineer is employed and paid by the Employer?*

## What then is the required standard under common law?

Under the common law, the Engineer when performing the role of a quasi-judge has a duty to act impartially as was stated in *Sutcliffe v Thackrah* (1974) AC 7272 where it was held that “ *in many matters, (The contract administrator) is bound to act on his client’s instructions whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.....The building owner and the contractor make their contract on the understanding that in all such matters the (contract administrator) will act in a fair and unbiased manner.*”

## Conclusion

In conclusion, the role of the Engineer seems to be increasingly misunderstood. He is not only intended to be a contract administrator but also an engineer with complete engineering skills having a good understanding of the contract and the required contract administration procedures. Thus, he should be able to

The duality in role of the Engineer presents challenges in terms of questions of independence, conflict of interest in terms of discharging his functions. There have been reports of Employers in Uganda putting constraints and restrictions on the Engineer in the course of discharging their duties. Engineers should aim to have good support in contract administration procedures so as to achieve the aims of the FIDIC forms of contract. determine new rates under a red Book contract or to agree or determine adjustments to the Contract price under a Yellow Book Contract.

***CG Engineering Consults is a company that deals in engineering design, claims consultancy, and dispute resolution.***

***Edited By;***

***Gavamukulya Charles, MCI Arb, AICCP***



***Nabirye Liz***

### Contact Us

+256 704 341 970 / +256 772 47 32 55

@consults\_cg

cgengineeringconsults@gmail.com

www.cg.co.ug



**cg** | consults  
engineering

