

PRE-ACTION PROTOCOL FOR CONSTRUCTION AND ENGINEERING DISPUTES (SECOND EDITION)

- ▶ The new Protocol retrospectively came into force on 9 November 2016 after consultation by TeCSA and TECBAR.
- ▶ It varies the first edition of the Protocol dramatically, importantly removing the compulsory element.
- ▶ However, it is at present largely unclear how the Protocol should be treated and is only available on the TeCSA website.

What is it about?

Review after review of the pre-action process in Construction and Engineering disputes have, eventually and inevitably, led to a new and updated Pre-Action Protocol (Protocol). The latest of those reviews was conducted in 2015 by way of a questionnaire to the industry, its clients, the legal profession and other affected parties, which produced some interesting feedback. Of the 677 respondents, 95% thought that the Protocol as it then was (the 1st edition) was a valuable tool; 87% believed that it had improved access to justice; and notably, 75% felt that access to and guidance from TCC judges pre-action would also be beneficial.

Some of the changes are particularly significant: the Protocol can be disapplied by agreement between the parties; cost consequences will only be imposed for 'flagrant/very significant' disregard of the Protocol; the parties are now only 'usually' required to meet each other, and a Protocol Referee Procedure has been introduced which, by agreement between the parties (and for a fee of £3,500 + VAT), allows a TECBAR or TeCSA 'Referee' to decide on any non-compliance by a party with the Protocol, to which the court can later give due weight.

Why does it matter?

The Protocol is, as it has been since its imposition in 2000, something to be kept at the forefront of a client's mind when commencing, or considering commencing, a claim. It may be tempting to think that the new rules can more easily be disregarded without adverse consequences. However, there are at least three reasons why that would not be a good idea:

- ▶ We are at a critical juncture. The Ministry of Justice (MoJ) has not yet published the Protocol on its website, despite it 'coming into force' on 9 November. No transitional arrangements have been announced to regulate what happens in the window between the two Protocols, or for claims started prior to the announcement of the 2nd edition. The TCC Court Guide still refers to the 1st edition of the Protocol in outlining best and recommended court practice for parties in proceedings.
- ▶ Following the pre-action procedure can offer a real benefit to parties. The mere fact that the Protocol seems to be easier to ignore without the risk of cost consequences does not automatically amount to an incentive to issue proceedings before at least exploring the opportunities that settlement avenues may offer.
- ▶ While the court can be expected to be slower to impose cost consequences for non-compliance, it is still not clear what will be regarded as conduct amounting to 'flagrant or very significant disregard' of the Protocol. At least until there is some authority on the point, it will be sensible to assume a fairly low threshold for culpable non-compliance.

Now what?

At present there is uncertainty as to what this means for our clients. Whether one may assume that the Protocol applies to disputes arising after 9 November, or whether it would be wiser to wait until the MoJ confirms the existence of the second edition is a mystery. Logic suggests that disputes started before 9 November fall under the 1st edition of the Protocol and that those coming after that date fall under the 2nd edition. There is, worryingly, nothing to confirm this. Nor is there any indication of transitional arrangements.

It would therefore be a risk to rely wholly on the provisions of the new Protocol at this stage. Furthermore, the overarching pre-action rules should continue to be considered, at least until further information is received.

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