Shortcut or Show Cause? Counterclaims vis-à-vis Clause 20 compliance under FIDIC

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A. Introduction

Clause 20 of the FIDIC Conditions of Contract is often treated like the strict school principal of dispute resolution, procedural, inflexible, and always watching the clock. It lays out a structured escalation path: notify, refer to the Engineer, wait, and only then knock on the doors of arbitration. Claimants have long learned to follow this path carefully.

But here's where things get tricky: what happens when the Respondent, usually the Employer, shows up in arbitration with a set of shiny counterclaims that never went through Clause 20's gatekeeping steps? Are they allowed to just slide in through the side door?

This isn't just a procedural conundrum, it's a question that digs into fairness, reciprocity, and strategic gamesmanship. This article aims to explore both sides of the arbitration table.

B. One Clause, Two Standards?

a. The Claimant's Perspective: "We Took the Long Route. So Should You."

Claimants are often hyper-compliant. They issue detailed notices under Sub-Clause 20.1, they wait patiently (or impatiently) for Engineer responses. In brief, they take every procedural step because they know non-compliance can lead to jurisdictional disaster.

And then, suddenly, the Respondent counters with claims in their Statement of Defence, with no prior notice, no Engineer engagement, and no evidence of procedural pain.

Unfair? Absolutely, from the Claimant's seat. It feels like Clause 20 is a one-sided filter. If the contract mandates a structured pathway for dispute resolution, shouldn't both parties walk that path?

b. The Respondent's Justification: "It's Not a New Claim — It's Just a Counterpunch."

From the Respondent's perspective, the counterclaims are usually justified as a reaction to the Claimant's claims and allegations. Another argument that the Respondent may raise is since the arbitration is already underway, referring counterclaims separately to the Engineer or DAB would create delays and duplicity in the dispute resolution mechanism.

They lean on principles of efficiency and tribunal's discretion. And they have some help from Article 23(4) of the ICC Rules gives tribunals the power to allow new claims post the Terms of Reference, if justified.

C. Jurisdiction vs. Admissibility: Diverging Legal Approaches

The enforceability and admissibility of counterclaims raised without prior compliance with Clause 20 turn on the fine distinction between jurisdiction and admissibility. Courts and tribunals globally have increasingly recognized that while arbitration clauses must be interpreted with commercial common sense, procedural safeguards embedded within dispute resolution clauses cannot be casually bypassed.

a. Tribunal's Discretion and Procedural Pragmatism

From an institutional perspective, the ICC Rules allow tribunal's discretion under Article 23(4) to admit new claims post-Terms of Reference, but that discretion does not override clear contractual requirements. Where a contract prescribes pre-arbitral steps, tribunals often distinguish between:

- Affirmative counterclaims seeking relief independent of the Claimant's claims (e.g., damages, time extensions), which generally must satisfy Clause 20 requirements; and
- Defensive counterclaims or set-offs, which arise purely in response to the Claimant's claims and are presented not as standalone relief but as a rebuttal or mitigation of liability.
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In the latter case, tribunals have more leeway to admit such defensive claims even in the absence of pre-arbitral compliance. As held in several ICC and LCIA proceedings, where the counterclaim is a mirror-image defence to the primary claim. such as asserting that any delay is attributable to the Claimant; the tribunal may treat the issue as one of overall liability apportionment, not a separate dispute requiring pre-referral.

b. How Indian and UAE Law Treat Clause 20 Compliance?

The enforceability of counterclaims in FIDIC-based arbitrations without prior compliance with Clause 20 depends on whether such procedural steps are viewed as jurisdictional preconditions or issues of admissibility. Jurisdictions vary in their treatment of this distinction, and its implications are particularly significant in arbitration regimes such as those of India and the United Arab Emirates (UAE), where construction disputes frequently arise under FIDIC-based contracts.

In India, the judiciary has consistently held that compliance with pre-arbitral steps, such as those found in Clause 20 of the FIDIC Conditions, is mandatory and jurisdictional. The Supreme Court's decision in M.K. Shah Engineers & Contractors v. State of M.P. (1999) underscored those pre-arbitral steps, such as obtaining a decision from a designated authority before initiating arbitration, are essential and jurisdictional. However, the Court also recognized that such conditions could be waived by the conduct of the parties, especially when both proceed to arbitration without objection.

A similar view was adopted in DDA v. S.K. Jain (2009), where the Supreme Court emphasized strict adherence to pre-arbitral procedures, holding that failure to comply with mandatory preliminary steps renders the arbitration clause inoperative.

Further, the Supreme Court in Tejas Constructions and Infrastructure Pvt. Ltd. v. Municipal Council, Sendhwa (2012) reaffirmed that disputes could not be referred to arbitration unless the preconditions for dispute escalation were fully satisfied. In that case, the Court held that failure to refer the matter first to the Engineer constituted a jurisdictional defect, rendering the arbitration invalid.

Contrastingly, in State of Goa v. Praveen Enterprises (2012), the Supreme Court adopted a more flexible approach, allowing counterclaims even if not explicitly mentioned in the initial arbitration reference, provided they fall within the scope of the arbitration agreement.

Since then, the Supreme Court has also recognized scenarios where strict compliance with pre-arbitral steps may be unnecessary. For instance, in Demerara Distilleries Pvt. Ltd. v. Demerara Distillers Ltd. (2014), the Supreme Court deemed pre-arbitral negotiations as procedural and not jurisdictional, especially when such steps would be futile.

A significant development occurred in National Highways Authority of India v. Transstroy (India) Ltd. (2022), where the Supreme Court clarified that counterclaims need not undergo separate pre-arbitral procedures if they arise from the same dispute. The Court emphasized that once a dispute is referred to arbitration, all related claims and counterclaims should be adjudicated together to avoid multiplicity of proceedings.

The Indian position is evolving from a formalistic enforcement of multi-tier dispute clauses toward a more nuanced balance. The Supreme Court and several High Courts have signalled that tribunals generally retain authority to hear counterclaims, treating the pre-arb requirements as procedural and waivable.

In the UAE, courts have traditionally aligned with the earlier Indian view, treating pre-arbitral conditions as jurisdictional prerequisites. For instance, the Dubai Court of Cassation in Case No. 140 of 2007, Case No. 53 of 2011, and Case No. 339 of 2020 has consistently held that failure to comply with contractual preconditions, such as referring the dispute to the Engineer, meant that the arbitration was initiated prematurely. As a consequence, tribunals were required to decline jurisdiction, and parties had to recommence the process following compliance with the required steps.

However, a recent decision has introduced a potentially significant shift, wherein the Dubai Court of Cassation in Case No. 1514 of 2022 re-examined the classification of such preconditions under the UAE Federal Arbitration Law (Federal Law No. 6 of 2018). Although the ruling ultimately found de facto compliance on the facts, the Court, in a notable obiter dictum, suggested that failure to satisfy preconditions such as Engineer referrals should be regarded as a matter of admissibility rather than jurisdiction. The Court observed that non-fulfilment of these preconditions does not revoke the tribunal's authority; rather, it merely delays the tribunal's capacity to hear the substantive claims. This reasoning mirrors international arbitration guidelines, such as Article 3 of the CIArb International Arbitration Practice Guideline on Jurisdictional Challenges, which classifies compliance with preconditions as an admissibility issue, granting the tribunal discretion to suspend proceedings pending compliance.

Nonetheless, this shift in judicial reasoning is not yet part of the UAE's jurisprudence. The admissibility-based analysis was not determinative of the outcome in Case No. 1514 of 2022, and therefore may not be followed by lower courts or future benches of the Court of Cassation in the absence of consistent reaffirmation. Until then, parties should continue to assume that non-compliance with pre-arbitral steps under UAE law may still result in jurisdictional objections and procedural setbacks.

c. Comparative Implications

In ICC arbitrations, tribunals are generally guided by the contract and the governing law, but may also look to institutional rules. For example, in ICC Case No. 16948, a counterclaim was rejected for failing to comply with the pre-arbitral procedure. In contrast, in ICC Case No. 21199, the tribunal accepted a counterclaim where it found that the Engineer or DAB mechanism had effectively broken down. Similarly, the English High Court in Peterborough City Council v. Enterprise Managed Services Ltd. (2014) reinforced that contractual dispute resolution steps must be respected before arbitration can commence.

These cases illustrate that while tribunals and courts may apply a degree of procedural pragmatism, there are limits. Arbitrators generally retain discretion to treat reactive or defensive counterclaims more leniently, especially when it is clear that preconditions have become inoperative or compliance would be futile. However, when counterclaims seek affirmative relief independent of the Claimant's case, strict adherence to pre-arbitral procedures remains the default expectation under most legal systems, including India and the UAE, unless jurisprudence evolves further.

D. Drafting Suggestions: Improving Clarity Through Particular Conditions

While Clause 20 is often treated like a one-way street, it doesn't have to be. With some careful drafting, parties can ensure that procedural clarity isn't just an afterthought, but a built-in GPS for how counterclaims are handled. Here are a few ways to do that:

- Clause 20 Mirror Clause: "For the avoidance of doubt, the procedures set out in Sub-Clause 20.1 through 20.8 shall apply equally to all claims and counterclaims, regardless of which Party initiates them."
- Set-off Safety Net: "Notwithstanding the above, a counterclaim or set-off that is solely advanced in response to a referred claim and does not seek independent relief shall not require prior referral to the Engineer under Sub-Clause 20.1."
- Tribunal Leeway Clause: "The arbitral tribunal shall have the discretion to admit any counterclaim raised in arbitration if the procedural requirements under Clause 20 were not followed, provided it is satisfied that the counterclaim is defensive in nature or that compliance was waived or rendered impractical."

By putting these tools in the Particular Conditions, you build in clarity, fairness, and tactical foresight. After all, the best arbitration battles are fought on fair ground, not on procedural loopholes.

E. Conclusion and Way Forward

Clause 20 should not be applied in a rigid, mechanical fashion. Rather, it demands a contextual interpretation that balances procedural consistency with the practicalities of dispute resolution. While procedural equality is essential, which requires both parties to adhere to the same dispute resolution framework, it must be complemented by the tribunal's discretion to differentiate between genuinely defensive counterclaims and those that seek independent relief.

Importantly, Clause 20 should neither be weaponized to suppress legitimate defences nor diluted to justify strategic circumvention. The critical distinction lies in identifying whether a counterclaim is reactive, i.e., serving as a defence, or, affirmative, constituting a new claim requiring compliance with pre-arbitral procedures. Tribunals must draw this line with principled clarity, as the credibility of contract-based dispute resolution hinges on ensuring equal procedural treatment for both parties.

From a practical standpoint, Claimants should consider raising early objections to counterclaims that bypass the Clause 20 mechanism. They may also explore bifurcation or seek to strike out such claims on grounds of admissibility, framing their arguments around contractual symmetry and fairness.

For Respondents, the path forward involves anticipating potential counterclaims early in the process. Where feasible, they should initiate Engineer or DAB referrals concurrently with arbitration preparation. If procedural compliance proves impractical, it is critical to maintain a clear record explaining why such steps were unworkable or constructively waived. In arbitration proceedings governed by ICC Rules, Respondents may also invoke Article 23(4) to request that tribunals exercise discretion in admitting such counterclaims, particularly when doing so serves efficiency and justice.

In the end, Clause 20 is not merely a procedural gatekeeper, rather a litmus test for fairness, clarity, and integrity in dispute resolution.