DISPUTE BOARDS—GOOD NEWS AND BAD NEWS: THE 2005 ''HARMONISED'' CONDITIONS OF CONTRACT PREPARED BY MULTILATERAL DEVELOPMENT BANKS AND FIDIC

GORDON L JAYNES*

Fortunately, the good news outweighs the bad news. The major good news is that certain banks[1] have agreed to *require* the use of Dispute Boards (''DB'') for all contracts for which they provide financing if the estimated contract value, including contingency allowances, is more than US$10m. or its equivalent. This is understood to be the first time that all of these banks have required (as distinct from recommended) the use of Dispute Boards.

The precise basis of the agreement of the banks is not clear from the text of their first standard bidding document, which is that of the World Bank.[2] Page ii of the document states that the World Bank's May 2005 revision to its Standard Bidding Document

> ''. . . is to conform, to the extent possible without contravening the May 2004 Guidelines [for The World Bank] to the model provided by the Master Procurement Document for Procurement of Works & User's Guide harmonized among various Multilateral Development Banks (MDBs) and approved by the heads of Procurement of the MDBs and International Financial Institutions (IFIs) in October 2004.''[3]

The World Bank states, also on page ii of the document, that in collaboration with FIDIC, a new set of General Conditions has been agreed by the banks, and within those General Conditions

> ''the most significant change is the introduction in Clause 20, Claims, Disputes and Arbitration, of a Dispute Board which may be comprised of one or three members, as may be determined by the Employer and indicated in the Contract Data (Part A of Section VIII, Particular Conditions) without regard to the estimated cost of the contract''.[4]

* Mr Jaynes can be reached at GLJ4law@aol.com.

[1] The banks, as announced by FIDIC, are: African Development Bank, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Bank for Reconstruction and Development (the World Bank), Islamic Bank for Development Bank [*sic*], and Nordic Development Fund.

[2] The document can be found at the web site of the World Bank, www.worldbank.org, and can be downloaded free of charge. It is headed ''Standard Bidding Document'' and entitled ''Procurement of Works & User's Guide'', May 2005. It will be noted that the Bank's document uses the spelling ''harmonization'', whereas FIDIC's document, published in October 2005, uses the spelling ''harmonisation'', which has been adopted in this article, except when quoting from the Bank's document.

[3] The MDBs and IFIs are not identified in the World Bank document. The ''Master Procurement Document'' and 2004 Guidelines seem not to be available on the World Bank's website.

[4] ''Contract Data'' is a substitution for the former World Bank form ''Appendix to Bid'' which Appendix was modelled on the FIDIC form ''Appendix to Tender''.

This is indeed a significant revision to The World Bank's previous requirements.[5] The harmonisation effort has been extensive and has involved much work not only by the banks but also by FIDIC, and it has involved much more than clause 20 and resolution of disputes.

Readers familiar with the predecessor documents of the banks will recall that they have used FIDIC's Conditions of Contract for Works of Civil Engineering Construction ''General Conditions'' (most recently the Fourth Edition), and then have provided to their borrowers detailed Conditions of Particular Application (in substitution for those published by FIDIC) and have designated which of such Conditions of Particular Application are mandatory and which are optional. Many of those ''substitute'' Conditions of Particular Application have made major alterations to, or elaborations of, the standard FIDIC General Conditions. Not all of the banks have made exactly the same ''substitute'' Conditions of Particular Application, nor have all of the banks had exactly the same stipulations regarding which are mandatory and which are optional. The potential for confusion or difficulty on contracts co-financed by more than one of the banks is obvious.

As explained on page 2 of the Bank Document:

> ''The harmonization of the General Conditions has made unnecessary the great number of deviations to the General Conditions of Contract ... introduced in the former SBD Procurement of Works through Particular Conditions of Contract to account for all non-applicable general conditions.''

A comparison of the ''deviations'' shows that by the harmonisation of the General Conditions, what were some 45 pages of Conditions of Particular Application have been reduced to five pages of Particular Conditions (of which three pages are what used to be an Appendix to Bid).

The harmonisation work was completed in May 2005 and the first of the banks to publish the harmonised document was the World Bank. It reflects significant changes in the Bank's formerly required Conditions of Contract, changes which will require careful study in use. The fundamental approach in the harmonised document is to abandon FIDIC 4th Edition, and adopt the General Conditions of FIDIC's 1999 Edition of ''Conditions for Construction'' (the so-called ''First Edition''), but to avoid extensive and complex Conditions of Particular Application and instead to make direct amendments to FIDIC's General Conditions. The result is, in effect, a new and different set of ''FIDIC Red Book'' General Conditions for use by the Bank's borrowers when contracting for the type of construction for which the FIDIC Red Book historically has been used—remeasured contracts

[5] In the Introduction to the most recent edition of its Standard Bidding Document, ''Procurement of Works'', the World Bank indicated that any contract estimated to cost more than US$50m. must have a three-person Board, and for those contracts whose value was between US$10m. and 50m., the borrower could choose to have either a one-person Board or a three-person Board.

utilising bills of quantities, with construction supervised by ''the Engineer''.[6]

Readers sensitive to legal issues will recognise immediately the potential problems of the banks making such use of FIDIC's copyrighted Conditions. These have been overcome by a separate agreement with FIDIC enabling the banks to do what they have done, but requiring continued recognition that the copyright remains with FIDIC, even though FIDIC does not necessarily agree that the changes to its document are what FIDIC itself would recommend.[7] In its publication of the harmonised General Conditions, FIDIC has set forth at the outset of the publication ''Terms and Conditions of Use'' which outline the licence arrangements and include a detailed assertion of sole copyright ownership. On this point, it is important to note that FIDIC has long had a close collaborative relationship with the development banks, and participates regularly in their colloquia for discussion of procurement issues; in a sense, FIDIC is a ''partner'' in the banks' development efforts, but seeks always to balance the interests of the banks' borrowers with those of the contractors and consulting engineers who form the other two parts of the ''development triad''. In the periodic meetings with the banks, not only FIDIC but also multinational representatives of national contractors' organisations participate in the colloquia on procurement issues.

Clearly readers will wish to make their own studies of the harmonised FIDIC General Conditions.[8] There are many important changes to what readers may know from prior study of FIDIC's 1999 edition of the Conditions for Construction. But what of the banks' treatment of Dispute Boards?

The starting point for analysis is to say that, overall, the harmonised document adopts clause 20 of FIDIC's 1999 ''Conditions for Construction'' (the current ''Red Book''). However, there are interesting changes which the banks and FIDIC have made, there are changes which have not been made but (it is submitted) should have been made, and there are some

[6] A detailed analysis of the banks' changes in all the General Conditions is beyond the scope of this article, which addresses only those changes relating to the use of Dispute Boards. In its publication of the harmonised General Conditions, FIDIC has noted in its Introduction '' . . . in the case of the dispute provisions contained in Clauses 20.2 to 20.8 and in the associated Appendix, the opportunity has been taken to make other amendments which FIDIC considers an improvement on earlier wording in the Construction Contract, 1st Edition, 1999''.

[7] Each page of the harmonised Conditions displays FIDIC's assertion of ownership. The World Bank document says at p. ii: ''Given that the harmonized General Conditions is [*sic*] based extensively on FIDIC's 'Conditions of Contract for Construction', second edition [*sic*], published by FIDIC in 1999, and being FIDIC [*sic*] the sole copyright owner of such publication the IBRD has subscribed a license agreement with FIDIC that authorize [*sic*] the use of the harmonized version of such conditions of contract by the Borrowers of the World Bank when preparing bidding documents in accordance with these SBD Procurement of Works.''

[8] [Editorial Note: see page 4, above, of this issue where the new Conditions are discussed.]

puzzling omissions from what it would seem should have been stipulated. This article is directed to those points.[9]

The only bank document published as of the writing of this article is that of the World Bank. By the time of publication of this article, it may be that other banks will have published their versions. Thus, the rest of this article refers only to the World Bank harmonised document and FIDIC's publication of its new edition.

New format

For the first time, the World Bank has published its ''Standard Bidding Document'' traditionally entitled ''Procurement of Works'' under a new title, ''Procurement of Works & User's Guide''.[10] The World Bank says in its ''Foreword'' to its document

> ''These Standard Bidding Documents for Procurement of Works [SBDW] are mandatory for use in major works contracts (those estimated to cost more than US$10 million, including contingency allowance) unless the Bank agrees to the use of other Bank Standard Bidding Documents on a case-by-case basis. (The Bank has also issued a civil law version of the SBDW as well as a SBDW for smaller contracts.)''[11]

Harmonisation changes from FIDIC 1999

What are the changes which the banks and FIDIC have agreed? Some are changes of grammar, layout or syntax and need not be noted here. The first major change from FIDIC 1999, clause 20, appears at sub-clause 20.2, regarding appointment of the Dispute Board (which the document often refers to simply as ''DB'', a convenient abbreviation which also is used in this article). Several changes have been made:

(1) As elsewhere in the harmonised document, the term ''Contract Data'' is used in lieu of the term ''Appendix to the Tender''. (The Contract Data sheets appear as Part A of the Particular Conditions of the harmonised document.)

(2) Although also covered by the ''Warranties'' in the agreement among the parties and the DB member, a new second paragraph has been added to sub-clause 20.2:

> ''The DB shall comprise, as stated in the Contract Data, either one or three suitably qualified persons ('the members'), each of whom shall be fluent in the language for communication defined in the Contract and shall be a professional experienced in the type of construction involved in the Works and with the interpretation of contractual

[9] One minor change which this author is happy to see is the abandonment of the ''alphabet soup'' used for Dispute Boards; gone is ''DRB'' from the World Bank's terminology; gone is the FIDIC term ''DAB''—with its inherent confusion with UK statutory adjudication—and the drafters have simplified the terminology to just ''Dispute Boards''.

[10] The World Bank publishes several ''Standard Bidding Documents'' and that for Procurement of Works is only one. The extent of the ''User's Guide'' in the May 2005 document is discussed below.

[11] *Op. cit*, p. iii.

> documents. If the number is not so stated and the Parties do not agree otherwise, the DB shall comprise three persons, one of whom shall serve as chairman.''

Thus, it seems to be intended that the employer shall decide the size of the DB; viz. sub-clause 1.1.1.10 of the General Conditions. No guidance appears in the harmonised document regarding the criteria to be applied by the employer in deciding the size of the DB. Perhaps employers will be guided by the predecessor version of the document, which gave the borrower the option of selecting either a one-person or a three-person Board unless the estimated value of the contract, including contingencies, was in excess of US$50m., in which case the Bank required a three-person Board.

Users may also take into consideration the criteria contained in (d) and (e) of the FIDIC *Guide* to the 1999 Edition of the Red Book, at page 304, regarding the likely amount of the average monthly Payment Certificate, and the nationality or nationalities of the DB member(s). Regrettably, neither the Bank's document nor the FIDIC publication of the harmonised Conditions point the user to the FIDIC *Guide*, on this or any other matter.

It is interesting to note that in the Contract Data there is an entry for ''List of potential DB sole members'' and the Bank's guidance is: ''Only when the DB is to be comprised of one sole member, list names of potential sole members; if no potential sole members are to be included, insert: 'none'.'' Unanswered is the question of whether the list of sole members is exclusive and no other candidate can be considered in pre-contract negotiations with the successful bidder, or whether the successful bidder will be able to propose other candidates. It is somewhat surprising that the User's Guide does not mention the existence of the FIDIC President's List of Approved Adjudicators as a potential source for use in selecting a DB member. Neither does it alert the user to the Bank's Directory of Independent Consultants (''DICON'') system as a potential source for use in selection of a DB member.

Still on the Contract Data, there also is an entry for ''Appointment (if not agreed) to be made by'', and the Bank's guidance is ''Insert name of the appointment entity or official''. This wording seems wide enough to enable an employer to select any official, which could lead to abuse by an unscrupulous or ill-advised employer. Unlike its predecessor document, the harmonised document gives no guidance to the borrower on selection of an appropriate appointing authority or official.

(3) In the third paragraph of the harmonised text, there is a shift in approach which seems potentially faster than the 1999 FIDIC document. Instead of the third member being selected by the parties after first consulting the initial two appointees, the harmonised document has the initial two appointees recommend a chairperson for agreement by the parties.

(4) Sub-clause 20.1 is not entirely clear regarding the time for appointing the DB, and hopefully the wording will be clarified in the future. The first paragraph says the DB shall be appointed by "the date stated in the Contract Data". In the space for that in the Contract Data, the Bank has printed (presumably as mandatory): "28 days after the Commencement."[12] However, the fourth paragraph of sub-clause 20.2 foresees a possibility of the parties jointly appointing the DB up to "21 days before the date stated in the Contract Data". Having in mind that such date is linked to the date of the contractor's receipt of the Letter of Acceptance, it would seem clearer to link the period for joint appointment to that letter instead of the commencement date.

(5) A major change, and one which may create misunderstandings or argument, is the deletion of the following from the 1999 FIDIC text:

> "If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.
>
> If at any time the Parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any one or more members of the DAB. Unless the Parties agree otherwise, the appointment will come into effect if a member declines to act or is unable to act as a result of death, disability, resignation or termination of appointment.
>
> In any of those circumstances occurs and no such replacement is available, a replacement shall be appointed in the same manner as the replaced person was required to have been nominated or agreed upon, as described in this Sub-Clause."

No guidance is given on the reason for the deletions. Perhaps the concept of "standby" members has been found to be of little use. Even with the omission of the last two of the three paragraphs quoted above, the harmonised text includes the 1999 FIDIC paragraph governing replacement of members who decline to act or are unable to act as a result of death, disability, resignation or termination of appointment.

However, the deletion of the provision for joint reference to the Board for an opinion (not a decision), is puzzling. Notably, however, Part A of the Appendix to the General Conditions, "General Conditions of Dispute Board Agreement" retains, in paragraph 4(k), the DB availability "to give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any)". It is hoped that users will retain their ability to obtain informal advice and opinions of the Board, as these have proven to be of great value in avoiding formal disputes. It seems that despite the

[12] It seems this should refer to "Commencement Date", not "Commencement"; the former is defined as the date notified under sub-clause 8.1 of the General Conditions: viz., sub-clause 1.1.3.3. Under sub-clause 8.1, the engineer is to give the contractor not less than seven days' notice of the Commencement Date; unless otherwise stated in the Particular Conditions, the date will be within 42 days after the contractor receives the Letter of Acceptance. Upon receipt of the engineer's notice, the contractor is to commence as soon as reasonably practicable.

above-referenced deletion, such help will be available; viz., the second paragraph of Procedural Rules, discussed below.

Clause 20.3 introduces a new provision in sub-clause (b) by providing for action by the appointing entity or official if either party fails to approve timeously a nominated person to serve as member. While this is helpful to avoid wilful obstruction of the process of forming the Board, it seems potentially a way of avoiding the party considering the nominee being free to object on reasonable grounds and request the nomination of some other person.

As noted above at (2), in the model ''Part A—Contract Data'', no guidance is contained as to potential appointing entities or authorities. Especially for users unfamiliar with the FIDIC Conditions, and perhaps unfamiliar with established and respected independent appointing entities and officials, this is an unfortunate omission, which hopefully will be remedied in future amendments.

Clause 20.4 in the fifth paragraph adds a requirement not found in the 1999 Edition regarding the notice of dissatisfaction with the DB decision. The notice given must include a statement of the intention to commence arbitration. In passing, it should be noted that neither the 1999 Edition nor the harmonised document requires a copy of the notice to be given to the Board, and it is submitted that this was and remains a small oversight and that best practice suggests giving a copy to the Board.

Clause 20.5 retains the 1999 Edition requirement for a minimum 56-day period for amicable settlement efforts before arbitration may be commenced. This concept of belated amicable settlement efforts was originally explained by FIDIC when first introduced in the Fourth Edition of the Red Book as being necessary in some countries to enable government servants to compromise through amicable settlement negotiations, although it would seem a more straightforward way to empower such persons would be to include a clause explicitly doing so in the Conditions. More recently FIDIC has spoken of the purpose of the amicable settlement period as being to provide the parties a ''cooling off'' period, and FIDIC has indicated that it has found this delay to be a popular feature. However, it is a feature which is not found in other Dispute Board systems, and some persons have suggested that it is an inappropriate delay to the ability of a party to commence arbitration of what clearly has become a mature dispute.

Clause 20.6, which contains the arbitration agreement has been altered from the model contained in the 1999 Edition. Whereas the 1999 Edition foresees use of the Rules of Arbitration of the International Chamber of Commerce, the harmonised document leaves it open to the parties to stipulate in the Particular Conditions ''how arbitration shall be conducted'', and then provides that if no arbitration proceedings are stated in the Particular Conditions the ICC Rules shall be used.

Allowing the parties to stipulate how arbitration shall be conducted may reflect the past practice of the World Bank to suggest the possibility of

arbitration under UNCITRAL Rules, or other institutional rules (including the ICC Rules), leaving the choice of arbitral system to the borrower. However, the harmonised wording also leaves open the possibility of *ad hoc* arbitration arrangements, so long as they are "international".[13]

Following clause 20 are two further documents. The first is entitled "Appendix" and starts with "A General Conditions of Dispute Board Agreement" [*sic*]. There is no "B" in the Appendix; in its publication of the harmonised Conditions, FIDIC has deleted the "A". In their form Appendix General Conditions are the same as their counterparts in the 1999 Edition. The following differences in substance are noted.

(1) In Clause 2 it is stated that the Agreement takes effect from the latest of three dates. This awkwardly worded paragraph is essentially the same as in the 1999 Edition. The first of the three dates is the Commencement Date defined in the contract. This seems in contradiction of the statement in the Contract Data (in the Particular Conditions) that the "DB shall be appointed . . . 28 days after the Commencement". Perhaps the Contract Data is intended to read "Commencement Date": on this, please see above, footnote 12 in this article. The other two dates are in reality one, namely, when all Dispute Board Agreements have been signed by the Contract Parties and the Dispute Board Members.

(2) Two omissions have been made from the 1999 Edition format for this clause 2:

> "When the Dispute Adjudication Agreement has taken effect, the Employer and the Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective."
>
> "No assignment or subcontracting of the Dispute Adjudication Agreement is permitted without the prior written agreement of all the parties to it and of the Other Members (if any)."

No explanation is given for these omissions. While the first omission may be in general unobjectionable, the second seems an odd omission. Perhaps it was felt justified because an earlier part of clause 2 specifically recognises that "This employment of the Member is a personal appointment".

(3) Clause 5, relating to the general obligations of the employer and the contractor has omitted a provision from the opening paragraph, which deals with requesting advice from, or consultation with a member otherwise than in the normal course of the DAB's activities under the contract and the Dispute Adjudication Agreement. The 1999 Edition permits such request or consultation "to the extent that prior agreement is given by the Employer,

[13] In contrast, the arbitration provision of the form of agreement with the DB members specifies *institutional* arbitration, which unless otherwise agreed shall be under the ICC Rules: viz., Clause 9 of the Appendix to the General Conditions.

the Contractor and the Other Members (if any)''. No explanation is given for the omission.

(4) Clause 6 deals with payment of the member and follows the 1999 Edition of FIDIC (which in turn is based on the concept first established in the World Bank ''Procurement of Works'' Standard Bidding Document published in January 1995): a monthly retainer fee for certain work and costs and all services not otherwise covered by other parts of the payment scheme; a daily fee for travel and work on site and reading submissions in preparation for a hearing; and reimbursement of expenses and certain taxes (if imposed).

There are two minor differences from the 1999 Edition. First, the reduction in retainer fee following the issuance of the Taking Over Certificate for the whole of the works is only by one-third, instead of one-half. Secondly, a new paragraph has been inserted which reads:

> ''If the parties fail to agree on the retainer fee or the daily fee of the appointing entity or official named in the Contract Data shall determine the amount of the fees to be used.''

It appears that the first ''of'' should be deleted. In the FIDIC publication the paragraph reads:

> ''If the parties fail to agree on the retainer fee or the daily fee, the appointing entity or official named in the Contract Data shall determine the amount of the fees to be used.''

Surely, the FIDIC wording is correct, and hopefully the Bank's document will be revised soon.

Also, it would be useful if the same use of appointing entity or official could be used in the event of failure to agree the revised fees which the prior paragraph foresees occurring annually after ''the first 24 calendar months'' of Board service. Perhaps this suggestion will be adopted in future revisions of the Appendix.

Unfortunately, nowhere in the harmonised document is there any guidance to a user on what amounts to establish for either the retainer fee or the daily fee.

It is regrettable that the Bank's harmonised document has omitted the World Bank guidance which has prevailed for the past 10 years, because it is likely that some borrowers will be uncertain how to proceed on DB compensation. The past guidance has been that, unless the parties otherwise agree, the monthly retainer fee should be three times the daily fee, and the daily fee should be that paid to arbitrators for the International Centre for the Settlement of Investment Disputes (''ICSID''), which at the date of writing this article is US$2,500 per day. Borrowers might decide that a lower amount was appropriate in the contract's particular circumstances, but at least past borrowers had a point of reference in deciding what to establish as fees. The FIDIC publication and the FIDIC *Guide* to the 1999 Edition are

both silent on the quantification of fees, and it is respectfully submitted that this is an unfortunate omission.

(5) Clause 8 deals with default of a DB member and retains, and expands the 1999 Edition Appendix, which provides that, if a Member fails to comply with any of his obligations, he is to reimburse the parties for all fees and expenses of all DB members for proceedings or decisions which are rendered void or ineffective by his failure. Not only is this form of penalisation inconsistent with general practice in alternative dispute resolution arrangements, but also it is inconsistent with the spirit of clause 5 of the Appendix, which foresees that a DB member shall not ''be liable for any claims for anything done or omitted in the discharge or purported discharge of the Member's functions, unless the act or omission is shown to have been in bad faith''.

Unlike the 1999 Edition, which proceeds from an Appendix to an ''Annex Procedural Rules'', the harmonised document simply sets forth ''Procedural Rules'' after the end of the nine clauses of the Appendix. The harmonised document is slightly different in layout, abandoning the former nine numbered paragraphs and using no paragraph numbering but inserting alphabetical sub-paragraphs in some paragraphs. However, the content is identical in substance. The FIDIC publication has not followed the style of the Bank's document and has retained the 1999 Edition titling and numbering.

A change in wording in the second paragraph is welcome. Where the 1999 Edition refers to site visits as enabling the DB to become and remain acquainted with (*inter alia*) potential problems or claims, the new second paragraph expands on this by adding ''and, as far as reasonable, to endeavour to prevent potential problems or claims from becoming disputes''. It is precisely in such preventive work that Dispute Boards achieve optimum value for the contract parties.

The Bank's document does not contain an Index of Sub-Clauses; the FIDIC publication does. Hopefully the Bank soon will include that Index in its document. Meanwhile, readers who are frequent users of FIDIC documents, including the new ''MDB Harmonised Edition'', will wish to go to the FIDIC website in order to enjoy the convenience of its Index where it is available free of charge.[14] A copy can also be bought by e-mail to fidic.pub@fidic.org

The Bank's Document also does not contain (yet?) the sample forms for Dispute Board Agreements which are at Annexes D and E of FIDIC's publication. These are for a single person DB and for each person of a three-person DB. They do not deviate in substance from the sample forms contained in FIDIC's 1999 Edition.

[14] http://www1.fidic.org/resources/contracts/describe/FC-RA-H-AA-10.asp

All other comments aside, it is clear that the implementation by the MDBs and the IFIs of the 2005 harmonised edition of the FIDIC Red Book will increase dramatically the number of DBs operating throughout the World. Additionally, it seems likely that at least some of the various national bilateral aid agencies will follow the practice of the MDBs and IFIs and implement the use of DBs in contracts which they finance. With increased use of DBs, one can hope for continuing improvements in the development of the DB technique, so readers are advised to ''stay tuned'' to this *Review* for ''breaking news''!