

A DISPATCH FROM THE FRONT: DISPUTE BOARDS AT 2002 GORDON L JAYNES

Much is afoot in the international engineering and construction industry with respect to Dispute Boards. The purpose of this paper is to provide a "snapshot" of this activity at the outset of 2002.

Although entitled as a dispatch from "the front", the activity is on multiple "fronts". FIDIC's publication of the 1999 First Editions of its three major sets of Conditions of Contract has been followed in 2001 by the publication in hard copy of its *Guide* to the use of those Conditions, which includes detailed insight into the use of NUIC's Dispute Adjudication Board system. In May of 2000, the World Bank published a new edition of its Standard Bidding Document, "Procurement of Works" which includes the latest version of the Bank's Dispute Review Board system, significantly changed from its previous version. Starting in 2000, and continuing into 2001, FIDIC has conducted Training and Assessment Workshops for persons seeking admission to its President's List of Dispute Adjudicators. In June of 2001, the American Arbitration Association opened its first office outside the United States, one aim of which is increasing its international activities with respect to Dispute Boards. Also in June 2001 the Dispute Review Board Foundation held its first International Conference, with attendees from 13 countries. In September of 2001, the UK's Institution of Civil Engineers presented a seminar on Dispute Boards at the World Bank headquarters in Washington, DC. The International Chamber of Commerce, acting through the Commission of its Court of International Arbitration, and through its Centre for Expertise, is increasing its activities with respect to Dispute Boards.

Meanwhile, practitioners are encountering Dispute Board arrangements which differ significantly from past practice; also, the use of the Dispute Board technique has begun to be applied in aspects of large projects other than just engineering and construction, such as in the resolution of disputes arising in the operation of project financing arrangements for both projects undertaken as privately financed and those undertaken as "public-private partnerships".

AT THE WORLD BANK

When, in January 1995, the Bank revised its Standard Bidding Document entitled *Procurement of Works*, it began its requirement that borrowers resolve disputes by use of a three person Dispute Board if the financed contract was estimated to cost US\$50 million or more (including contingency allowances), and gave its borrowers three options for financed contracts estimated to cost less than that US\$50 million benchmark: a three person Dispute Board, a single Dispute Expert, or if the Engineer was "independent from the Employer", the Engineer.¹

The current edition of "Procurement of Works" (May 2000•) retains the US\$50 million benchmark, but deletes the option to use the Engineer on contracts below that benchmark, and instead refers only to contracts "smaller than US\$10 million", and indicates that they "should generally follow the Standard Bidding Documents. *Procurement of Works*,

Smaller Contracts, which provide for a similar disputes review method"². The similarity is that an outside party is used for dispute resolution. However, in the *Smaller Contracts* document, the "Adjudicator" becomes involved with the project only if, and after, a dispute arises, whereas in a traditional Dispute Board, the Board is in place and active from the outset of the contract, and before any disputes arise.

The 2000 edition also changes the effect of the Dispute Board's "Recommendation". In the 1995 edition, a Recommendation was not binding if, within 14 days of receipt of a Recommendation, either party gave written notice to the other of intention to commence arbitration of the dispute. (If no such notice was timely given, the Recommendation became final and binding and was "to be implemented by the parties forthwith, such implementation to include any relevant action of the Engineer."³) The 2000 edition provides "The Recommendation of the Board shall be binding on both parties, who shall promptly give effect to it unless and until the same shall be revised, as hereinafter provided, in an arbitral award."⁴ It retains the 14-day deadline for notice of intention to commence arbitration, failing which the Recommendation becomes final and binding.⁵ In both editions, there is no time limit for the actual commencement of arbitration, provided notice of intention to do so has been given timely.

Although the 2000 edition was published after the publication of FIDIC's 1999 First Edition of its Conditions of Contract for Construction, the Document continues the use of Part I, General Conditions, of FIDIC's 1987 Conditions of Contract for Works of Civil Engineering Construction (as amended in 1988 and 1992), but the Bank's Part II, Conditions of Particular Application, amends clause 67 of those General Conditions to substitute the Dispute Board for the Engineer in the resolution of disputes.⁶

AT FIDIC

The use of Dispute Boards in the FIDIC forms first appeared in 1995, in clause 20 of the Conditions of Contract for Design Build and Turnkey (the "Orange Book"), and next appeared in the 1996 Supplement to the Fourth Edition of the "Conditions of Contract for- Works of Civil Engineering Construction". The three major forms published as 1999 First Editions all contain Dispute Board provisions, although in two versions-"full term" and "*ad hoc*". The Conditions of Contract for Construction use a "full term" Board (i.e., established before the Contractor commences work), whereas the forms Conditions of Contract for Plant and Design Build and Conditions of Contract for EPC/Turnkey Projects recommend "*ad hoc*" Boards (i.e. established only if, and after, a particular dispute arises).⁷

The Dispute Board provisions of the 1999 Conditions of Contract for Construction differ significantly from those of the 1996 Supplement to the Fourth Edition of the Conditions of Contract for Works of Civil Engineering Construction. Also, the Dispute Board provisions of both the 1999 Conditions of Contract for Plant and Design Build and those for EPC/ Turnkey Projects differ from the provisions of the 1995 Conditions of Contract for Design Build and Turnkey. The differences are more in detail than in fundamental structure. However, FIDIC's Dispute Board provisions, from their first arrival, have had significant differences from those of the World Bank, principally:

- FIDIC's provisions have been a substitution for a written decision of the Engineer, intended to take effect immediately, even if notice is given of intention to refer the dispute to arbitration. The Bank's provisions stemmed from the USA origins of the Dispute Board, in which the Board's Recommendations were intended to be persuasive rather than obligatory, and could be averted by timely notification of dissatisfaction. This difference is reflected in the terminology of the two organizations: FIDIC used the name "Dispute Adjudication Board"; the World Bank used "Dispute Review Board", the name in general use in the USA.
- FIDIC's provisions include a requirement for "amicable settlement" efforts following a notice of dissatisfaction. Resort to arbitration cannot occur before a minimum of 56 days of such efforts. The World Bank provisions permit immediate initiation of arbitration. Neither set of provisions set any time limit by which arbitration must be commenced.⁸

Both the Bank's Dispute Board provisions and those of FIDIC include "default" appointment systems, akin to those found in typical arbitration Rules. FIDIC foresees the possibility of itself serving as the appointing entity selected by the parties, and the new *Guide* includes detailed instructions to users on how to obtain that service from FIDIC⁹. The appointment is made by "the President of FIDIC or a person appointed by the President"¹⁰ and in connection with such appointing activity -FIDIG has established the "FIDIC President's List of Approved Arbitrators", the introductory Note to which states: "FIDIC has established a high standard for [the List]. Successful attendees at an Adjudication Assessment Workshop will need to be fluent in English and familiar with FIDIC's 1999 Conditions of Contract. Attendees will be subject to rigorous testing, and will be expected to demonstrate compliance with the specified criteria for inclusion on the List."¹¹

Although the clauses of the FIDIC Conditions do not include any requirements for use of FIDIC as a "default" appointing entity, the new *Guide* sets out a detailed procedure which must be followed if such use is made.¹²

The World Bank "default" appointment provision does not include comparable appointment services from any part of the Bank, although its suggested "appropriate international appointing authorities include the Secretary-General of the Bank's "sister" organization, the International Center for Settlement of Investment Disputes, in Washington, DC."¹³

Other than a few footnotes, the World Bank provisions offer no guidance to users, whereas FIDIC's new *Guide* includes some six A4-size pages of detailed commentary.

THE AMERICAN ARBITRATION ASSOCIATION ("AAA")

20 June 2001 marked the opening of a European office of the AAA's International Center for Dispute Resolution. This reflects the increasing involvement of the AAA in international dispute resolution since the establishment of its International Division in 1996. The Division has administered disputes in 70 different countries, and during 2000 the Division received 511 new cases. The European office of the Center is

already involved in service to Dispute Boards, including the expansion of the International Division's Roster of Dispute Review Board Members from various countries, presently including more than 60 persons.

The European office of the Center is headed by Mr Mark Appel, Senior Vice-President. He can be contacted by email at appelm@adr.org or by fax at 00(353) (1) 418 2223. The address of the Center is Harcourt Centre (Block 3), Harcourt Road, Dublin 2, Ireland. The Center's Dispute Board *Guidelines, Hearing and Meeting Protocols*, and *Three Party Agreement*, all offered as suggestions and not mandates, can be found at www.adr.org.

THE DISPUTE REVIEW BOARD FOUNDATION ("DRBF")

This not-for-profit corporation has as its purpose the promotion of the successful use of Dispute Boards. In addition to its Annual Conferences, the DRBF publishes a small journal, *Foundation Forum*, and operates training programmes on the use, and the chairing, of Dispute Review Boards. Although the DRBF publishes a list of its members, at present it does not maintain any list of persons formally recommended by the DRBF for service on Dispute Boards. Also, the Foundation Members have published a book, *Construction Dispute Review Board Manual*,¹⁴

The DRBF's first International Conference was held at a London Heathrow airport hotel in June 2000, and attracted over 40 attendees from Canada, Eire, England, Iceland, Italy, Japan, Lesotho, The Netherlands, Northern Ireland, Poland, Scotland, Switzerland, and the USA. A second International Conference is planned to be held on 25-26 May of this year, in Rome.¹⁵

THE INSTITUTION OF CIVIL ENGINEERS

Although this organisation is based in London, England, it has local associations in various countries, one of which is the Mid-Atlantic States Local Association ("ICE MASLA").¹⁷ In September of 2001, it co-sponsored with the World Bank a seminar held at the World Bank, entitled "Ten Years of DRB Success at China's Ertan Dam", featuring a report by the Ertan Dispute Board Members on this difficult and complex project which was completed ahead of schedule, with all disputes amicably settled by the end of construction. In addition to ICE members, the seminar was open to all interested professionals, including members of the DRBF, and the American Society of Civil Engineers and the American Society of Consulting Engineers. Some 70 people attended from various countries.

AT THE INTERNATIONAL CHAMBER OF COMMERCE ("ICC")

Last year there was increased ICC activity relating to Dispute Boards which continues this year. In April 2001, the ICC Commission on International Arbitration received from its Forum on Arbitration and New Fields the final report of that Forum's Construction Arbitration Section, which highlights the growing use of Dispute Boards

and their impact on construction arbitrations (and arbitrators).¹⁷

A deeper involvement of the Commission with respect to Dispute Boards is arising from its Forum on ADR, which to some extent is working in parallel with the Commission's Working Group on ADR. The Forum is preparing a "White Book" survey of ADR techniques in use throughout the world and is considering the most recent developments with respect to Dispute Boards, as well as possible future activities of the Commission in respect of the promotion of successful use of Dispute Boards. (In passing, it is noted that the Commission established a July 2001 publication date for its new Rules and *Guide for ADR*¹⁸)

Additionally, the ICC's International Centre for Expertise is revising the Rules of the Centre, to include, *inter alia*, provisions highlighting and improving its service as a source for suitable experts available to serve as Members of Dispute Boards.¹⁹

PITFALLS FOR THE PRACTITIONER

- Notwithstanding the detailed formats of the Dispute Board provisions of the World Bank and FIDIC, individual contract provisions must be studied with some care because, despite overall appearance of conformity with the format of the Bank or FIDIC, it is not unusual for individual contract provisions to contain significant alterations to those formats. Also, all of the formats suggested by the Bank and FIDIC are extant and in use in all of their various past and present editions, so practitioners must be alert to the differing procedures apt to be encountered. Also, as with other standard documents, Employers often "edit" the dispute provisions in ways which may not be noticed from the general appearance of the clauses, and which require careful study of the particular wording.
- Some dispute resolution procedures have wording which suggests that Dispute Boards are being established but in fact they do not conform to all of the traditional features of Dispute Boards. Interesting variants have been developed on the Channel Tunnel, the new Hong Kong International Airport, and the continuing use by the Hong Kong Architectural Services Department of "dispute resolution advisers".²⁰
- For whatever reasons, Dispute Boards continue to be established late. The parties to contracts used for several major projects financed by The World Bank have failed to establish the required Dispute Boards until years after commencement of construction. This deprives the Boards of their essential characteristics of being conversant with construction as it progresses and being in place to assist in resolution of disputes as soon as they arise. It also leads to a "backlog" of disputes awaiting the Dispute Board when established—disputes on which the parties have developed entrenched positions.
- Whether from lack of understanding or from determination to involve the Engineer in dispute resolution, many contracts on several projects financed by The World

Bank have had "double decker" dispute resolution vehicles, involving a traditional written decision of the Engineer followed by Dispute Board consideration of the dispute if either party is dissatisfied with the Engineer's decision. (There also have been instances of the reverse—a Dispute Board consideration followed by an Engineer's decision if either of the parties is dissatisfied with the Dispute Board's determination.) Apart from creating great potential for delay in resolution of disputes, such "hybrids" lack the essential characteristics of traditional Dispute Boards, and almost invite friction between the Engineer and the Dispute Board.

- The current FIDIC *"ad hoc"* Dispute Board provisions for the Plant and Design Build Conditions and the EPC/Turnkey Projects Conditions also deprive the Board of its traditional advantages of being in place from the outset of the contract and, as with Boards established late, convert the Board into an ADR device akin to a "pre-arbitration quasi-arbitration".
- Users should note the seeming contradiction in the present version of FIDIC's Appendix to the General Conditions entitled "General Conditions of Dispute Adjudication Agreement": unless otherwise agreed in writing, clause 5(c) excludes Dispute Board Member liability 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."²¹ However, clause 8, a broad and Draconian provision, states: "If the Member fails to comply with any obligation under clause 4, he/she shall not be entitled to any fees or expenses hereunder and shall, without prejudice to their other rights, reimburse the Employer and the Contractor for any fees and expenses received-by the -Member and the other Members (if any), for the proceedings or decisions (if any) of the DAB which are rendered void or ineffective."²² Clause 4 lists 11 obligations of Members, and dearly a Member could fail to comply with some of them without having any bad faith.
- Although FIDIC's Guide comments that Dispute Board Members are entitled to finance charges in respect of delay in payment of their invoices,²³ the text of the relevant clause does not so state.²⁴
- There are obvious advantages to restricting nationalities of Dispute Board Members to other than those of the Employer, the Contractor (including those of constituent members of a multinational Contractor), and the Engineer—especially if either or both the Employer and the Engineer are state organizations. Some Employers insist on freedom to use persons of the Employer's own nationality. Indeed, some Employers restrict all Board membership to persons of the same nationality as the Employer. Such arrangements create the risk of at least the appearance of probable bias within the Board, which undermines confidence in (and ultimate acceptability of) the Board's determinations. However, there is an inherent dilemma for Employers, especially those of developing countries: if they do not inject Board Members from their own countries, how can those countries develop a suitable number of experts experienced in service on Dispute Boards?

THE FUTURE

With so many organizations active in the establishment and operation of Dispute Boards, and with the increasing number of Boards being established, it is inevitable that further developments will emerge. Already Dispute Boards are in use on project aspects not directly related to engineering and construction matters, including for example disputes arising from project financing arrangements, especially on privately financed infrastructure projects.²⁵

For further reports on such future developments, watch this *Review!*

APPENDIX: COMPARISON OF THE WORLD BANK DRB SYSTEM WITH THE FIDIC DAB SYSTEM

This comparison uses *only* the World Bank's May 2000 Standard Bidding Document "Procurement of Works" ("TWB") and the FIDIC 1999 First Edition "Conditions of Contract for Construction" ("FIDIC"). It does not address the FIDIC provisions regarding what it terms "*ad hoc*" DABs for the 1999 First Edition 'Conditions of Contract for Plant and Design Build ("P&DB") nor the Conditions of Contract for EPC Turnkey Projects ("EPCT").

It should be noted that there are earlier versions extant (and in use) of both TWB and FIDIC Dispute Board provisions which differ from the versions compared here.

1. **General** FIDIC Guide gives more detailed suggestions and guidance to the user than TWB. FIDIC publishes List of vetted adjudicators; TWB maintains DICON (Directory of Individual Consultants) but does not have a formal system of vetting people entered on DICON.
2. **Size:** TWB requires three-person Board if contract estimated to cost US\$50m or more; otherwise can use single Expert; if less than US\$10m, can use Adjudicator. FIDIC considers • three-Member Board appropriate if average monthly Payment Certificate is expected to exceed US\$2m (at year 2000 prices).
3. **Establishment** TWB establishes a Board not later than 28 days after date of Employer's Letter of Acceptance of Contractor's Tender, FIDIC uses Appendix to Tender to set number of Board members and date of establishment of the Board. Also, FIDIC foresees possible selection from list contained in contract
4. **Criteria for Members:** Under both, all members to be agreed by both parties. TWB criteria: "experienced with the type of construction involved in the Works and with the interpretation of contractual documents" and "fluent in the language of the Contract"; FIDIC "suitably qualified". (But see paragraph 3, "Warranties", of FIDIC Appendix, which is to be agreed with members, and has same three requirements as TWB.)

5. **Chairman:** TWB, selected by two agreed party-appointed members and approved by parties: FIDIC, parties appoint after "consulting" the two agreed party-appointed members.
6. **Expiration/Discharge:** Under FIDIC, member replaceable by agreement of parties after 70 days' notice (unless for default) ; no such TWB provision. Both forms foresee replacement for death, disability or resignation. Resignation requires 70 days' notice under FIDIC; no prior notice required under TWB.
FIDIC: expires at "Discharge" under sub-clause 14.12 ("Discharge") unless otherwise agreed. TWB: ends "regular activities" at end of DLP or Contractor's expulsion from site under sub-clause 63.1 ("Default of Contractor") *and* recommendations made on all disputes previously received; remains available to process any dispute referred to it (presumably for dealing with disputes referred to it during DLP) but no fees unless dispute referred.
7. **Jurisdiction:** TWB: "If any dispute arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, whether during the execution of the Works or after their completion and whether before or after the repudiation or other termination of the Contract."

FIDIC: "Disputes shall be adjudicated by a DAB in accordance with sub-clause 20.4", which refers to "... a dispute (of any kind whatsoever between the Parties in connection with, or arising out of, the Contract or the execution of the works..."

Apart from formal disputes, FIDIC foresees 'parties agreeing to obtain Board "opinions" on "matters" whereas paragraph 2 of the World Bank Rules and Procedures restricts "advice or consultation from the Board".

8. **Timetable:** TWB's is shorter than FIDIC's: members available for site visits in 7 vs. 28 days; Board's written decision in 56 vs. 84 days; party dissatisfaction notification 14 vs. 28 days; FIDIC has minimum 56-day amicable settlement period after notice of dissatisfaction before resort to arbitration and TWB has no similar provision
9. **Board compensation:** FIDIC leaves to parties and individual member, thus member compensation can differ among members; also, compensation reviewed every 24 months; retainer dropped to 50 per cent at TOC. Both foresee a monthly retainer plus a daily fee, plus expenses. TWB gears both monthly retainer and daily fee to ICSID Arbitrators' Daily Fee, and fixes both for duration of service, with retainer fee reduced by two-thirds during DLP (or if Contractor expelled). FIDIC foresees "suitable security" to member for costs before attending site visit or Board meeting; no comparable TWB provision.
10. **Site visits:** TWB, not less than thrice in 12 months; FIDIC refers to three criteria-no less than 140 days (paragraph 1, Annex), no sooner than 70 days (Procedural Rule 1); "Typically every three or four months" (Introduction to Annex).

11. FIDIC has "Appendix" to General Conditions, entitled "General Conditions of Dispute Adjudication Agreement" (approximately five pages); also has "Annex" entitled "Procedural Rules" (approximately 1.5 pages). TWB has "Rules and Procedures" (six pages) and Board member's "Declaration of Acceptance" (one page). Key points:
- (i) TWB foresees possibility (with prior consent of other party) of employment of a Board member by a party during service on Board (paragraph 1(c) of Rules and Procedures); e.g., party appointment to a Board on a different project. FIDIC also foresees same possibility but requires consent of parties, the Engineer, and the other Board members.
 - (ii) FIDIC discusses member default, and includes liability, *inter alia*, to reimburse all fees and expenses paid to all members re proceedings or decisions rendered void or ineffective. (But see paragraph 5 (c) of Appendix.) No such provision in TWB.
 - (iii) FIDIC contains express confidentiality provision; TWB does not.
 - (iv) Generally, FIDIC Appendix and Annex are broader, more detailed, and provide much more guidance to users than TWB.
12. **Arbitration:** TWB sets different procedural approach *for* foreign Contractor than domestic Contractor, FIDIC requires three arbitrators unless otherwise agreed. FIDIC expressly provides direct recourse to arbitration if a party fails to comply with a Board decision which has become binding, thus avoiding "recycling" through the Board a dispute over such failure; TWB has no such provision. FIDIC also provides for such direct resort if no Board is "in place"; TWB does not

¹Pp v and vi "Introduction"

²P. 135

³P. 205

⁴P. 137

⁵P. 140

⁶Pp 135 et seq.

⁷These differences of use have been the subject of previous discussion in the Review. See, e.g. (2000) ICLR 42 and 477 at 491 and 504 at 531; see also (2001) ICLR 240 at 267.

⁸A more detailed comparison of the FIDIC and Bank Dispute Board provisions is appended to this paper.

⁹P 310

¹⁰*Ibid*

¹¹Details, including application procedure and forms, are at FIDIC's website www.fidic.org/resources/adjudicators/admission. Alternatively, information can be obtained from FIDIC's headquarters in Lausanne, Switzerland, PO Box 86, 1000 Lausanne 12, or fax +41 21 654 44 11. To date, three such workshops have been held by FIDIC and at present the List includes some 20 persons.

¹²P310

¹³P136 r.15

¹⁴Published by McCraw Hill, 11 W 19th St (4th Flr), New York, NY 10011-4285, USA. Fax: 1(212) 337-6056. Cost. US\$45: proceeds help fund the DRBF. For additional information on USA practice, see [2001] ICLR 275.

¹⁵Details of DRBF membership and activities can be found at www.drb.org/home/.

¹⁶It can be contacted via Mr. Lynn De Wolfe, McDonough Bolyard Peck, 8315 Lee Highway, Suite 44, Fairfax, VA 22031-2215, USA. Also an e-mail discussion group has been established by ICE MASLA and it can be joined by contacting ldewolfe@mbpce.com.

¹⁷See [2001] ICLR 644, paras. 12 *et seq.*

¹⁸See Commission Doc. 420/19-014.

¹⁹The Centre's present Rules were published in December 1992, as ICC Publication No 520, ISBN 92.842.1149.2. and appeared in this *Review at* [2001] ICLR 644. The text also is available from the Centre, which can be contacted at e-mail expertise@iccwbo.org or by fax at 33 (1) 49 53 29 29. Details of the Centre can be found through its link on the website www.iccatbitration.org.

²⁰pp. 15 and 16, *Asian Dispute Review*. June 2001, available from gigi_kwok@informa.com.

²¹*Guide*, p. 324

²²*Guide*. p. 331

²³p. 329

²⁴Appendix, clause 6. pp. 325-329

²⁵The Workshops on "Privately Financed Infrastructure Projects" presented by the International Development Law Institute under the sponsorship of the Asian Development Bank during the past two years, in Bangladesh, China, India, Indonesia, and Vietnam, have featured the use of Dispute Boards on such projects. Also, the UNCITRAL *Legislative Guide on Privately Financed Infrastructure Projects*, published in the Summer of 2001 (UN Publication Sales No E.01.V.4, ISBN 921-133632-5) extensively discusses the use of Dispute Boards to prevent and settle disputes on such projects: see, pp. 180-183.