

FIDIC/MDB Approach in respect of Dispute Adjudication Boards

Dr. Götz-Sebastian Hök, Berlin¹²

FIDIC³ based Dispute Adjudication Boards (DABs) and their correlatives under the FIDIC MDB harmonised version, Dispute Boards, have two purposes. They help avoid disputes and they decide on unavoidable disputes. Dispute avoidance is as important as dispute resolution. This dualistic concept has a wide acceptance throughout the world and has to some extent become the international standard in the construction industry. It is used for public works and infrastructure projects, but also for privately financed projects, albeit in the private sector the reduced role of a dispute resolver prevails. The concept has also been tested in a Civil Law context⁴. Since dispute adjudication is supposed to be effective, FIDIC has opted for binding DAB decisions, a concept which may lead into the discussion on the enforceability of DAB decisions⁵. My paper will focus on:

- Dispute Avoidance practice
- Civil Law surroundings
- The binding effect of DAB decisions.

In what follows, the operation of DAB/DBs is discussed in the context of the model used in the FIDIC contracts (1999 edition)⁶. The so called MDB harmonized version (MDB) of the FIDIC Red Book 1999 had been first published in 2005 and then updated in 2006,

¹ The author is a member of the JICA study team for the implementation of Dispute Boards and a FIDIC listed adjudicator and was also involved in the assessment of FIDIC adjudicators on the national level in Japan, Germany and France.

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³ FIDIC = International Federation of Consulting Engineers (French: Fédération Internationale des Ingénieurs Conseils)

⁴ In particular in Botswana, Poland, Romania and South Africa. But to the knowledge of the author there are also DBs in Germany, Kazakhstan, Mali and Turkey.

⁵ See the recent articles from Seppälä, How not to interpret the FIDIC Dispute Clause, [2012] ICLR 4 et sq.; Gillion, Enforcement of DAB Decisions under the 1999 FIDIC Conditions of Contract, [2011] ICLR 388 et seq.; see also *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33; ICC Case No 10619, [2008] IC Arb Bull No 2, 85.

⁶ This suite of contract forms includes the Conditions of Contract for Construction (Red Book), the Conditions of Contract for Design & Build (Yellow Book) and the Conditions of Contract for EPC Turnkey Projects (Silver Book). It also referred to as the Rainbow Edition 1999.

2007 and 2010⁷. The advanced FIDIC approach to DABs is to be found in the FIDIC Gold Book⁸.

1. Dispute Adjudication Boards and Dispute Boards

FIDIC forms of Contract suggest either a three member or a one member Board. If the Parties fail to agree on the appointment of a member (or members) either party may file a request to the FIDIC President⁹ in order to seek the appointment of any of the Board Members. The Board shall begin its activities following the signing of a Dispute Adjudication Board Agreement incorporating General Conditions of Dispute Adjudication Agreement and the Procedural Rules. The Board members are independent experts and not employees or agents of either the Employer or the Contractor. Board members shall not assign or subcontract any of their services or duties. The Board shall visit the Site and meet with representatives of the Parties and the Engineer at regular intervals, at times of critical construction events, at the written request of either party. The timing of Site visits shall be as agreed among the Employer, the Contractor, and the Board, but failing agreement shall be fixed by the Board. Site visits shall include an informal discussion of the status of the construction of the Works and an inspection of the Works. Upon joint request of the parties the Board may submit recommendations and opinions. Whenever a dispute will be referred to the DAB it will hear the case and make a decision within 84 days. Unlike an arbitral tribunal the Board is authorised to investigate the merits¹⁰. Normally hearings will be conducted at the Site. However, any other location that would be more convenient and still provides all required facilities and access to necessary documentation may be utilized by the Board. The Board may also proceed without oral hearings. After the hearings are closed, the Board shall meet in private in order to reach a decision. The Board's decision, together with reasons, shall be served in writing to both Parties. The decision shall be based on the pertinent Contract provisions, applicable laws and regulations, and the facts and circumstances involved in the dispute.

FIDIC Boards have jurisdiction for all disputes which arise out of the Contract or in connection with the Contract. A Board may typically open up, review and revise any certificate, determination, instruction, opinion or valuation of the Engineer (Red & Yellow Book) or Employer's Representative (Silver & Gold Book) as the case may be. A DAB decision shall be binding on the Parties who shall give prompt effect to the decision.

⁷ The MDB form forms part of the MDB's Standard Bidding Documents and is in principle mandatory for use by borrowers.

⁸ This is the Design, Build and Operate form of Contract which was published first in 2008.

⁹ FIDIC holds a list of assessed adjudicators. The three days' assessment takes place every three years.

¹⁰ As emphasised by the Court in: *CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK* [2011] SGCA 33 in citing Chern, *Dispute Boards*, 1st edition, at p. 192.

It shall be given in accordance with Sub-Clause 20.4 of the FIDIC Conditions of Contract (1999).

Hence unlike Boards under the Statutes in Singapore and Australian Laws FIDIC Boards have full jurisdiction on all matters including extension of Time for Completion claims and other matters.

Arbitration panels have jurisdiction to enforce final and binding DAB decisions (see Sub-Clause 20.7 FIDIC 1999).

2. Dispute Avoidance Practice

A FIDIC DAB is deemed to be a complementary contract management tool in the endeavour to implement both best engineering and management practice on Site. FIDIC forms of Contract provide two different suggestions. The FIDIC Red Book (1999) suggests a **permanent DAB** whilst the FIDIC Yellow and Silver Book (1999) suggest the use of **ad hoc DABs**¹¹. The FIDIC Gold Book (2008) shows the new trend in that it provides for a **standing DAB**. Apparently FIDIC is now more inclined to suggest permanent DABs for design & build projects. The FIDIC Update Task Group intends to change the recommendations from ad hoc to standing DABs for all FIDIC forms of Contract. The reason is that FIDIC has become aware of the advantages of dispute avoidance practices and services that can be offered and provided by permanent DABs, but not by an ad hoc DAB.

There are many advantages of standing DABs¹². Permanent DABs assist in avoiding disputes. Avoiding disputes means to save cost and time. Prolonged disputes may poison the working atmosphere and seed suspicion and suspiciousness. Prolonged uncertainty about the financial situation (having impact on the need to take and maintain financial arrangements) and uncertainty regarding Time for Completion (resulting in constructive acceleration and/or foreseeable liability for delay damages) should be avoided. Also, the availability of experts¹³ may help in discussing and finding attractive and beneficial technical, commercial and legal solutions (e.g. an appropriate (yet missing) remedy for failure to comply with a particular contractual duty or the

¹¹ In 1999 the ad hoc concept was preferred for the purposes of the FIDIC Yellow Book and the FIDIC Silver Book because the Contracts Committee and the Task Group believed at that time that under a design & build contract the parties would prefer to have separate and individual experts for civil works, mechanical or electrical works or for the design on a case by case basis. However, this concept implies the risk of contradicting decisions and avoids dispute avoidance techniques.

¹² See Chapman, Dispute Boards on major infrastructure projects, [2009] Management, Procurement and Law, Vol. 162, 7 et seq.

¹³ FIDIC adjudicators warrant and represent by means of the DAA that they are experienced in the work, which the Contractor is to carry out under the Contract and experienced in the interpretation of contract documentation. To the opposite the ICC DB rules do not require such experience at all, though it is obviously preferable to have experts on board.

introduction of an incentive to complete the Works in time). In other words a DAB may avoid practicing business as usual and suggest tailor-made solutions for everyday issues. The authority of respected and credible experts may prevent both parties from losing face.

The dispute avoidance features are the following: At any time the parties to the contract may jointly request to give an opinion and/or recommendation on technical and/or contractual issues. The DAB is a job-site instrument, becoming aware of issues and upcoming problems. As problems arise, it may put issues and upcoming disputes on the agenda of joint meetings, which typically take place during the regular Site visits. The DAB may also investigate facts and sometimes have direct access to the banks and funding institutions in order to discuss the issues with them, e.g. if “no objections” are necessary but missing. The mere fact that a DAB is there may have a beneficial effect in that it may help the Engineer to determine things properly, without further consideration of arguments that do not have a contractual source or justification (e.g. budget overrun). Of course, whilst doing so the DAB will have to avoid any perception of bias. However, the sword of Damocles that is bias should not prevent the DAB from acting as a dispute avoidance board (DAB).

3. Civil Law surrounding

The basic and fundamental principle, which allows agreements on dispute adjudication is usually referred to as the principle of contractual freedom¹⁴. This principle is recognized worldwide, both in Civil Law countries like Indonesia (see Article 1338 Civil Code), Philippines (see Article 1306 Civil Code), South Africa and Sri Lanka (Dutch Roman Common Law) or Vietnam (see Article 389 Civil Code) and in Common Law countries like India, Malaysia (Section 10 Contract Act 1950), Pakistan or Singapore. Contractual freedom typically includes the right of the parties to confer the right of determination of the performance upon a third person (see Article 1309 Civil Code Philippines)¹⁵. In any case state budget laws, auditing laws and procurement laws should be considered¹⁶. However, typically the above laws and constraints do not prevent public authorities from making use of best management practice. Nevertheless, it may be wise to consult all state authorities involved in the tendering process,

¹⁴ Charret, A Common Law of Construction Contracts – or Vive la Différence?, [2012] ICLR 72 et seq.

¹⁵ See also the comparative study of Tallon, La détermination du Prix dans les Contrats, 1989

¹⁶ German procurement rules include the following provision: In addition, dispute resolution proceedings may be agreed upon. The agreement should be made when the contract is executed (see § 18 (3) VOB/B). In France contracts for public works are deemed to constitute an act of public administration. Thus in principle disputes arising out of a contract for public works shall be referred to the administration courts. Art. 127 French Procurement Law (Code des Marchés Publics) provide a three tier approach: Conciliation, Comités consultatifs de règlement amiable des différends ou des litiges relatifs aux marchés publics, Arbitration.

procurement and project execution process in order to make sure that there is a common understanding on the use of DB.

In the last twenty years FIDIC forms of contract have been increasingly utilised in Civil Law countries¹⁷. In particular in Eastern Europe and the former Soviet Union republics in central Asia (Azerbaijan, Kazakhstan, Turkmenistan, Uzbekistan), as well as in parts of Africa (Botswana, Cameroon, South Africa), East Asia (Indonesia, Philippines, Sri Lanka, Vietnam) and the Middle East (Dubai, Abu Dhabi, Qatar) FIDIC forms of contracts are welcomed and are frequently in use. Since FIDIC forms do recommend and suggest the use of DABs, it is reassuring for Civil Law parties to receive confirmation that DABs are compatible with Civil Law systems.

As pointed out above most Civil Law jurisdictions recognize the twin principles know as the principles of **freedom of contract** and **pacta sunt servanda**¹⁸. Also the Unidroit Principles on International Commercial Contracts (UP) recognize these fundamental principles of contract law¹⁹. Since FIDIC DABs derive their powers exclusively from the contract they can be called a creature of contract²⁰. It is beyond doubt that in general DABs may also be agreed to and operate in a Civil Law surrounding. However, there are some particularities to be discussed.

Typically the states and jurisdictions confer dispute resolution powers upon their courts. Even the admissibility of arbitration may be questionable without the relevant state expressly allowing for private dispute resolution practices²¹. Thus in principle it is necessary to assess whether the involved states or jurisdictions do allow the parties to contract out of access to the state courts, whether only temporarily (dispute adjudication subject to further review) or fully (arbitration). Since dispute adjudication is not intended to ensure compliance with all legal niceties whilst the standards of arbitration are more and more recognized to substitute court proceedings it is suggested that dispute adjudication clauses should never stand alone and that the FIDIC approach which provides that DAB decisions can be reviewed in arbitration avoids difficult discussions on the admissibility or legitimacy of DAB clauses and agreements.

¹⁷ See also the author's article in: [2011] ICLR 412 et seq.

¹⁸ Charret, A Common Law of Construction Contracts – or vive la Difference, [2012] ICLR 72 et seq.

¹⁹ In accordance with Article 1.1 UP freedom of contract is a basic principle in the context of international trade. Pursuant to Article 1.3 UP a contract validly entered into is binding upon the parties. For a more detailed discussion of an international lex constructionis see Hök, FIDIC Verträge im Lichte der Unidroit Prinzipien als Vertragsstatut (FIDIC Contracts in the Light of Unidroit Principles as the proper law of the Contract), [2008] Zeitschrift für deutsches und internationales Baurecht (ZfBR) 115 et seq.; Molineaux, Moving Toward a Lex Mercatoria – A Lex Constructionis, 14 [1997] Int'l Arb., No 1, 55 et seq.

²⁰ Chapman, Dispute Boards on major infrastructure projects, [2009] Management, Procurement and Law, Vol. 162, 7 et seq.

²¹ See the former Article 2061 French Civil Code (abrogated in 2001).

Civil Law jurisdictions typically classify contracts in accordance with what are called the nominated contracts²² for which the Civil Codes and the Civil Law provide complementary and mandatory provisions. If, for example, parties agree on a contract for services different complementary rules apply than to a contract for works, etc. In terms of dispute resolution the premature classification is quite often that a dispute adjudication agreement should be deemed to constitute either an arbitration agreement or an agreement on expert determination. A more sophisticated analysis involves the consideration of the typical nature and elements of dispute adjudication which include compliance with natural justice (or similar approaches), a less formal approach regarding the conduct of the procedure than in arbitration, the binding effect of a DAB decision and the inquisitorial powers of the DAB during the decision making process. Taking into account those elements, the classification process could be such that dispute adjudication is neither arbitration nor expert determination but something in between or special, thus *sui generis*. If so, one must carefully consider the full law in order to understand the set of rules that may be applicable as the complementary dispute adjudication law²³.

Civil law typically allows agreements that empower a third person to determine specified elements of a contract and the resulting performance. Thus a contract can be made that does not already specify the exact amount of works or services against which a specified amount of money shall be paid. According to German law a third person can be appointed to determine contractual performance (see Section 317 et seq. German Civil Code). The determination will be binding on the parties unless the determination is grossly inequitable (see Section 319 German Civil Code). Similarly, pursuant to Section 1309 Civil Code of the Philippines “the determination of the performance may be left to a third person, whose decision shall not be binding until it has been made known to both contracting parties”.

Thus the dispute adjudication clauses have to be read and construed as well as to be applied in light of and in accordance with the elements of such further requirements.

4. Binding Effect of DAB decisions and enforceability of DAB decisions

The binding effects of a DAB decision depend on what has been agreed upon. Under FIDIC there is no doubt that the parties agree when they make their contract that they shall give effect to any future DAB decision. To the extent that the parties to the adjudication clause have agreed that they shall give effect to a resulting DAB decision, the question arises whether this agreement is enforceable. In other words it must be checked whether an agreement according to which the parties have agreed to be bound

²² Typical nominated contracts are: *locatio conductio operis* (contract for works), *locatio conductio operarum* (contract for services), sale contracts and loan contracts.

²³ See for examples Hök, *Dispute Adjudication in Civil Law Countries*, [2011] ICLR 412, 434

to the determination of the performance by a third person can be enforced and what are the elements that are required to be met in order to enforce the decision.

The parties do not agree themselves independently either to do or to omit something. Rather the parties agree to perform or accept what the third person has or had determined. Thus the duty to give effect to a DAB decision which in itself does not result directly from the intentions of the parties (this would constitute a legal transaction – “acte juridique”) but is the professional opinion of a third person (thus a “fait juridique” as opposed to an “acte juridique”) should probably be dealt with a bit differently than a mere duty to pay a specific amount of money as independently agreed by the parties. It must be derived from the relevant circumstances as described above that the parties certainly did not agree to be bound to any kind and type of decision (irrespective of whether a certain procedure was followed and independent of whether what had been agreed on in terms of a contract). Rather it must be assumed that the parties’ intentions included merely those decisions for which they have conferred judicial powers on the DAB (jurisdiction) and which are the result of a fair procedure (natural justice). Though of course the requirement of a fair procedure should be understood subject to further qualification in accordance with the law, it shows that civil law jurisdictions will have to acquaint themselves with the concepts of dispute adjudication and that the courts will have to shape the elements of fair procedure in accordance with what the parties have anyway agreed on in terms of the contract. Since there is very little experience with FIDIC based dispute adjudication in Civil Law countries and jurisdictions, with the exception of probably South Africa and Botswana, there is still some uncertainty about the binding effects of dispute adjudication decisions.

On the other hand it is difficult to argue that Civil Law jurisdictions are unable to deal with dispute adjudication and other alternative forms of dispute resolution than arbitration. The examples of the Italian “*lodo irrituale*”²⁴ and similar contractual arbitration in some US states show that irrespective of some difficulties civil law practitioners might encounter, it is feasible to deal with such features. In other words it is acceptable that a third person may make a decision on a dispute which does not have legal force (*res judicata*) in itself, and which cannot be enforced by means of simple registration of judgment²⁵.

Under FIDIC forms of contract Sub-Clause 20.4 clearly says that the parties to the contract shall give prompt effect to any DAB decision whether merely binding or final and binding. The contractual machinery is such that the failure to comply with any such

²⁴ The Italian *lodo irrituale* had been discussed in very detail by the German Supreme Court. The court held that the *lodo irrituale* does not meet the elements of an arbitral award and shall not be enforced under the 1958 New York Convention; see German Supreme Court, *Judgment from 8.10.1981 - III ZR 42/80, [1982] NJW 1224*

²⁵ For a more in depth study see Cassis, *Problèmes de Base de l'Arbitrage*, §§ 505 et seq. who concurs.

DAB decision constitutes a breach of contract and may result in suspension of progress and/or termination of contract.

Sub-Clause 20.7 FIDIC 1999 confers upon the arbitral tribunal jurisdiction to deal with the failure to comply with a final and binding DAB decision. Sub-Clause 20.9 FIDIC Gold Book follows a broader approach. Thereunder, a dispute with regard the failure to give effect to a (merely) binding and/or final and binding DAB decision may be referred to arbitration. Whilst under Sub-Clause 20.6 it is likely that the court will hear the merits before granting relief, Sub-Clause 20.7 FIDIC 1999 and Sub-Clause 20.9 FIDIC Gold Book do allow the arbitral tribunal to grant specific performance.

4. MDB Approach

The multilateral Development Banks have incorporated the FIDIC Conditions of Contract in their Standard Bidding Documents for Works. Currently they use the harmonised version of the Red Book which is based on a FIDIC licence. The Bank's DAB or DB policy is not yet very clear.

Pursuant to the World Bank Procurement Guidelines the conditions of contract shall include provisions dealing with the applicable law and the forum for the settlement of disputes. International commercial arbitration has practical advantages over other methods for the settlement of disputes. Therefore, the World Bank recommends that Borrowers use arbitration in contracts for the procurement of goods and works. The Bank shall not be asked to name arbitrators²⁶. In the case of works contracts, supply and installation contracts, and turnkey contracts, the dispute settlement provision shall also include mechanisms such as dispute review boards or adjudicators, which are designed to permit a speedier dispute settlement. Nowhere is it mentioned that DBs are required, albeit the Standard Bidding Documents include the related DB provisions as suggested by FIDIC, though the wording had been changed from Dispute Adjudication Board to Dispute Board.

In practice the multilateral development banks do not unanimously and clearly insist on the use of DBs. Frequently Employers delete DB clauses arguing that they do not comply with the law. The truth is presumably that the banks have no clear policy on the eligibility of DB cost and that employers like to save cost without knowing the disadvantages of such practices. However there is encouraging news since JICA has started an initiative for the promotion of the use of DBs which seems to be very successful in that the Asian Development Bank seems to support the JICA plans.

5. Conclusion

²⁶ It is understood, however, that officials of the International Centre for Settlement of Investment Disputes (ICSID) shall remain free to name arbitrators in their capacity as ICSID officials.

FIDIC forms of Contract are deemed to be suitable for use with Civil Law surroundings. Undeniably the FIDIC forms of Contract include wording that does not reflect a Common Law approach²⁷. FIDIC forms of Contract promote best practice in terms of contract management. This is the reason why the FIDIC Red Book and the FIDIC Gold Book introduce and suggest standing DABs. They shall help avoid disputes and to manage the project properly. In terms of dispute resolution, FIDIC forms of Contract promote a full range feature since the DABs have jurisdiction on all type and matters that arise out of and in connection with the Contract. Moreover FIDIC Forms of Contract provide for binding decisions rather than for recommendations. The multilateral development banks have adopted this approach. They are more and more convinced that cost for standing DABs should be eligible. However, it is far from accurate to suggest that FIDIC contracts and FIDIC based DABs are uniquely for use in the public sector. There is a huge number of private projects implementing DABs, for example in the mining and oil & gas industry as well as in the field of architectural projects in the Middle East.

²⁷ See for example Sub-Clause 11.9 – acceptance of the works which is not a Common Law concept but a typical Civil Law approach (for example as per Section 640 German Civil Code or Article 1792 French Civil Code or Article 1719 Civil Code of the Philippines), in that the act of acceptance relieves the contractor of liability for defects and shifts the risk of care of the works to the employer.