TO DA(A)B, OR NOT TO DA(A)B... (PART ONE)

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FIDIC has made clear that it considers the use of a dispute board fundamental to a fair and balanced contract, which is the underlying philosophy of its forms. Despite this, employers and contractors are often resistant to using dispute boards, and the dispute board provisions are often deleted when using the FIDIC forms. In this two-part alert, we look at the reasons behind the resistance to dispute boards and what parties to FIDIC contracts might do to make the dispute board provisions work better for both them and their project.

Here we look at the benefits that might be expected from using a dispute board and some practical experiences of using dispute boards, before considering why the expected benefits may not be being realised.

The intention behind the dispute board in the FIDIC forms

Arbitration (and litigation), in the international projects and construction sector, have traditionally been regarded as costly and time consuming. There is a perception (and sometimes a reality) that contractual disputes often take almost as long to be resolved as the project itself. Recognising this, FIDIC has sought to develop its standard forms in a way that provides for and encourages early and efficient dispute resolution without recourse to arbitration or litigation.[1]

In the FIDIC 1999 Rainbow Suite, provisions for dispute adjudication boards (DABs) were introduced and developed as part of a three tier dispute resolution process.[2] The DAB provisions were developed with the aim of providing the parties with a quick (84 days from referral to decision), inexpensive and effective method of dispute resolution, available contemporaneously during the project works. The intention was that the procedure, if used correctly, would remove, or at least limit, the need for recourse to arbitration or litigation and help the parties to maintain a good working relationship. In the 1999 Suite, the Red Book required that the DAB be appointed on a 'standing basis' (from an early stage in the project), in contrast to the Yellow and Silver Books, where the DAB is to be appointed on an 'ad-hoc' basis, when a claim has already become a dispute.

Practical experience of the use of FIDIC dispute boards

There are early and significant reported successes of dispute boards in large (US$billion) FIDIC projects, for example the Ertan Hydroelectrical Project in China and the Katse Dam Project in Africa. Both projects provided for a three person dispute review board, appointed early on in the project, who were able to provide non-binding recommendations. In both projects the board made numerous site visits.[3] In the Ertan project over 40 disputes were referred to the board, not one of which went on to arbitration or litigation. In the Katse Dam project, out of 12 disputes referred to the board only one went on to arbitration and, at arbitration, the board's recommendation was upheld.[4]

Beyond FIDIC, there are many instances of dispute board success on large projects, for example, the 2012 Olympics in the UK, Chek Lap Kok International airport in Hong Kong, and the Eurotunnel. The 2019 Global Construction Disputes Report from Arcadis[5] notes that owners and other

project participants who are engaging in formal contract-mandated avoidance, mitigation and resolution techniques are reaping success. The Dispute Resolution Board Foundation (DRBF), which tracks and analyses the use of dispute boards worldwide, reports that 85 – 98 percent of dispute board recommendations/decisions have not gone on to further arbitration or litigation.[6]

Despite these statistics, not all parties view dispute boards positively. The FIDIC dispute board provisions are frequently struck out, usually by Employers and more often in particular jurisdictions. While cost is often the first reason given for removal of the provisions, other common concerns include that the provisions encourage contractor claims, the board may deliver rough justice or bad decisions, the decisions may not be enforceable, or payments made in compliance with a decision may not later be recoverable.

Even where a contract has provided for the use of a dispute board, this does not always mean that the contractual provisions will be operated as intended, with the result that the perceived benefits of the dispute board are unlikely to be realised.

Sometimes, the lack of success may be a result of the board itself, rather than any action by or failure of the parties. This might happen where the board members appointed have more in common with one of the parties (shared nationality, language, culture, project experience), where the board appointed is not sufficiently experienced for the role of DAB, chosen perhaps for cost reasons, and not able to properly manage and assist the parties to resolve their disputes. These factors can lead to untenable or inconsistent decisions, which one or both parties will not respect and which will do nothing to reduce and finally resolve the disputes and issues between the parties.

In other cases, the lack of success of the dispute board provisions is down to one or both of the parties, not taking seriously, ignoring or misusing the provisions, for example:

Failure to appoint the DAB as specified.

Often the parties fail to appoint the DAB as specified in the contract. Late appointments perhaps have the most impact where the Red Book 1999 or the 2017 Editions are being used, which provide for a standing board appointed at the outset. If the board is not actually appointed until a dispute has arisen, this removes the intended benefit of having a standing board already familiar with the project and ready to "hit the ground running" on the dispute.

Failure to comply with the DAB's decision.

Sometimes the unsuccessful party issues a "notice of dissatisfaction" (NOD) with the DAB's decision (as it is entitled to do). However, sometimes that party also fails to comply with the binding decision in the period prior to final resolution in arbitration. This means that the successful party will need to commence further proceedings in order to enforce the board's decision, sometimes without a favourable result. This issue arises in large part due to drafting in the 1999 Editions which provide only for final DAB decisions (that is where no NOD had been issued in time) to be directly enforced in arbitration. The 1999 Editions made no express provision in relation to enforcement of not-final DAB decisions.[7]

Provisions not taken seriously or manipulated to cause delay.

Sometimes the provisions are simply viewed by one or both of the parties as a necessary procedural step before arbitration can commence.[8] Where one or both parties simply "go through the motions" without any real commitment or attempt to narrow or resolve the issues between them at the DAB stage, the process is unlikely to result in a decision that the parties respect. Sometimes the reluctant or unsuccessful party may seek to manipulate the provisions to bring about delays in order to put off a final and binding decision for as long as possible.

Inappropriate use of the provisions.

There have been cases where parties misuse the procedure and "ambush" the other party, with either (i) a significant volume of documentation or assessments; or (ii) a number of arguments which the other party was unaware of and, under the adjudication process and timetable, is unable to respond to properly. One of the parties may bring so many related and complex claims that they would be better dealt with in arbitration (or litigation) than under the adjudication process and timetable.

Typically, where the dispute board is not used properly, for each dispute board decision there will be a NOD from at least one party, such that all disputes end up moving forward to arbitration. In these circumstances, the parties may consider themselves to be worse off - having diverted project resources to (and paid for) multiple dispute board referrals but resolved little.

Against that background, is there a justified resistance to the use of dispute boards in international projects? Or, are the problems experienced simply down to misunderstanding and misuse, which could be overcome?

Part Two of this alert will look at the development of the 2017 FIDIC dispute resolution provisions and whether they address the issues discussed above, as well as considering what else parties to FIDIC contracts might do in order to make the dispute board provisions work better for both them and their project.

End Notes

[1] Some countries have statutory adjudication regimes applicable to construction projects in that jurisdiction, for example, in England & Wales, the regime introduced by the Housing Grants, Construction and Regeneration Act 1996 (Construction Act 1996). Any contractual regime would be required to meet the minimum applicable statutory requirements in those jurisdictions.

[2] A dispute review board giving recommendations that would only bind the parties if there were no objections was first introduced as a 1995 World Bank Standard Bidding Conditions requirement. The first introduction of a dispute adjudication board giving binding decisions was in the Orange Book 1995.

[3] 16 on the Katse Dam Project and more than 20 on the Ertan Project.

[4] See Chern on Dispute Boards: Practice and Procedure, 2008, Cyril Chern.

[5] Global Construction Disputes Report 2019: Laying the foundation for success: Available at www.arcadis.com)

[6] Available at http://www.drb.org based on an analysis of its database.

[7] Although FIDIC has repeatedly confirmed that any DAB decision, regardless of whether or not a NOD has been issued, should be able to be enforced summarily in arbitration. See for example the FIDIC Guidance Memorandum of 1 April 2013 which provided suggested amendments to sub-clause 20.7 in the 1999 Editions to provide for binding but not final decisions to be enforced in arbitration. This issue caused extensive debate regarding the ability to enforce a binding but not final DAB decision. See for example, the Persero series of cases where the claimant was able to enforce a binding but not final DAB decision, but only after two sets of arbitration, High Court, and Court of Appeal proceedings, PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation [2015] SGCA 30. The FIDIC 2017 Editions include drafting aimed at preventing these issues, though there may still be difficulties with enforcement in some jurisdictions. This will be considered in Part Two of this alert.

[8] This is particularly the case as some national courts have now confirmed that the DAB is a mandatory pre-condition to arbitration, Peterborough City Council v Enterprise Managed Services Limited [2014] EWHC 3193 (TCC).

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