

EVOLUTION OF DISPUTE RESOLUTION MECHANISM IN INTERNATIONAL CONSTRUCTION CONTRACTS

BY

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1. INTRODUCTION

The peculiar features of international construction contracts seem to have been influenced by the need to develop standard practices and procedures to cater for or mitigate the risks which the Engineers, contractors and suppliers share in executing cross-border construction projects. These contracts have been influenced greatly by the emergence of standard forms of contract developed by some international institutions¹ and lending institutions.²

In this paper, attention shall be focused on the evolution of the dispute resolution mechanism, using the *Fédération Internationale des Ingénieurs-Conseils*³ (FIDIC) forms of contract as a guide, even though FIDIC itself is based on the British Institution of Civil Engineers' (ICE) standard domestic contract; the symbiotic relationship between FIDIC and ICE has continued up to the seventh edition of the ICE Conditions.

¹ see e.g. Federation International des Ingeneurs-Conseils (FIDIC); Other notable standard forms have been developed for use internationally by the Engineering Advancement Association of Japan (ENAA); Joint Contracts Tribunal (JCT) in the United Kingdom; the European Development Fund (EDF); the Institution of Civil Engineers New Engineering Contract (NEC)

² See e.g. the International Bank for Reconstruction and Development (World Bank); see also some other major lending institution, the Inter-America Development Bank, Asian Development Bank, European Development Bank and the European Bank for Reconstruction and Development all have standard forms of contract for procurement and services.

³ This is an association of national associations of Consulting Engineers with their Headquarters and Secretariat in Lausanne in Switzerland.

2. TRADITIONAL ROLE OF THE ENGINEER

Since 1913, FIDIC has produced the contract form used in the majority of all transnationally financed civil Engineering construction projects carried out in the developing world⁴. The traditional pre-1999 FIDIC forms of contract empowered the consulting Engineer with so much authority that his performance became a source of conflict between the contractor and the employer.

According to various current sources, the independence of the Engineer appears to be more and more endangered.⁵ In the developed countries as well as developing world, corruption has hit the roof⁶ amongst the government officials responsible for construction projects, and Engineer's role has been completely diffused. For example, in Germany, construction contracts do not include the independent Engineer as they are strictly a "two party contract" between the employer and the contractor. Similarly, France shows preference for lump sum contracts for large public works where the Engineer is attributed a nominal role with emphasis on design and coordination.

3. DISTRUST AND SUSPICION OF THE FIDIC ENGINEER'S ROLE

⁴ Christopher R. Seppala: Contractor's Claims Under the FIDIC Civil Engineering Contract, Fourth (1987) Edition-I, [1991] INT'L Bus. Law. 395, 395

⁵ M. R. Ludlow, Role of an Intermediary [1994] 11 ICLR 209

⁶ See e.g. Japan: The Biter Bit, ECONOMIST, Nov. 13 1993 at 38, 38, reported the allegation of improper contribution and bribes given to Prime Minister Ozawa and other local officials by the nation's largest construction company; see also, *Casey Ichniowski & Anne Prestion*, The Persistence of Organized crime in New York City construction: An Economic Perspective, 42 INDUSTRIAL & LABOR RELATIONS REV. 549, 549-50 (1989), catalogued extensive corruption plaguing all aspects of construction in New York as reported by the New York State Organized Crime Task force.

The Engineer's duty to act impartially and quite independently under the pre-1999 FIDIC conditions included the duty to supervise⁷ or control and to decide upon disputes⁸. Thereafter the Engineer's decisions on disputes were binding and final and they could not be appealed except through arbitration.⁹ However, the Engineer appeared biased and acting somewhat in the interest of the Employer, and in consequence, the contractors felt more and more uncomfortable with the pre-1999 FIDIC forms of contract. Consequently, the contractor and owner started to seek alternative means for ensuring the desired cordial working relationship.

Similarly, the institutional lenders of funds to projects had expressed great concerns over the potential lack of independence of the Engineer and pressed for alternative means of decision making in the first instance.¹⁰

The Engineer's impartiality was highly contentious, especially in the civil law countries, e.g. the French believe that the power given to the Engineer under the FIDIC was exorbitant and had in certain cases poisoned the atmosphere between the contractor and Employer.

The Engineer exercised discretion independently but his actions or inactions did not expose him to any liability whatsoever under the contract between the Employer and the contractor.

⁷ E.g. under FIDIC Clause 7.6, the Engineer is empowered to order the contractor to carry out emergency remedial work without prior consultation with the Employer.

⁸ See e.g. *Mid Glamorgan County Council v Land Authority for Wales* (1990) 49 Build L.R.61, where the courts stressed that if there had not been reference to the Engineer, the arbitrator would not have jurisdiction to deal with the dispute in the absence of agreement between the parties. see also FIDIC Clause 67

⁹ See e.g. *N.W.R.H.A. v Derek Crouch* [1984] Q.B. 644; 26 Build L.R. 104, where it was held that, in a contract where an independent person was empowered to make decisions binding on the parties, a court does not have power to substitute its own views for that of the parties' chosen decision.

¹⁰ J. Jenkins and S. Stebbings, *International Construction Arbitration Law*, page 64

4. EVOLUTION MULTI-TIERED DISPUTE RESOLUTION MECHANISM

Following the distrust and suspicion that have trailed the Engineer's role, the 1999 FIDIC forms of contract¹¹ provided for specified claim rights, including procedures for the enforcement of such rights, e.g. the 1999 edition of the FIDIC Red and Yellow Books each contains about 30 sub-clauses¹² of such rights. Specifically, the FIDIC (1999 Red Book) under Clause 20, like its counterpart the ICE under Clause 66, obliges the parties to comply with the agreed mandatory¹³, multi-tiered dispute resolution mechanism before arbitration can be started.

The Dispute Board¹⁴ (DB) which is a major component of the multi-tiered dispute resolution system is one of the most important ADR techniques.¹⁵ It was introduced into the USA market in the mid-seventies¹⁶, it has been accepted as a useful technique for resolving the potentially complex and disruptive disputes that can arise in construction projects. The aim is to resolve, on an amicable basis, disputes arising in the course of execution of construction works. With the measure of success recorded in some

¹¹ See other forms of contract by international lending institutions e.g. the World Bank; the European Development Fund (EDF); the Inter-America Development Bank; the Asian Development Bank; the European Bank for Reconstruction and Development.

¹² C. R. Seppala: "Contractor's Claim Under The FIDIC Contracts For Major Works" presented at the International Construction Contracts and Dispute Resolution, co-hosted by ICC and FIDIC in partnership with the Cairo Regional Centre for International Commercial Arbitration, and published in the Construction Law Journal, London, in 2005.

¹³ The pre-arbitration procedures may just be optional so that non-compliance will not bar any claims from proceeding to arbitration as was exemplified e.g. by the interim award of 17 July 1992, Stockholm Chamber of Commerce, XXII YBCA (1997) 197 *et seq.*

¹⁴ In the context of this write up Dispute Board (DB) means a Dispute Review Board (DRB), or a Dispute Adjudication Board (DAB) or a Combined Dispute Board (CDB) composed of one or three members

¹⁵ ADR for Alternative Dispute Resolution or for Amicable Dispute Resolution (as defined by the ICC).

¹⁶ Historically, DB concept originated in the late 1960s in the United States where it was successfully used on the Boundary Dam project in Washington and then later in 1975, on the Eisenhower Tunnel Project.

large international construction contracts¹⁷ since 1981, many international institutions, including the FIDIC, ICE, ICC, World Bank, etc, have made the inclusion of the DB compulsory in their forms of contract. The use of Adjudication Board in the United Kingdom in resolving construction disputes is statutory¹⁸ and enforcement is by summary procedures in the courts.

The use of DB has come as a consolation to both the lenders and contractors who had lost faith in the contentious role of the impartial Engineer under the various standard forms of construction contracts. ¹⁹ It must be remarked that the use of DB to resolve construction disputes has grown geometrically.²⁰ The success recorded by DB over the past decade will continue to attract more practitioners in this field. Statistics have shown that about 97% of the disputes referred to DB will not go beyond that procedure into arbitration or litigation.²¹

5. ADVANTAGES OF DISPUTE BOARD

Some of the advantages ascribed to the adoption of 1999 FIDIC forms of contract include:

¹⁷ The Dispute Board techniques have been successfully used in some international construction projects amongst which are: El Cajon Dam Project, Honduras; Channel Tunnel Project (France/United Kingdom); Lesotho Highland Development Project (Lesotho - South Africa); and Gilbel Gibe Hydro-electrical Project (Ethiopia).

¹⁸ The DB under FIDIC should not be confused with the process of adjudication provided in Housing Grants, Construction and Regeneration Act 1996 of the United Kingdom

¹⁹ The World Bank and other multilateral development banks have developed standard form of contracts which include adjudication as a tier for dispute resolution; some standard form of contracts have also been issued by FIDIC, Institution of Civil Engineers (NEC and ECC); Asian Development Bank; European Bank for Reconstruction & Development, etc

²⁰ The success of DB in the United States of America led in 1975 to its mandatory provision in the World Bank Standard Bidding Documents Clause 20.2, and in 1997 to its adoption by Asian development Bank and the European Bank for Reconstruction respectively; see also FIDIC, 1999 Red Book clause 20.2; see also, the ICE in the New Engineering Contract (NEC) diffused the role of the Engineer into supervisor, project manager and adjudicator.

²¹ "What is a Dispute Board and Why Use One" by R. Gaitskell, presented on Thursday 14 October 2004, at Norton Rose, Kempson House, Camomile Street, London EC3.

- (i) Mandatory compliance with the DB provisions
- (ii) Generally, DB is permanently installed at project initiation²² and disagreements or disputes are given early attention and addressed contemporaneously²³ without the need for the historical reconstruction of events as in arbitration.
- (iii) The claims and responses are more carefully and realistically prepared than in arbitration²⁴, leading to a higher degree of credibility as spurious matters are eliminated.
- (iv) The parties could mutually agreed to initially select panel members with expertise from a range of disciplines,²⁵ and in the event of disputes the actual DB members could be appointed from the technical specialists or experts with appropriate skills in their fields.²⁶
- (v) Not only do DBs work well, but they indeed work faster, cheaper, and in a much less contentious manner than arbitration tribunals.²⁷
- (vi) The decision of a DB decision is binding on the Parties upon its receipt and the parties shall comply with it without delay, notwithstanding any expression of dissatisfaction²⁸; it is admissible as evidence as per agreement of the parties or to the extent permitted by law in subsequent arbitration or litigation.²⁹

²² See e.g. Dispute Board Rules of ICC, Art. 3; Except e.g. when using the FIDIC Conditions of Contract for Plant and Design-Build (the Yellow Book) or FIDIC Conditions of Contract for EPC/Turnkey Projects (the Silver Book) where DB could be on *ad hoc* basis; it enhances the good working relationship of the parties.

²³ N. G. Bunni, *The FIDIC forms of Contract*, 3rd edn section 26.2

²⁴ N. G. Bunni, *The FIDIC forms of Contract*, 3rd edn section 26.2

²⁵ See e.g. Channel Tunnel Project with a standing panel of five members, Hong Kong Airport Project with a seven member (six plus a convenor) panel; Channel Tunnel Rail Link Project with two standing panels (one technical and the other financial)

²⁶ J. Jenkins and S. Stebbings, *International Construction Arbitration Law*, page 64

²⁷ A Moure, *Canada Dry Arbitrations?*

²⁸ See ICC Dispute Board Rules, Art. 5 (see Art. 4.3 for Recommendation of DRB); see also FIDIC RED Book, Clause 20.4

²⁹ See ICC Dispute Board Rules, Article 9.3 and Article 25, see also "The standing Neutral Concept" in *The Construction's Guide to Dispute Avoidance and Resolution* at www.adr.org.

6. DISADVANTAGES OF DISPUTE BOARD

Some of the disadvantages of the DB include:

- (i) Dispute Boards are not arbitral tribunals and their determinations are not enforceable like arbitral awards³⁰. Under the laws of most countries, the award of an arbitral tribunal would, almost by definition, not be subject to review on the merits, whereas a decision of a Board is subject to such review³¹.
- (ii) While the Determination of the Dispute Boards may become contractually binding on the parties they are not enforceable at law, as such.³²
- (iii) The DB has not gained international acclaim.
- (iv) Dispute resolution must be properly tailored, otherwise due to uncertainty of dispute types and the required expertise, a large panel of experts in related fields must be maintained during construction.³³
- (v) The DB's mission is limited to the contract's life, thus a DB clause does not survive the nullity of the contract.
- (vi) An arbitral tribunal (appointed to hear the dispute *de novo*) is totally free to consider or disregard the recommendation of the DB.³⁴

³⁰ ICC Dispute Board Rules, Art. 1; the DB decisions are not subject to recognition pursuant to the 1958 New-York Convention.

³¹ C. Seppala, *The new FIDIC provision for a Dispute Adjudication Board*, RDAI/IBLJ, 1997/8, p. 983.

³² "ICC Dispute Board Rules - Some Points for Consideration", by H. Lloyd, a presentation at the ICC UK forum in 2004

³³ See e.g. Channel Tunnel Project with a standing panel of five members, Hong Kong Airport Project with a seven member (six plus a convenor) panel; Channel Tunnel Rail Link Project with two standing panels (one technical and the other financial)

³⁴ See also, World Bank Standard Bidding Documents, Article 20.6: 'Neither Party shall be limited in the proceeding before the arbitrator(s) to the evidence or arguments previously put before the DB to obtain its decision or to the reasons for dissatisfaction given in its notice of dissatisfaction. Any decision of the DB shall be admissible in evidence in the arbitration'; see also, ICC Dispute Board Rules, Article 25;

7. CONCLUSION

The evolution of the multi-tiered dispute mechanism in international construction projects has resulted in shielding the Engineer from getting involved in the pre-arbitration role for the disputes between the employer and the contractor, as he could neither act impartially nor independently. Thus the 1999 FIDIC has adopted the diffused role of the Engineer as is currently available in some notable international institutions³⁵ to restore confidence in the efficiency and fairness of the Engineer's role.

³⁵ See e.g. the New Engineering Contract (NEC); European Development Bank (EDB); World Bank, International Chambers of Commerce (ICC); American Arbitration Association (AAA).