

4

Multinational Practice

4 . 1 Introduction

This section of the Manual is primarily written for financing institutions, owners and their representatives, contractors and Board members on multinational construction projects. It also describes Dispute Board use in the U.K.

The term “multinational” as used herein refers to construction projects where multiple nationalities are involved in the contract. Often the foreign currency requirements for the project are obtained from a multinational development bank, such as The World Bank. The entity building the project often is part of the government of the country where the project is constructed, and the contractor typically is of a different nationality. Sometimes the contractor is a joint venture of companies of different nationalities, and may or may not include a contractor of the same nationality of the country where the project is constructed. Typically, the project will involve an organization to supervise the contractor, and the supervising entity may be of a nationality different from either that of the entity building the project or that of the contractor.

This section of the Manual uses the term “Dispute Board” (DB) to avoid the confusing array of references used by the various organizations in their documents, and to differentiate from DRBs used in North American practice.

In multinational use almost all DB practices and procedures are similar to those described in Sections 1, 2 and 3 of this Manual. However, there are some differences and those are discussed in this section.

Chapter 4.2 presents the history and general application of multinational DBs and DB practice in the U.K.

Chapter 4.3 discusses current practices and procedures that are unique to multinational DBs.

Chapter 4.4 provides links to various contract provisions for DBs.

4.2 History

The World Bank, the Fédération Internationale des Ingénieurs-Conseils (FIDIC), and the International Chamber of Commerce (ICC) have advocated multinational use of the DB process.

4.2.1 The World Bank and Other Development Banks

The first use of a DB by The World Bank was on the El Cajon hydropower project in Honduras in the 1980s. The project involved the tallest concrete arch dam in Latin America. The success of the DB at El Cajon, on which all disputes were resolved amicably by the time construction was complete, led The World Bank to suggest wider use of the technique for projects they financed.

DBs were first introduced in The World Bank's "Sample Bidding Documents for Procurement of Works" in the December 1991 edition. Developers of major projects were "encouraged to consider" a DB within the contractual procedure for settlement of disputes.

In January 1995 The World Bank published a new edition of one of its standard bidding documents entitled "Procurement of Works." As with earlier editions, it used the general conditions published by FIDIC, called "Conditions of Contract (International) for Works of Civil Engineering Construction." However, the FIDIC provision that gave "the Engineer" the duty of deciding disputes was deleted, and the use of a DB, with provisions similar to those used at El Cajon, was substituted. These provisions required the use of a DB from the outset of the contract, and all disputes were submitted to the DB for a written report and recommendation. If neither party gave written notice of objection within 14 days of receipt, the recommendation became final and binding. However, if a timely notice of objection was made, the recommendation was not binding, and it was left to the parties to continue to negotiate, with ultimate recourse to international arbitration.

Later, The World Bank provided that a three person DB must be used if the estimated cost of the contract, including contingencies, is US\$50 million or more. If the estimated cost is less than US\$50 million, the borrower can have a three or one person DB. If the estimated cost is US\$10 million or less, the borrower can use an adjudicator, appointed after a dispute arises.

Other multilateral development banks, such as the Asian Development Bank, used the same provisions, although most of the other banks simply recommended, and did not require, that borrowers adopt the DB system.

In May 2000 The World Bank published a new edition of "Procurement of Works" and modified the DB procedure to follow that of FIDIC (see below) and make immediate compliance with the recommendation mandatory, unless and until modified by an award by an international arbitration tribunal.

In May, 2005, a group of multilateral development banks and international financial institutions reached agreement on a new document "Procurement of Works and User's Guide" which abandoned the use of the 4th Edition (1987, as amended) "Conditions of Contract (International) for Works of Civil Engineering Construction," discussed in 4.2.2, below, and in its place substituted a new set of Conditions of Contract, developed in collaboration with FIDIC, an organization mentioned in 4.2.2, below.

The new Conditions are entitled "MDB Harmonized Conditions for Construction." They are a modification of the FIDIC 1999 Conditions for Construction, mentioned in 4.2.2, below. The modification is part of a "harmonization" of procurement of works by the major development lenders. The "harmonization" will simplify financing of contracts jointly by two or more development lenders,

and has created shorter and less complex documents for use by borrowers in contracting for construction work financed by the development lenders.

The new conditions require borrowers to have a Dispute Board for every contract for which any of the development lenders provide any funding, irrespective of the expected amount of the contract. The borrower has the option to select a three person Board or a one person Board, and is to indicate its choice in its Invitation to Bid. The consequence is that there will be many more Dispute Boards created, including in regions of the world where development lenders formerly recommended but did not require the use of Dispute Boards.

A sense of the sweep of this new requirement for Dispute Boards can be had from review of the institutions which have adopted the new conditions: 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.

In March, 2006, the 2005 edition of the MDB Harmonized Conditions was revised, and is available from FIDIC, at www.fidic.org/bookshop, or at The World Bank website, www.worldbank.org.

4.2.2 FIDIC

FIDIC is an international federation of national associations of consulting engineers. It publishes model forms of contract for use in international construction. The first and principal form was one for international civil works, first published in the late 1950s, with the title “Conditions of Contract (International) for Works of Civil Engineering Construction.” It became commonly known by the color of its cover, the “Red Book.” The *Red Book* was designed for construction contracts in which the contractor built to the employer’s design and was supervised an engineer, usually a firm of consulting engineers, engaged for the purpose of overseeing the work of the contractor. As it is the leading model form for use in international civil works projects, The World Bank adopted it, with changes, as noted above.

The “FIDIC Conditions of Contract” resolved disputes by written decisions of the employer’s engineer, whose decision was final, subject only to being altered by an arbitral award. When the engineer’s written decision was issued, it was effective immediately, and the parties were obliged to comply with it. Unless objected to within a stated time limit, the decision became final. If objected to within the time limit, the dispute could be taken on to international arbitration.¹ Nevertheless, the parties still had to comply with the decision unless and until the award of the arbitral tribunal altered it, which might be years later.

FIDIC uses the term “employer” instead of “owner.”
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This approach had been in use by FIDIC since the earliest publication of its model “General Conditions,” but was argued by some to be unsatisfactory for various reasons. Some of these reasons included the fact that some employers used an engineer who was part of the employer’s organization, instead of being an independent consulting engineer, and the fact that many of the disputes which required such decisions were disputes arising from the actions of the engineer, so that the engineer in effect sat in judgement on his own behaviour. Dissatisfaction with written decisions of the employer’s

¹ When differing nationalities are involved in a single contract, it can be difficult to agree to a single national court to which to turn for final resolution of disputes. This led to using international arbitration instead of a particular national court for final resolution of disputes.

engineer led to many disputes, which often would not be settled until long after completion of construction.

In 1995, FIDIC published a separate set of conditions for use on design-build turnkey contracts with major changes to the conditions of its *Red Book*. In the design-build turnkey conditions, the contractor is responsible for both design and construction, based upon a set of requirements supplied by the employer. In this new form, disputes were to be resolved by a Dispute Adjudication Board or Dispute Adjudication Expert. This was similar to the DB of The World Bank, with one principal difference: the determination of the DB, like that of the engineer under the *Red Book*, was immediately binding on the parties, and had to be complied with even if the DB determination was referred to international arbitration.

In 1996, FIDIC published a supplement to the *Red Book*, providing an optional amendment to the *Red Book*, deleting the arrangements for the engineer to make written decisions on disputes and substituting a DB, just as in the FIDIC design-build turnkey conditions.

In 1999, FIDIC published three major sets of model conditions involving DBs. The *Red Book* was given a new title, “Conditions for Construction.” Another set of conditions originally published for use in contracts for electrical and mechanical works (the *Yellow Book*) became “Conditions for Plant and Design-Build.” The third was a new set of conditions, “Conditions for EPC Turnkey” (EPC stands for engineer, procure and construct). Thus, the 1995 Design-Build Turnkey form was split to put “Design-Build” with “Plant” and “Turnkey” with “EPC.”

Only the *Red Book* has a true DB, established at the outset of the contract, unless the parties agree otherwise. The Design-Build and the Turnkey use what FIDIC calls an “ad hoc” DB, established only if and after a dispute arises, thus lacking the essential characteristic of having been in place from the beginning of the contract. Thus the “ad hoc” DB is similar to an arbitral tribunal.

FIDIC provides standard contract clauses for DBs and a model Three-Party Agreement.

4.2.3 International Chamber of Commerce

The ICC is an international entity comprised of national committees established in most countries involved in international commerce. It is well known for its ICC International Court of Arbitration, a body based in Paris which administers arbitrations held in accordance with its rules, but carried out anywhere in the world. It administers more international arbitrations than any other organization, and a large number of those arbitrations involve disputes arising in the international construction industry.

The ICC has a commission on arbitration that in recent years has become active in alternative dispute resolution. This led to the evaluation of DBs. In September 2004, the ICC published its rules on DBs, which created documents for three types of DBs:

- A Dispute Review Board, which resembles the DB as used by The World Bank from 1995 until 2000, and makes determinations that are not binding if objected to within 30 days.
- A Dispute Adjudication Board, which produces determinations that are immediately binding, although subject to review by arbitration.
- A Combined Dispute Board, which issues determinations that are not binding. However, if requested by either party, and if the Combined Dispute Board is convinced a binding determination is essential to the progress of the project, it has the power to issue a determination which is immediately binding, although subject to review by arbitration.

The ICC rules provide standard contract clauses for DBs and a model Three-Party Agreement.

4.2.4 U.K. Institution of Civil Engineers

In July 2004, the U.K. Institution of Civil Engineers (ICE) published its “Dispute Resolution Board Procedures,” to establish DBs under contracts using the ICE’s model conditions of contract, and to be compliant with England’s statutory system for adjudication of disputes arising from construction contracts.

The ICE DB procedures are based on FIDIC’s DB procedures, but contain necessary amendments to be compliant with the U.K. Housing Grants, Construction and Regeneration Act of 1996.

Under this act, parties to almost all construction contracts awarded in the U.K. are provided with a statutory right to have disputes adjudicated, at any time, by an adjudicator selected by the parties, or whose name is agreed pre-contract and stated in the contract agreement, or appointed by any one of several officially recognized Adjudication Nominating Bodies. The procedure for the adjudication (appointment, time limits for decisions, power of the adjudicator, payment of fees, etc.) must comply with specified rules set out in the act, or absent such rules, the Statutory Scheme for Adjudication (a statutory instrument published by the U.K. government) applied by default.

The ICE provides standard contract clauses for DBs and a model Three-Party Agreement.

4.3 Current Practice and Procedures

4.3.1 Training and Certification of Dispute Board Members

Many organizations, both commercial and professional, give short seminars and lectures about DBs. This training is informal and lasts only a day or two. It is not participatory training, but consists of a series of lectures with opportunity for questions.

FIDIC maintains a President's List of Approved Adjudicators, for use when asked to select DB members. The list is available to FIDIC members on the FIDIC website. The website also contains detailed instructions to apply for listing. Applicants must be members of one of the consulting engineering organizations that are members of FIDIC or themselves be members of FIDIC.

Documents are submitted with an application to facilitate assessment of the applicant's experience and standing in respect to dispute resolution. When the accumulation of applicants justifies, FIDIC arranges an Assessment Workshop, conducted by a three-person Assessment Panel. Applicants are required to become familiar with the FIDIC Conditions of Contract before attending the workshop.

The workshop is a strenuous two-day exercise. There are no lectures; instead there are a multiple choice answer quiz, an overnight assignment of writing an essay type answer to a hypothetical problem, quizzes requiring essay type answers, individual private interviews, and an end-of-workshop assignment of writing a DB decision, to be submitted within two weeks of the conclusion of the workshop. All three members of the Assessment Panel are in attendance throughout, and all review all written assignments and attend all private interviews. At the end of the assessment process, the Assessment Panel submits to FIDIC's Executive Committee a written report of its assessments of the applicants, and in due course the applicants are notified by FIDIC's executive director of the outcome of the assessment.

FIDIC plans to monitor the President's List to assure that its listees are active on DBs and require listees to report DB assignments periodically.

During the work of the task force that developed the ICC Dispute Board documents, there were discussions regarding the establishment of an ICC list of recommended Board members, but it was decided that this would be contrary to the ICC's long-standing policy of not maintaining lists of recommended arbitrators or mediators.

The World Bank does not maintain a list of recommended Board members.

Since 1996 the ICE has published a list of accredited Board members. The persons listed undergo a rigorous assessment, personal in-depth interviews, and are subject to regular review as to their continued suitability for inclusion of the list. When named as the default appointing authority, the president of the ICE appoints Board members and Chairs from the ICE DB list.

4.3.2 Member Selection

All of the standard DB documents have detailed provisions governing member selection. Generally, these provisions provide for both one-person and three-person DBs, and require that both parties to the contract approve all members.

For three-person DBs, The World Bank provisions call for selection to be made by each party selecting one member for approval by the other party, and those two select the third member, who serves as Chair. The FIDIC provisions call for selection by the same method, except that the Chair is approved

by the two parties. The ICC Rules provide for “joint appointment” by the parties of the first two members, with the third member to be proposed to the parties by the two members first chosen.

Most ideas for persons to nominate are by word of mouth or acquaintance with persons active in the field. Some parties choose from the published lists mentioned above. Parties also consult published lists of arbitrators and mediators.

Provisions are included for “default appointers” so that if either party fails to nominate a member or agreement cannot be reached on a Chair, the default appointer will select, so that neither party can prevent the formation of the DB and thus frustrate the process. Examples of default appointers are the president or vice president of FIDIC for FIDIC DBs, and the ICC Dispute Resolution Centre for DBs under the ICC. FIDIC and the ICC offer appointment services for DBs for a fee.

The ICC will hear challenges by the parties to an appointed DB member for alleged bias or partiality. A fee is charged for this service.

All three of the provisions cover replacement of DB members who resign or are incapacitated or die. The multinational DB systems deal with appointment and replacement of DB members in more detail than other DRBs.

4.3.3 Meetings

Language usually is not a problem with multinational DBs, as English is the dominant language in these contracts.

The standard forms in use in multinational contracts typically leave it to the parties to establish the frequency of regular visits of the DB. Published guidance suggests that DBs should visit quarterly. This is not a financial burden to the parties when the Board members are local to the project. However, where the DB is comprised of persons who must travel long distances, a site visit is a significant item of cost. For example, up to two days of paid travel time in each direction are normally allowed for a site visit. Often a stay in a hotel is required before proceeding on to site. Once at the site, the visit usually lasts two or three days. The result is that a routine visit can involve a week of daily fees for each Board member plus international airfares. Consequently the parties may attempt to increase the time between regular visits, endangering the effectiveness of the DB.

4.3.4 Conduct of Dispute Board Members

Conduct of Board members is most important in multinational practice. The World Bank, FIDIC and ICC provide detailed requirements to assure that DB members are and will remain independent of the parties. To this end, all Board members can strictly observe the DRBF Code of Ethics.

Persons of different nationalities, from different cultures, with different customs attend the meetings. Body language, gestures, facial expressions, and vocal inflections assume magnified importance, and must be borne in mind constantly, not only during meetings and hearings but also in social contacts between the Board members and the parties.

Board members must be aware of cultural differences. For example, there are cultures that do not like confrontation, so an aggressive voice tone or aggressive body language is unproductive. Some cultures find it difficult to express disagreement openly. This leads to seemingly bland remarks that are completely misunderstood by persons accustomed to clear, crisp statements of positions and reasons. Another challenging area is that many cultures show great respect and deference to older persons. This can carry over into what can be, and what cannot be said to older people.

4.3.5 Referral of a Dispute

Either party can refer a dispute to the DB. Some multinational contracts have added a specific requirement that the parties shall have made a strong effort to settle a dispute before referral to the DB. Others have specific reference to involvement of the DB in an attempt to resolve disagreements before they crystallize into disputes. These procedures provide for the DB to provide guidance to the parties in connection with potential disputes, similar to Advisory Opinions [2.4 and 3.5].

4.3.6 Hearings

Hearings with multinational DBs tend to be more formal than those in the North America. There are several reasons for this:

- Compared to practices in North America, multinational construction contracts tend to have less commonality between the parties. For example, the contractor may be a joint venture of firms of differing nationalities; the engineer may be a firm of consulting engineers from a different nation, and neither the contractor nor the engineer is of the same nationality as the employer. The contractor and/or the engineer may be new to the country of the project, and may not anticipate any further work in that country after completion of the contract. Thus, the parties may share little if any common attitudes and practices on construction or contractual matters.
- FIDIC and the development banks want determinations of disputes to be based on written presentations, to focus the points at issue and assure that they have been presented fully and clearly to the DB.
- Disputes on multinational construction projects often involve complex issues entailing large amounts of money. This leads to the use of lawyers to prepare written presentations to the DB to better assure clarity and completeness.
- These contracts commonly have government entities as employers. They are usually under intense scrutiny and publicity regarding resolution of problems on the project. Government officials sometimes face difficulty in settling disputes by negotiation because of the potential for charges of favouritism or even corruption. These officials want to establish a clear record of strict observance of the contract requirements, and to present every argument they can find which might defeat a claim against their government.

Nevertheless, hearings for multinational contracts usually are less formal than hearings in arbitration or litigation. The parties present their arguments through the persons who have been most directly involved in the performance of the contract. The use of lawyers to make presentations in the hearings is discouraged, except in relation to legal matters.

DB determinations are admissible in evidence in subsequent proceedings relating to the dispute.

4.3.7 Clarification and Reconsideration

The World Bank and FIDIC forms do not provide for clarification or reconsideration. As a practical matter, multinational DBs allow questions seeking clarifications, but have not engaged in reconsideration, absent new facts.

Article 24 of the ICC Rules provides for “Correction and Interpretation of Determinations.”

4.3.8 Subsequent Dispute Resolution Activities

Typical multinational DB provisions include international arbitration for final and binding resolution of disputes that have not otherwise become final and binding. This generally includes a provision that allows a shortcut to arbitration proceedings if a party fails to comply with a binding DB determination.

The standard Conditions of Contract promoted by The World Bank, FIDIC, and the ICC foresee arbitration in accordance with the published Rules of existing bodies such as the ICC International Court of Arbitration, the United Nations Commission on International Trade Law, or the London Court of International Arbitration.

The World Bank provisions foresee that a DB member can be called as a witness and give evidence before the arbitrators on any matter whatsoever relevant to the dispute. The FIDIC Guide comments: “Unless the Parties agree otherwise, no Member should participate in a future arbitration, either as an arbitrator or as witness.” The ICC Rules at Article 9(3) state: “Unless otherwise agreed by the Parties, a DB Member shall not act in any judicial, arbitration or similar proceedings relating to any Dispute, whether as a judge, as an arbitrator, as an expert, or as a representative or advisor of a Party.”

Occasionally a party fails to comply with an arbitral award, and it becomes necessary to seek enforcement of the arbitral award by appeal to a national court having jurisdiction over the person or assets of the failing party. Success in obtaining such enforcement is much easier if the nation, which was the seat of the arbitration, and the nation in which court enforcement is sought both are signatories to the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. This should be kept in mind when considering the arbitration agreement established at the time of entering the contract.

4.3.9 Termination

The standard forms of The World Bank, FIDIC, and ICC all provide that the parties can terminate one member or the entire DB by written agreement. Replacement is by the same procedure as that used in choosing the member.

The World Bank and FIDIC forms provide that the DB will be available after substantial completion of construction and during the Defects Liability Period (typically one year), but without periodic site visits - a standby arrangement in case problems of defective design, materials, or workmanship arise.

4.3.10 Compensation and Payment

Forms of The World Bank, FIDIC, and ICC have comparable payment provisions. The parties share all costs equally. Board members are paid a daily fee while working or travelling plus a monthly retainer. Expenses, including business class air travel, are fully reimbursed.

The daily fee is agreed by the parties and DB members. The World Bank documents refer to the use, unless the parties otherwise agree, of the daily fee for arbitrators as established by the International Centre for the Settlement of Investment Disputes, an organization which is part of The World Bank.

The monthly retainer is intended to cover the DB member becoming familiar with the contract, reading periodic progress reports, maintaining files, all office overhead costs, and being available to come to the site on short notice. Typically, the retainer is an amount equal to three times the daily fee.

4.4 Links to Websites

Following is a brief description of materials available on The World Bank, FIDIC, ICC and ICE web sites, with links to those sites.

The World Bank

The Standard Bidding Documents for Procurement of Works, May 2004, is available in text or PDF. See Section XIII, “Disputes Settlement Procedure, Disputes Review Board’s Rules and Procedures.”

www-wds.worldbank.org/servlet/WDS_IBank_Servlet?pcont=details&eid=000009265_3970716143954

FIDIC

All FIDIC publications are available for purchase at the bookshop at

http://www1.fidic.org/bookshop/default_contracts.asp#collection

Details of the FIDIC President's List of Approved Adjudicators are also available.

International Chamber of Commerce

The complete ICC Dispute Board Rules can be read in English or downloaded in English or French at

http://www.iccwbo.org/drs/english/dispute_boards/rules.asp

Details of the ICC's International Centre for Expertise is available at

<http://www.iccwbo.org/home/bdrs/expertise/expertise.asp>

U. K. Institution of Civil Engineers

An application form requesting appointment of a Dispute Resolution Board Member/Chair may be downloaded in PDF.

An accredited list of adjudicators with detailed CVs may be downloaded.

The Dispute Resolution Board Procedure will be available for purchase from the bookshop (at “Services”) in 2005.

http://www.ice.org.uk/knowledge/knowledge_contracts.asp