

## THE NEW FIDIC PROVISION FOR A DISPUTE ADJUDICATION BOARD<sup>1</sup>

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The most significant development in the procedure for the resolution of disputes under international construction contracts in recent years has been the introduction of the dispute review or adjudication board, or, in the case of smaller contracts, the use of a single adjudicator or expert decision-maker, to resolve disputes before, and, hopefully, instead of, arbitration.

The World Bank introduced this system into its Standard Bidding Documents—Procurement of Works in 1995<sup>3</sup> and FIDIC introduced a similar system into its Conditions of Contract for Design/Build and Turnkey (the "Orange Book") published some months later in the same year. In 1996, FIDIC issued a Supplement to its Conditions of Contract for Works of Civil Engineering Construction, fourth edition, 1987 (the "Red Book"), which provides, among other things,<sup>4</sup> for a dispute adjudication board (the "Board") consisting of either one or three persons. FIDIC proposes this as an "acceptable alternative" to the Engineer's role in dispute resolution under Clause 67 of the Red Book.

As regards the Board, the new FIDIC Supplement consists essentially of three documents: (i) Amendments to be made to Clause 67—Settlement of Disputes—and to the Appendix to Tender, (ii) a Guide to Amended Clause 67—Disputes and Arbitration, and (iii) model Terms of Appointment and Procedural Rules for the Board. The Supplement is 20 pages long (pages A-1 to A-20). For convenience, the full text of amended Clause 67 is set forth in an Annex at the end of this article.

This article will briefly: (1) review how under the new Supplement a Board is constituted and functions, (2) describe the steps in the procedure for the settlement of disputes by a Board, and (3) provide some comments on the Board procedure.

<sup>1</sup> Based on a paper presented at the 3<sup>rd</sup> World Bank/FIDIC Conference on International Procurement held in Vienna on 11 and 12 July 1996.

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<sup>3</sup> The World Bank's Sample Bidding Documents—Procurement of Works, published in December 1991, recommended the use of a disputes review board but did not propose a sample clause on the subject for introduction into its bidding documents.

<sup>4</sup> For a general description of this Supplement, see Bowcock, "The New Supplement to the FIDIC Red Book" [1997] 14 ICLR 49. The Supplement was developed from the Orange Book's Terms of Appointment for a Dispute Adjudication Board. These Terms are included as a loose-leaf insert in the Orange Book, and reproduced in FIDIC's "Guide to the Use of the Orange Book" (Lausanne, 1996).

## I. CONSTITUTION AND FUNCTION OF BOARD

As is well known, the procedure for the settlement of disputes in Clause 67 of the Red Book provides that disputes must be submitted initially to the Engineer for decision before they may be referred to arbitration.<sup>5</sup> The limitations of this procedure are also well known. As the Engineer is hired and paid by, and administers the contract on behalf of, the Employer, he is not independent of the parties and cannot reasonably be expected to be always impartial in the settlement of disputes.

The significance of the new procedure for resolving disputes before arbitration which FIDIC proposes is that it provides for a decision maker *who is completely independent of the parties and who should be able always to act impartially*. Under this new alternative, instead of having disputes submitted to the Engineer for settlement before arbitration, they would be submitted to the Board. Where this alternative procedure is adopted, the Engineer would no longer have any involvement in deciding disputes under Clause 67.

How will the Board be constituted and how will it function? Essentially, it is proposed that the Board be constituted and function as described below.

### 1. Constitution of Board

Under the FIDIC scheme, the Board is to be formed at the beginning of the construction contract. Thus, the members of the Board would either be named in the contract itself or be selected by the parties within 28 days of the Commencement Date (as defined).<sup>6</sup>

The number of members may be one or three.<sup>7</sup> FIDIC states that the main factors which should be taken into account in deciding whether to have one or three are the estimated Contract Price (if it exceeds US\$ 25 million, FIDIC suggests three members) and the types of activities to be carried out.<sup>8</sup>

As a general rule, the members should be engineers or other construction professionals with experience in the type of work involved and in the interpretation of contract documents. Exceptionally, a member may be a lawyer. Thus, in the case of the "Panel" which settles disputes under the Channel Tunnel contract (which is similar to the Board), the Chairman is a lawyer. The particular qualifications of the members should depend, it is

<sup>5</sup> See the author's "The Pre-Arbitral Procedure for the Settlement of Disputes in the FIDIC (Civil Engineering) Conditions of Contract" (1986) 3 ICLR 315 (hereinafter cited as "Pre-Arbitral Procedure") dealing with dispute settlement under the 3<sup>rd</sup> edition of the Red Book, the author's "The FIDIC Conditions of Contract for Works of Civil Engineering Construction—Fourth Edition 1987—The Principal Changes in the Procedure for the Settlement of Disputes (Clause 67)" [1989] 6 ICLR 177 dealing with dispute settlement under the 4<sup>th</sup> edition, and the author's "Pre-Arbitral Decisions and Their Impact on the Arbitration: The Decisions Made by the Consulting Engineers" in International Council for Commercial Arbitration, Congress series no. 5, Stockholm, 1990 (Deventer, Netherlands, 1991), page 376.

<sup>6</sup> FIDIC Supplement (hereinafter referred to as "Supp."), p. A-1.

<sup>7</sup> *ibid.*

<sup>8</sup> Supp. p. A-5.

suggested, on the anticipated nature of the issues that they are likely to be called upon to decide.

If there is to be only one member of the Board, then he or she is to be chosen by mutual agreement of the parties. If there are to be three members, then each party should nominate one for approval of the other party, and the parties should mutually agree on the third. As in the case of the single member Board, all members are to be agreed upon by both parties.<sup>9</sup> The purpose of this requirement is to ensure that the entire Board has the confidence of the parties.

In the case of a one-member Board or the chairman of a three-member Board, it is accepted that the Employer may propose candidates in the invitation to tender documents for tenderers to accept. However, FIDIC rightly emphasises that tenderers should not be placed under pressure to accept candidates proposed by the Employer, and neither the candidate for a one-member Board nor the Chairman of a three-member Board should ordinarily have the nationality of either party.<sup>10</sup> If the parties cannot agree on any appointment, then the position is to be filled by the appointing body or official (who may be the President of FIDIC) named in the invitation to tender.<sup>11</sup>

Each member must be, and remain throughout the contract period, independent of the parties. He must have no interest, financial or otherwise, in either of the parties and must not have been employed by either of them or the Engineer (unless this has been disclosed). Thus, each party-appointed member is not a representative of the party naming him although he can be of the same nationality as that party. When making a decision, each member is required to act impartially, as is true of the Engineer under the Red Book.<sup>12</sup>

The Employer and the Contractor are each responsible for one-half of the Board's remuneration.<sup>13</sup> If one party fails to pay its share, then the other party may pay on its behalf and recover the amount not paid, together with damages, from the party in default. If a Board member's invoices are not paid in due time then he may either suspend his services until his invoices are discharged or resign his appointment.<sup>14</sup>

## **2. Remuneration of Board Members**

The remuneration of members is to be mutually agreed upon by the Employer, the Contractor and each member. If they are unable to agree, then each member's remuneration is to consist of (i) a daily fee (for each working day) to be fixed in accordance with the daily fee established for

<sup>9</sup> Supp. p. A-1.

<sup>10</sup> Supp. pp. A-5 and A-6.

<sup>11</sup> Supp. p. A-6.

<sup>12</sup> Supp. pp. A-1 and A-6.

<sup>13</sup> Supp. p. A-1.

<sup>14</sup> Supp. pp. A-11 and A-17.

arbitrators in accordance with the regulations of the International Centre for Settlement of Investment Disputes ("ICSID"), and (ii) a retainer fee per calendar month (to ensure continued availability) equivalent to three times such daily fee, and reimbursement for reasonable expenses.<sup>15</sup>

### 3. Manner of Operation of the Board

The Board is required to be kept regularly informed about the progress of the works and visit the site regularly and/or at the times of critical construction events. In any event, the Board is expected to visit the site at least three times in any 12-month period (subject to adjustment in any given contract).<sup>16</sup> Such site visits are intended to allow the Board to keep abreast of the project, as well as of possible claim situations.

After the Board is constituted, the Employer and the Contractor must provide each member with a copy of all documents that he may request, including contract documents, progress reports, variation instructions, certificates and other papers pertinent to the performance of the contract.<sup>17</sup>

The Board is given express power to open up, review and revise any determination of the Engineer.<sup>18</sup> Subject to an 84-day time limit for giving notice of its decision (*see* Section II, Step 3 below), the Board is entirely free to establish the procedure to be applied in deciding a dispute. Among other things, it may decide the following: issues relating to its jurisdiction; what submissions, if any, are to be made by the parties; whether to hold a hearing; whether to take the initiative in ascertaining the facts; and whether to grant provisional relief such as interim or conservatory measures.<sup>19</sup> The Board may also, with the assistance of the parties, seek the advice of an outside expert, should this be necessary to make a decision.<sup>20</sup>

Where the Board consists of three members, decisions of the Board are taken by a majority vote. Decisions must be in writing and be reasoned. They are expressly stated to be admissible in evidence in any subsequent arbitration.<sup>21</sup> Members of the Board have no liability for anything done or omitted in the discharge of their functions unless the act or omission is shown to have been in bad faith.<sup>22</sup>

The Board's appointment is terminated when the written discharge, which the Contractor normally gives to the Employer with his Final Statement, becomes effective.<sup>23</sup> Prior to that time, neither party may unilaterally terminate a member's appointment, though a member may resign

<sup>15</sup> Supp. p. A-1. At the date of the publication of the FIDIC Supplement in 1996, ICSID's daily fee was US\$ 900.

<sup>16</sup> Supp. p. A-19.

<sup>17</sup> Supp. p. A-13.

<sup>18</sup> Supp. p. A-2.

<sup>19</sup> Supp. pp. A-2 to A-3.

<sup>20</sup> Supp. p. A-7.

<sup>21</sup> Supp. pp. A-2, A-3 and A-14.

<sup>22</sup> Supp. p. A-12.

<sup>23</sup> Supp. p. A-2 and Red Book Sub-Clause 60.7.

voluntarily. Otherwise, barring death or disability, a member's appointment can terminate only by mutual agreement of the parties.<sup>24</sup>

Having seen then how the Board is constituted and functions, how does the Board go about making decisions? Essentially, the procedure is the same as for the resolution of disputes by the Engineer under Clause 67.

## II. THE STEPS IN THE PROCEDURE FOR DISPUTE SETTLEMENT BY THE BOARD

To understand the procedure for the settlement of disputes by the Board provided for by Clause 67, as supplemented (the text of which, as previously mentioned, is annexed hereto), it is convenient to break it down into seven steps. Each of these steps is reviewed in sequence and briefly commented upon below:

### Step 1: There must be a "dispute" between the Employer and the Contractor

To invoke Clause 67, it is not sufficient for the Employer or the Contractor to have made a claim against the other. Instead, it is necessary that a "dispute" exist between the Employer and the Contractor in connection with the contract.<sup>25</sup> Typically, a dispute exists where the Contractor has made a claim which the Engineer or the Employer has rejected and the Contractor contests that rejection.<sup>26</sup>

The requirement of a dispute is important. If no "dispute" exists, then there can be no valid reference to the Board under Clause 67 and, thereafter, no valid reference to arbitration.<sup>27</sup>

<sup>24</sup> Supp. p. A-2.

<sup>25</sup> The presentation of financial "claims" by the Contractor (as distinct from "disputes") is dealt with in a separate clause, namely Clause 53 entitled "Procedure for Claims". See the author's "Contractor's Claims under the FIDIC Civil Engineering Contract", Fourth (1987) Edition, *International Business Lawyer*, October and November 1991.

<sup>26</sup> See *Monmouthshire C.C. v. Costelloe & Kemple* [1965] 5-BLR 83. If the determination of the Contractor's claim was first made by the Engineer's Representative (as would normally be the case), instead of by the Engineer, the Contractor should first refer the matter to the Engineer who may confirm, reverse or vary such determination, under Sub-Clause 2.3 of the Red Book. See also *Gleeson Group v. Wyatt of Snetterton* [1994] 72 BLR 15 in relation to subcontract disputes, as well as the author's "The New FIDIC International Civil Engineering Subcontract" [1995] 12 ICLR 5, pp. 18 to 21.

<sup>27</sup> See ICC Case No. 6535 in 1992 reported (in French translation) in the *Journal du Droit International* [1993] Vol. 1, p. 1024. See also the author's *Pre-Arbitral Procedure*, especially pp. 317 to 322. On the other hand, if the Board were to decide that there was no dispute in a given case, its decision would not be dispositive. A party could still (by following the new Clause 67 procedure) refer such issue to an ICC arbitral tribunal for decision. If the arbitral tribunal were then to find that there was in fact a dispute, in the author's view, the arbitral tribunal should assume jurisdiction and proceed to decide the dispute on its merits. There would seem little point in getting the Board's view of the merits at that point as, unlike an Engineer, the Board would ordinarily not have detailed first-hand knowledge of the project of its own to contribute to a resolution of the dispute.

**Step 2: The "dispute" must be Referred in Writing to the Board for Decision**

It is clear that it is mandatory to refer disputes to the Board, as Sub-Clause 67.1 states that: "If a dispute ... arises between the Employer and the Contractor ... *the dispute shall initially be referred ... to*" the Board (emphasis added).

Under English law, at least, the courts will stay court proceedings in favour of a procedure where the parties have agreed to refer disputes to a panel of experts like the Board and then to arbitration. Thus, in *Channel Tunnel Group Ltd. v. Balfour Beatty Construction and others* [1993] AC 334, the House of Lords stayed proceedings brought by an employer for an injunction to restrain a contractor from suspending work, in light of a clause in the contract providing for the reference of all disputes to a panel of experts before arbitration. The holding in the *Channel Tunnel* case has been incorporated into Section 9(2) of the English Arbitration Act of 1996, which provides that a party to an arbitration agreement may apply to stay litigation even though "the matter is to be referred to arbitration *only after the exhaustion of other dispute resolution procedures*" (emphasis added).

According to Sub-Clause 67.1, the letter or other document referring a dispute to the Board must state that the reference is made under Sub-Clause 67.1. A copy of the document must be sent to the other party and (for information) to the Engineer. The parties must make available to the Board all additional information, further access to the site, and appropriate facilities as the Board may require for the purposes of rendering a decision.

In the letter or other document referring a dispute to the Board, a party needs to take great care as to how it defines the scope of the dispute, as this will determine the scope of the jurisdiction of the Board and, in the event of a subsequent arbitration, the scope of the jurisdiction of the arbitrator(s). This is because the arbitrator(s) can only take jurisdiction of a dispute which has previously been referred to the Board and the jurisdiction of the arbitrator(s) over that dispute cannot exceed the scope of the dispute submitted to the Board for decision.<sup>28</sup>

**Step 3: The Board must give Notice of its Decision, Acting as Panel of Expert(s), and not as Arbitrator(s), to the Parties and (for information) to the Engineer, within 84 days**

When the Board gives a decision, the decision must be reasoned and state that it is given under Sub-Clause 67.2. Once given, it is immediately binding

<sup>28</sup> Sub-Clause 67.4 expressly provides that the jurisdiction of the arbitrator(s) is limited to any dispute in respect of which the decision, if any, of the Board has not become final and binding and amicable settlement has not been reached.

As an alternative to seeking the decision of the Board on a dispute, the parties may also, provided they act jointly, seek an opinion from the Board on any matter, with a view to avoiding a potential dispute. Supp. p. A-6.

on the parties and must be respected, even if a party is dissatisfied with it (the decision can only be revised by an amicable settlement or an arbitral award). As discussed in Section 1 above, the Board has broad freedom to establish the procedure for making a decision. Nevertheless, the question is sometimes raised, at least in common law jurisdictions, whether adjudicators, like the members of a Board, may decide questions of law. An Australian case has decided that they may do so.<sup>29</sup> In that case, in response to the contention that they may not, the court stated that the parties should have considered the potential difficulties of using a single alternative dispute resolution process for all disputes prior to the execution of their contract.

The decision must be given within 84 days. This period can only be extended by an amendment to the contract which, as a practical matter, the parties are unlikely to agree to save in exceptional circumstances.

**Step 4: If Either Party is Dissatisfied with the Board's Decision (or it fails to give a Decision within 84 days) then either may, within 28 days, Notify the Other (and for Information, the Engineer) of its Dissatisfaction**

According to Sub-Clause 67.2, the notice of dissatisfaction must state that it is given under Sub-Clause 67.2 and set out the matter in dispute and the reason(s) for dissatisfaction. The effect of the giving of the notice of dissatisfaction is to establish the party's contractual right to take the matter to arbitration under the arbitration clause in Sub-Clause 67.4. This follows from Sub-Clause 67.2 which provides that ordinarily no arbitration in respect of a dispute may be commenced unless such notice of dissatisfaction has been given.<sup>30</sup>

If neither party has given notice of dissatisfaction within 28 days of receiving the Board's decision, then neither will have acquired the right to have the dispute arbitrated and the Board's decision is said to become "final and binding" upon the parties. As a practical matter, this means that each party is bound to comply with it, failing which such party is liable for breach of contract.

If a party fails to comply with a final and binding decision of the Board, then the other party may exercise such rights to enforce the decision, if any, as may be available to him. Such a decision should not ordinarily be enforceable like an international arbitral award as, among other things, Sub-Clause 67.2 expressly provides that the Board acts as a panel of experts and not as arbitrator and the possibility of arbitration is expressly provided

<sup>29</sup> *Public Authorities Superannuation Board v. Southern International Developments Corporation Pty Ltd.* (1987) unreported (Smart J in Common Law Division of New South Wales, decision no. 17986 of 19 October 1987) cited by Burke and Chinkin in "Drafting Alternative Dispute Resolution Clauses" [1990] ICLR 443. Similarly, the author has taken the position that the Engineer should be able to decide questions of law under unamended Clause 67 and there are US cases to support this view, see the author's *Pre-Arbitral Procedure*, especially pp. 327-329.

<sup>30</sup> There is no obligation, however, to proceed to arbitration merely because a notice of dissatisfaction has been given.

for at a later stage, under Sub-Clause 67.4. Under English law, at least, it has been determined that an adjudicator's decision is not an arbitration award.<sup>31</sup>

Nonetheless, it may be possible to enforce a decision of a Board in summary proceedings before the courts of certain jurisdictions. Thus, under English law, it may be possible to seek summary judgment in respect of a final and binding decision of a Board under RSC 14.<sup>32</sup> Similarly, under English law, in at least one case, the decision of an adjudicator has been enforced by a mandatory injunction.<sup>33</sup>

Where other means of enforcement are unavailable, Sub-Clause 67.5 provides that a party may refer a failure to comply with a final and binding decision itself to arbitration directly, without being obliged to refer the failure to comply with the decision itself to the Board for decision. Thus, a second reference to the Board of the same underlying dispute can be avoided.

Where a party refers a failure to comply with a final and binding decision to arbitration, the party should have a good case for requesting the ICC's International Court of Arbitration and the arbitral tribunal to accord it an expedited procedure. Thus, although a final and binding decision of a Board will not itself be internationally enforceable like an arbitration award, it may not take that long (if the decision is otherwise satisfactory and an appropriate arbitration strategy is adopted) to transform such a decision into such an award.

#### **Step 5: Where a Party has given a Notice of Dissatisfaction, both Parties have 56 days thereafter to Attempt Amicable Settlement**

As is the case under unamended Clause 67, where a notice of intention to commence arbitration has been given, the parties are required to attempt to arrive at an amicable settlement of their dispute for 56 days before arbitration may be commenced.

As FIDIC has explained,<sup>34</sup> the purpose of this provision is to provide contractual justification for the opening of settlement discussions before arbitration. This justification may be helpful or necessary to enable certain persons, such as officials with state-owned or public bodies, to participate in settlement discussions immediately before a possible arbitration as, in the absence of such a provision, such participation could be seen as an unacceptable sign of weakness or capitulation in the face of a threatened arbitration.

<sup>31</sup> *A. Cameron v. John Mowlem Company* [1990] 52 BLR 24. Whether such a decision constitutes an arbitration award in any given case will, ultimately, be a matter to be decided under the relevant national law. The view expressed here is, simply, that it was not the intention of FIDIC that a decision of the DAB should constitute such an award.

<sup>32</sup> Order 14, Summary Judgment, Rules of the Supreme Court.

<sup>33</sup> *Drake & Scull Engineering Ltd. v. McLaughlin & Harvey* [1992] 60 BLR 102.

<sup>34</sup> See FIDIC's *Guide to the Use of FIDIC Conditions of Contract for Works of Civil Engineering Construction* (Lausanne, 1989), p. 155.



No sanction is stipulated, however, should either or both of the parties neglect to attempt to arrive at an amicable settlement.

**Step 6: Any Dispute which has Neither become Final and Binding nor been Amicably Settled is to be Finally Settled by International Arbitration**

According to Sub-Clause 67.4, unless otherwise specified, the arbitration is conducted under the Rules of Arbitration of the International Chamber of Commerce (the "ICC"). As Clause 67 of the Red Book has provided for ICC arbitration since the Red Book's first edition in 1957, there is a lot of experience of ICC arbitrations under the Red Book and a number of such awards have been published.<sup>35</sup>

Whereas Clause 67 expressly provides that arbitration may be commenced prior to or after completion, as a practical matter, arbitration (which is more likely to be initiated by the Contractor than the Employer) will usually begin after completion, when the Contractor can assess his overall financial position in relation to the project and determine whether the expense and time of such a proceeding is justified. As there is no contractual time limit by which arbitration must commence, the only time limit is that fixed by the relevant statute of limitations (or, in civil law countries, period of prescription) established by applicable law.

The arbitrators are given express power "to open up, review and revise" any decision of the Board, as well as any opinion, instruction, determination, certificate or valuation of the Engineer, relating to the dispute. Thus, the arbitrators have the express power to decide *de novo* all questions of fact, contract interpretation and law relating to a dispute.

Neither party is said to be limited in the proceedings before the arbitrator(s) to the "evidence or arguments" put before the Board to obtain the Board's decision. At the same time, the jurisdiction of the arbitrator(s) is limited (as discussed earlier) to the disputes which have been referred to the Board and otherwise passed through the channels of Clause 67.

Owing to the various time periods under the clause, it may not be possible to begin arbitration until 168 days (that is, 24 weeks or nearly 6 months) after a dispute has been referred to the Board. This number of days is the result of adding up the earlier time periods referred to in the Clause.

<sup>35</sup> ICC awards, or extracts of such awards, in relation to the Red Book have been published in the ICLR, *Journal du Droit International* ("Clunet"), published in France, and *Yearbook Commercial Arbitration* published by the International Council for Commercial Arbitration, as well as in *The ICC International Court of Arbitration Bulletin*, Vol. 2, No. 1, June 1991.

**Step 7: When the Contract is Completed and the Appointment of Members of the Board Expires, any Dispute may be Settled by Arbitration Directly**

Under the Red Book, the Engineer's administrative responsibilities essentially terminate upon delivery of the Defects Liability Certificate,<sup>36</sup> which normally will occur one year after the Works have been taken over. However, if, after delivery of the Defects Liability Certificate, the Contractor wishes to refer a dispute under Clause 67, it would appear that the Contractor must still refer the dispute to the Engineer before it can be referred to arbitration. This is, arguably, the case since nothing in the Red Book states that this condition to arbitration lapses upon, for example, the delivery of the Defects Liability Certificate.<sup>37</sup> On the other hand, it ordinarily makes little practical sense for the Engineer to remain available, after the delivery of the Defects Liability Certificate, merely to decide disputes under Clause 67.

This issue has now been cleared up in the new provisions for a Board. According to Sub-Clause 67.6, when the appointment of the members of the Board has expired (normally when the discharge given by the Contractor under Sub-Clause 60.7 has become effective), any dispute may be referred directly to arbitration under Sub-Clause 67.4. Thus, it is now clear that it does not need to be referred beforehand to anyone (such as the Board, under amended Clause 67) for a decision.

### III. COMMENTS ON THE BOARD PROCEDURE

#### 1. Effectiveness of the Board Procedure

The procedure for a decision by the Board is likely to be a more effective system for the resolution of disputes than the procedure for a decision by the Engineer. Unlike the Engineer, the Board is a completely neutral body. The members of a Board are appointed and paid by both parties. The Board has no other role under the contract than to decide disputes (or to give opinions on contentious issues when requested to do so by both parties). On the other hand, the Engineer administers the contract and may have designed the works, with the consequence that its own actions (or inactions) may themselves be the subject of dispute. Hence, when called upon to decide a dispute, the Engineer may itself be involved in a conflict of interest.

Nevertheless, the merits of the Board should not be overstated. As the Board must render a decision within 84 days, there may be no opportunity for the parties to make submissions, or for a hearing, or for the presentation of

<sup>36</sup> See Sub-Clause 62.1.

<sup>37</sup> However, in the case of an arbitration under a contract based on the second edition of the Red Book, it has been held that where, after expiration of the Period of Maintenance (which corresponds to the Defects Liability Period under the fourth edition), the Engineer is no longer in office, the Contractor is excused from having to refer a dispute to the Engineer under Clause 67 as a condition precedent to arbitration. Partial Award dated 30 June 1995 in ICC case no. 7748 (unpublished).

expert evidence, and the Board may have little or no time for independent investigation or even reflection. Thus (like its predecessor, the Engineer), the Board cannot be expected to decide disputes with the rigour or thoroughness of international arbitration where, as the "rules of natural justice" must be observed, each party is given a reasonable opportunity to present its case. As the procedure before the Board is a summary procedure, the Board may be of relatively limited value in the case of, for example, very big or complex disputes. Furthermore, as seen earlier, the Board's decision will not ordinarily constitute an arbitration award and, consequently, may not be readily enforceable internationally.

The Board procedure may afford the claimant, who can decide when and in what form to submit a dispute to the Board, an undue advantage. The time allowed to the claimant to prepare an initial submission or reference to the Board is unlimited, whereas the respondent will have only a few weeks at most to answer, as the Board must decide a dispute within 84 days. This may be insufficient time in which to answer to a well prepared, detailed claim.

However, for the majority of disputes, the advantages of the Board should outweigh its disadvantages. It allows for speedy, interim decisions by technically qualified persons, independent of the parties, and yet familiar with the project. While the decisions of the Board cannot be expected to have necessarily been prepared with the care of arbitration awards, the Board satisfies the need in construction for quick and roughly accurate decisions, by a neutral decision-maker. In most instances, this is as much justice as an international contractor requires and, where a serious error may have occurred, it may still refer the matter to international arbitration.

The institution of the Board can be expected to reduce the need to resort to international arbitration for at least three reasons:

- (i) As the Board is entirely independent of the Employer, the Board may reasonably be expected (as mentioned earlier) to render more fair and impartial decisions than the Engineer. Where decisions can reasonably be believed to have been made fairly and impartially, each party is less likely to want to take the matter to arbitration.
- (ii) The decision of the Board may be submitted as evidence in a later arbitration, where it will have more weight, in principle, than an Engineer's decision, because the Board consists of professionals who, although they will not be as familiar with the project as the Engineer, are independent of the parties and have been chosen with their consent. As a Board's decision will have more weight, a party may be less inclined to challenge it by arbitration.
- (iii) Under the ICC Rules of Arbitration, the arbitrator(s) must fix and allocate the costs of the arbitration between the parties.<sup>34</sup> In determining how the costs of an arbitration are to be allocated, a

<sup>34</sup> Article 20 of the ICC Rules of Arbitration. Costs are defined broadly in Article 20 to include all costs of the arbitration including lawyers' fees and expenses, arbitrators' fees and expenses and administrative costs of the ICC.

party may invite the arbitral tribunal to take due account of whether and, if so, to what extent the arbitrators' award differs from the decision of the Board. To take an example, if there is little difference between the arbitrators' award and the Board's decision, the respondent in the arbitration may argue that the arbitration should not have been brought and therefore that the claimant should be made to bear all the costs of the arbitration. This factor may cause a party to hesitate before referring a Board's decision to arbitration.

As the decision of the Board is more likely to be dispositive of a dispute than the decision of the Engineer, parties are likely to approach a Board with more caution, and hence Board proceedings are likely to be more elaborate than those, if any, before an Engineer under Clause 67. As disputes are more likely to be finally decided at the level of the Board, each side will have an interest to make more of an effort to obtain the "right" decision from the Board than was the case when each had to submit a dispute merely to the Engineer. Hence, the parties may take more care in the preparation of their oral and written submissions to the Board and proceedings will possibly be more formal than is the case with the Engineer under Clause 67. The more important the dispute, the more careful and extensive the parties' preparation is likely to be.

The Channel Tunnel experience is of interest here. In that project a form of Board called a "Panel" was used. According to one report, the first Panel meeting was held with just six other people present and lasted one hour and the Panel spoke directly to the parties without the intervention of legal representatives. However, at the end of the project, Panel hearings became highly sophisticated legal presentations with each side having a team of up to 50 people. Hearings were conducted in a style not too dissimilar from an arbitration.

As the Channel Tunnel is a mega-project in size, it is not a good example of what will usually happen. It is *an extreme case*. But this example confirms that the procedure before the Board is likely to be more formal and elaborate than is true of the Engineer's decision procedure under Clause 67, though still quicker, cheaper and almost certainly less formal, than an international arbitration. This, in turn, is likely to induce parties to resolve their disputes without referring them to the Board. Thus, the very existence of the Board may promote the amicable resolution of disputes. Furthermore, as the members of the Board (or most of them) are likely to be in place for the life of the project, a party will ordinarily have an interest in avoiding taking tenuous or extreme positions, which might undermine its credibility with the Board in relation to subsequent disputes where more may be at stake, or its contractual or legal position is stronger. This factor may also somewhat reduce references to the Board.

Under Clause 67 of the Red Book, the Employer in practice rarely referred disputes to the Engineer. The Employer also rarely commented openly (that is, to the Contractor's knowledge) on references made by the Contractor to

the Engineer under Clause 67. The Employer left it largely, if not wholly, to the Engineer to deal with the Contractor's references under Clause 67.

But as the Board is, unlike the Engineer, wholly independent of the Employer, the Employer must now be prepared, within a short time period, to make submissions to the Board in reply to the Contractor's submissions and be as ready as the Contractor to make initial references of disputes to the Board for decision. Few Employers or Engineers (on behalf of Employers) may yet be ready, by training or experience, to take on these new tasks. Unlike a Contractor, they are not in the habit of preparing submissions to a third party in order to persuade that person to accept their point of view. On the other hand, if Employers fail to assume a sufficiently active and assertive role, they risk receiving adverse decisions from the Board, which can only be overturned if they themselves initiate arbitration, something Employers are usually not inclined to do.

## **2. Selecting Qualified Board Members**

A critical issue will be selecting qualified engineers and other professionals who are available and willing to serve as members of a Board. Just as the effectiveness of arbitration depends largely on the quality of the arbitrators, so the effectiveness of a Board will depend, largely, upon the quality of its members.

The initial appointees to a Board will be very important as, once selected, members cannot be changed without the agreement of both parties. Thus, on a major project, the members may be in place for five or ten years or more (e.g. the members of the Panel for the Channel Tunnel have reportedly been in office for ten years or more). Indeed the FIDIC rules might be improved if it were made easier to replace a member (e.g. by providing at least for mandatory retirement at a specified age) without making it so easy to do so that such rules could be abused.

Each party needs thoroughly to investigate the background of each candidate for a Board, not just the one whom the party proposes, because each party must approve all members and because one "bad" member (e.g. a member who is not available when needed, or who is partisan or obstructive) can block or delay the work of the Board as a whole; as no member can be removed prematurely without the consent of both parties.

While FIDIC, the ICC's International Centre for Expertise and various other bodies are prepared to offer their services to help appoint members to a Board, as adjudication is so new, no international institution has so far had substantial experience in making such appointments.

Whereas the relevant construction sites are likely to be in the developing countries (often in remote, difficult to reach, locations), most of the best qualified candidates for a Board, in terms of technical qualifications and

experience, are likely to be in the developed countries. Hence, there may at least be a problem of availability of members on short notice. In addition, the best qualified candidates may insist on higher levels of remuneration than those provided for by the ICSID fee scale referred to in Sub-Clause 67.1. (See Section I(2) above.)

A further difficulty is that no one can predict at the outset of a given contract how busy a Board thereunder may be, making it very hard for prospective appointees to know what demands will be made on their time. Members of the Panel for the Channel Tunnel contract could reportedly have considered it a full-time job, although they had not planned on this at the outset. On the other hand, in other cases the members may have little or nothing to do.

While members of a Board will usually be construction professionals (engineers, quantity surveyors or project managers), in the case of major projects, it may be advisable for the Chairman of the Board to be a lawyer. In the case of the Panel for the Channel Tunnel contract, the Chairman is (as previously indicated) a French law professor who is an expert in construction law.

### **3. Should the Board make a Recommendation or Decision?**

Under the procedure for a "disputes review board" provided for in the World Bank's Standard Bidding Documents, such board issues a "recommendation" on a dispute rather than a "decision" as provided for in the case of the Board under FIDIC's proposal. This may lead one to enquire which method of dealing with a dispute is the better solution.

In the case of an international construction contract at least, it seems a better solution, in the author's view, for the Board (or disputes review board) to issue a "decision". In international contracts, parties usually want a resolution of the dispute, even if it is only of an interim nature. If the Board concludes that a Contractor should receive a specified payment, the Contractor will prefer to know that it has a clear right to be paid. This is the case when it receives a favourable "decision" from the Board as, even if the Employer elects to challenge the "decision", it is required to give effect to that "decision" in the meantime. Similarly, if there is a "decision" that the Contractor should be paid, it will be easier for the Employer's staff to justify to higher authority or to relevant financing institutions (or both) that the payment must be made, than if there is merely a "recommendation". With a "decision", the parties will know exactly what their rights are, subject to possible later arbitration. On the other hand, a "recommendation" (even a "final and binding" one, as referred to in the World Bank's Standard Bidding Documents,<sup>39</sup> whatever this may mean) leaves the parties' rights in a state of uncertainty. As no payment is required, no one may feel it need be made.

<sup>39</sup> World Bank's Standard Bidding Documents—Procurement of Works, January 1995, p. 205.

Consequently, the dispute may remain unresolved except through subsequent arbitration.

#### 4. Risk that Board Procedure be Deemed an Arbitration

The system of disputes review or adjudication boards, which developed originally in the United States, is generally accepted in the common law countries as a procedure which is distinguishable from arbitration. Under English law, it is known as "interim expert determination" or "adjudication"<sup>40</sup> and under US law as "expert determination".<sup>41</sup>

However, in some countries, it cannot be excluded that the Board procedure would be considered an arbitration. If it were an arbitration, then the relevant statutory provisions dealing with arbitration would apply, making it necessary, among other things, to observe the requirement that each party be given a reasonable opportunity to present its case (known in French law as *le principe du contradictoire*) and making the Board's decision enforceable like an arbitration award.

In their recent treatise on international commercial arbitration law, Messrs Fouchard, Gaillard and Goldman, three experts on French arbitration law, state (translation):

"If the parties confer on a third party whom they call an expert a power of decision (either to resolve a technical dispute or to value an asset or an amount of damages) this third party, not having only a purely consultative mission, is in reality either an arbitrator, or—in the absence of a dispute—a common agent..."<sup>42</sup> (Emphasis added)

As the members of the Board are expressly called upon to decide a dispute by a "binding" decision (the decision must be given effect even if challenged), they might be arbitrators under this definition.<sup>43</sup> While these eminent authors may only mean here a procedure where a dispute is referred to a third party whose decision will be "final" (that is, not reviewable by another tribunal), and not merely "binding", they refer explicitly thereafter in the same chapter (dealing with "the notion of international commercial arbitration") to the procedure whereby disputes are decided by a Panel under the Channel Tunnel contract, without expressing an opinion as to whether they consider this procedure to amount to an arbitration under French law or not.<sup>44</sup> The procedure for the resolution of disputes under the

<sup>40</sup> Kendall, "Expert Determination in Major Projects", *International Business Lawyer*, April 1997, p. 173.

<sup>41</sup> Dykes, *Advantages and Disadvantages of Expert Determination as Compared to Other Methods of Dispute Resolution* (paper presented to the Section on Business Law, International Bar Association, 12<sup>th</sup> Biennial Conference, Paris, September 1995).

<sup>42</sup> *Si les parties confient à un tiers qu'elles appellent expert un pouvoir de décider (soit pour trancher un litige technique, soit pour procéder à l'évaluation d'un bien ou d'un dommage), ce tiers, n'ayant plus une mission purement consultative, est en réalité soit un arbitre, soit—en l'absence de contestation—un mandataire commun...* Fouchard, Gaillard, Goldman, *Traité de l'Arbitrage Commercial International* (Paris, 1996), p. 22.

<sup>43</sup> See also Article 1496 of the French *Nouveau Code de Procédure Civile* which provides that (translation): "The arbitrator decides a dispute..." and which is often referred to by French legal authors when seeking to define arbitration under French law.

<sup>44</sup> Fouchard, Gaillard, Goldman, p. 23.

Channel Tunnel contract is the same in all relevant respects as that contained in Clause 67 of the Red Book except that a Panel of Experts is substituted for the Engineer or (under the new FIDIC Supplement) the Board.

Another expert on French arbitration law, Mr de Boissésou, in his well known treatise on French and international arbitration law,<sup>45</sup> states that two criteria distinguish arbitration from *expertise*<sup>46</sup>: (i) the existence (in the case of arbitration) of a dispute, and (ii) the intention of the parties to confer a jurisdictional power upon a third party (the arbitrator). Arguably, the Board procedure satisfies both of these criteria. As is true under English law,<sup>47</sup> the fact that the parties describe the members of the Board as being experts and not arbitrators is not conclusive as to whether the procedure is an arbitration under French law.<sup>48</sup>

A persuasive reason, in the author's view, for contending that the Board procedure should not be considered an arbitration, whether under French or any other law, is the explicit provision in the new Clause 67<sup>49</sup> that the decisions of the Board may be opened up, reviewed and revised in an ICC arbitration. 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 review.<sup>50</sup>

Hopefully, when procedures for the resolution of disputes (at least on an interim basis) by an expert or panel of experts, like the Board, are more widely used and become better known and understood internationally, the risk that they may be considered under the laws of some countries as involving an arbitration, perhaps because they do not fall readily into another existing legal classification, will diminish or cease to exist.

#### IV. CONCLUSION

FIDIC's proposed alternative of having disputes settled by the Board procedure instead of the Engineer is a welcome development. The availability of this alternative will help to redress the imbalance in favour of the Employer that has long existed in Clause 67 of the Red Book. The Board can provide a neutral and objective, even if rough and ready, prediction of

<sup>45</sup> de Boissésou, *Le Droit Français de l'Arbitrage* (Paris, 1990), pp. 182-4.

<sup>46</sup> A French civil procedure under which a court or arbitral tribunal appoints an independent expert to give an opinion to it in relation to a technical issue or issues involved in a court case or arbitration. *Nouveau Code de Procédure Civile*, Articles 232 to 284-1.

<sup>47</sup> Kendall, *Expert Determination*, second edition (London, 1996), p. 96.

<sup>48</sup> *Nouveau Code de Procédure Civile*, Article 12.

<sup>49</sup> Supp. p. A-3.

<sup>50</sup> In an analogous situation, under one interpretation of Article V.1(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the "New York Convention"), an arbitral award is not "binding" (and thus not internationally enforceable under the New York Convention) if it is subject to "ordinary" appeal, that is, a *de novo* review on the merits. See van den Berg, *The New York Convention of 1958* (Deventer, Netherlands, 1981), page 342.



an arbitral tribunal will decide, at modest cost<sup>51</sup> and within a short time frame compared to international arbitration. This should enable more disputes to be finally settled without arbitration than was true when disputes were referred to the Engineer. If the decision of a Board should not finally resolve a dispute to the parties' satisfaction, it may nevertheless serve to reduce the gap between the two parties' positions, and thereby improve the chances that the parties themselves will be able to negotiate an amicable settlement and thus avoid arbitration. It is noteworthy that, according to reports so far, in contracts where Boards or similar bodies (such as disputes review boards, independent adjudicators or panels of experts) have been used, there have been relatively few cases where disputes proceeded to arbitration or litigation and, where they have done so, they have usually been settled before an arbitration award or judgment was rendered.<sup>52</sup>

### ADDITIONAL NOTE

In July 1997, as this article was going to press, FIDIC issued a Supplement to its Conditions of Contract for Electrical and Mechanical Works, third edition, 1987 (the "Yellow Book") providing for a dispute adjudication board procedure which is modeled on, and very similar to, the procedure applicable to the Red Book described in this article.

### ANNEX

#### DISPUTE ADJUDICATION BOARD

The following amendments to Clause 67 in Part I General Conditions of the Conditions of Contract for Works of Civil Engineering Construction and to the Appendix to Tender are to be made if it is decided to replace the Engineer as the decision maker by a Dispute Adjudication Board. The amendments to Clause 67 should be included in Part II Conditions of Particular Application.

#### **Amendments to be made to Clause 67—Settlement of Disputes**

*Delete the text of Clause 67 and substitute:-*

#### **Settlement of Disputes and Arbitration**

##### **67.1 Dispute Adjudication Board**

*If a dispute of any kind whatsoever arises between the Employer and the Contractor in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any opinion, instruction, determination, certificate or valuation of the Engineer, the dispute shall initially be referred in writing to the Dispute Adjudication Board (the "Board") for its decision. Such reference shall state that it is made under this Sub-Clause.*

*Unless the member or members of the Board have been previously mutually agreed upon by the parties and named in the Contract, the parties shall, within 28 days of the Commencement Date, jointly ensure the appointment of the Board. The Board shall comprise suitably qualified persons*

<sup>51</sup> Experience in the United States suggests that the additional cost is far less than the cost of arbitration or litigation. Matyas, Mathews, Smith and Sperry, *Construction Dispute Review Board Manual* (New York 1996), pp. 6-7.

<sup>52</sup> *ibid.*, p. 14. This conclusion also appears to be reinforced by experience with the Panel of Experts under the Channel Tunnel contract.

as members, the number of members being either one or three, as stated in the Appendix to Tender. If the Board is to comprise three members, each party shall nominate one member for the approval of the other party, and the parties shall mutually agree upon and appoint the third member (who shall act as chairman).

The terms of appointment of the Board shall:

- (a) incorporate the model terms therefor published by the *Fédération Internationale des Ingénieurs Conseils (FIDIC)*, as they may have been amended by the parties,
- (b) require each member of the Board to be, and to remain throughout his appointment, independent of the parties,
- (c) require the Board to act impartially and in accordance with the Contract, and
- (d) include undertakings by the parties (to each other and to the Board) that the members of the Board shall in no circumstances be liable for anything done or omitted in the discharge of their functions unless the act or omission is shown to have been in bad faith; the parties shall indemnify the members against such claims.

The terms of the remuneration of each member of the Board, including the remuneration of any expert from whom the Board may seek advice, shall be mutually agreed upon by the Employer, the Contractor and each member of the Board when agreeing the terms of appointment. In the event of disagreement, the remuneration of each member shall include a daily fee in accordance with the daily fee established from time to time for arbitrators under the administrative and financial regulations of the International Centre for Settlement of Investment Disputes, a retainer fee per calendar month equivalent to three times such daily fee and reimbursement for reasonable expenses. The Employer and the Contractor shall each be responsible for paying one-half of the Board's remuneration.

The appointment of any member of the Board may be terminated (other than on a member's own initiative) only by mutual agreement of the Employer and the Contractor. The appointment of each member of the Board shall expire when the discharge referred to in Sub-Clause 60.7 shall have become effective, or at such other time as the parties may mutually agree.

If at any time the parties so agree, they may appoint a suitably qualified person or persons to replace (or to be available to replace) any or all members of the Board. Unless the parties agree otherwise, the appointment will come into effect if a member of the Board declines to act or is unable to act as a result of death, disability, resignation or termination of appointment. If any of such circumstances should occur and no such replacement is available, the member shall be replaced in the same manner as such member was nominated or agreed upon.

If any of the following conditions apply, namely:

- (a) the parties fail to agree upon the appointment of the sole member of a one-person Board within 28 days of the Commencement Date,
- (b) either party fails to nominate a member (acceptable to the other party), for a Board of three members, within 28 days of the Commencement Date,
- (c) the parties fail to agree upon the appointment of the third member (to act as chairman) for a Board of three members within 28 days of the Commencement Date, or
- (d) the parties fail to agree upon the appointment of a replacement member of the Board within 28 days of the date on which a member of the Board declines to act or is unable to act as a result of death, disability, resignation or termination of appointment,

then the appointing body or official named in the Appendix to Tender shall, after due consultation with the parties, appoint such member of the Board, and such appointment shall be final and conclusive.

#### **67.2 Procedure for Obtaining the Board's Decision**

When in accordance with Sub-Clause 67.1 a dispute is referred by one party to the Board, a copy of such reference shall be sent by that party to the other party and (for information) to the

Engineer. The parties shall promptly make available to the Board all such additional information, further access to the Site, and appropriate facilities, as the Board may require for the purposes of rendering a decision.

The Board shall have full power, among other things, to:

- (a) establish the procedure to be applied in deciding a dispute,
- (b) decide upon the Board's own jurisdiction, and as to the scope of any dispute referred to it,
- (c) take the initiative in ascertaining the facts and matters required for a decision,
- (d) make use of its own specialist knowledge, if any,
- (e) decide upon the payment of interest in accordance with the Contract,
- (f) decide to grant provisional relief such as interim or conservatory measures, and
- (g) open up, review and revise any opinion, instruction, determination, certificate or valuation of the Engineer related to the dispute.

No later than the eighty-fourth day after the day on which it received such reference, the Board, acting as a panel of expert(s) and not as arbitrator(s), shall give notice of its decision, to the parties and (for information) to the Engineer. Such decision, which shall be reasoned, shall state that it is given under this Sub-Clause.

Unless the Contract has already been repudiated or terminated, the Contractor shall, in every case, continue to proceed with the Works with all due diligence, and the Contractor and the Employer, as well as the Engineer, shall give effect forthwith to every decision of the Board, unless and until the same shall be revised, as hereinafter provided, in an amicable settlement or an arbitral award.

If either party is dissatisfied with the Board's decision, then either party, on or before the twenty-eighth day after the day on which it received notice of such decision, may notify the other party and (for information) the Engineer of its dissatisfaction. If the Board fails to give notice of its decision on or before the eighty-fourth day after the day on which it received the reference, then either party, on or before the twenty-eighth day after the day on which the said period of 84 days has expired, may notify the other party and (for information) the Engineer of its dissatisfaction. In either event, such notice of dissatisfaction shall state that it is given under this Sub-Clause, and set out the matter in dispute and the reason(s) for dissatisfaction. Subject to Sub-Clauses 67.5 and 67.6, no arbitration in respect of such dispute may be commenced unless such notice is given.

If the Board has given notice of its decision as to a matter in dispute to the Employer, the Contractor and the Engineer, and no notice of dissatisfaction has been given by either party on or before the twenty-eighth day after the day on which the parties received the Board's decision, then the Board's decision shall become final and binding upon the Employer and the Contractor.

### 67.3 Amicable Settlement

Where notice of dissatisfaction has been given under Sub-Clause 67.2, the parties shall attempt to settle such dispute amicably before the commencement of arbitration. Provided that unless the parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made.

### 67.4 Arbitration

Any dispute in respect of which:

- (a) the decision, if any, of the Board has not become final and binding pursuant to Sub-Clause 67.2, and
  - (b) amicable settlement has not been reached,
- shall be settled, unless otherwise specified in the Contract, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed

under such Rules. The arbitrator(s) shall have full power to open up, review and revise any decision of the Board, as well as any opinion, instruction, determination, certificate or valuation of the Engineer, related to the dispute.

Neither party shall be limited, in the proceedings before such arbitrator(s), to the evidence or arguments previously put before the Board to obtain its decision.

Arbitration may be commenced prior to or after completion of the Works. Any decision of the Board shall be admissible in evidence in the arbitration. The obligations of the parties, the Engineer and the Board shall not be altered by reason of the arbitration being conducted during the progress of the Works.

#### **67.5 Failure to Comply with the Board's Decision**

Where neither party has given notice of dissatisfaction within the period in Sub-Clause 67.2 and the Board's related decision, if any, has become final and binding, either party may, if the other party fails to comply with such decision, and without prejudice to any other rights it may have, refer the failure itself to arbitration under Sub-Clause 67.4. The provisions of Sub-Clauses 67.2 and 67.3 shall not apply to any such reference.

#### **67.6 Expiry of the Board's Appointment**

When the appointment of the members of the Board, including any replacements, has either been terminated or expired, any such dispute referred to in Sub-Clause 67.2 shall be finally settled by arbitration pursuant to Sub-Clause 67.4. The provisions of Sub-Clauses 67.2 and 67.3 shall not apply to any such reference.