Chapter 12

Recent Case Law on Dispute Boards

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Dispute Boards (DBs) in international construction contracts are still in their infancy and therefore it should not be surprising that they have had teething problems. While the first time a DB is reported to have been used in an international project was a Dispute Review Board (DRB) for the El Cajón dam project in Honduras in 1981, a provision for a DB was not included in a FIDIC form of construction contract until 1995.[1] Furthermore, FIDIC did not develop a standard set of DB rules until the publication of FIDIC's new suite of contracts for major works in 1999. Similarly, the ICC did not publish its first set of DB rules until 2004.[2]

Given the time it takes, after DB rules are published and included in construction contracts, for disputes to arise, for DB provisions to be invoked, and for arbitral awards and court cases relating to DBs to be reported, it is not surprising that only now — some 10 to 15 years later — are we able to see and consider the kinds of issues to which DBs can give rise.

This article will comment briefly on recent domestic court decisions and ICC arbitral awards dealing with DBs, mainly Dispute Adjudication Boards (DABs), addressing the following questions:

I. A Mandatory Condition to Arbitration?

II. What Sanction for Failure to Refer to a DB?

III. How should a DB Decide Jurisdiction?

IV. What if a Party Fails to Cooperate in Appointing an Engineer[3] or DAB?

V. Is a DAB Decision Enforceable?

VI. Can its Validity be Challenged?

VII. Other Issues?

VIII. Conclusion

Most of the court decisions and arbitral awards discussed below relate to the current suite of FIDIC's construction contracts for major works published in 1999, namely, the 'Red' (for civil engineering construction), 'Yellow' (for plant and design-build works) and 'Silver' (for EPC/turnkey construction works) Books (the '1999 FIDIC Contracts').

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A MANDATORY CONDITION TO ARBITRATION?

As the very purpose of a DB procedure is to avoid, if possible, the time and expense of arbitration, resort to a DB will normally be a condition precedent to arbitration.

This was acknowledged in Europe by the English House of Lords as early as in 1993, in a case involving a dispute related to a contract for the construction of the Channel Tunnel based on the FIDIC Red Book (4th edition 1987).[4] In that case, the contractors (the defendants) had threatened to suspend work because of the alleged failure of the employer (the plaintiffs) to pay them certain amounts. The employer, in turn, applied to the English courts for an interim injunction to prevent the contractors from stopping work. Although the contract provided for the reference of disputes to a form of DAB[5] before arbitration, the House of Lords stayed the litigation, holding that (per Lord Mustill):

> ".. those who make agreements for the resolution of disputes must show good reasons for departing from them, .. having promised to take their complaints to the experts and if necessary to the arbitrators, that is where the appellants [the employer] should go."[6]

This is now reflected in the English Arbitration Act 1996, Section 9(2):

> An application [for a stay of legal proceedings] may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.

The 2015 ICC Dispute Board Rules envisage that resort to a DB will be a condition precedent to arbitration and this is certainly the intention in the 1999 FIDIC Contracts. This is clear from Sub-Clause 20.2 of those contracts which provides that:

> Disputes *shall be* adjudicated by a DAB. [Emphasis added].

However, Sub-Clause 20.8 of the 1999 FIDIC Contracts provides for a limited exception in the following case:

> "If a dispute arises between the Parties (..) and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise."

In that case, the dispute may be referred directly to arbitration.

Apart from the obvious case of where a DAB's appointment has expired, Sub-Clause 20.8 has been rightly recognized to apply, among other cases:

- where a party had been intransigent or uncooperative in constituting a DAB,[7] or
- where the sole DAB member was found to not be impartial and independent.[8]

However, where an *ad hoc* DAB is provided for, as will normally be the case in a FIDIC Yellow Book or Silver Book contract, it has been argued, based on Sub-Clause 20.8 of the 1999 FIDIC Contracts, that the requirement to refer a dispute to the DAB does not apply — there being, so the argument goes, 'no DAB in place' — and that a dispute may, therefore, be referred directly to arbitration.

Thus, in a recent English case which involved a FIDIC Silver Book contract, the employer had argued that Sub-Clause 20.8 was an 'opt-out' clause and that when there was no DAB in place it need not refer the dispute to the DAB.

When the contractor objected, the Court decided that:

1. Sub-Clause 20.2 ('shall') made it mandatory to refer disputes first to the DAB, and
2. Sub-Clause 20.8, which is the same in the Red, Yellow and Silver Books, 'probably applies only in cases where the contract provides for a standing DAB'.[9]

Thus, the Court held — correctly — that referral to the DAB was a mandatory pre-condition to arbitration or litigation.[10]

Similarly, the Swiss Federal Court (Switzerland's highest court) has found the pre-arbitral DAB procedure in FIDIC contracts (in this case, a Red Book contract was involved) to be a mandatory condition to arbitration, rejecting an argument to the contrary based on Sub-Clause 20.8 (although in that case the Court found the DAB procedure inapplicable for other reasons).[11]

This mandatory condition *applies to claims of both parties*. Thus, after a contractor had initiated arbitration — following a referral to a DAB — and the employer asserted a counterclaim for the first time, such counterclaim was held inadmissible as it had not been referred to the DAB.[12]

On the other hand, if the counterclaim could have been shown to have been encompassed by a 'dispute' previously referred to a DAB, it might have been admitted to arbitration.[13]

II WHAT SANCTION FOR FAILURE TO REFER TO A DB?

Where arbitral tribunals have found that there had been a failure to refer a dispute to a DB (or its predecessor, the engineer) they have taken one of two approaches: either they have dismissed the case for lack of jurisdiction or, alternatively, they have suspended the case for a limited time period to allow this condition precedent to arbitration to be fulfilled. As there will have been a breach of a mandatory condition of arbitration, an award of damages is also possible, at least theoretically.

In ICC Case 6535 (1992) involving a FIDIC Red Book (2nd edition) contract, the arbitral tribunal found that no 'dispute' had previously been submitted to the engineer (the predecessor of the DB) and, consequently, the tribunal had no jurisdiction and *dismissed the case*.[14] A similar decision was reached in relation to a DAB in ICC Case 16262 (2010), an arbitration with its seat in London.[15]

On the other hand, tribunals sitting in Switzerland, at least, have tended to take a different approach. Thus, in a 2016 Swiss Federal Tribunal case, the relevant contract contained a mandatory requirement of conciliation rather than a DB (but the point is much the same for our purposes). After an arbitral tribunal found that it had jurisdiction, despite one party's claim that the conciliation condition had not been complied with, the objecting party commenced court proceedings challenging the arbitral tribunal's decision on jurisdiction.

In keeping apparently with Swiss doctrine,[16] the Federal Court, after setting aside the arbitral tribunal's award upholding its jurisdiction, did not dismiss the case but instead *suspended the arbitral procedure* for a limited period of time, so that the conciliation procedure could take place.[17] A similar decision was reached in an arbitration in Zurich in relation to a DAB in ICC Case 14431 (2008).[18]

What is the proper remedy — whether suspension or dismissal — should depend upon what is authorized by the relevant contract. Yet, the Swiss and other authorities favoring a suspension or stay, appear to ignore this point.

Moreover, the author notes that, after the award in ICC Case 6535 dismissing the case, the parties settled their dispute amicably.[19] Thus, the sanction of dismissal can promote settlement, whereas a suspension or a stay may induce or lead to further arbitration.

Arbitration specialists may therefore give insufficient weight to the value that conditions precedent to arbitration, which result in dismissal, can have in cutting down and reducing disputes that would otherwise be referred to arbitration.

HOW SHOULD A DB DECIDE JURISDICTION?

In a recent Namibian court case,[20] a contractor had referred a dispute to a DAB under a Red Book contract (1999). But the employer challenged the DAB's jurisdiction over the dispute.

The DAB decided by an 'interim decision' that it had jurisdiction over the dispute. However, the employer claimed the DAB's decision violated the DAB's own procedural rules (specifically, its duties under a FIDIC contract to act 'fairly and impartially' and to adopt procedures suitable to the dispute[21]), and applied to a Namibian Court to stop the DAB proceeding and refer the interim decision to arbitration.

Applying to a local court was apparently an option open to the employer, perhaps because Namibia is one of the relatively few countries not to have ratified the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York Convention').[22]

In a well-reasoned judgment, the Namibian Court denied the application finding that the DAB had the power to decide both on the procedure to be applied to a dispute and on its jurisdiction. Indeed, these powers are expressly accorded to it under the Red Book.[23] Consequently, the Court found that the DAB had the power to decide upon its own jurisdiction by an interim decision.

The Court noted also that Sub-Clause 20.6 of the Red Book provides that a DAB might make a decision 'relevant to the dispute' but which does not finally dispose of it (as the DAB had done by its interim decision):

> The arbitrator(s) shall have full power to open up, review and revise any certificate, determination, instruction, opinion or valuation of the engineer, *and any decision of the DAB, relevant to the dispute*. [Emphasis added]

IV WHAT IF A PARTY FAILS TO COOPERATE IN APPOINTING AN ENGINEER OR DAB?

In a recent English court case,[24] under a FIDIC Red Book (4th edition, 1987) contract, the contractor was reported to have attempted to refer a dispute to the engineer for a decision under Clause 67 (the equivalent of Clause 20 in the 1999 FIDIC Contracts), but the engineer responded that his employment had terminated and, consequently, he would not issue the requested decision. The contractor then requested the employer to replace the engineer, but the employer failed to do so.

When the contractor later sought arbitration, the employer argued that there was no jurisdiction because of the lack of an engineer's determination. The arbitrator affirmed his own jurisdiction. The employer then challenged the arbitral award alleging that the pre-arbitral procedures had not been complied with.

The English High Court held that the employer was not entitled to rely on the lack of a decision from the engineer, since it had not replaced him.

However, had the contractor begun the arbitration without first requesting the employer to replace the missing engineer, the contractor's request for arbitration might well have been dismissed as premature. This was the result in ICC cases 6276 and 6277 (1990).[25]

The Swiss Federal Court has also recognized that in special circumstances (including, among others, lack of cooperation by the other party in constituting a DAB), a party may be relieved of the obligation to refer disputes to a DAB as a condition to arbitration.[26]

V IS A DAB DECISION ENFORCEABLE?

Under the 1999 FIDIC Contracts, the decision of a DAB (or its predecessor, the engineer), whether binding or final and binding,[27] creates a contractual obligation, that is, for example, to pay promptly whatever may be due by the decision. As recently stated by Singapore's Court of Appeal, there is:

> a distinct contractual obligation on a paying party to comply promptly with a DAB decision ...[28]

Consistent with this, breach of an obligation to pay an amount awarded by a decision gives rise to liability in damages.[29]

In a FIDIC contract, enforcement accords with the 'pay now, argue later' commercial purpose of such a DAB decision, which:

> serves the vital objective of safeguarding cash flow in the .. construction industry, especially that of the contractor, who is usually the receiving party.[30]

This is consistent with the view taken in several ICC awards, although in at least one case the respondent-employer was ordered to pay the amount due under a DAB decision into 'an escrow or similar trust account'[31], pending an award on the merits.

VI CAN ITS VALIDITY BE CHALLENGED?

However, in certain limited cases the validity of a DAB decision may be challenged. This might occur in the following cases:

1. If a DAB fails to act 'fairly and impartially' and to ensure 'each Party has a reasonable opportunity to present its case',[32] that is, violates due process or natural justice.[33]
2. Lack of jurisdiction, e.g., there exists no 'dispute'[34] or the DAB has been improperly constituted.[35]
3. Fraud or collusion.[36]
4. Any other grounds under local law.

VII OTHER ISSUES?

Given the recent rapid growth in resort to DBs, they are giving rise to numerous issues that remain to be resolved. These include, but are by no means limited to, the following:

1. May a DB award a party the costs incurred in a DB proceeding? Neither the FIDIC rules nor the ICC's 2015 DB rules make clear provision for this (apart from providing for the sharing by the parties of the costs of the DB itself).
2. In ICC Case 20632 (2016), while awarding arbitration costs pursuant to Art. 37 of the ICC Rules of Arbitration, 2012 (the 'ICC Rules'), the arbitral tribunal by its final award (so far unpublished) denied the award of DAB-related costs, such as counsel fees, under a FIDIC contract finding no ground to conclude otherwise in the rules applicable to the DAB.
3. Absent an applicable choice of law provision, what law governs the DB clause? The law governing the main contract or (if different) that governing the arbitration clause itself or (if different) the law of the country of the construction site? Though this question would appear to be important (how else is one to determine the scope and meaning of a DB clause?) there appears to be no uniform answer to it.[37] In the author's view, much will depend on how the DB clause is drafted.[38]
4. Does referral to a DB constitute the commencement of legal proceedings for purposes of the statute of limitations or does only a referral to arbitration do so? Although under the law of a number of countries this is a matter that parties are free to decide by their contract, no DB rules appear to deal with this important issue yet.
5. Unlike the ICC's (Arbitration) Rules,[39] most DB rules do not yet appear to address the common situation of multi-party disputes, that is, where more than two parties are involved. This may create problems in the case of, for example, an ad hoc DAB (that is, one constituted to settle a single dispute) where there are two or more parties on one side of a contract.[40]
6. Should there be an international legal regime for the enforcement of DB decisions similar to the New York Convention applicable to arbitral awards? As DBs grow in popularity, there may be a movement in this direction.

VIII CONCLUSION

Unlike the case of arbitration, there will usually be no statute to regulate DB proceedings.[41] Consequently there will be no law to complete or complement what is contained in a DB agreement.[42] Therefore the DB agreement will need to be drafted to cover, to the extent practical, all possible eventualities.

Many of the reported disputes which have arisen so far in relation to DBs have done so due to deficiencies in the drafting of DB agreements, which have come to light as a result of the explosive growth in DB proceedings since the 1999 FIDIC Contracts were published.

While they have given rise to serious difficulties in some cases, on the whole, national courts in a variety of jurisdictions (*e.g.* England, Singapore and Switzerland) have done a creditable job in supporting the DB process and in interpreting DB agreements correctly.

Increased experience with DBs should lead to the drafting of more comprehensive and sophisticated DB agreements and, consequently, many current issues with them should be overcome.

NOTES

1 A dispute adjudication board was provided for in FIDIC's Conditions of Contract for Design-Build and Turnkey (the 'Orange Book') in 1995.

2 Since replaced by a new edition in 2015.

3 Prior to the DAB, disputes under FIDIC contracts were required, as a condition to arbitration, to be referred to the engineer for settlement.

4 *Channel Group v Balfour Beatty Ltd.* [1993] AC 334.

5 In that case, there was a panel of five experts comprising four engineers from different disciplines and one lawyer who was the Chairman. Each dispute was decided by the Chairman and two of the four engineers whom the Chairman selected having regard to the nature of the dispute which had arisen. The Chairman was Professor Philippe Malinvaud, an eminent expert on French construction law, who has written an article (in French) about his Channel Tunnel experience, *Réflexions sur le 'Dispute Adjudication Board'*, Revue de Droit Immobilier 2001, p. 215.

6 *Channel Group v Balfour Beatty Ltd.* [1993] AC 334, 353.

7 ICC Case 16155 (2010) and ICC Case 18505 (2013), ICC. Bull. pp. 71 and 137, respectively (commentary, p. 29).

8 ICC Case 19581 (2014), ICC Bull. p. 147 (commentary, p. 30).

9 *Peterborough City Council v Enterprise Managed Services Ltd.*, (2014) EWHC 3193 (TCC), para. 33.

10 ICC Case 20118 (2015), para. 123, a partial award (so far unpublished) relating to a Silver Book contract is to the same effect.

11 Federal Court Decision 4A_124/2014 (July 7, 2014) and Matthias Scherer and Sam Moss, *Swiss and English courts analyse enforceability of multi-tier dispute resolution provision providing for DAB proceedings (FIDIC, clause 20)*, ASA Bulletin, 2014, Volume 32, 849.

12 *See* ICC Case 16765 (2013), ICC Bull. p. 101 (commentary, p. 25). *See also* the author's *The Arbitration Clause in FIDIC Contracts for Major Works* [2005] ICLR 4, 6-9, to the same effect.

13 ICC Case 19346 (2014) ICC Bull. p. 142 (commentary pp. 33-34). For a discussion of 'dispute' in this context *see also* the author's *The Arbitration Clause in FIDIC Contracts for Major Works* [2005] ICLR 4, 6-9.

14 ICC Int'l Ct. of Arb. Bull., Vol. nº 9, November 1998, pp. 34-5.

15 ICC. Bull. p. 75 (commentary, p. 31).

16 Kaufman-Kohler and Rigozzi, *International Arbitrations: Law and Practice in Switzerland*, Oxford, 2015, para 5.23:

> .. the solution best reconciling the non-binding character of mediation or conciliation with the principle of party autonomy consists in staying the arbitration and fixing a time limit for the parties to attempt to resolve the dispute by way of the agreed pre-arbitral method.

17 *X v Y* Federal Court 4A-628/2015 (March 16, 2016), ASA Bulletin, 2016, Volume 34, 988.

18 A similar view has been expressed by Gary Born and Marija Scekic:

> ..even where a contractual provision is interpreted as a mandatory condition precedent, it should be capable of being satisfied even after an arbitration is commenced; this avoids the inefficiencies and denials of access to adjudicative remedies that a contrary interpretation would produce.
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> *Pre-Arbitration Procedural Requirements — 'A Dismal Swamp' in Practicing Virtue: Inside International Arbitration*, edited by David Caron *et al*, Oxford, 2015, pp. 227, 251-52.

19 The author was counsel for the respondent.

20 *Roads Authority v Kuchling et al*, (A 188/2015), [2016] NAHCMD 32 (22 February 2016).

21 Articles 5(a) and (b) of the Procedural Rules (the 'Procedural Rules') annexed to the form of Dispute Adjudication Agreement in the Red Book (1999).

22 Article II of the New York Convention requires Contracting States to recognize arbitration agreements, which may be interpreted to include a condition to arbitration such as the requirement to refer a dispute first to a DAB.

23 Articles 8(a) and (b) of the Procedural Rules.

24 *Al-Waddan Hotel Ltd v Man Enterprise SAL (Offshore)* [2014] EWHC 4796 (TCC), [2015] BLR 478.

25 ICC Int'l Ct. Arb. Bull. Vol. 2, Nov. 1998, pp. 34 and 68.

26 *See*, for this case, footnote 11 above.

27 That is to say, whether or not the decision has been the subject of a notice of dissatisfaction from one of the parties within a specified time limit.

28 *Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] SGCA 30 ('Persero'), para. 88 and, to the same effect, *Tubular Holdings (Pty) Ltd. v DBT Technologies (Pty) Ltd.*, (06757/2013), [2013] ZAGPJHC 155 (3 May 2013), (South African Court).

29 ICC case 16948 (2011), ICC Bull., p. 107 (commentary, p. 32).

30 Persero, para. 71. *See* the author's *The Second Persero Case before the Singapore Court of Appeal*, Const. L. Int'l, Vol. 10, Issue 4, Dec. 2015, p. 19.

31 ICC case 18473, second partial award (2015) (so far unpublished).

32 Art. 21(6) of the ICC's 2015 DB Rules. The comparable provisions in the 1999 FIDIC Contracts, are contained in Article 5 of the Procedural Rules. In this connection, *see* ICC Case 19581 (2014) ICC Bull. p. 147 (commentary p. 30).

33 *See*, in the case of statutory adjudication in England, *Discain Project Services Ltd. v Opecprime Developments Ltd.* (2001) BLR 285.

34 *See* ICC case 6535 (1992), *see* footnote 15 above.

35 *See* ICC case 19581 (2014). ICC Bull. p. 147 (commentary p. 30).

36 *See*, in England, *Campbell v Edwards* [1976] 1 WLR 403 at 407: '*Fraud or collusion unravels everything*', per Lord Denning.

37 Compare the position taken in Swiss Federal Court Decision 4A_124/2014 (July 7, 2014) (see footnote 11 above) and ICC case 16083 (2010) ICC Bull. p. 57 (commentary, p. 28) (both applying the law governing the arbitration clause, being found in these cases to be the law of the place of arbitration) with ICC case 20118 (a so far unpublished partial award) (2015) (applying the law governing the contract to the DAB appointment process).

Interestingly, as the result of a recent (2016) reform of the law of contract, French law would appear (like Section 9(2) of the English Arbitration Act 1996, though in another context, see Section I above) to recognize the autonomous nature of a DB clause as new Article 1230 of the French Civil Code provides that (translation):

> Termination [of a contract] affects neither *clauses relating to the resolution of disputes*, nor ... clauses relating to confidentiality and non-competition. [Emphasis added]

['La résolution n'affecte ni *les clauses relatives au règlement des différends*, ni ... les clauses de confidentialité et de non-concurrence.']

38 While a recent interesting paper urges the inclusion of a choice-of-law provision in model arbitration clauses and arbitration agreements and recognizes 'the scope of pre-arbitration requirements in multi-tiered clauses' as one of the issues to be addressed, it does not otherwise express a view as to how this issue should be dealt with. *See* Neil Kaplan and Olga Boltenko, *The Dangers of Neglect — Governing Law of Arbitration Agreements in Defining Issues in International Arbitration*, edited by Julio Cesar Betancourt, Oxford, 2016, pp. 81, 84.

39 *See* Article 12(6-8) of the ICC Rules providing that where there are multiple claimants, the ICC Court may appoint each member of the arbitral tribunal and designate one of them as President.

40 An example is the so far unpublished award in ICC case 20118 (2015), para. 130.

41 The only two countries which are reported to have laws regulating DBs are Honduras and Peru. *See Dispute Boards in Latin America: Experiences and Challenges in a Promising Market* by Roberto Hernández Garcia, a Mexican lawyer, published in the electronic newsletter of the Dispute Board Federation, http://www.comad.com.mx/sites/default/files/arts/201410dbf.pdf, Geneva, October 2014.

42 Indeed, as mentioned in Section VII above, it may be unclear what law applies to a DB agreement; the law governing the contract in which it is contained, the law governing the arbitration clause or the law of the country of the construction site, should these be different?