

The Dispute Board Federation

Geneva - Singapore

Excellence in Dispute Resolution since 2001

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Featured Events and Continuing Professional Development Units

2011

There are several new programmes and events which are shown on our website and these include:

Our new Certification Programme in Partnership with RICS.

The 2011 FIDIC Contracts Total Immersion Programme

The DBF - FIDIC Intensive DAB Training Programme

On a social and networking note we will have our next **Member Dinner** to be held in London on April 15, 2011 and the

Reception Parties for the new RICS - DBF Programme which are to be held in March in Hong Kong, Singapore, Bangkok and Dubai.

For further information on any of these please contact Anne Eve our Programme Administrator at anne.eve@dbfederation.org

For a full listing please go to our website www.dbfederation.org

RICS Reception Events

The Royal Institution of Chartered Surveyors (RICS) and the DBF are holding several Reception Events in March to introduce the new joint accreditation of dispute board members and the new RICS Register of Approved Dispute Board Members. These invitation only events are taking place during the second half of March in Hong Kong, Singapore, Bangkok and Dubai. If you would like to receive an invitation to attend please contact me directly at h.wilson@dbfederation.org.

As many of you know both our FIDIC Contracts Total Immersion Programme has now opened for its 2011 Registration and next week we will also be opening registration for our Intensive DAB Training Programme. Emails on these will be going out shortly.

The DBF is an appointing body for Dispute Boards and Dispute Board Members and draws from its qualified membership to fill positions as requested by Governments, Employers and Contractors. We take pleasure in announcing that the new Chair of our Appointments Committee for 2011 is Ben Beaumont. His email is b.beaumont@dbfederation.org. Ben and his Committee will be reviewing all appointment standards for our members and helping to implement the further use of the DBF as an appointing body.



For further information on the new RICS - DBF Joint Certification and Accreditation Programmes please click here:

Herbert Wilson
Executive Director

DISPUTE BOARDS - DO THEY ALWAYS WORK - IF NOT, WHY NOT?

*By: Peer Dalland**



Since the adoption of the MDB Harmonised Conditions of Contract by the Multilateral Banks in 2006, Dispute Boards have become mandatory on all international contracts funded by one of the Multilateral Banks. Whilst it may be argued that Dispute Boards were mandatory before 2006 under the FIDIC 1999 series of contracts, this did not always eventuate, and it was not common practice, particularly in Developing Countries, to establish the Dispute Boards at the start of the Contract.

Many of the original problems relating to the early establishment of Dispute Boards and selection of Dispute Board Members have been addressed in the FIDIC MDB Harmonised Conditions of Contract, but the process can still be frustrated by recalcitrant Parties to a Contract.

On many projects the Dispute Board will be established long after disputes have arisen. In some cases it may take 6-12 months before a Dispute Board composition is agreed between the parties. I am aware of Contracts using MDB Harmonised Conditions that are 12 months into the Contract period and have not yet appointed the Dispute Boards.

There are many contentious issues to be overcome before the members of a Dispute Board can be agreed. High on the list are the self interests of the Parties to the Contract. The Employer generally wants the Dispute Board members to be of its own nationality, whilst the Contractor, which, on projects funded by any of the Multilateral Development Banks frequently is of a different nationality, would prefer to see its own nationality represented on the Board.

The Employer is often not enthusiastic about using independent international adjudicators as envisaged by the FIDIC contract conditions, because of what it sees as exorbitant costs. Retainer fees, travelling cost, accommodation and time spent in the Country for international adjudicators with going rates of around USD 2,500-3,000 per day are often perceived to be unnecessary expenses, particularly when a local arbitrator/lawyer may only charge USD 200-300 per day. The rationale by the Employer in these circumstances is that money saved on the Dispute Board will be available to cover other project costs.

The Contractor does not benefit from such perceived savings, but will frequently argue that a Board member with the same cultural background as itself will better understand its position in a dispute situation. There are perceived, as well as real advantages, in each Party having Board members of the same nationalities as its own. Apart from the ease of communicating with DB members of its own nationality, it may also be of significant advantage when dealing with cultural and financial issues. All of these issues and attitudes can cause significant problems and conflict during the selection process of DB members.

It is generally accepted by most providers of international contracts that the Dispute Board should be seen to be totally independent and impartial and that Dispute Board members should ideally be of different nationalities from the Parties to the Contract. In reality this can be difficult to achieve, particularly on projects in large developing countries where the Employers and local ADR practitioners firmly believe that they have the necessary expertise from within their own country to make up the Dispute Boards. Within these countries the local professionals often argue that the cost of individual board members should not exceed certain daily rates which are based on going rates for professionals in that country, and which may be only 10-15% of the rates for international adjudicators from a developed western country. Such arguments are attractive to the Employers and are mostly not resisted by the funding agencies.

The appointment of Dispute Board members of the same nationality as the Employer without doubt provides significant advantages to the Employer, particularly if the Contractor is an International Contractor from a different country and the Contract is funded by an international funding agency. The advantage is further magnified if the Contract also provides that the seat of

arbitration shall be in the Country of the Project and that the arbitrators shall be appointed by that country's national arbitration body.

In such situations the Contractor will rarely have its claims treated in an impartial and fair manner at any level of the proceedings and the Dispute Board decisions can be flawed resulting in Notices of Dissatisfaction, often from both Parties. Eventually the disputes are taken to arbitration.

The avoidance of such scenarios is the very reason that the Dispute Board concept was developed and why it is now an important inclusion in the Conditions of Contract on all international construction projects. However, the Dispute Board concept will only succeed where the process is allowed to be transparent and when the Parties to the Contract are familiar with the principles of Dispute Avoidance.

It is rarely the Employer which delays the establishment of a Dispute Board. I know of several instances where the Employer has secured the signature of the Dispute Board members on the Tripartite Agreements, but the Contractor has delayed signing the agreement for long periods after the Contract has been signed. This has been so even though the Dispute Board members appear to have been agreed to prior to the signing of the Contract. Once the Main Contract has been signed there is no clear path for the Employer to secure the Contractor's signature on the Tripartite Agreements and I am aware of several projects using MDB Harmonised Contract Conditions which have been running for twelve months or more without the DB Agreements having been signed by the Contractors involved.

There are compelling arguments for ensuring that the Dispute Board Agreements are signed by all Parties before the Main Contract is signed by the Employer.

The Dispute Board composition should be agreed with the Contractor during the Bid negotiations and there are other ways to ensure that the signing of the Dispute Board Agreements is not delayed. One option is that the Contract provides that the Commencement Date shall be the date when the Employer signs the Tripartite Agreements **after** the mutually agreed DB members have signed.

If it is also contractually provided that the Site Access will not be available until the date when the Dispute Board Tripartite agreement has been signed by the Contractor, any delay by the Contractor in signing the tripartite agreement may then cause a delay to the project for which an EOT would not be available to the Contractor.

There are many lessons to be learned from Projects where a Dispute Board is not performing its functions, and there would be significant advantages in establishing, a body to gather information on the performance and success of Dispute Boards on International Contracts and to analyse such data with a view to improve the process. The MDBs are the only institutions that can influence the contractual provisions of international projects and the only bodies which are in a position to request or carry out audits on project performance.

I am aware of several Audits being conducted of international projects which have not performed and where the final quality of the Works is not satisfactory. The audits I am referring to are to be carried out by consulting organisations, but I think it would be more prudent for the MDB to carry out such audits themselves using its own staff and/or staff consultants as required, or alternatively, to use an independent body which are not involved in performing any design and/or supervision functions on international projects.

Organisations like the DBF have the expertise within its membership to carry out these functions on behalf of the MDBs.

I have outlined problems that I have observed and experienced in recent years on projects using a wide range of FIDIC contracts such as FIDIC 4, 1999 Red Book and MDB Harmonised Conditions of Contract. Other FIDIC Conditions of Contracts such as Yellow Book in particular, should, in my opinion, also be amended to provide for a permanent DB established at the start of the project. Many contracts under the Yellow Book are of substantial value and complexity and to use ad-hoc Dispute Boards on such contracts is in my opinion not appropriate. The end result when the Dispute Boards are not in place or are ineffective in their operation, is that disputes are less likely to be resolved at "grass root" level and the disputes are more likely to proceed to formal hearings and/or to arbitration. I am aware of at least one major project where this is happening.

But do we always know when this happens?

In summary I suggest that the following provisions be considered by the MDBs for inclusion in

Contracts on future international construction projects:

1. Dispute Boards comprise independent, pre-qualified members of nationalities different to that of the Contract Parties.
2. The cost of the routine site visit, retainer fees and travelling, to be funded by the MDB separately to the Project funding i.e. in similar manner to the funding for Supervision and/or Management Consultants.
3. Cost of disputes and hearings to be shared by the Parties.
4. Arbitrators to be appointed by a recognised International Arbitration Centre and the seat of arbitration to be outside the Country of the Project.
5. MDBs to separately fund mandatory and project specific professionally run training seminars and workshops covering all aspects of the relevant FIDIC Contracts to be attended by the Employer Organisation, Contractor and Supervision Consultant. This training ought also to include the MDB's project staff and should take place before or at the commencement of the project. Involvement of the Dispute Board Members in the training may be a worthwhile consideration.
6. Establish audit and monitoring procedures to allow evaluation of the performance of projects with regards to formal referrals of contractual disputes to the DBs and any subsequent Arbitration procedures.

Some of the above proposals have been submitted to one MDB in project specific, confidential reports, but so far, to my knowledge, no action has been taken.

I hope this article may generate some discussion on how to improve the establishment and operation of Dispute Boards on international projects, and I would welcome comments and discussion on the subject.

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Peer is a member of the FIDIC President's List of Approved Adjudicators, a Fellow of the DBF and is a Construction Management Specialist with Dalland Associates Pty Ltd Australia