

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:

**DBF Members Dinner
September 15, 2011
Singapore**

**The DBF Intensive DAB
Training Programme
November 14-15, 2011
Luxembourg**

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

The DBF Regional Advisory Councils

The DBF believes that the regional involvement of key local individuals and experts is the best way to attain consensus on global matters as well as to promote the involvement of the DBF. In this regard the Dispute Board Federation maintains Regional Advisory Councils. These Councils advise us on regional customs, differences and protocols in the construction industry. Based upon this information we can then formulate policy and procedures in dispute resolution and infrastructure development thus assisting both our members and governments who seek our assistance.

The regions covered by the Advisory Councils vary with each group. Currently we have two such Advisory Councils one for the Middle East and North Africa (MENA) region which encompasses the U.A.E., Libya, Egypt, Bahrain, Tunisia and across North Africa. The other Advisory Council is for the Asia-Pacific region and encompasses Singapore, Malaysia, Indonesia, Vietnam, Cambodia, Thailand, Hong Kong, and Australia. We are now going to be adding another for Central and Northern Europe. As our Regional Councils expand it has become necessary for the command structure to change and for us to have a Global Chair to which all of the Regional Councils report.

In this regard the DBF is proud to announce the appointment of Mark Tiggeman as the Global Chair of the DBF's Regional Advisory Councils. Mark is a senior partner of Kennedys which is an international Solicitor firm based in London and he has been very active with the DBF over the years. He is a leader in the field of Dispute Boards and their use on major infrastructure projects. Additionally as a Solicitor he brings over 22 years of experience in dispute resolution of major international matters to this new role within the DBF.

We welcome Mark's leadership and look forward to his restructuring of the Regional Advisory Councils within the DBF so that we can better serve the international construction community.



The Engineer's Determination Making Role - Between Fairness and Arbitrariness

By: Dr. Götz-Sebastian Hök, Berlin



Under a FIDIC contract the Engineer shall make fair determinations (see Sub-Clause 3.5 and 14.6). Talking about Engineer's fairness means to demystify its role, and yes we are talking about its role not its character or personality. The Engineer's role is not god-given. The parties could live without the Engineer's powers and authorities; whether they would then have less problems or whether this would be more appropriate is however questionable. Anyway its role and function does not merely depend on his integrity, skills and honesty. Under a FIDIC contract the parties rather define a role or function of a person, in FIDIC this being the Engineer, who shall determine matters arising out of or in connection with the contract. He shall do so fairly but not as an adjudicator^[1].

According to Sub-Clause 3.1 the Employer is obliged to appoint and to maintain the Engineer^[2]. The nature of the Engineer's role and function implies that both parties (but in particular the Employer) will not interfere with the Engineer's unfettered duty to act fairly^[3], which Civil Law writers quite often ignore^[4]. He is thus not only an employer's agent as sometimes suggested^[5]. In other words by virtue of the FIDIC contract the Employer warrants that the Engineer will act in accordance with the Contract^[6]. This means that the Employer shall not only not prevent the unfettered exercise of the engineer's powers and authorities^[7] but also ensure that the Engineer will exercise his powers and duties in accordance with the contract from which he derives its authorities^[8]. By contrast, the law does not imply a warranty of the Engineer's competence^[9] nor does it imply that the Engineer will come to a particular result. Rather FIDIC requires the Engineer to apply the contract. Coincidentally the parties submit themselves to the Engineer's contract interpretation (see Sub-Clause 1.5)^[10] and agree to comply with any of the Engineer's determinations and certificates. Hence, the FIDIC contract stipulates the legal basis for the Engineer's exercise of fairness and the effects of it^[11].

On the other hand the Engineer must acquaint himself with the contract and his related powers and authorities as well as with the accompanied constraints and limits. Irrespective of all this the agreement between the Employer (Client) and the Engineer will establish the responsibilities and liabilities of the Engineer towards the Employer (Client) and the Contractor. As the Engineer is not a party of the construction contract, its role therein described does not establish such duties and responsibilities but require them anyway. In a nutshell the construction contract establishes the powers and authorities but only by means of the agreement between the Employer and the Engineer the Engineer will assume the respective responsibilities and liabilities. However, there is strong authority for the view that the Employer and the Contractor make their contract with the understanding that the Engineer will have to act in accordance with the construction contract^[12]. The Employer must have complied with this requirement when making the agreement with the Engineer because otherwise the Engineer will of course not himself be bound to exercise his authorities and powers under the construction contract with this understanding. Also only by virtue of the consultancy agreement the Engineer will become liable to his employer for all negligence or unskilful measurement and

valuation of work done^[13].

Hence, it can be summarised that the Engineer's powers and role have two distinct foundations. The Engineer's powers stem from the construction contract. The Engineer's duties stem from its agreement with the employer (or client). It can therefore be said that the Engineer's role is to exercise fairness whilst the Engineer's duty to exercise fairness follows from a separate agreement.

However, the starting point for the Engineer's exercise of fairness is not always the same. The factual and legal background of the Engineer's power to exercise fairness is different depending on the relevant clause. Whilst Sub-Clause 3.5 refers to matters (such as claims and the adjustment to the Contract Price in case of Variations), which shall become determined, Sub-Clause 14.6 refers to Interim Payment Certificates to be issued. Also the factual background is slightly different. Whilst under Sub-Clause 3.5 the Engineer shall make a determination based on known facts and circumstances (though sometimes based on factual assumptions like the hypothetical progress as shown in the programme) the Engineer's authority under Sub-Clause 14.6 does not require full knowledge of everything. Rather the Engineer may issue Interim Payment Certificates, which are usually based on estimates of the value of the work done in the previous certification period and which need not necessarily be accurate. Indeed, it would be difficult for them to be completely accurate. Hence, the Engineer's roles under Sub-Clause 14.6 and Sub-Clause 3.5 are so different that a split discussion is required.

Under Sub-Clause 3.5 the Engineer has almost no discretionary powers meanwhile under Sub-Clause 14.6 the assessment standard is broader and allows less accuracy than under Sub-Clause 3.5. Under Sub-Clause 3.5 the Engineer has to act as the determination maker and the scope and limitations of his powers in this respect are defined by the terms of the Contract and subsequently by reference to a claim notice. Anyway it is suggested that the Engineer is in both roles obliged to hold fairly balance between his Client and the Contractor and to act in accordance with the ethics and general practices of his profession.

[1] A distinction can be drawn between *arbitri* (arbitrators), on the one hand, and *arbitratores* (valuers or *aestimatores*), on the other, see *De Lange v. ABSA Makelaars (Edms) Bpk* (262/09) [2010] ZASCA 21; [2010] 3 All SA 403 (SCA); (2010) 31 ILJ 885 (SCA) (23 March 2010)

[2] *Mallmann, Bau- und Anlagenbauverträge nach den FIDIC Standardbedingungen*, 116

[3] See Hudson's *Building and Engineering Contracts*, 11th edition, note 6-112

[4] For example *Mallmann, Bau- und Anlagenbauverträge nach den FIDIC Standardbedingungen*, 122 et seq., who does not deal with the problem at all or at least not in the relevant context of Engineer's determinations. Rather he discusses problems of independency and bias in respect of dispute adjudication at page 98 et seq.

[5] see *Markanda, Building and Engineering Contracts*, 2nd edition, 308 where *Markanda* simply distinguishes the Engineer's role as an agent from that as a quasi arbitrator.

[6] See *Minister Trust Ltd v. Traps Tractors* [1954] 1 W.L.R. 963, at 974

[7] See in this regard also *University of Stellenbosch v. J A Louw (EMDS) Bpk* 1983 (4) SA 321 (A) quoted in *G Liviero & Son Building (Pty) Ltd v. Ifa Fair-Zim Motel & Resort (Pty) Ltd, Ifa Fair-Zim Motel & Resort (Pty) Ltd v. G Liviero & Son Building (Pty) Ltd and Another* (7802/09, 7803/09, 7434/09) [2010] ZAKZPHC 44 (27 August 2010)

[8] See Hudson's *Building and Engineering Contracts*, 11th edition, note 6-145

[9] See Hudson's *Building and Engineering Contracts*, 11th edition, note 6-220

[10] Interesting to note that Article 102 of the Serbian Law of Contracts and Torts provides: (1) *Contracting parties may provide that a third person shall interpret the contract in case of disagreement concerning the meaning and scope of terms of contract.* (2) *In such a case, unless otherwise specified by contract, the parties shall be precluded from filing an action with the court or other competent agency, prior to*

obtaining interpretation of the contract, unless the third person refuse to interpret the contract.

[11] The effect of exercising determination powers is a provisionally binding determination (see Sub-Clause 3.5). Though in principle the Engineer's error in the exercise of its certifying role does not invalidate its determination a fatal and manifest error can (see MacRoberts on Scottish Building Contracts, 137).

[12] *Sutcliffe v. Thackrah* [1974] A.C. 727 (HL)

[13] See Markanda, *Building and Engineering Contracts*, 309 quoting Emden's *Building Contracts and Practice*, 8th edition, Vol. 1, 470