

# 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 being planned for the New Year.

Programmes include Claims, The Use of Witnesses in DAB Hearings, DAB Advocacy & Procedures.

Starting in 2011 we will also have regular DAB Member Briefings from the World Bank, the EBRD, The Millennium Challenge Corporation, and the Islamic Development Bank.

On a social and networking note we will have our Professional Member-Guest Dinners to be scheduled in London, Dubai, Singapore, Santiago, Stockholm, Beijing, Istanbul, Bogota, and Sarajevo.

Also to be planned is an International Golf Tournament networking event for Development Bankers, Contractors, and DAB professionals to be at St. Andrews, Scotland.

For a full listing please go to our website  
[www.dbfederation.org](http://www.dbfederation.org)

## The Royal Institution of Chartered Surveyors

This is a very exciting month for the Dispute Board Federation. Membership applications are increasing and our new website [www.dbfederation.org](http://www.dbfederation.org) is receiving many excellent reviews from both our members, stakeholders and the general public. With that in mind the DBF is very pleased to announce its new partnering arrangement with the Royal Institution of Chartered Surveyors (RICS) which will allow for the joint-certification and accreditation of dispute board members globally and will serve both the 100,000+ international membership of RICS as well as the ever growing global membership of the DBF.

The Royal Institution of Chartered Surveyors and the Dispute Board Federation believe that professionally trained and certified Dispute Board members are the solution to the ever increasing need for qualified professionals in the field of dispute resolution particularly in response to growing world wide demand for trained and professional Dispute Board members.

In response, the Royal Institution of Chartered Surveyors is forming an international register of RICS accredited dispute board members. In partnership with the Dispute Board Federation, the Royal Institution of Chartered Surveyors is to implement a comprehensive training and assessment programme to ensure that all RICS accredited Dispute Board members undergo a rigorous assessment of their suitability as a Dispute Board member. To accomplish this purpose the DBF and RICS are partnering so that the DBF can assist RICS in the training and assessment of candidates. The pool of candidates for training will be sought from both RICS members as well as from interested professionals from other learned bodies.

The training provided would be of such caliber to enable successful candidates to attain both RICS accreditation as Dispute Board members and also to jointly attain certification as a Professional Dispute Board Member with the DBF. The specialised training programme is then followed by an assessment of each

candidate. Both the training and the assessment are based upon the existing content of similar programmes and certification currently used by DBF in its worldwide training and certification programmes.

Ben Beaumont, Chair of the RICS Working Group which concluded this joint effort stated: "*With a joint focus on delivering regionally to a diverse and international membership base, RICS and DBF feel confident that the new RICS international register of accredited Dispute Board members will benefit the growing need for effective ADR worldwide.*"

The entire new certification programme and courses available will be unveiled over the next several weeks and the DBF looks forward to a long relationship with the Royal Institution of Chartered Surveyors.

**Herbert Wilson**  
Executive Director



## Status Quo of DABs in Germany



by Götz-Sebastian Hök<sup>[1]</sup>

The bad news is that there is currently no statutory dispute adjudication though there is strong need for alternative dispute resolution methods in Germany<sup>[2]</sup>. The good news is that German practitioners seem to be ready to use it. However, the most frequently used standard form of contract in Germany, also referred to as the General Contract Terms for the Execution of Construction Works - Part B (abbreviated: VOB/B) does not provide adjudication as a normal feature of dispute resolution. Also FIDIC standard contract terms are rarely used in Germany. Hence there is very little experience with Dispute Boards. On the other hand an overflowing discussion grew up as to whether dispute adjudication could solve some cardinal problems within the German construction industry, which have been identified as being expensive and lengthy procedures, all of which are inherent in the recovery of any debt<sup>[3]</sup>. Those who have been involved in dispute adjudication proceedings throughout the world will presumably confirm that these problems could be resolved by implementation of DABs.

However, a further more detailed look on what happens in Germany will lead to the observation that the complaints about long and expensive court proceedings are most often the result of missing records and documentation and frequently also the result of an intensive use of expert evidence because the judges usually do not have particular experience in the industry and must heavily rely on experts for dealing with such cases. Unfortunately German practice does produce much less records, documents and let us say evidence than it is needed. Compared with standard practice in anglo-saxon countries the documentation outcome in Germany is a nightmare. Rather it is common practice to prepare the file for court when the project has been completed, staff and equipment are no longer on site and usually the responsible persons are not available any more. Thus, the implementation of dispute adjudication which will not go along with a substantial change in current German practice of programming, record keeping etc., will not change too much because even an experienced adjudicator will not be able to give its professional opinion without having been fed with information and evidence. Hence DAB's will encounter huge problems if not based on a FIDIC form of contract.

However, during the past last years, advantages, disadvantage, pros and cons of dispute adjudication have been discussed in detail<sup>[4]</sup>. Though inspired by English law, this discussion mainly focused on how to use dispute adjudication as a feature, which is assumed to be better and more appropriate than court proceedings and thus suitable to replace court proceedings and arbitration ignoring:

- the fact that the availability of and the access to a sophisticated judicial proceeding is always something which is not only desirable but at least something which is one of the basic elements of a modern jurisdiction, and
- the fact that English statutory dispute adjudication promotes a concept which mainly intends to ensure that payments will not be withheld unreasonably

The aforementioned approach limited heavily the scope of discussion. The main concerns by German authorities and authors are that dispute adjudication promotes a model of rough justice, producing decisions, which are not suitable to become enforced by the courts<sup>[5]</sup>. Some authors even have put in the discussion

that dispute adjudication may contradict with fundamental rights<sup>[6]</sup>. Practical experiences have not been put in the discussion because there are none or very few.

With regard to the implementation and use of dispute adjudication in Germany three main issues can be identified:

Dispute adjudication can very easily be confused with expert determinations as covered in Sections 317, 319 BGB<sup>[7]</sup>. According to the majority of German authorities dispute adjudication has the very nature of an expert determination<sup>[8]</sup>. This leads to the following observations.

Under Sections 317, 319 the parties of a contract may agree to appoint an expert who shall submit an expert determination rather than an expert witness statement. According to the courts the purpose of such an expert determination is to obtain conclusive evidence for a fact or circumstance meaning that the parties are bound to what the expert has determined and that further evidence is not accessible<sup>[9]</sup>. However, the expert is not bound to follow any procedural rules, such as to hear the parties. Also it is not required to form a legal opinion. What the expert shall do and what he actually does in most cases is to use its knowledge, skills and experience in order to come to its decision. In other words the expert forms its professional opinion by reference to its own knowledge or facts, which were investigated by it. It is not there to consider the parties' arguments or the law. Although the expert's commitment may require the consideration of the law it is not an essential or natural element of it. Hence an expert determination constitutes the expert's opinion or view on the subject matter. It is binding on the parties who may not question the determination unless it is harshly unfair or harshly wrong. Jurisdictional issues may not arise and procedural fairness is not required.

It derives from the aforementioned that a DAB will not ask whether it has jurisdiction to decide the dispute and that it will not comply with any procedural standards such as natural justice or similar. Such a Board may not act ex parte. It does not apply the law. Such a DAB simply does not make any sense.

It must be questioned that German courts will understand a DAB clause constituting a bar to exercise jurisdiction. Rather German courts will at best argue that unless the DAB acted as an expert the claim cannot be due yet. However, the court will accept its jurisdiction.

DAB decisions whether provisionally or finally binding can hardly become enforced. The courts shall hear the case on the merits and make their decisions on the merits. Summary judgments are not admissible or possible. For that the German courts can directly enforce a DAB decision it must constitute an independent entitlement or at least conclusive evidence of such an entitlement. For both theories justifying arguments are missing, at least if a provisionally binding DAB decision is concerned.

An expert determination may not constitute an independent entitlement or in other words it may not constitute a cause of action. It constitutes evidence. However this type of evidence does not originate from the parties themselves which prevents the courts from relying on it in document evidentiary proceedings. Hence, an expert determination may prove two things only: the fact that an expert has issued a determination and what the expert has said and/or determined. Its determination will not have res judicata. The obligation to give effect to the DAB decision might be construed to constitute nothing else than the confirmation that no further evidence as to the claim is admissible. However, all kind of defence is still available and admissible. Also the claimant will still be required to substantiate its claim for which the expert determination may serve as either partial or full evidence. The scope of evidence will depend on what the parties have agreed on to submit as a question to the expert. The court will then decide to what extent further evidence is inadmissible. In no case the existence of a DAB decision will make it useless or unneeded to represent a full claim or case. The court shall finally consider the facts and come to a decision. It may open up and review the expert determination if it is harshly unfair or wrong (see Section 319 BGB).

For instance German courts had no opportunity to consider a case based on a DAB decision. However, it was held that an Italian lodo irrituale does not fall under the 1958 New York Convention<sup>[10]</sup>. Rather the courts concluded that the lodo irrituale lacks enforceability because of its mere contractual nature as opposed to the nature of an arbitral award<sup>[11]</sup>. The courts held, that unlike an arbitral award, a lodo irrituale constitutes an interim decision, which opens the way for obtaining a decision from a court. Hence a lodo irrituale serves a basis of an action upon the action. It is submitted that a DAB decision has a very similar nature to that of a lodo irrituale and that German courts will therefore recognise it as a basis of a claim<sup>[12]</sup>. However it is noteworthy that the former Empire Supreme Court was reluctant to accept a foreign award as full evidence for a claim unless it being recognised in accordance with Sections 328, 723 Civil Procedure Code having the same effects like a domestic award. Rather the foreign award proves the existence of the award as such and it may also show evidence for the cause of action on the merits of the case. However, it does not determine the claim. Hence, based on the authority the claimant was obliged to show full evidence for its claim<sup>[13]</sup>.

However, even if the court assumes that the meaning of the words "the losing party shall give effect to the decision" is that that the parties shall in fact immediately do what the DAB has decided to be the law the court will still have problems to enforce the DAB decision unless the decision has become final and binding

because German law does not know interim awards as a regular type of court decision. Rather it provides for interlocutory measures (Sections 916 et seq. Code of Civil Procedure). Unfortunately it must be doubted that a court will understand that the enforcement of a DAB decision is by nature urgent in order to avoid painful and irreversible damage for the claimant. However it being urgent and not doing it creating a painful and irreversible situation is a condition precedent wherefore the claimant shall show evidence. In practice the claimant will not be able to do this.

Hence, German authors usually suggest that using dispute adjudication as a means of dispute resolution presupposes a change in law. This view is of course questionable as the principle of freedom of contract applies. Hence, contractually based dispute adjudication is admissible. A FIDIC DAB may be established and it may act in accordance with the Contract. However, since the parties do not intend to obtain an expert determination Sections 317 et seq. BGB do not apply. The question arises then how to deal with DAB proceedings and DAB decisions. The standard of natural justice has no homologue in German law, though of course German law sets out standards for a fair and unbiased procedure. Also German law does not yet define a clear approach as to how to enforce a DAB decision. However, as an increasing number of encouraging decisions world-wide do exist which have confirmed the enforceability of DAB decisions there is no reason to refrain from using dispute adjudication as an appropriate means of dispute resolution to the extent that it is embedded in a FIDIC contract.

In this regard, under the auspices of the German Association of Consulting Engineers a national list of dispute adjudicators has been successfully established over the past five years. All listed adjudicators were assessed by experienced and assessed FIDIC experts also and thus the future for Dispute Boards in Germany or at an minimum international style adjudication for construction disputes appears promising.

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[1] Götz-Sebastian Hök is a German solicitor registered at the Berlin bar. He has a PhD in law, is a lecturer a Berlin University of Applied Science, a FIDIC listed adjudicator, a FIDIC licensed FIDIC trainer and a DBF Fellow.

[2] See Gralla/Sundermeier, [2007] BauR 1961; Schulze-Hagen, [2007] BauR 1950

[3] See Greger/Stubbe, Schiedsgutachten (2007), § 1 et seq.; Schramke, [2002] NZBau 409 et seq.; Lembcke, [2007]NZBau, 273 et seq.; Schulze-Hagen, [2007]BauR 1950; Hök, [2010] IBR 378

[4] See Schulze-Hagen [2007] BauR 1950 et seq.

[5] See Schulze-Hagen[2007] BauR 1950 et seq.

[6] See Quack [2010] ZfBR 211 et seq.

[7] See for example Lembcke, [2007]NZBau 273, 276; Stubbe, [2006] SchiedsVZ 150, at 153; Greger/Stubbe, Schiedsgutachten, note 194; Schramke[2007] BauR 1983, 1990 et seq.; Walter, 103 (1990) ZZP 141, at 150; Weick, in: FS Coing, Vol. 2, 543, at 560; Borowsky, [2007/2] ZKM 54; Denzer, Stellung und Bedeutung des Engineer, 213; Schmidt-Gayk, in: IBB, 57, 70; Mahnken[2007] BauR 1994, 2000

[8] Compare Lembcke, [2007] NZBau 273, 276; Rosener in : Münchener Vertragshandbuch, VI.1 notes 18, 19

[9] German (former) Empire Supreme Court, [96] RGZ 57

[10] German Federal Supreme Court, decision from 8.10.1981 - III ZR 42/80, NJW 1982, 1224 citing Sanders, Yearbook Commercial Arbitration (YCA), Vol. IV 1979, 232 et seq.

[11] See Hök, [2007] ZfBR 416, at 424

[12] See OLG Brandenburg, [2005] BauR 605; Hök, [2007] ZfBR 416, at 424

[13] German (former) Empire Supreme Court, [129] RGZ 385 et seq.