

# DRBF INTERNATIONAL CONFERENCE PARIS, MAY 2013

FIDIC's contribution to Dispute Boards

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## The position under FIDIC Contracts before 1995

FIDIC Contracts are widely used in developing countries,

FIDIC Contracts based on the Institution of Civil Engineers' Standard conditions of contract for civil engineering works

The role of the 'Engineer'

independent, even-handed, fair and judicious

determination of either party's rights such as claims for time or money

The Engineer engaged by the Employer.

Engineer likely to have been the designer.

Engineer often a senior partner of a major consulting company  
respect for the Engineer's determinations of time and payment

Engineer would not shy away from finding fault within his own  
organisation in the event that the root cause of the problem was due to  
the Engineer's own firm's delinquency.

Happy days, but not to last.

market forces and internationalism.

Employers tightly limited in their financial resources

emergence of a different breed of Engineers.

the Engineer could hide behind the corporate veil.

Claimsmanship in the 80s and 90s

tight margins - profit on the claims.

A disastrous attitude giving sub-contractors particular concerns under pay-when-paid provisions and causing confrontations

The concept that the Engineer was fair and impartial evaporated

an adjudicator with no connections to the project, the Employer, the Contractor the designer had great appeal.

Sending disputes off to an arbitrator?

The unrecoverable costs of arbitration or litigation were often substantial

'Construction Act' of 1996

well known adjudication provisions

Internationally, FIDIC and a number of development banks picked up on a trend that had emerged from the USA

## Standing DABs, *ad hoc* DABs

For Silver and Yellow Books, FIDIC adopted a compromise.

manufacturing or off-site nature - disputes were less likely to arise.

A standing DAB which undertakes regular visits to the project was thus unnecessary.

Adjudicators under Silver and Yellow books did not perform the essential function of a DB – they were appointed after disputes arose, were usually involved in single disputes so the benefits of consistency was lost and could not assist the parties in dispute avoidance.

They were not proper dispute boards.

changes in the forthcoming revised FIDIC forms of contract.

## Why did FIDIC adopt DABs rather than DRBs

DRB's give non-binding recommendations. These recommendations are persuasive only

*Status quo* remains

persuasive recommendation would not be adequate

Cash flow is the life blood of commerce

FIDIC followed suit and used the Dispute Adjudication Board to give decisions that were to be complied

decisions were not necessarily final. Arbitration or the courts could follow but this did not prevent the DAB decision from having the necessary teeth to compel immediate compliance.



## The MDB edition

Multilateral Development Bank (MDB) or Harmonised Edition of the FIDIC contract was produced.

various additional clauses into the Particular Conditions and this created inconsistencies, uncertainties and increased the possibility of disputes.

The Harmonised conditions were first published in 2005 and are now in their third edition (2010).

## The growth in DAB as a result of FIDIC's support

contracts funded by the EU institutions use the FIDIC contract and thus require a DAB - Romania, Serbia, Bulgaria, Moldova, etc.

African countries where funding is provided by, for example, the US Millennium Challenge Account or other development banks, FIDIC contracts are utilised - Mali, Mozambique, Tanzania, Kenya, etc.

DRBF to ensure that this growth is sustainable and the quality of DAB service does not decline as the number of DABs increases.

## DABs are more than adjudication

avoiding disputes.

The adjudication of disputes is only a part of the service a dispute board can offer to a project.

## Lists of Adjudicators

President's List - used by FIDIC to nominate DAB members when asked to do so.

FIDIC is often the appointing authority

first-hand experience as an adjudicator is necessary

limited appointments.

member associations to establish national lists

The criteria for listing on a member association list varies considerably.

What these national lists do provide is a training ground for those persons who aspire to the FIDIC President's List and who need to build up their experience.