

DRBF 15th Annual International Conference, Genoa, Italy
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Session 5: Recent Developments in Dispute Board Rules

OVER-RULED!

Gordon L. Jaynes

Glj4law@aol.com

Good morning!

First, I want to address the topic assigned to me. Unlike my fellow panellists, I was not assigned a specific set of Rules to discuss. Instead, the topic given to me is “The Experienced Practitioner”. That may appear to be self-advertisement; however, that title was not proposed by me. Of course, when I saw it on the DRBF web site I did not object – it does sound better than “The Old Practitioner”!

Dick has worked with me a lot on Dispute Board matters and he knows that I occasionally “sound off” on the subject to Rules. When Dick invited me to join this session, I suggested titling my part “Rules! Rules! Rules!” – but then I decided sounded a bit like Richard III at Bosworth, pleading for a horse. So, I settled on “OVER-RULED!” – and just one exclamation point.

My complaint is with respect to procedural Rules. Of course, I recognise that some are needed, but my observation has been that the more elaborate they are, the more they lead to mischief. To quote John Uff, CBE QC: “Why give the Parties rods with which to beat your back?” The more complex the procedures, the greater the opportunity for error. Also, the more complex the procedures the less flexibility you have to adapt procedurally to the circumstances arising during the Board’s dealing with the dispute referred.

In my experience, the ANNEX to the APPENDIX to FIDIC's Clause 20 provides an admirable set of procedural rules, and a DAB or a DB which strays from them to more detailed rules does so at its peril. There are 9 of them, in total length about 1.5 pages. They give the Board ultimate control over time and agenda for Site visits, entitle the Board to receive documents which it requests, decide how to proceed in deciding any dispute referred to the Board, conduct hearings including control of attendance, adopt inquisitorial procedure if it wishes, determine its own jurisdiction under the Contract, take the initiative to determine facts or other matters it needs for making its decision, make use of its own specialist knowledge, decide on payment of financing charges under the Contract, decide on provisional relief such as interim or conservatory measures, and open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer relevant to the DAB's decision.

The Procedural Rules contain only two restrictions on the Board:

"Subject to the time allowed to give notice of a decision and other relevant factors, the DAB shall (a) act fairly and impartially as between [the parties], giving each of them the opportunity of putting his case and responding to the other's case, and (b) adopt procedures suitable to the dispute, avoiding unnecessary delay or expense."

That is a very flexible and powerful charter for the Board. Reading the Annex, a newcomer might wonder why any other rules have been created.

Part of the explanation for the various sets of rules lies in the history of Dispute Boards. That history is too long to review in detail this morning but I will try to summarise some key points.

When first developed the Boards were used to obtain non-binding Recommendations and were intended only for use in the USA domestic construction industry, and not for other industries or for general international commerce. A large number of such Boards have existed, and still do, in North America, especially in the USA, and the Boards still produce non-binding decisions.

When the Multilateral Development Banks (“MBD”) adopted the use of Boards for international construction contracts, the MDB also initially gave non-binding Recommendations. However, shortly after FIDIC adopted the use of Boards which made “binding but not final” decisions, the MDB altered their Boards so that they, too, make finding but not final decisions. Thus on the international engineering and construction scene, by the end of the 1990s and the early 2000s, the only Boards known to be making non-binding Recommendations were in North America.

However, there were some in the international construction industry who believed that Users should be able to choose the type of output they wanted from their Boards, and this led to a group of drafters who developed the 2004 ICC Dispute Board Rules of which we will hear details this morning.

Your Conference materials also will include references to other Dispute Board Rules prepared in past years by, for example, the UK Institution of Civil Engineers, the American Arbitration Association, and its International Centre for Dispute Resolution, the London Olympics Authority, -and most recently the two new sets of Rules which also will be discussed this morning – those of the USA “Consensus Docs” and those of the UK-based but internationally active Chartered Institute of Arbitrators.

Apart from the different approaches to Board output – non-binding Recommendations vs. binding-but-not-final – what has stimulated so many sets of Rules for the Dispute Board process?

It seems likely that one motivation may be the self-interest of the institutions which publish the rules. If the organisation already is active in resolution of construction disputes, the growth in use of Boards may lead the organisation to seek to secure (or maintain) “market share” in the commerce of assisting Dispute Board Users particularly in selection or even appointment of Dispute Board members, offering educational meetings and materials, training on Dispute Boards, and furthering the interests of the organisation’s members in being appointed as Board members. The organisations may be responding to requests for such rule making, from either or both its members and non-members who otherwise use the services of the organisations.

Also, part of the motivation of the institutions seems to stem from wishing to expand the use of Dispute Boards into other areas of commerce besides construction, such as licensing of Information Technology, use of other intellectual property, including copyrighted or trademarked images – indeed, any contractual arrangements which involve complex subject matter or long duration or both, and therefore have significant exposure to the risk of difficult disputes.

Clearly wider commercial uses are part of the motivations of two of the organisations represented here today – the Chartered Institute of Arbitrators and the International Chamber of Commerce, both of which serve many commercial areas in addition to the construction industry.

Perhaps another explanation of the growth in forms of Rules for Dispute Boards is the human tendency of the ambitious to seek to improve what is currently available.

Are there any pitfalls or problems with respect to the various Rules?

I suggest that the pitfalls or problems are less in the Rules than they are in the failure to use the Rules wisely. Of course, all Dispute Board Rules can be improved, and probably will be over time. But the Rules now on offer are “fit for purpose” and in my view the pitfalls and problems experienced by Dispute Boards stem from the User behaviour, not from the Rules.

Before warning of pitfalls or problems, I want to explain that I do not wish to distort the scene, to cause a “mental astigmatism”. We hear or read of problematic Dispute Boards, but we must not lose sight of the fact that there are a great many Dispute Boards which function successfully. So, my discussion is not meant to “put you off” use of Dispute Boards. On the contrary it is meant to help you to achieve success as a User of these Boards. Also, among my comments will be several recommendations to Board members, which of course indirectly are recommendations to the Employer, Contractor, and Engineer or Employer’s Representative (“ER”).

Selecting the most appropriate Conditions for your project

Too often Users of the FIDIC Conditions select a set by just the title and give little or no attention to the carefully drafted “Guidance” offered by FIDIC regarding each set of its Conditions, including the alternative or sample provisions offered with respect to many of the Conditions. An example is the decision on which type of Dispute Board to establish when using the Yellow Book (for Plant and Design-Build) or the Silver Book (for EPC Turnkey).

If you are an Employer or Engineer or ER and plan to use contract conditions of either of FIDIC's Yellow or Silver Books, use the "standing" DAB instead of the "ad hoc" DAB: the "Guidance" section of each Book gives the wording needed to use a "standing" DAB. The record of successful use of the "ad hoc" alternative is not inviting. Indeed it is not truly a Dispute Board because it has not been structured to assist the Parties in *avoiding* formal disputes. By definition it cannot prevent disputes arising. It is not surprising that it frequently has been seen to be an expensive "rehearsal" for an immediately-following arbitration or Court case.

Do not be tempted to think that "disputes only arise during construction" so if your contract is for design-build or EPC Turnkey, you can "save money" by not establishing a Dispute Board until the pre-construction design phase. Such parsimony has proven to be misplaced. Do not let the cost of the DAB discourage you from setting it up at the outset. Think of the cost as a form of "insurance policy" which brings you increased protection against expensive and lengthy arbitration or Court litigation, and increased possibility of contract completion on time and within budget.

Selecting your Dispute Board

If you are an Employer or Engineer/ER do not try to impose restrictions on the Contractor by setting forth in the documents accompanying the Invitation to Tender a list of candidates and requiring the use of a particular person or a particular group of persons.

An important part of the psychology of successful use of Boards is to establish the spirit of cooperation between the contract parties. Collaboration in the selection of each Board Member is an important

step in developing the spirit of cooperation, of working together toward a shared goal. This collaboration also assures that both Parties are fully satisfied with the persons selected. It builds confidence that each Board member works for both Parties.

Choose carefully those you propose for Board membership. Do not hesitate to use “due diligence” in exploring the candidate’s prior Board experience, including requesting and checking of references from past Users of the candidates. Probe politely to find out if the candidate is already heavily committed to other Boards or to arbitral tribunals, or to other work. It is understandable that especially persons who are self-employed tend to accept all invitations to serve rather than decline due to existing and anticipated future workload, so you should be alert to this risk. Share with the other Party the fruit of your “due diligence”.

Although reputation, or “name”, is important, you should have enough contact with the candidate to get a “feel” for whether you are comfortable to place such responsibility with the person. You should have what current slang calls “face time”. This is best done jointly with the other Party, and a common method is a pre-arranged Skype conference call. In assessing candidates, both from references by others and in your contact with the candidates, seek to gain a sense of whether the candidate has the desired combination of technical expertise, open-mindedness, and cordiality to work with others.

Unless the first two Members are selected at the same time, always inform the candidates for the second position of the identity of the person already selected as one Member. This reduces the risk of incompatibility among Board members. Regarding the Chairman, Sub-Clause 20.3 requires the Parties to consult both Members

already selected and then to agree the Chairman of the Dispute Board. It is good practice to elicit comment of the first two members selected regarding any potential Chairman, but the Contract does not require the Parties to agree to a person who has been proposed by either or both of the other Members.

The Chairman is likely to be the most important Member, even if only because the Chairman will have the deciding vote if the position of the Board is not unanimous. The position therefore deserves no less scrutiny, or due diligence, than that given the other two Members. Especially it should be remembered that the Chairman is likely to have to meet a greater availability of time for Board work than the other two Members, including typically during the drafting of decisions, and arranging visits with the Parties.

Let us now assume that we have a true Dispute Board. What advice do I offer?

First meeting of the Board with the Parties and the Engineer/ER

Whether the first meeting is in an office or at the Site or elsewhere, allow time for the Board to review together with the Parties and the Engineer/ER the Contract provisions for dispute prevention, including the procedural rules adopted in the Contract. (In FIDIC Conditions, Clause 20, its Appendix, and the Annex to the Appendix).

Do not assume that the team is familiar with the Contract dispute resolution provisions. You may be meeting with people who were not involved in the formation of the Contract and who are not yet fully familiar with all that the Contract contains, especially provisions for dispute resolution. As has been said before, “The Parties just got married: they are unlikely to have spent much time talking about divorce!” Encourage questions about the dispute provisions as you

review them together. As already mentioned, avoid additions to the Contract procedural rules.

If you see Contract provisions regarding dispute resolution which have become problematic for any reason, such as delay in establishing the Dispute Board, discuss the advantages of amending such provisions. Such amendments may be possible to accomplish by a simple exchange of letters.

For example, if the Board has not been established until after disputes have arisen and the Parties have fully formed differing views, and intend to submit referrals to the Board as soon as possible, seek to persuade the Parties to change the standard time limits on the Board; remember, those time limits are based on the assumption that the Board would be in place at the outset of the Contract and would be fully familiar with any disagreements long before they become formal referrals of disputes.

As in dealing with Parties' disagreements before they can become formal disputes, a principal task of the Board is to *persuade* – in this case to persuade them to alter an inappropriate DAB timetable. Most Rules foresee and allow for making such change, and has been done on various projects, especially after the DAB has pointed out the risks of trying to keep to an impracticable timetable.

If there is an accumulation of disputes awaiting Board establishment, then at the initial meeting, also arrange periodic visits with the Parties, whether at Site or elsewhere, to identify and deal with existing or potential disagreements which have not yet reached the stage of formal disputes for referral to the Board. Establish a separate plan and timetable for dealing with the already-existing disputes which the Parties intend to refer to the Board. Try to

arrange that the first step in dealing with a particular intended referral be an informal discussion with the Board after the Board has reviewed whatever documents the Parties have already prepared; and, if no documents have been prepared, seek to persuade the Parties to defer document productions until the Board has discussed with the Parties the disagreements which they are planning to put forward as formal referrals. Such discussion may enable the team to avoid the step of formal referral of at least some of those already-existing disputes.

Emphasise that you are not Circuit Judges who come to the Site regularly to adjudicate formal disputes, hold hearings, and prepare written decisions. A DAB is **not** litigation, and it is **not** arbitration!

The Board is part of the Contract team aiming to assist in prevention of formal disputes. It brings to that effort many decades of experience on similar projects. Let the Parties know that you will be happiest if there never are any formal disputes and all disagreements can be resolved amicably. “The best Board is the one which never has to make a formal decision.” Encourage use of informal opinions of the Board, including such use by the Engineer or ER as the Engineer or ER may consider potentially helpful.

If one Party is reluctant to join in a request for an informal view of the Board, do not meekly accept – seek to *persuade*. If the reluctant Party will table the problem and explain its reluctance so that all can understand the reluctant Party’s concerns, the problem may be overcome. All members of the project team are “in the same boat”, trying to make the voyage a successful one, and the Board is a key member of the crew.

Also make clear that in the Information Age, the Board expects to maintain communications with the Parties and the Engineer or ER throughout performance of the Works. Make clear that in addition to receiving such traditional information as Monthly Progress Reports (including the reporting of claims and their progress, or lack of progress), the Board is to receive Minutes of meetings in which disagreements appear, especially any dealing with claims. The Board may ask to attend electronically (by Skype or other means) meetings regarding claims. Further the Board may itself initiate electronic discussions with the Parties and the Engineer or ER. Additionally, the Board may request physical meetings with the Parties and the Engineer or ER between the regularly scheduled meetings.

In short, *sell your services!* Persuade, persuade, persuade: be patient, but politely persistent in keeping your hands on the boat's tiller for navigation of claims and disagreements. Be proactive, not just reactive.

More about the initial visit

Review the forms which the Parties and the Engineer intend to use to manage and to record progress of the Works – manpower, materials, equipment, transport, and programmes. Consider the suitability of those forms and their potential for use in disagreements over claims for time and money and encourage modifications to the forms if they seem to need improvement. Clarify what if any similar documentation is intended to be required with respect to claims involving third parties such as subcontractors and suppliers.

Discuss the Board visit report, whether at Site or elsewhere. If you are not serving a FIDIC Contract, adopt the approach of Rule 3 of the Annex to the Appendix to Clause 20 and deliver your signed report

before departing the meeting. Arrange to review your draft of the report with the Parties and the Engineer or ER before putting the text into final form and signing it. This review is to assure that any factual statements are correct, and that the suggestions of the Board are understood. This is particularly important if the Parties, the Engineer or ER, and the Board do not all have the same first language.

Write the meeting reports having in mind that they can (and should be) used by the Parties and the Engineer or ER to assure that others in their respective organisations are aware of all developments affecting the ability to avoid formal contract disputes and adversarial proceedings.

It also is wise to have the meeting reports record the names and organisations of the attendees during each day of the meeting. This is an excellent tonic for encouragement of faithful attendance. If distances and logistics make it difficult for the Employer to attend a particular Site visit, extend the Site visit to include a pre-departure meeting of the Board, the Contractor, and the Engineer or ER with the Employer at the Employer's offices.

Thinking "outside the box"

Whether you are a sole member of the Board or one of three members, do not hesitate to take advantage of the experience of colleagues who are active in the kind of contract with which you are involved, but without breaching your confidentiality obligations. Also, take the time to research learned papers and books for possible guidance in assisting the Parties toward consensus. Both of these steps should be done early in your acquaintance with the disagreement

Written submissions

Perhaps it is the influence of familiarity with arbitration rules of organisations which administer arbitrations, perhaps it is the influence of lawyers trained in the common law system of pleadings, but some Dispute Board Rules require the Parties to make sequential submissions of documents as part of the referral process. This is unfortunate for many reasons. I mention only four:

*It ignores the fact that by the time of any referral, the Board should be thoroughly familiar with the basis of each Party's view of the claim or disagreement, and have been involved in discussion with the Parties about the matter. It is relevant that in the FIDIC Conditions, Procedural Rule 6, the Board "may" conduct a hearing, and "may" request that written...arguments" be presented to it. That wording is discretionary not mandatory. Indeed, Rule 5(b) requires the Board to adopt procedures which avoid "unnecessary delay or expense".

It is quite possible to proceed without a hearing and without written argument, while still meeting the requirement of Rule 5(a) to give each Party "a reasonable opportunity of putting his case and responding to the other's case". Ideally those two Rule 5 (a) requirements will have been met long before any referral of a formal dispute to the Board! Just because arbitrations typically enmesh the parties in piles of paperwork and expensive hearings, it does not follow that Disputes Boards should mimic arbitral practice;

*It tends to inhibit the Board from making specific pre-submission requests for particular information which it considers it needs to enable it to make its decision or Recommendation, and this discourages an "inquisitorial" approach (in favour of an adversarial approach) in the referral process;

*It makes it more difficult for the Board to convince the Parties to collaborate to prepare mutually agreed statements of relevant facts;

*It tends to involve third party specialists (or, colloquially, “hired guns”) in preparation of the submissions, and to promote involvement of those specialists throughout the remainder of the Board proceedings.

It is wise to include here a specific caution: do not agree to adopt document discovery proceedings: they are the bane of arbitral proceedings and have no place in Dispute Board proceedings. In the context of FIDIC’s DAB Procedural Rules, document discovery does not meet the criteria of Rule 5(b) on “avoiding unnecessary cost or expense”.

Although often Parties display a “reflex reaction” of wanting to produce expert witnesses on technical issues, or legal issues, or both, the Board should not agree unless it finds that a matter in dispute involves expertise not available from the Board itself. Should that occur, the Board should seek to persuade the Parties to allow the Board to select one independent expert who will assist the Board. Avoid presentation of Party-appointed expert witnesses; it is both time-consuming and expensive, and anyway often results in the Board having to retain its own expert to assist the Board in navigating the conflicting analyses of differences of opinion between Party-provided experts.

Preparing the decision or Recommendation

If you serve on a three person Board, after the referral has been discussed privately among the Board members, offer to assist the Chairman in drafting, in order to gain time.

When the decision or Recommendation is issued, usually it is done electronically, and it is a wise precaution to ask the Parties and the Engineer or ER to confirm safe receipt. It is a welcomed touch if the Board adds that if any part of the document is unclear, to please advise the Board.

Notice of dissatisfaction

If you are a Board member and receive such a notice, don't sulk or nurse your wounded pride. Your job is not ended by such a notice. Respond to the Parties and the Engineer or ER, expressing your hope that even if both Parties are not satisfied with the decision/Recommendation, the Board is available to continue to assist the Parties. In a FIDIC context, you can participate in the "amicable negotiations" which are required for a minimum period. Seek to explore with both Parties whether they would like to involve the Board in further discussions, perhaps to explore whether some part or parts of the decision/Recommendation can be used to craft a mutually acceptable solution to the dispute.

If such an overture is rebuffed, ask whether the dissatisfied Party (or Parties, if both are dissatisfied) would be prepared to try using a mediator to close the gap between the Parties, and if there is a receptive response from either or both Parties, suggest a few possible mediators and provide c.v.s of those persons you suggest. Follow up in a week or so to see whether there is interest in mediation, or perhaps some other form of ADR. Make sure that the Parties do not remain silent and mark time until the minimum period expires after which either party can initiate arbitration.

Probably you already will have emphasised the importance of avoiding arbitration if possible, noting the cost and time required for arbitration of construction disputes, but do not hesitate to say it again. Offer to talk with, and/or meet with, the Parties' top

management to discuss your experience of the time and cost of arbitration, especially if you know that top management of one Party (or perhaps both Parties) has no prior experience of international commercial arbitration.

Even if these efforts on your part do not bear fruit, always let the Parties and the Engineer know that you remain available to assist in any way they think may be helpful in avoiding, or ending amicably, any arbitration of the dispute(s), especially if the arbitration is commenced while the Board is still in service to the Contract.

Where possible, remain in touch with any arbitration of any dispute(s) arising under the Contract so that you know the final outcome of the arbitration and can assess the end result of the Contract having had the benefit of a Dispute Board. Such knowledge can give you a depth and richness of experience that makes you a more valuable Dispute Board member in the future.

Finally explore with the Parties their willingness to allow you to publish later a "sanitised" version of the final resolution of disputes under the Contract, or if there have been no formal disputes, then to publicise that. Offer each Party prior approval of any text developed for this purpose, explaining that it helps to build the use of Boards. I have included as a final page an example of the kind of letter that helps to promote Dispute Boards generally as the preferred method of avoiding and resolving disputes.

Thank you for your attention and may you enjoy much success in use of Dispute Boards!

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To: The DISPUTE REVIEW BOARD (DAB)
Atten.: Mr. Gordon Jaynes (Chairman)

Copy:

The ENGINEER
Construction Supervision ELECTROWATT-GHIDRI-Kunming

The EMPLOYER
Kunming Zhangjiuhe River Water Diversion Construction and Water Supply Project Administration Bureau

Dear Sirs,

We are pleased to inform you that the Employer and the Contractor have amicably reached a package agreement dated January 21st, 2014 for final settlement of CW-Lot I of Kunming Zhangjiuhe River Water Diversion and Water Supply Project, fully closing all the pending matters in connection with Lot I.

As per this package agreement, the Employer will make a last payment of CNY34'120'000 to the Contractor before May 15, 2014. Actually, on the 22nd of April 2014 the Contractor has received this payment from the Employer. Thus the Contractor confirms that all the payments stipulated in the final settlement package deal agreement have been made to the Contractor as programmed, while the Contractor will properly settle final payments with the Subcontractors as already confirmed in the above-mentioned final settlement package deal agreement. Besides that, all the required documentation has been properly submitted by the Contractor and the Subcontractors as required and also accepted by the Employer. The Employer confirms that the Contractor has fulfilled all his contractual obligations to the satisfaction of the Employer. The Engineer has issued a Final Payment Certificate to the Contractor with copies to the Employer dated April 20 of 2014.

Therefore, the Employer and the Contractor will terminate the agreed DAB service from May 1st, 2014.

At this moment, both the Employer and the Contractor would like to express our deepest gratitude to the DAB members who walked with the parties through the whole project particularly the most difficult stages, guiding the parties to build mutual acceptable procedures to solve possible disputes. With your constant care and encouragement, it is finally possible the two parties amicably reach the final settlement package agreement. Again, we would like to give our sincere thanks and appreciation to the DAB members for your tremendous contribution to the final completion and a successful closure of the Project.

Signed for and on behalf of

The Employer, Kunming Zhangjiuhe Water Diversion and Water Supply Project Construction Bureau, by Mr. Lai Baoheng

The Contractor, Cooperativa Muratori e Cementisti - CMC di Ravenna by Mr. Salvatore Casciaro

Attachment: Final Settlement Package Agreement for Lot I of Kunming Zhangjiuhe Water Diversion and Water Supply Project