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I. INTRODUCTION

In recent years, the inventory of alternative dispute resolution (“ADR”) techniques has been enriched by the use of dispute review (or adjudication) boards.¹ The International Chamber of Commerce (“ICC”) has now issued its new Dispute Board Rules (“DB Rules”), in force as from 1 September 2004.² This article first reviews the background and comments upon certain general principles and issues that arise in connection with dispute boards. The article then summarises the salient features of the ICC’s DB Rules and concludes with a few comments about these rules.

II. BACKGROUND

Introducing its DB Rules, the ICC describes dispute boards as follows:

“Dispute Boards (DBs) are independent bodies normally set up at the outset of a contract and which remain in place for its duration. Comprising one or three members thoroughly acquainted with the contract, DBs can help parties resolve their disagreements and disputes by providing informal assistance and by issuing recommendations or decisions.”

The modern development of dispute boards began in the United States in the 1960s, where they were used successfully on major civil engineering projects (dams, underground construction, etc.). Dispute boards were subsequently used with success in international projects. In 1989, the American Society of Civil Engineers (“ASCE”) published a standard dispute review board (“DRB”) specification that had been prepared by the Technical Committee on Contracting Practices of the Underground Technology Research Council. The ASCE published a revised DRB specification in 1991. A Construction Dispute Review Board Manual was published in 1996.

In the United Kingdom, beginning in the 1970s, parties to construction projects developed a procedure known as adjudication, in which disputes

¹ For a recent, analytical discussion of dispute boards, see Christopher Dering, “Dispute Boards: It’s Time to Move On” [2004] ICLR 438. Mr Dering cites other articles on dispute boards that have been published in this *Review*, *ibid.* at p. 438, n. 1.

² The Chairman of the ICC Task Group on Dispute Boards, Pierre Genton, explained the ICC’s reasons for publishing the DB Rules and discussed the DB Rules in his article, “Le nouveau Règlement CCI sur les ‘Dispute Boards’”, *Les Cahiers de l’Arbitrage*, No 2004/2—1^{re} partie, published in *Gazette du Palais*, 3–4 December 2004, pp. 36–41.

were submitted to a standing project neutral who would render decisions that were binding upon the parties, but subject to review or appeal in a later proceeding (litigation or arbitration). The success of adjudication led to the inclusion in the Housing Grants, Construction and Regeneration Act 1996 of provisions that mandate the use of statutory adjudication in all commercial construction projects in England, Scotland and Wales (except for exempted projects in certain industries).³ Practitioners in the UK consider that adjudications under the Act have significantly reduced the number of disputes that are referred to litigation or arbitration.

A change of policy by the World Bank 10 years ago increased the use of dispute boards in international projects. The World Bank had long recommended (and eventually required) that contracts for construction projects that it helped to finance be based upon the FIDIC “Red Book”—i.e., the Conditions of Contract (International) for Works of Civil Engineering Construction, 4th Edition (or an earlier edition of the Red Book). The Red Book provided that disputes be referred in the first instance to the engineer, who would render a decision that would become final and binding upon the parties unless one of them gave notice of its intention to commence arbitration. However, many parties involved in international construction contracts doubted that the engineer—selected and paid by the employer—could act impartially when deciding disputes, some of which could involve action or inaction by the engineer himself.

In 1995, the World Bank issued new Standard Bidding Documents for the Procurement of Works (“SBD-W”), which provided for disputes to be submitted to a dispute review board, rather than to the engineer. (The World Bank’s SBD-W permitted the reference of disputes to the engineer only for contracts that cost less than US\$50 million *and* only if the engineer was independent of the employer.) The dispute review board under the SBD-W would issue recommendations that were not binding upon the parties. If a party did not accept the dispute review board’s recommendation, the parties would have to resort to arbitration for a final and binding resolution of their dispute.⁴

FIDIC itself then introduced a dispute adjudication board (“DAB”) in its various conditions of contract:

- In 1995, FIDIC published its new Conditions of Contract for Design/Build and Turnkey (the “Orange Book”), which did not provide for an engineer to review and decide disputes. Instead, disputes were to be referred to a DAB.
- FIDIC followed with Supplements to the Red Book, in 1996, and to the Conditions of Contract for Electrical and Mechanical Works,

³ For a detailed description of adjudication procedures under the Housing Grants, Construction and Regeneration Act and relevant extracts from the Act, see S Furst & V Ramsey, Eds, *Keating on Building Contracts* (7th ed., 2001), §§ 16–100 to 16–118 and Appendix A. For the scope of the Act, see *ibid.* §15–15C.

⁴ In the version of the SBD-W issued in 2000, the dispute review board’s recommendation is binding upon the parties, unless subsequently revised in an arbitral award.

3rd Edition (the “Yellow Book”), in 1997, both of which offered the option of referring disputes to a DAB instead of to the engineer.

- In 1999, FIDIC published its new “rainbow” suite of model contracts, including the Conditions of Contract for Construction (the “New Red Book”), Conditions of Contract for Plant and Design-Build (the “New Yellow Book”), the Conditions of Contract for EPC/Turnkey Projects (the “Silver Book”), and the Short Form of Contract (the “Green Book”). These conditions of contract all provide for the referral of disputes to a DAB (or, in the Green Book, to a sole adjudicator).

The DABs under the FIDIC conditions of contract render decisions (rather than recommendations) that are binding upon the parties unless challenged and revised in arbitration.

III. GENERAL PRINCIPLES AND ISSUES RELATING TO DISPUTE BOARDS

The parties’ primary goal in establishing a dispute review (or adjudication) board is to create a procedure for resolving disputes without resort to formal, time-consuming and costly proceedings in court or in arbitration. Proceedings before a dispute board should therefore be relatively quick and informal. The dispute board’s recommendation or decision may be accepted by the parties, thereby avoiding court litigation or arbitration. Moreover, the resolution of disputes through dispute board procedures may facilitate co-operation between the parties and prevent their relationship from becoming adversarial. Problems may be resolved before they become “disputes”. Thus, an effective dispute board can contribute to the successful completion of the project.

Members of the dispute board must be independent of the parties. They should have experience and expertise that enable them to follow the progress of the project and to make reasoned, persuasive recommendations or decisions regarding disputes that are submitted to them. In contrast to arbitration, where the parties generally have the right to appoint an arbitrator without securing the consent of the opposing party, the parties should agree upon all members of the dispute board. (There must nonetheless be a back-up procedure to be followed if the parties fail to agree upon an appointment.) The fees and expenses of dispute board members are paid in equal shares by the parties.

The status of a dispute board’s determinations may differ: as mentioned above, the World Bank’s SBD-W originally provided for dispute *review* boards that issue non-binding recommendations. In contrast, the dispute *adjudication* boards established under the various FIDIC conditions of contract issue binding decisions that can only be revised by agreement of the parties or through arbitration.

However, the distinction between non-binding recommendations and binding decisions may not matter so much in practice: the independence of the dispute board members, combined with their experience and expertise, should give their eventual determinations considerable persuasive force. The fact that the dispute board's determination will generally be admissible in any further proceedings (arbitration or litigation) may encourage a disappointed party to accept the dispute board's resolution of the dispute, even if it is only a "recommendation".⁵

The question arises whether the dispute board should be standing (i.e., constituted at the beginning of the contract and maintained throughout the performance of the contract) or *ad hoc* (i.e., constituted if and when a dispute arises). There are certain obvious advantages to a standing dispute board: the parties would normally find it easier to agree upon the members of the board at the beginning of a project than after a dispute has arisen. One of the principal advantages of the dispute board procedure—viz., the members' familiarity with the project (which, among other things, enables them to render decisions quickly)—depends upon the board being in existence throughout the project, in order to receive reports and other documents, to make periodic site visits, etc. On the other hand, a standing dispute board will naturally be more expensive than an *ad hoc* dispute board, since the members of a standing board must be paid a retainer and reimbursed for their expenses incurred during site visits, meetings with the parties and their own deliberations. These additional expenses may seem excessive if the initial phase of the contract involves a relatively long period of design, procurement and/or manufacturing away from the site. However, parties who are concerned about the expense of a standing dispute board would be well advised to compare the costs of an arbitration or litigation in court: a dispute board that assists the parties in avoiding those formal proceedings is generally good value for money.

Taking these factors into consideration, FIDIC adopted different solutions in its new conditions of contract: the New Red Book provides for a standing DAB, whereas the New Yellow Book and the Silver Book provide for *ad hoc* DABs. The parties to a contract based upon the New Yellow Book or the Silver

⁵ Cf. Dering, *supra* note 1, pp. 440–445, arguing that there is an "essential difference of purpose" between DRBs and DABs (the purpose of a DRB being to produce a recommendation that both parties will feel inclined to accept) and concluding that the DRB's procedure should be flexible and free of restrictions and that the proceedings before the DRB, including its recommendation, should not be admissible in subsequent dispute resolution proceedings. Others would maintain, however, that the purpose of a DAB is quite similar to that of a DRB—viz., to produce a decision that both parties will accept. Mr Dering's comments regarding the procedure before a DRB might therefore apply equally well to a DAB.

Book nonetheless have the option of establishing a standing DAB if they deem it appropriate.⁶

IV. THE ICC'S DISPUTE BOARD RULES

1. Structure and key elements

The ICC's DB Rules are a free-standing set of rules that may be adopted by the parties to any contract. The ICC has proposed Standard ICC Dispute Board Clauses for this purpose. These standard clauses include agreements to arbitrate disputes that have been referred to a dispute board, in the event that a party expresses dissatisfaction with the dispute board's recommendation or decision. The ICC has also published a Model Dispute Board Member Agreement to be concluded by the parties and the individual members of the dispute board.

Rather than choose between a dispute review board ("DRB") and a dispute adjudication board ("DAB"), the ICC has offered both forms of dispute board (Articles 4 and 5, respectively). A DRB issues non-binding *recommendations*; a DAB issues binding *decisions*. Indeed, the ICC has taken a further step and offered a third alternative: a combined dispute board ("CDB") (Article 6). The CDB issues recommendations with respect to disputes that are referred to it. The CDB may instead render a decision with respect to a given dispute if the parties agree that it should do so. If the parties disagree on this point, the CDB shall decide whether to render a decision, rather than a recommendation, taking into consideration factors such as those listed in Article 6.3 (e.g., whether, due to the urgency of the situation, a decision would facilitate performance of the contract).

A recommendation is not binding upon the parties but becomes binding if no party expresses its dissatisfaction with the recommendation within 30 days of receiving it (Article 4.3). In contrast, a decision is binding upon the parties upon receipt (Article 5.2). If a party expresses its dissatisfaction with a recommendation or a decision, the dispute shall be settled by arbitration, if the parties have so agreed (e.g., in an agreement based upon one of the ICC's standard dispute board clauses), or, if not, by any court of competent jurisdiction (Articles 4.6 and 5.6, respectively).

The DB Rules opt for the more common practice of establishing a standing dispute board: unless otherwise agreed, the parties shall establish the dispute board at the time of entering into the contract, specifying whether it shall be a DRB, a DAB or a CDB (Article 3).

If the parties have agreed that the dispute board shall have a sole member,

⁶ The rationale and merits of FIDIC's choices are discussed in Gordon L. Jaynes, "FIDIC's 1999 Editions of Conditions of Contract for 'Plant and Design-Build' and 'EPC Turnkey Contract'—Is the 'DAB' Still a Star?" [2000] ICLR 42, and Christopher R. Seppälä, "FIDIC's New Standard Forms of Contract—Force Majeure, Claims, Disputes and Other Clauses" [2000] ICLR 235, 249–250, and in letters from Mr. Seppälä [2000] ICLR 465 and Mr. Jaynes [2000] ICLR 468.

that member shall be “jointly” appointed by the parties (Article 7.3). When the dispute board comprises three members, the parties shall “jointly” appoint the first two members (Article 7.4). The two members shall then propose the third member to the parties, who complete the constitution of the dispute board by appointing that person, who will normally act as chairman (Article 7.5). The DB Rules give no particulars regarding the procedure to be followed for these joint appointments.

The ICC, through its newly created ICC Dispute Board Centre (the “Centre”), offers certain administrative services to the parties who agree to establish a dispute board in accordance with its DB Rules:

- If the parties fail to appoint a dispute board member as foreseen by Articles 7.3, 7.4 or 7.5, the member shall be appointed by the Centre.
- The Centre shall finally decide any party’s challenge against a dispute board member for lack of independence or otherwise (Article 8.4).
- If the parties so agree, the Centre will review the decision of a DAB or CDB in draft form before it is signed. The Centre may require modifications only as to the form of the decision (Article 21).

It is only for these services that the parties would owe any payment to the ICC (Article 32). An appendix to the DB Rules provides a schedule of fees to be paid for the services. Therefore, if appointments to the dispute board are made without difficulty, no challenge is filed against a board member, and the parties do not agree to the Centre’s review of the board’s eventual decision(s), the dispute board would operate without the involvement (or even the knowledge) of the Centre, and the parties would owe no fees to the ICC.

The DB Rules include detailed provisions regarding the operation of the dispute board, procedures before the dispute board, determinations of the dispute board, and other matters. For example:

- Articles 11–13 set out the parties’ obligation to co-operate with the dispute board, including the provision of information and arranging for meetings and site visits.
- Article 15 defines the powers of the dispute board (a full page in the ICC’s DB Rules pamphlet).
- The DB Rules set time limits for the response to an initial statement of case (Article 18.1), for the hearing regarding a dispute (Article 19.2), and for the rendering of the board’s determination (Article 20.1).
- Article 19.8 describes the procedure to be followed in the hearing, in four stages.
- Article 22 stipulates the required contents of the dispute board’s determination (viz., date, findings and reasons), as well as other

elements that may be included (e.g., summary of the dispute, chronology of relevant events, etc.).

- Articles 26–32 (4 pages!) govern the compensation of dispute board members and the ICC. These provisions go so far as to stipulate that, unless otherwise agreed, the air travel expenses of dispute board members “shall be reimbursed at unrestricted business class rates” (Article 29.1).⁷

These and other provisions are a striking contrast to the ICC Rules of Arbitration, which do not stipulate in detail the procedures to be followed in an ICC arbitration. Whereas the ICC has chosen to keep its Rules of Arbitration fairly general and flexible (to promote their acceptance by parties of different nationalities and legal cultures), the ICC has found it preferable (as have the World Bank and FIDIC with their respective rules) to regulate the operation of dispute boards in considerable detail.

2. Concluding comments

Dispute boards were initially developed for construction projects, and they have been accepted as a useful technique for resolving the potentially complex and disruptive disputes that can arise in such projects. The ICC’s DB Rules may help to expand the use of dispute boards in other types of contracts, where model provisions (comparable to the FIDIC conditions of contract, with their DAB provisions), do not yet exist.

The choice offered to the parties by the ICC to select among three types of dispute boards—DRB, DAB or CDB—provides flexibility and should broaden the appeal of the DB Rules. Parties are well advised to consider and decide at the outset whether their dispute board should render non-binding recommendations or binding decisions, although in practice, parties who act in good faith are likely to comply with a recommendation just as they would accept a decision.

However, there can be too much choice in a smorgasbord: it may be doubted that parties will often opt for the ICC’s “combined dispute board”. Under Article 6.3, if the parties disagree over whether the CDB should issue a decision, the question becomes a preliminary issue for the CDB to decide. Tactical considerations may thus give rise to a new dispute between the parties, in conflict with the general goal of facilitating the quick and informal resolution of disputes. The CDB appears to be an awkward, rather than a useful, compromise.⁸

⁷ While acknowledging that the inclusion of such provisions in the DB Rules may appear unusual or inappropriate, Mr Genton explains their utility, *supra*, note 2, p. 40. Indeed, parties may appreciate that details regarding compensation, a potentially sensitive topic, need not be negotiated with dispute board members, because they are already settled in the DB Rules.

⁸ Cf. Genton, *supra*, note 2, p. 38, offering a rationale for the CDR’s power to decide whether to render a recommendation or a decision.

Considering the level of detail found in the DB Rules, it is surprising that Article 7 provides simply that the parties shall “jointly” appoint members of the dispute board, without further details of the procedure to be followed for the two initial appointments. Setting out a specific procedure (which could, of course, be altered by agreement of the parties) would have been helpful. For example, FIDIC’s New Red Book provides that each party shall nominate one member of the DAB for approval by the other party. Another approach would have each party provide a list of several potential dispute board members to the other party. The recipient of a list could contact and interview each person on the list and would then make a selection. Each party thus appoints a dispute board member from a list of candidates provided by the other party.

A dispute board’s ability to give informal but authoritative advice to the parties is one of its distinctive and most valuable qualities. Article 16 is thus an important provision of the DB Rules: It provides that the dispute board may, on its own initiative or upon the request of any party (but in either case with the agreement of all of the parties), “informally assist the Parties in resolving any disagreements that may arise during the performance of the Contract”. Under this provision, the dispute board may, *inter alia*, meet separately with a party and it may give its informal views to the parties. The dispute board, drawing upon its knowledge about the project and its own expertise, can thereby assist the parties in resolving disagreements before they become formal disputes.

Article 23 of the DB Rules illustrates an important aspect of a dispute board’s role in the resolution of disputes that distinguishes dispute boards from arbitral tribunals: the dispute board “shall make every effort to achieve unanimity”. This virtually amounts to a duty to find a compromise solution. At the same time, Article 23 expressly provides for dissenting opinions: a member who disagrees with the dispute board’s determination shall give the reasons for his disagreement in a separate opinion that shall not form part of the determination but shall be communicated to the parties. Whether these provisions actually facilitate the parties’ acceptance of the board’s determination will depend upon the circumstances of the individual case. The parties in one project may accept a reasonable compromise proposed by a dispute board that has won their trust, while in another project, a unanimous, compromise solution may leave one party so dissatisfied that it decides to challenge the decision in arbitration. Similarly, a dissenting opinion may encourage the losing party to take the matter to arbitration—or show that party that its prospects in arbitration are not promising.

Finally, parties that agree to the DB Rules must consider the proceedings that may follow a dispute board’s determination. The standard dispute board clauses proposed by the ICC provide, in part, as follows:

“All disputes arising out of or in connection with the present Contract shall be submitted, in the first instance, to the [DRB/DAB/CDB, as the case may be] in accordance with the [DB] Rules.”

There follow provisions for a dispute to be finally settled under the ICC Rules of Arbitration:

“If any Party sends a written notice to the other Party and the [DRB/DAB/CDB] expressing its dissatisfaction with a [Recommendation/Decision], as provided in the Rules, or if the [DRB/DAB/CDB] does not issue the [Recommendation/Decision] within the time limit provided in the Rules, or if the [DRB/DAB/CDB] is disbanded pursuant to the Rules, the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.”

These provisions would appear to bar a party from submitting a dispute to arbitration without first submitting it to the dispute board, but the bar is not stated expressly, thus leaving the point open for doubt and dispute. Compare sub-clause 20.4 of the New Red Book, which (like the ICC’s standard clauses) provides for a party to issue a notice of dissatisfaction with the dispute board’s decision, but also stipulates that “neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause”. It would therefore be advisable for parties using one of the ICC’s standard dispute board clauses to add a similar provision, making it unambiguously clear that the referral of a dispute to the dispute board is a precondition to any submission of the dispute to arbitration.