

# **DRBF 15<sup>th</sup> Annual International Conference, Genoa**

**Saturday 23<sup>rd</sup> May 2015**

## **Session 5: Recent Developments in Dispute Board Rules**

### **FIDIC's Dispute Adjudication Board Rules in the context of Gordon L. Jaynes' paper "Over-Ruled"**

by Siobhan Fahey<sup>1</sup>

I am honoured to have been asked to participate in DRBF's 15<sup>th</sup> Annual International Conference. In particular, I am very pleased to have been given the opportunity to add a contribution to Mr Jaynes' very well written paper "Over-Ruled" from the perspective of FIDIC's Dispute Adjudication Board (DAB) Rules.

In expressing such very positive views on FIDIC's DAB Rules, Gordon has made my work here really quite easy!

I tend to agree with Gordon that perhaps so many institutional Rules are not necessary. On the one hand, maybe it can be argued that a range of Rules gives Users more choice but, on the other hand, could it be the case that so many Rules have the result of diluting the effectiveness of DBs in the eyes of potential DB Users? If DBs indeed represent such a good way of resolving contractual disputes, why is there a need for so many different Rules with seeming little difference between them?

This was one of the factors that led FIDIC in recent years to collaborate with ICC in the development of ICC's updated DB Rules (i.e. a revision of ICC's 2004 DB Rules). The idea was that FIDIC's updated suite of contracts would incorporate the revised ICC DB Rules, in much the same way as arbitration of disputes under the current suite of FIDIC contracts uses ICC's Rules of Arbitration. However, while this collaboration was very successful – due in no small part to ICC's pro-active cooperation and engagement with FIDIC – ultimately FIDIC decided (very disappointingly in my own view) not to use the new ICC DB Rules in the updated FIDIC contracts.

This decision was an internal FIDIC policy-decision, it was not based on the quality or otherwise of the soon to be published new ICC Rules. While I and some of my FIDIC colleagues did our best to persuade FIDIC of the advantages of using the new ICC Rules, in the end analysis there remained a strongly held view amongst other FIDIC colleagues that the DAB process under FIDIC contracts should remain one that is, and is seen to be, by engineers for engineering projects. As such, it was decided that the rules that apply should remain as FIDIC DAB Rules, and FIDIC should retain 'ownership'/control of the process in the context of FIDIC contracts.

Before addressing the FIDIC DAB Rules themselves, it may be worthwhile noting that under the 1999 suite of FIDIC contracts the DAB's involvement takes the place of the Engineer's role in deciding in Parties' disputes ... as appeared in previous versions of FIDIC contracts (for example, the 1987 FIDIC Red Book). In the 1990s FIDIC came to recognise the increasingly problematic fact that, as the Engineer was appointed and paid for by the Employer, his independence and 'impartiality' in deciding disputes was always open to be questioned by the Contractor. It became more usual than not for the Engineer's decision to be rejected out-of-

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hand by the Contractor and, therefore, the first stage of dispute resolution under FIDIC contracts became less and less effective. As such, in 1999 FIDIC introduced the concept of the DAB as the first stage in dispute resolution instead of the Engineer's decision.

That said, and as noted by Gordon in his paper, whereas the DAB under the General Conditions of the Red Book 1999 (FIDIC's employer-design form of contract) is a 'standing DAB', under the Yellow Book 1999 (FIDIC's design-build form of contract) and the Silver Book (FIDIC's turnkey/engineer-procure-construct form of contract) the DAB is an ad-hoc DAB – and so only appointed after a dispute has crystallised and, often only for one particular dispute.

In the sixteen years since DABs first featured in FIDIC contracts, it has become clear that the standing DAB is undoubtedly more effective bringing as it does consistency, the invaluable advantages of dispute avoidance and the opportunity for the DAB to become part of the 'project team' as so eloquently described by Gordon in his paper. It is on this basis that FIDIC is currently planning on updating the FIDIC suite of contracts such that all DABs will be standing DABs regardless of the form of contract.

I agree with Gordon that the FIDIC DAB Rules are very flexible. They were drafted to give the DAB ultimate control over the proceedings, allowing the conduct of the DAB process to be tailor-made by the DAB to each particular construction project. Recognising that construction projects come in all different sizes and complexities, the DAB can itself customise the formalities to be followed to the type and nature of disputes arising from the project.

However, it is generally recognised that a particular DB is only as good as its DB members. As has previously been stated by Gordon:- there is an 'art' to the DB technique. While it may be stating the obvious to those attending this conference, it is worthwhile reminding ourselves and all Parties/Users that the DB process is not litigation, it is not arbitration ... and, indeed, it is not intended to be a dress-rehearsal for arbitration!

For a DB process to be successful, it requires each DB member to apply the 'art' of the DB technique appropriately to the particular project in hand and the circumstances of the Parties' disagreements/disputes in that project. In this regard, I was very pleased to read the invaluable and very practical pointers for DB members that Gordon set out in his paper – especially those concerning the necessary powers of persuasion required of the DB for prevention of disputes.

The reality is that some DB members have honed this 'art' to great effect and others not so much. If a particular DB member coming from a background of litigation or arbitration uses his/her experience in this regard as the basis for conduct of the DB, then the potential for a successful DB is diminished.

In the hands of experienced and competent DB members, the flexibility inherent in the FIDIC DAB Rules more often than not leads to very successful projects but, otherwise, the ultimate control that is granted to DAB members can and does give rise to problems. Unfortunately, it is the bad news of the relatively few instances of such problematic DBs that spreads fast amongst Users and potential Users, whereas all the DBs that are so successful barely feature. This inevitably leads to a misconception by Employers and contract drafters of the effectiveness and cost-benefit of DBs on construction projects.

Therefore, and taking this opportunity to agree with Gordon's point that the more elaborate the Rules the more the scope for 'mischief', I venture that maintaining flexibility but ensuring a minimum certainty of procedure for Users is the ideal balance to be achieved in any set of DB Rules. This balance may be one that is taken into consideration in the review of FIDIC's current

DAB Rules, which is due to take place shortly in conjunction with FIDIC's updating of the 1999 Suite of Contracts.

As Gordon put it so well, there is a 'human tendency of the ambitious to seek to improve what is currently available'!

Other matters which are up for consideration in FIDIC's review of the current DAB rules in the updated FIDIC contracts are likely to include the new concepts introduced in the Gold Book 2008 (FIDIC's design-build-operate form of contract) as well as those that DBRF past-President Jim Perry recently and very helpfully brought to FIDIC's attention (which included some by reference to new developments in ICC's updated DB Rules). In particular, the scope for increasing the DAB's powers/authority will probably be reviewed along the following lines:-

- to engage in dispute avoidance, to provide assistance and/or to informally discuss disagreements with the Parties before they become disputes;
- to overrule the 28-day time limit for Contractor's claims (if fair and reasonable in the particular circumstances);
- to determine the language of the DAB proceedings (having regard to the ruling language and language of communications under the contract);
- to appoint experts to advise DAB members (with the Parties' agreement);
- to allow extension by the DAB of the time limit for a decision (in consultation with the Parties, but limited to a cumulative total of xx days);
- to correct mathematical errors in the DAB decision ... and even errors or fact and/or principle?;
- to respond to a Party's request for clarification of an ambiguity in the DAB decision.

And, of course, consideration will also be given to what amendments or supplemental provisions (if any) that may be desirable following recent court cases in Singapore (*PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation (Indonesia)* [2014] SGHC 146) and Switzerland (Swiss Federal Supreme Court's decision dated 7 July 2014 [4A\_124/2014]).

In connection with the outcome of the latter court case, I take this opportunity to draw the reader's attention to the "**FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract**" dated 1st April 2013 (please see: <http://fidic.org/node/1615#sthash.pg27idMJ.dpuf>). As you will see, this memorandum is designed to make explicit FIDIC's intentions in relation to the enforcement of the DAB decisions that are binding but not yet final – so that if a Party fails to comply with a DAB decision, this failure can referred *directly* to arbitration without having to go through the steps of a referral to the DAB or amicable settlement.

Finally, I take this opportunity to express my wish that the success of DBs in construction projects continues unabated in the long-term. May we become ever more successful in convincing Employers and contract-drafters of the effectiveness of DBs in preventing and solving disputes ... no matter what Rules are used!

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