Fenwick Elliott

RECENT DEVELOPMENTS: DOMESTIC AND INTERNATIONAL

10TH ADJUDICATION UPDATE SEMINAR

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THE SAVOY HOTEL, LONDON

Introduction

Adjudication under the Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") has now been with us for 6½ years. The Adjudication Society's website identifies over 200 cases predominantly dealing with the adjudication, although some focus on payment issues arising from the HGCRA.

Adjudication can no longer be said to be a UK phenomenon. Adjudication has been introduced in Australia (New South Wales, Victoria, Queensland, and Western Australia) and New Zealand. Adjudication, or related measures in respect of security for payment in respect of construction work, has been considered in Singapore, Hong Kong, Texas and the State of New York (excluding the World Trade Centre Developments area). In addition, the Dispute Review Board has, in the eyes of the World Bank, matured into an adjudicative binding process captured by the World Bank's own procurement of works procedure, and also the Dispute Adjudication Board procedure set out in the FIDIC forms of contract.

Adjudication has spread as a result of the right to call in an adjudicator because of an implied term in the contract (arising from statute) and the right to adjudication quite simply because the parties have expressly included it within their contract (even though there may be no legislative requirement on the parties to adjudicate because of the jurisdiction they are operating within).

The focus of this paper, therefore, is recent developments not just in the domestic arena but also in the international arena. Bearing in mind the introductory points made above, this papers seeks to briefly consider the development of adjudication as a contractual mechanism before then considering how it has spread into the international arena and how it might continue to spread internationally as further legislation develops. In addition, the issues that have arisen from some of the recent case law will also be considered.

Domestic Developments

There have been several interesting cases since the last Fenwick Elliott Adjudication Update some 6 months ago. These fall under the category of "in writing", scope of dispute referred, and payment provisions. For a more complete analysis of a range of jurisdictional challenges see Gould, N. "Caution from the Court".[1]

"In Writing"

In the case of *Connex South Eastern Limited v MJ Building Services Group Plc* MJ Building Services Group Plc carried out work in connection with the installation of close circuit television systems for the Claimant. [2] MJ had been invited to tender for work to 50 stations. They were given a verbal instruction to carry out the work, but no written order, nor was any written contract was issued. On 20th September work was suspended. On 18th October 2000 it was agreed that work would proceed, but that MJ would not claim compensation for the suspension. In February 2002 the scope of the work was considerably reduced. On 24th February 2004 MJ served a Notice of Adjudication in respect of Connex's failure to make payment. The adjudication was stayed by consent pending the outcome of this hearing.

Connex sought the following declarations:

- That there was no agreement as required by Section 107 of the Act;
- MJ no longer had a right to adjudicate as the contract had been repudiated; and
- MJ's Notice of Adjudication was an abuse of process as the issues between the parties had been settled.

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(1) Gould, N. (2002) *Caution from the Courts* 6th Adjudication Update, Fenwick Elliott, Savoy, 4 November.

(2) TCC, HHJ Havery QC, 25th June 2004.

HHJ Havery QC held:

- That Connex's instruction to proceed with the work in the minutes of the meeting of 15th September 2000 constituted an acceptance of MJ's tender. The minutes were in writing and were therefore sufficient evidence within Section 107 (4) of the Act.

- It was well established that adjudication can occur after completion of the works. The right to adjudicate at any time survived repudiation as would an arbitration clause.

- The 11th February 2002 letter was not particularly clear and did not relate to an existing claim. It could not, therefore, amount to a settlement. As a result MJ's Notice of Adjudication was not an abusive process.

He therefore declined to make the declarations sought.

Scope of Dispute Referred

In the case of *William Verry Limited v North West London Communal Mikvah* William Verry Limited agreed to construct for the North West London Communal Mikvah a Jewish ritual Bath in Golders Green, London for approximately £2.4 million. [3] Several disputes arose and there were three consecutive adjudications in respect of interim valuations. This application related to the third adjudication by which the adjudicator decided that Verry should be paid £67,055.97 plus interest in respect of retention.

The second adjudicator's decision dealt with an interim valuation. A further interim valuation (No. 34) was then issued. No further work had been carried out, but half of the retention was due for release. However, the Interim Certificate showed that no amount was to be paid because of an allegation of defects. Verry referred to the adjudicator the issue of whether retention should be paid. The adjudicator decided that Verry should be paid the half release of retention.

Mikvah refused to pay on three jurisdictional grounds. First, that the referral was one day late, out of time and therefore the adjudicator did not have the jurisdiction to consider it. Second, that there was no dispute because Verry had not challenged Mikvah's non-payment of the retention, such that a claim had not been made which had then been rejected in order to crystallise the dispute. Finally, that the adjudicator had failed to decide all of the critical issues referred to.

[3] TCC, HHJ Thornton QC, 11 June 2004.

Proceedings started pursuant to CPR Part 8, but were transformed into a Part 7 proceedings in order that the Judge could consider the factual issues rather than strictly legal ones.

HHJ Thornton QC considered the three jurisdictional changes. He decided that the 7 day period for service of the referral notice ran from the date that the Adjudication Notice was issued and not from the date that it was served. The referral was therefore as a matter of fact served one day late. However, the language of Section 108(1)(b) was not rigid, and there was nothing in that sub-section to preclude a contract from allowing an adjudicator to extend the timescale for issue of the referring document. Clause 41 A.5.6 of the JCT Contract provided that a failure by any party to comply with the contract would not invalidate the decision of an adjudicator. The adjudicator once appointed asked that the referral be faxed to him by 11 December 2003. Verry complied with this direction and therefore HHJ Thornton QC decided that the Referral Notice was served within time.

In respect of the no dispute point, HHJ Thornton QC made it clear that William Verry Limited's adjudication notice referring to the release and payment of the first half of retention was to be considered against the background that was known to the parties at the time or shortly before the issue of the notice. It was clear that the subject matter of the dispute required an adjudicator to consider the interim valuation machinery of the contract, to open up review and revise the last certificate therefore carrying out a full revaluation in order to determine whether retention should or should not be released. While Verry had not specifically challenged the release of retention with Mikvah, they had taken issue with allegation of defects, which impacted upon the financial calculation of the Interim Certificate which in turn determined whether retention would be released. Consideration of the defects was therefore an integral part of the adjudication even though it was not specifically mentioned in the Adjudication Notice.

The adjudicator had decided that he could not revalue the work nor consider any defects. This was based on his incorrect understanding of *Ferson Contractors Limited v Levolux A.T. Limited*[4]. The adjudicator felt that he was bound by his previous gross valuation of the work in the second adjudication. However, this rationale failed to consider the contractual interim valuation machinery of the contract, which provided him with the ability to revalue the works on a gross basis. The adjudicator's error in failing to value the works afresh and failure to consider the defects was an error of law, and was also unfair to Mikvah.

HHJ Thornton QC considered whether these jurisdictional errors were so fundamental as to transform the third adjudication decision into a decision that a different question or

[4] [2003] TCLR 5.

dispute to that which was actually referred. On balance he decided that the adjudicator had answered the right question albeit incorrectly. However, he wanted to provide Mikvah with an opportunity to refer their defects dispute to adjudication and therefore propose that the judgment would not be drawn up for 6 weeks in order to provide Mikvah with an opportunity to refer the defects issue to adjudication and receive a decision which could then be considered against the enforcement of this decision in order to arrive at a balance to be paid to one or the other party.

Payment provisions

The case of *Alstom Signalling Limited (t/a Alstom Transport Information Solutions) v Jarvis Facilities Limited*, considered a variety of interesting issues including the application of Section 110 and 111 of the Act.[5] Alstom Signalling Limited had been engaged as main contractor by Railtrack to design, manufacture and install plant for an extension to the Tyne and Wear Metro. Jarvis Facilities Limited were sub-contractors to Alstom for the design, supply, installation, testing and commissioning of signalling and telecommunications equipment. The form of contract was the IChemE Model Form for Process Plant, Sub-Contract, Second Edition 1997. A target cost summary applied. A dispute had arisen about the existence of and/or operation of a "pain/share" or "pain/gain" clause, which was the subject of separate proceedings.

The matter was referred to adjudication and as a result Alstom complied with the decision paying Jarvis £1,695,501.50 and interest. The decision was expressed to be provisional and it was hoped that there would be a dialogue between the parties in order to resolve the final account. Application No. 32 was then made in May 2003. Alstom asked that all documentation be sent to their Birmingham office in order to avoid delay. This was not done. Two notices of adjudication was served by Jarvis in January 2004 and Alstom cross adjudicated. The separate enforcement proceedings were consolidated.

HHJ LLoyd QC held that there was not an absolute right to have an adjudicator's decision paid. Apart from jurisdictional challenges or the fact that a decision could be initiated by a failure to comply with the concepts of fairness, a judge when considering a summary judgment application also needed to consider the overriding objective of CPR Part 1. To consider one summary judgment application in respect of an adjudicator's decision and then at a second summary judgment application to track back over old ground was inconsistent with the overriding objective of CPR Part 1. Further, if it were possible to resolve a point of law and determine it finally by way of summary judgment then the interests of the parties would be best served.

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(5) [2004] EWHC 1285 (TCC).

His Honour therefore considered how the payment provisions of the Act operated and came to the conclusion that the decision of the adjudicator should not be enforced. This was because the adjudicator was asked to decide what sum was "due". The adjudicator decide that in the absence of a withholding notice Jarvis' application should be paid, but HHJ LLoyd QC held that the amount "due" was the amount identified in Alstom's certificate not the payment application of Jarvis.

The adjudicator had decided that Section 110(1)(b) of the HGCRA required a final date for payment to be "embedded in the contract between the parties" a date that was not capable of being changed. He therefore concluded that the contract did not satisfy the Section 111(1)(b) of the HGCRA and therefore applied the Scheme by default. Section 110(1) states:

> (1) Every construction contract shall –
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide for a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

His Honour referred to the last part of Section 110(1), noting that it was clear that the parties were free to agree on the period between the due and final date of the payment. He stated:

> The event could be a stage, or milestone or completion, practical or substantial. It could be the result of an action by a third party, such as a certificate under a superior contract or transaction, as is found in financing arrangements. Provided that the event is readily recognisable and will produce a date by reference to which the final date can be set, there is no reason why it cannot be used.

If Railtrack, even in breach of a contract with Alstom, failed to issue a certificate then that did not mean that, for the purpose of Section 110(1)(b), there was no final date for payment. A failure of Railtrack to provide a certificate on time could not be used by Alstom as a defence as Clause 2.6 of the contract stated that Alstom were to pay their sub-contractor the amount due within 7 days of Railtrack's certificate being issued in accordance with Annex F1, which set up the project cut-off dates. As a result, the final date for payment could be ascertained and the adjudicator was wrong to conclude that the Scheme applied.

Natural justice

The case of *McAlpine PPS Pipeline Systems Joint Venture v Transco Plc*, considered the subject matter of the dispute and breaches of natural justice in terms of providing a party with a proper opportunity to respond to new material. [6]

Transco engaged McAlpine to carry out work in respect of 37 km of steel pipeline between Farningham and High Halden in Kent for approximately £15½m. The contract was based on the NEC form priced with an activity schedule, option A. An adjudicator was named in the contract. There was a lengthy series of events dealing with a variety of claims during and after completion of the work. McAlpine referred to adjudication a dispute relating to Transco's liability to pay interest to McAlpine.

Transco argued that the adjudicator made a decision on a much wider range of issues that had arisen during the course of the adjudication and there was therefore an issue about what constituted the dispute, and a breach of natural justice.

HHJ Toulmin CMG QC considered that while the dispute appeared to relate to interest it was important to consider not just what the parties referred to adjudication but secondly on what basis those issues had been referred to adjudication. He referred to a series of adjudication cases considering the issue of what constituted a dispute, but noted that many of them did not consider the point addressed by the Court of Appeal in *Halki Shipping Corporation v Sopex Oils*, because in adjudication it is the nature of the dispute that has been referred to adjudication that is in fact the key question.[7] In order to determine what the parties had referred to adjudication, and thus what constituted a dispute in this case HHJ Toulmin CMG QC asked the parties 9 questions:

1) What were the issues discussed at the meeting before the referral?
2) What dispute was referred to the adjudicator, after the defendant had had the chance to respond to claims made?
3) What is the basis upon which the dispute was referred?
4) Was the adjudicator's decision responsive to the issues referred?
5) Were the issues raised during the adjudication?
6) If so, were they objected to by the other party?
7) Was any objection fundamental to the nature of the dispute referred?
8) If so, does that objection go to the fairness of the procedure?
9) If there was a breach of procedure does it "significantly affect the fairness of the decision?"

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(6) 12 May 2004, TCC, HHJ Toulmin CMG, QC.

(7) [1998] 1 WLR 727.

During the course of the adjudication a large quantity of new material was served on 18 December 2003 on Transco. Transco responded under protest on 23 December 2003. HHJ Toulmin CMG QC held that the case originally put forward by McAlpine changed substantially during the course of the adjudication. The service of this and further information should not have been considered by the adjudicator because, first, the information should have been served with the Referral Notice and second, it was new evidence in support of a new case which did not afford Transco a fair opportunity of responding.

As a result the adjudicator had dealt with a different dispute, and Transco had not been given a fair opportunity to respond. He, therefore, declined to enforce the decision.

In *AWG Construction Services Limited v Rockingham Motors Speedway Limited*, AWG Construction Services Limited (previously Morrison Construction Limited) entered into a contract with Rockingham Motor Speedway Limited.[8] This was for the design and construction of a new motor racing track and facilities near Corby in Northamptonshire. AWG was to design and build an oval racetrack and within that a conventional racetrack together with a four storey grandstand and ancillary works.

On completion of the development problems with the track arose and disruption to a race was caused by seepage of water through the surface of the track. Rockingham claimed loss of revenue and the cost of providing refunds. A withholding notice was served, but then remedial works were undertaken. A dispute arose as to whether the problem had in fact been rectified. One adjudication resulted in a decision in favour of AWG, which was the subject of separate proceedings. Rockingham commenced an adjudication on 1st October 2003 in respect of the quality and fitness for purpose of the works.

A decision in favour of Rockingham was challenged on the basis that the adjudicator decided something that was not referred to him and/or he breached the principles of natural justice because he allowed new matters or new claims to be introduced during the course of the adjudication and did not give the claimant a sufficient opportunity to consider those new matters and respond. Finally, they argued that there were multiple disputes that were not suitable for the adjudication procedure.

HHJ Toulmin CMG QC considered that the approach in *Nuttall v Carter*[9] was too rigid and contrary to the classification of a dispute in *Halki Shipping*. He preferred the *Halki* approach of the wide interpretation of the word "dispute" in order to preserve an

(8) 5 April 2004, TCC, HHJ Toulmin CMG QC

(9) [2002] BLR 312.

adjudicator's jurisdiction. However, where the decision was on a different basis from that which the dispute had been referred an objection could be made to the jurisdiction of the adjudicator, which would amount to a breach of natural justice.

He concluded that the basis on which the adjudicator found for Rockingham was entirely different to that identified in the referral notice. As a result the adjudicator's decision for that part of the dispute was beyond the scope of the dispute referred to him. The ability for an adjudicator to conduct an entirely inquisitorial process did not assist the enforcement of the decision. In respect of natural justice, the adjudicator did not give AWG a sufficient opportunity to consider the new matters put to them. This was, therefore, also a breach of natural justice.

Finally, there were three separate disputes under the contract which by agreement had been referred to adjudication. As only two of them had been challenged the third was severable and Rockingham was entitled to immediate payment of that sum. He did not order a stay in respect of arguments raised about AWG's financial status. As a result the adjudicator's decision in respect of the oval track was not enforced because there was no jurisdiction to make that decision, and the adjudicator had failed to comply with the rules of natural justice. Summary judgment was however given in relation to the severable grandstand works.

ICE Clause 66, Options A, B, C and D

The Institution of Civil Engineers issued in the summer an amendment to the ICE Conditions of Contract 7th Edition Measurement Version January 2003 for contracts commencing on or after 1st July 2004. In the original ICE Conditions of Contract the dispute resolution clause comprised a simple two-stage process. There has of course been some controversy about whether clause 66 as originally drafted complied with the HGCRA. This was because the old clause required "matters of dissatisfaction" to be referred to the engineer for an engineer's decision before a dispute could crystallise for the purposes of adjudication. Many have considered that this process breaches section 108(2)(a) of the HGCRA, which requires a construction contract to provide that a dispute (including any difference) may be referred to adjudication "at any time".

Amended clause 66 deals with this problem head-on by removing the pre-dispute step, but at the same time introduces 4 distinct resolution processes and an appointment procedure:

- Avoidance and settlement of disputes
- Clause 66A – notice of dispute and amicable dispute resolution
- Clause 66B – adjudication

- Clause 66C – arbitration
- Clause 66D – appointment of arbitrator, adjudicator, conciliator or mediator.

New Clause 66, therefore, provides four dispute resolution processes, together with appointments procedure. The parties might choose to adopt more than one of the dispute resolution options, but need not adopt all of them.

The introductory part of Clause 66 states that the purpose of the clause is to overcome differences and avoid disputes, but where this cannot be achieved it is then to facilitate a clear definition of the dispute and its early resolution. Clause 66(2) provides an advance warning system, which is essentially borrowed from the Engineering and Construction Contract. It requires either party to notify the other in writing (with a copy to the engineer) as soon as it becomes aware of "any matter which if not resolved might become a dispute". The parties are then to meet within 7 days of that written notification in order to try and resolve the "matter". Those parts, which cannot be resolved, are then defined in writing. [10]

Clause 66A provides an amicable dispute resolution process. It is instigated when one party serves on the other (with a copy to the engineer) a notice clearly setting out the dispute (referred to as the Notice of Dispute). The parties may then by further notice seek resolution by negotiation, conciliation or mediation. The mediation or conciliation is to be carried out in accordance with the ICE Conciliation Procedure 1999 or the ICE Construction Mediation Procedure 2002, subject to any amendments or modifications that are in force at the date of the written notice. A settlement will only be effective if it is reduced to a written agreement that is signed by the parties. [11] The mediator or conciliator is not to be called as a witness in any subsequent proceedings, whether they be by arbitration, adjudication or litigation. During the amicable settlement procedure both parties are to continue to perform obligations under the contract.

Adjudication is dealt with at new clause 66B. In order to avoid previous contentions with old clause 66, new clause 66B makes it clear that the parties have a right "at any time" to refer a dispute to adjudication in the following terms:

> Notwithstanding clauses 66 or 66A the Employer and the Contractor each has the right to refer any matter in dispute arising under or in connection with the contract or the carrying out of the works to adjudication and either party may at any time give notice in writing (hereinafter called the Notice of Adjudication) to the other of his intention so to do. The adjudication shall be conducted under "The Institution of Civil Engineers Adjudication

[10] Clause 66(2)(c).
[11] Clause 66A(2)(b).

> Procedure (1997)" or any amendment of modification thereof being in force at the time of the said Notice of Adjudication. [12]

In addition, the clause extends those matters that may be referred to adjudication from those that simply arise "under" the contract to those that arise "under or in connection" with the contract. The remaining sub-sections of clause 66B(1) then deal with those mandatory requirements of section 108 of the HGCRA, such as the requirement to appoint an adjudicator within 7 days, to reach a decision within 28 days and for the adjudicator to act impartially, amongst others.

Clause 66B(3) is of particular interest, because it provides that the decision of an adjudicator will become "final as well as binding" if an Notice to Refer the matter to arbitration has not been served not later than 3 months after the decision. This has been the approach of some international contract forms (for example, FIDIC), and so perhaps it is of little surprise to see the ICE adopting this approach. The courts are likely to follow the approach of the House of Lords in *Beaufort Developments v Gilbert Ash (NI) Limited* and hold that the decision becomes final and binding on the parties after the expiry of the time period. [13] However, a party, quite simply to reserve its position, may need to serve notices to refer the dispute to arbitration for each decision during the course of the project quite simply to keep its options open.

The ICE, have also chosen at clause 66B(4) to provide the adjudicator with authority to determine his or her own jurisdiction. There is an attempt at clause 66B (4) (b) to persuade a party to follow the amicable dispute resolution procedures that might be included in the contract by placing the burden upon the referring party of the adjudicator's costs for determining the extent of his jurisdiction, but only if the referring party has not issued a Notice of Dispute under clause 66A (1). That clause instigates the definition of the dispute for the purposes of amicable dispute resolution by the requirement for a written notice which identifies the scope of the matters in dispute. It is not clear whether this clause is really effective, nor much of a deterrent. A clause making the referring party liable for all of the costs of the adjudication for a failure to follow an amicable dispute resolution procedure would have been far more effective.

New clause 66C provides that all disputes arising under or in connection with the contract (other than the failure to give effect to the decision of that adjudicator) shall be referred to arbitration.

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(12) Clause 66B (1)(a)

(13) [1999] 1 AC 266 HL: [1998] 2 WLR 860: 1998 2 AER 778; 83 BLR 1; (1998) CILL 1386

Finally, clause 66D provides an appointment procedure. The parties are in the first instance to attempt to agree upon the identity of an arbitrator, adjudicator, conciliator or mediator. The clause does not refer to the agreement of a facilitator although a facilitator is anticipated at clause 66A (2) (c). If the parties cannot agree within 21 days of the service of a notice in writing then either party may request the President of the ICE or the Vice President to appoint. If the parties fail to appoint an adjudicator then an immediate application can be made by either party to the ICE. [14] The ICE will also appoint an arbitrator, adjudicator, conciliator or mediator if a vacancy arises. [15]

There are also some consequential amendments to the rest of the contract, as one would expect with an amendment of this nature. In addition, clause 67 has also been deleted and replaced with an applicable law clause.

Dispute Boards

The use of the term "Dispute Boards" or occasionally "Disputes Boards" (collectively "DBs") is a relatively new term. It is used to describe a dispute resolution procedure which is normally established at the outset of a project and remains in place throughout the project's duration. It may comprise one or three members who become acquainted with the contract, the project and the individuals involved with the project in order to provide informal assistance, provide recommendations about how disputes should be resolved and provide binding decisions. The one person or three person DBs are remunerated throughout the project, most usually by way of a monthly retainer, which is then supplemented with a daily fee for travelling to the site, attending site visits and dealing with issues that arise between the parties by way of reading documents and attending hearings and producing written recommendations or decisions if and as appropriate.

The term has more recently come into use because of the increased globalisation of adjudication during the course of projects, coupled with the increased use of Dispute Review Boards ("DRBs"), which originally developed in the domestic USA major projects market. DRBs were apparently first used in the USA in 1975 on the Eisenhower Tunnel. The use of DRBs has steadily grown in the USA, but they have also been used internationally. However, DRBs predominantly remain the providence of domestic USA construction projects. As adjudication developed, the World Bank and FIDIC opted for a binding dispute resolution process during the course of projects, and so the Dispute Adjudication Board ("DAB") was borne from the DRB system; the DRB provides a recommendation that is not binding on the parties.

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[14] Clause 66D(3).

[15] Clause 66D(4).

The important distinction then between DRBs and DABs is that the function of a DRB is to make a recommendation which the parties voluntarily accept (or reject), while the function of a DAB is to issue written decisions that bind the parties and must be implemented immediately during the course of the project. The DRB process is said to assist in developing amicable settlement procedures between the parties, such that the parties can accept or reject the DRB's recommendation. Genton, adopting the terminology of the International Chamber of Commerce ("ICC") describes the DAB approach "as a kind of pre-arbitration requiring the immediate implementation of a decision". [16] He goes onto state that:

> the DRB is a consensual, amicable procedure with non-binding recommendations and the DAB is a kind of pre-arbitration step with binding decisions. [17]

Building upon this distinction, the ICC has developed three new alternative approaches:

- Dispute Review Board – the DRB issues recommendations in line with the traditional approach of DRBs. An apparently consensual approach is adopted. However, if neither party expresses dissatisfaction with the written recommendation within the stipulated period then the parties agree to comply with the recommendation. The recommendation therefore becomes binding if the parties do not reject it.

- Dispute Adjudication Board - DRB's decision is to be implemented immediately.

- Combined Dispute Board ("CDB") – this attempts to mix both processes. The ICC CDB rules require the CDB to issue a recommendation in respect of any dispute, but it may instead issue a binding decision if either the employer or contractor requests and the other party does not object. If there is an objection, the CDB will decide whether to issue a recommendation or a decision.

Genton suggests that the third stage of a CDB would be the referral of a dispute leading to a binding decision, which would need to be implemented immediately. The ICC's approach is that the DB decides (if either party requests a decision) whether to issue a recommendation or immediately binding decision at the second stage of the process.

According to the ICC the essential difference is that the parties are required to comply with a decision immediately, whereas the parties must comply with a recommendation but only if the employer and contractor express no dissatisfaction within the time limit. The combined procedure seems at first glance to be a somewhat cumbersome approach

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[16] Pierre N. Genton (2003) Dispute Boards.

[17] Para. 7-029.

attempting to build upon the benefits of the DRB and DAB, without following a clear pathway. Nonetheless, it may prove useful for those parties that cannot decide whether they need a DRB or a DAB.

At the other end of the spectrum a DB could be considered as a flexible and informal advisory panel. In other words, before issuing a recommendation, the DB might be asked for general advice on any particular matter. The DB will then look at documents and/or visit the site as appropriate and, most usually, provide an informal oral recommendation which the parties may choose then to adopt. If the parties were not satisfied, the DB would proceed to the issue of a formal, albeit non-binding, written recommendation after following the formal procedure of exchange of documents and a hearing.

As the DB and CDB is a relatively new concept, it is more informative to consider development of DRBs before then considering the development and practice of DABs.

Dispute Review Board

A DRB usually comprises a panel of three impartial professionals who are employed by the employer and contractor to assist in avoiding disputes and resolving disputes that may arise in respect of a project. The panel should ideally have some specialist knowledge in respect of the type of project. In order to be effective, therefore, the panel needs to be implemented on or around the outset of the project in order that the panel can follow the progress of the project and deal with issues as they arise.

Most frequently, DRB provisions are included within the contract, or may be incorporated later by variation or change order. There will also need to be a tripartite agreement between the DRB members and the employer and contractor dealing with the remuneration of the panel as well as establishing the procedural rules and applicable terms such as confidentiality and the rights and obligation of the DRB members and the employer and contractor.

The key factor that distinguishes DRBs from other dispute resolution processes is that a DRB follows the progress of the project and makes recommendations about disagreements or disputes. While the DRB procedure is formal and will involve exchange of written positions, evidence and a hearing the written recommendation of the DRB is non-binding. The parties are, therefore, not obliged to comply with the recommendation. A fundamental point then about DRBs is that the panel must have the respect of the employer and the contractor and must reach reasoned recommendations that the parties can understand and respect in order that the parties will comply with the recommendation.

DRBs initially developed in the USA. According to the Dispute Review Board Foundation ("DRBF") the first documented use of an informal DRB process was on the Boundary Dam

and Underground Powerhouse project north of Spokane, Washington during the 1960s. Problems occurred during the course of the project, and the contractor and employer agreed to appoint two professionals each to a four member "Joint Consulting Board", in order that that Board could provide non-binding suggestions.

The DRBF reported that as a result the recommendations of the Joint Consulting Board were followed, and these included several administrative procedural changes and the settlement of a variety of claims and also an improvement in relationships between the parties. The project was also completed without litigation.

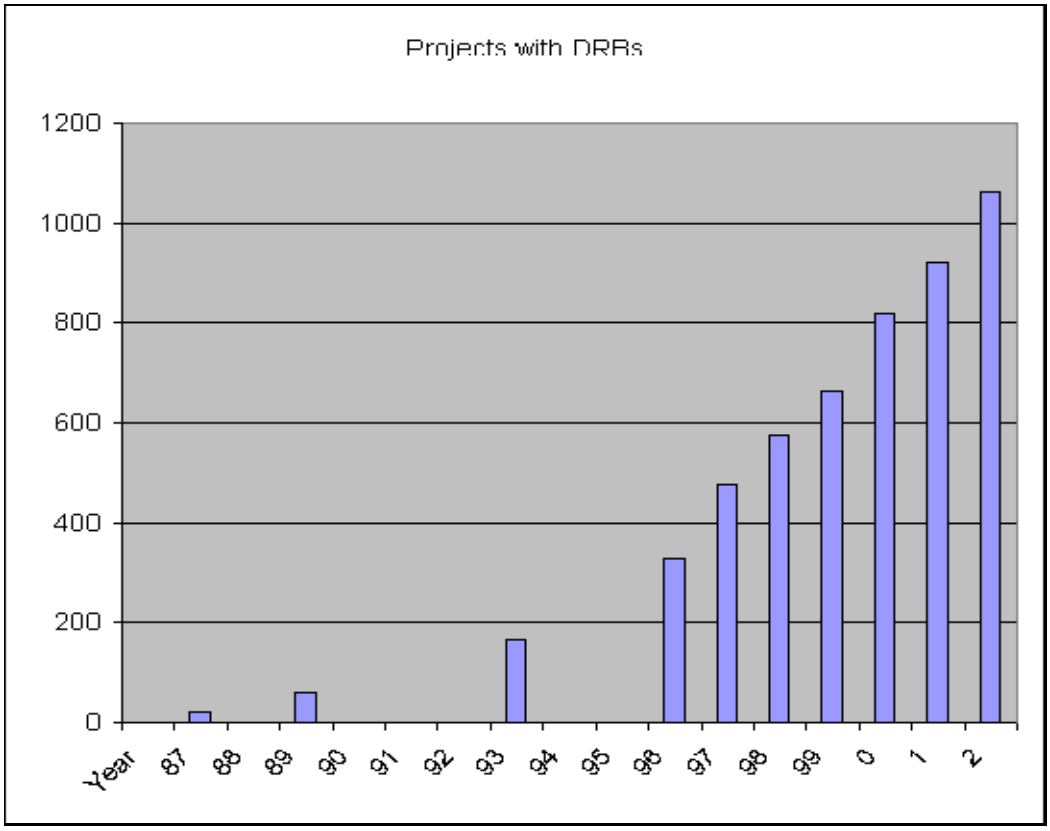
Subsequently the US National Committee and Tunnelling Technology, Standing Sub-committee No. 4 conducted a study and made recommendations for improving contractual methods in the United States. [18] Further studies were carried out, and the first official use of a DRB was made by the Colorado Department of Highways on the second bore tunnel of the Eisenhower Tunnel Project. This was as a result of the financial disaster encountered in respect of the first tunnel between 1968 and 1974.

The DRB was required to make non-binding recommendations about disputes that arose during the project. The Board was constituted at the commencement of the project and followed the duration of the project. The project was extremely successful. And as a result the use of DRBs began to spread for large civil engineering projects in the USA.

The DRBF has catalogued 1062 projects representing more than US$77.7 billion worth of project work. The December 2003 schedule shows that there were 340 contracts comprising DRBs in 2003. Of those projects 1,261 recommendations were given by the DRBs and only 28 matters went beyond the DRB process. In other words, only 2.2% of those disputes referred to the DRB progressed to arbitration or litigation. A more positive way of looking at this is that DRBs have a success rate of more than 97.8%. The DRBF has reported a considerable rise in the number of projects using DRBs:

[18] 1972.

Dispute Resolution Board Foundation, December 2003



The DRBF has produced the following statistics, updated to December 2003:

Contracts Complete and Under Construction (DRBF Schedule, December 2003)

Year	Projects with DRBs Each	Contract Value US$ Billion	Disputes Settled Each
1988	19	1.4	16
1989			
1991	63	3.2	78
1992			
1994	166	9.7	211
1995			
1996			
1997	326	22.1	424
1998	477	28.8	596
1999	576	32.6	758
2000	666	35.4	869
2001	818	41.0	1021
2002	922	46.2	1108
2003	1062	50.3	1261

DRBs are now widely used on a range of civil engineering projects in the USA. Their use is no longer limited to the mega projects, and 3 man, or indeed 1 man DRBs are being used on smaller projects.

Dispute Adjudication Board

The DAB has developed in parallel with DRBs. The key developments might be considered as follows:

- 1970: A contractual adjudication process was introduced into the domestic sub-contractor standard forms in the UK in order to primarily resolve set-off issues between the contractor and main contractor.

- 1994: Latham issues his final report reviewing procurement and contractual arrangements in the construction industry.

- 1995: FIDIC introduced a DAB in its Orange Book.

- 1996: FIDIC introduced as an option the DAB in the Red Book.

- 1996: Part II of the Housing Grants, Construction and Regeneration 1996 included adjudication provisions in Section 108.

- 1998: Part II of the Housing Grants, Construction and Regeneration 1996 is introduced on 1 May, together with the exclusion order (SI 1998 No. 648) and the Scheme for Construction Contracts, England and Wales (SI 1998 No. 649).

- 1999: FIDIC adopted a DAB/Dispute Review Expert ("DRE") procedure in favour of the additional approach of relying upon the engineer acting as the quasi arbitrator as well as an agent of the employer or owner. The DAB procedure became mandatory rather than an option. The three major model forms including DABs/DREs were:

    - Red Book: Conditions for Construction (a standing DAB comprising three members or one member).

    - Yellow Book: Plant & Design Build (ad hoc DAB).

- Silver Book: Engineer Procure and Construct (Turnkey) again incorporating an ad hoc DAB.

- 2000: The World Bank introduced a new edition of Procurement of Works which made the "Recommendations" of the DRB or a DRE mandatory unless or until superseded by an arbitrator's award.

- 2002: ICC Task Force prepared draft rules for Dispute Boards ("DBs").

- 2004: The World Bank, together with other development banks, and FIDIC started from May working towards a harmonised set of conditions for DAB.

- 2004: (July): ICE published a DB procedure. Designed to be compliant with the HGCRA.

The introduction in the 1970s of the limited contractual adjudication procedure is perhaps now of limited historical interest. In the UK, the HGCRA was clearly a major turning point. However, it can certainly no longer be considered merely a domestic UK turning point; it also represents a major international turning point in the area of construction dispute resolution. On the international arena, FIDIC led the way by the introduction of DABs in its 1999 suite of contracts. The FIDIC Conditions of Contract typically comprise:

- Clauses 20.2-20.8 the Dispute Adjudication Board;

- Appendix - General Conditions of Dispute Adjudication Agreement;

- Annex 1 - Procedural Rules; and

- Dispute Adjudication Agreement (three person DAB or one person DAB).

FIDIC DAB (Clause 20)

Clause 20 of the FIDIC form deals with claims, disputes and arbitration. Emphasis is placed upon the contractor to make its claims during the course of the works and for disputes to be resolved during the course of the works. Clause 20.1 requires a contractor seeking an extension of time or any additional payment to give notice to the engineer "as soon as practicable, and not later than 28 days after the event or circumstance giving rise to the claim".

Some have suggested that the contractor will lose its right to bring a claim for time and/or money if the claim is not brought within the timescale. [19] Under UK law this seems unlikely given that timescales in construction contracts are generally directory rather than mandatory[20], and also because Clause 20.1 does not go on to clearly state that the contractor will lose its right in the event of a failure to notify within a strict timescale. [21] Nonetheless, a contractor would be well advised to notify in writing any requests for extensions of time or money claims during the course of the works and within a period of 28 days from the event or circumstances giving rise to the claim.

The benefit then of the DAB is that it should be constituted at the commencement of the contract, so that the members of it will visit the site regularly and be familiar not just with the project but with the individual personalities involved in the project. They should, therefore, be in the position to issue binding decisions within the period of 84 days from the written notification of a dispute pursuant to Clause 20.4.

The DAB is appointed in accordance with Clause 20.2. It could comprise individuals that have been named in the contract. However, if the members of the DAB have not been identified in the contract then the parties are to jointly appoint a DAB "by the date 28 days after the Commencement Date". The DAB may comprise either one or three suitably qualified individuals. The appendix to the FIDIC contract should identify whether the DAB is to comprise one or three people. The appendix does not provide a default number, but Clause 20.2 states that the parties are to agree if the appendix do not deal with the matter. If the parties cannot agree, then the appointing body named in the appendix will decide if the panel is to comprise 1 or 3 memebers. [22] The default appointing authority is the President of FIDIC or a person appointed by the President of FIDIC. The appointing authority is obliged to consult with both parties before making its final and conclusive determination.

On most major projects a DAB will comprise three persons. If that is the case, then each party is to nominate one member for approval by the other. The parties are then to mutually agree upon a third member who is to become the chairman. In practice, parties may propose a member for approval, or more commonly propose three potential members allowing the other party to select one. Once two members have been selected, it is then more common for those members to identify and agree upon (with the agreement of the parties) a third member. That third person might become the chairman, although, once again with the agreement of all concerned, one of the initially proposed members could be the chairman.

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(19) Seppala, Christopher (2003) "Claims of the Contractor" a paper given at; The Resolution of Disputes under International Construction Contracts, ICC, Paris, 6-7 February.

(20) *Temloc v Errill Properties* (1987) 22 BLR 30, CA

(21) *Bremer Handelsgesellschaft mbH v Vanden Avenue-Izegem PVBA* (1978) 2 Lloyd's Rep 109, HL.

(22) Clause 20.3.

The terms of remuneration for each of the individual members of the DAB must be agreed between the parties. This is because each party will be responsible for paying 50% of the remuneration in respect of each member of the DAB.

Clause 20.2 states that a member can only be terminated by mutual agreement of both parties. The employer or contractor acting alone cannot terminate the DAB or a single member of the DAB once the DAB has been constituted. Once constituted the principle obligation of the DAB is to make binding decisions. However, the parties may jointly agree to refer a matter to the DAB simply for an advisory opinion.

If the parties do agree to terminate the appointment of an individual member of the DAB, then they should replace that person by agreement or if the parties cannot agree by nomination of the appointing entity. The parties might also need to replace a member if the member declines to act, resigns, becomes disabled or dies.

By virtue of Clause 20.3 the parties have agreed that the appointing entity named in appendix (the FIDIC President or his nominee by default) may appoint members to the DAB if the parties fail to agree within 28 days after the Commencement Date, or fail to agree the identity of a third member, or fail to agree on a replacement member within 42 days after the date on which the sole member declined or became unable to act.

Clause 20.4 deals with referring a dispute to the DAB. The first paragraph of clause 20.4 states:

> If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, the dispute shall be referred in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this sub-clause.

The parties are therefore obliged contractually to refer any dispute whatsoever that arises in connection with or out of the contract including the opening up and reviewing of notices and certificates. If the DAB comprises 3 members then the DAB is deemed to have received the notice of dispute when it is received by the Chairman alone. This means that the parties can simply direct all of their correspondence to the Chairman, but with copies to the other members, as well as providing a copy to the other party and engineer. [23]

Both the Employer and the Contractor are obliged to provide additional information and further access to the site and its facilities as the DAB may require in order for the DAB to make its decision.

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[23] Clause 20.4 and Procedural Rule 4.

The contractor, notwithstanding that a dispute has been referred to the DAB, is to continue to proceed with the works in accordance with the contract (unless abandoned, repudiated or terminated). Both parties are contractually obliged to properly comply with every decision of the DAB. DAB decisions are therefore immediately mandatory, unless or until revised by an arbitral award, litigation or settlement.

The DAB is obliged to provide its written decision within 84 days after receipt of the reference. The DAB must provide a reasoned award which must be issued pursuant to clause 20.4 of the contract.

The FIDIC contract, at clause 20.4, expressly states that the DAB is not acting in an arbitral capacity. The purpose of this express reference is to make it clear that the written decision of the DAB is not to be treated as an arbitrator's award, and so cannot be said to be immediately finally conclusive. Neither will the DAB's decision enjoy the status of an arbitrator's award in respect of enforcement. It will, however, be enforceable under the contract and depending upon the local law it may be possible to enforce payment required by a DAB's decision in the local court without recourse to the merits of the decision or a stay of litigation because of the existence of the arbitration clause.

If either party is dissatisfied with the decision of the DAB then either party may give notice of its dissatisfaction to the other party. However, this must be done within 28 days after receipt of the DAB's decision. If the DAB does not render its decision within 84 days of receipt of the reference then either party may simply serve a notice of dissatisfaction. A notice of dissatisfaction must set out the dispute and reasons for the dissatisfaction. Matters that are the subject of a notice of dissatisfaction which are not resolved amicably in accordance with clause 20.5 may then be referred to international arbitration pursuant to clause 20.6.

The crucial point about the notice of dissatisfaction is that the decision of the DAB becomes final and binding upon both parties unless a written notice of dissatisfaction is served within 28 days of receipt of the DAB's decision. If either party is not satisfied with the DAB's decision then it is crucial for that party to serve a written notice of dissatisfaction. In the absence of such a notice the parties have clearly agreed by contract that they will accept the DAB's decision as being final and binding upon them.

In light of the House of Lords decision in *Beaufort Developments v Gilbert Ash (NI) Limited* it is highly likely that a court will find that the parties are bound by such a clause and that a failure to serve a notice of dissatisfaction would result in either party's inability to raise a

dispute in connection with the same subject matter of any DAB decision that has become final and conclusive. [24]

Clause 20.5 requires the parties to attempt to settle their dispute amicably before commencing arbitration. There is a 56 day cooling off period after the issue of the notice of dissatisfaction. Either party may not commence arbitration (unless the other party agrees) until after the 56th day after the date on which the notice of dissatisfaction was "given".

The final method of dispute resolution is international arbitration pursuant to clause 20.6. The applicable rules are the ICC rules, and disputes are referred to a panel of 3 arbitrators.

FIDIC General Conditions of Dispute Adjudication Agreement

The appendix to the FIDIC form provides a tripartite General Conditions of Dispute Adjudication Agreement. It is tripartite in the sense that it is entered into between the Employer, Contractor and the sole member or 3 members of the DAB. The Agreement takes effect on the latest of:

- The Commencement Date defined in the Contract;
- When all parties have signed the tripartite Dispute Adjudication Agreement; or
- Or when all parties have entered into a dispute adjudication agreement.

The distinction between the last two bullet points refers to the Dispute Adjudication Agreement appended to the FIDIC form, or alternatively provides for the parties to enter into an effective dispute adjudication agreement even if it is not in the form attached to the FIDIC contract.

The engagement of a member from the DAB is a personal appointment. If a member wishes to resign then a member must give at least 70 days notice. Members warrant that he or she is and shall remain impartial and independent of the Employer, Contractor and Engineer. A member is required to promptly disclose anything which might impact upon their impartiality or independence. [25]

The general obligations of a member of the DAB are quite extensive. Clause 4 requires that a member shall:

- Have no financial interest or otherwise in the Employer, the Contractor or the Engineer;

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[24] [1999] 1 AC 266 HL: [1998] 2 WLR 860: 1998 2 AER 778; 83 BLR 1; (1998) CILL 1386

[25] Clause 3, Warranty.

- Not previously have been employed as a Consultant by the Employer, Contractor or Engineer (unless disclosed);
- Have disclosed in writing any professional or personal relationships;
- Not during the duration of the DAB be employed by the Employer, Contractor or Engineer;
- Comply with the Procedural Rules (see below);
- Not give advice to either party;
- Not whilst acting as a DAB member entertain any discussions with either party about potential employment with them;
- Ensure availability for a site visit and hearings;
- Become conversant with the Contract and the progress of the Works;
- Keep all details of the Contract and the DAB's activities and hearings private and confidential; and
- Be available to give advice and opinions if and when required by the Employer and Contractor.

By contrast, and pursuant to clause 5, the Employer and Contractor are obliged not to request a member to breach any of the obligations set out above. Neither is the Employer or the Contractor able to appoint a member as arbitrator under the Contract or call a member as a witness to give evidence concerning any dispute arising under the Contract. Further, the Employer and Contractor grant immunity upon the member of the DAB for any claims for anything done or omitted to be done in the purported discharge of the members functions unless those acts or omissions have been carried out by the member in bad faith. An indemnity is provided, joint and severally, by the Employer and Contractor in that regard.

Clause 6 deals with payment. There are two main elements to payment. The first is the retainer fee, which is paid on a monthly basis in consideration for the member being available for site visits and hearings, becoming conversant with the project and providing general services.

The second aspect of the fee comprises a daily fee for payment travelling to and from the site (a maximum of 2 days travelling in each direction) as well as for each day spent working on site, the hearings, preparing decisions and reading submissions. Reasonable

expenses together with taxes properly levied are then to be paid in addition. The retainer fee is paid from the last day of the month in which the DAB becomes effective until the last day of the month in which the taking over certificate is issued for the whole of the works. After that date, the retainer fee is reduced by 50% until the DAB is terminated or a member resigns.

It is therefore highly likely that each of the 3 members of the DAB will receive a different retainer fee and claim a different hourly rate. Each member submits their invoices for the monthly retainer and airfares quarterly in advance. Invoices for daily fees and other expenses are then submitted at the conclusion of a site visit or hearing. The contractor is to pay each of the members' invoices in full within 56 calendar days from receipt.

From a practicable perspective it is often sensible for the two "wing" members of the DAB to submit their invoices to the Chairman who then submits those invoices together with his or her invoice in one go to the Contractor. This means that the Chairman can remain the single point of contact for any issues arising in respect of the DAB's charges and that the final date for payment for all of the members will be on the same date, thus allowing the Chairman to take up the issue of late payment for the DAB if necessary.

If the Contractor does not pay then the Employer is obliged to pay the amount due. If a member has not received payment within 70 days from receipt of invoice by the contractor then that member may:

- Suspend his or her services until the payment is received; and/or
- Resign.

The Employer or Contractor may acting jointly terminate the DAB by giving 42 days notice. [26] If the member fails to comply with the Dispute Adjudication Agreement, or the Employer or Contractor fail to comply with it then those affected may terminate the tripartite Agreement. If a member breaches the Agreement then he or she will not be entitled to any further fees. Any disputes arising under the tripartite Agreement are to be dealt with by ICC arbitration comprising a single arbitrator. [27]

FIDIC Procedural Rules

The annex to the General Conditions of the Dispute Adjudication Agreement sets out procedural rules for the DAB. The DAB is to visit the site "at intervals of not more than 140 days" and should visit the site during critical construction events. Consecutive visits should

[26] Clause 7, Termination
[27] Clause 9, Disputes

not be less than 70 days. [28] The timing and the agenda for each site visit should be agreed between the DAB and the parties. [29]

In practice the DAB sets out the agenda, and the Chairman puts it to the parties and unless an objection is received from either of the parties the Board then proceeds upon that basis. At the conclusion of the site visit, the DAB is to prepare a report setting out its activities during the site visit and identifying those individuals who attended the site visit. [30]

Annex clause 4, requires the parties to furnish the DAB with a complete copy of the Contract, Progress Reports, Variation Certificates and other documents which are "pertinent to the performance of the Contract" or communications between the DAB Employer and/or Contractor shall be copied to the other party, and all the members of the DAB.

Annex clause 7 states that the DAB has the power to act inquisitorially. Further, the DAB is to establish the procedure before deciding a dispute and may refuse admission to the hearings and proceed in the absence of any party who has received notice of the hearing.

The DAB may also decide upon its own jurisdiction, conduct any hearings as it thinks fit, take the initiative and ascertain the facts, make use of its own specialist knowledge, decide upon the payment of interest if any, provide provisional or interim relief, open up, review and revised any certificate, decision, determination, instruction, opinion or valuation of the Engineer. [31]

Once a hearing has been concluded the DAB shall meet in private in order to discuss and prepare its decision. [32] Decisions should be reached unanimously, but if this "proves impossible", then a decision may be made by the majority. In practice, a single decision is usually issued by the DAB: a majority decision and a further section where the minority member sets out his or her written report. If a member fails to attend the hearing then the other two members may proceed to a unanimous decision unless the Employer and Contractor agree otherwise or the absent member is the Chairman and he instructs the other members not to proceed. The Contractor and Employer could of course ask the other two members to proceed and make a unanimous decision. [33]

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[28] Annex, Procedural Rule 1
[29] Annex, Procedural Rule 2
[30] Annex, Procedural Rule 3
[31] Annex, Procedural Rule 8
[32] Annex, Procedural Rule 9(a)
[33] Clause 9(c)

FIDIC Dispute Adjudication Agreement

The appendices to the FIDIC Form of Contract contain two Dispute Adjudication Agreements. The first is for use on a one person DAB, and the second for use on three person DAB. The Dispute Adjudication Agreements are for all intents and purposes the same for a one or three person DAB, except that where a three person DAB applies then those three persons are to act jointly as the DAB.

The terms of the General Conditions of Dispute Adjudication Agreement are incorporated by reference on clause 4 of the Dispute Adjudication Agreements. The retainer fee and daily fee of each member is set out in the both Dispute Adjudication Agreements. The Employer and Contractor bind themselves jointly and severally to pay the DAB member in accordance with the General Conditions of the Dispute Adjudication Agreement. Details of the specific FIDIC contract between the Employer and Contractor also need to be recorded, as it is from this document that the Employer and Contractor agree to be bound by the DAB and it is also from that document that the DAB obtains its jurisdiction in respect of the project.

The Move Towards Legislation For International Adjudication

The legislation that has been introduced in the UK, and other jurisdictions introducing adjudication has merely dealt with the domestic position. However, it has been radically suggested that adjudication legislation could be provided by a two part statute. [34] The first part of the Bill would deal with the domestic territorial position, whilst the second part could provide for adjudication in respect of a construction contract anywhere in the world. This follows the concept of international arbitration. Most arbitration acts provide for domestic arbitration in the country of origin, whilst also supporting, recognising and enforcing international arbitration. In other words, the international adjudication section of the Bill would provide an adjudication procedure together with the ability of a local court to support the process in terms of nominating adjudicators by default, or identifying or nominating a body by default and enforcing decisions. Parties, anywhere in the world could choose the adjudication procedure of another jurisdiction.

An International Adjudication Bill might include the following aspects:

1) Be drafted on a “minimum interference, maximum enforceability” basis;

2) Adopt the New York Convention for the purposes of enforcement;

[34] Robert Fenwick Elliott.

3) Provide for the local courts to identify an adjudicator or nominate an adjudicator nominating body in the appropriate part of the world. This could be done by a judge on a documents only (email) basis;

4) Provide a limited ability for challenges. There would always be the ability to challenges on the basis of no jurisdiction, but how restricted should challenges be based upon grounds of natural justice?

5) A decision would be binding, unless or until subsequent arbitration, litigation or settlement; and

6) Detailed procedural rules would need to be included.

The advantages of such an approach would mean that international projects could make use of adjudication procedures in a country supported by a competent court system, which is not always the case in some developing countries where considerable construction projects are being carried out. Further, the parties could choose an adjudication system that appears to be more effective than others, or adopt a system whose procedurals appear to suit their project or their needs to a greater extent than their domestic adjudication process, if any.

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