The use of Dispute Boards – recent experience

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Introduction

The suite of FIDIC Contracts, First Edition, published in 1999 includes three different Dispute Adjudication Board (DAB) procedures for the resolution of disputes:-

1. A "full-term" DAB, which comprises one or three members who are appointed before the Contractor commences executing the Works, and who typically visit the Site on a regular basis thereafter (typically the interval periods for site visits are between 70 and 140 days). During these visits, the DAB would also be available to assist the Parties in avoiding a dispute, if they and the DAB all agree. The FIDIC Conditions of Contract for Construction ("Red Book") includes the wording required for this full-term procedure, including: *"If at any time the Parties so agree, they may jointly refer the matter to the DAB for it to give its opinion."* [Paragraph 7. of Sub-Clause 20.2 refers].

2. An "ad-hoc" DAB, which comprises one or three members who are only appointed if and when a particular dispute arises, and whose appointment typically expires when the DAB has issued its decision on that dispute. The FIDIC Conditions of Contract for Plant and Design-Build ("Yellow Book") and the FIDIC Conditions of Contract for EPC/Turnkey Projects ("Silver Book") include the wording required for this ad-hoc DAB procedure, the difference between them being that the "Yellow Book" refers to the Engineer, whereas the "Silver Book has an Employer's Representative but no Engineer.

3. Under the "Red" and "Yellow Books" only, pre-arbitral decisions may be made by the Engineer, if he is an independent professional consulting engineer with the necessary experience and resources. Guidance on suggested substituted wording is given: *"The Engineer shall act as the DAB in accordance with this Sub-Clause 20.4, acting fairly, impartially and at the cost of the Employer"*. This procedure may involve less expense (which is directly borne by the Employer), because of the Engineer's involvement in the

administration of the Contract. Although there may be doubts as to whether the appointed Engineer will be truly able to act impartially when making pre-arbitral decisions, because he is paid by the Employer and because he may be influenced by the shortcomings in his own administration of the Contract, these doubts may be lessened by ensuring that pre-arbitral decisions are only made by senior members of the Engineer's staff who are not otherwise involved in the Contract.

Each FIDIC Book describes a dispute resolution procedure which may be applicable to most contracts for which the Book was intended to be used. However, for any particular contract, the most appropriate Book may not be the Book which contains the dispute resolution procedure which is to be preferred. When the tender documents are being prepared, consideration should be given as to the most appropriate dispute resolution procedure, taking account (among other things) of the following matters:-

(a) The extent of the Contractor's activities off Site, particularly any which are carried out before he commences the execution of the Permanent Works on the Site. E.g. The design and manufacture of Plant where it may not be economically viable to appoint a DAB because of insufficient likelihood of disputes.

(b) The extent of the Contractor's activities underground or elsewhere subject to the risk of encountering conditions which he did not foresee when preparing his tender. E.g. For a project requiring a considerable amount of tunnelling work, a full-term DAB may be the most appropriate , because it could visit the Site on a regular basis and examine the physical conditions whilst they were being encountered.

(c) The extent to which the final Contract Price is to be subject to measurement, many Variations, and/or to other matters not finally determined in the Contract. E.g. If all the Works are subject to re-measurement, a full-term DAB may be the most appropriate, because it could visit the Site on a regular basis and be available if the Parties agreed to jointly refer a matter to the DAB for it to give its opinion.

(d) The magnitude of the Contract, and/or of its documentation, which might indicate a greater likelihood of disputes. E.g. a three-person DAB would typically be regarded as appropriate for a "Red Book" contract involving an average monthly Payment Certificate exceeding $2.5M (US). If the average monthly

Payment Certificate is unlikely to exceed $1.25M (US), a one-person DAB may be preferred for reasons of economy, unless the Engineer is considered sufficiently independent, professional for him to make decisions under Sub-Clause 20.4.

(e) The Country and/or the nationality of the Parties. The Books are recommended for use on an international basis, so the parties are usually not of the same nationality. The DAB may therefore perform better if the nationality of each member is not the same as that of either Party or of the other members (if any). However, each of the regular visits of a full-term DAB may then require significant travelling expenses. If both parties are of the same nationality, the member(s) of the DAB could be residents of the Country, in which case it might be appropriate to reduce the Dollar thresholds in (d) above.

The role of the Engineer

As mentioned earlier in the Introduction, pre-arbitral decisions may be made by the Engineer, if he is an independent professional consulting engineer with the necessary experience and resources (Procedure 3. for use with the "Red" and "Yellow Books"). Notwithstanding whether or not this option is adopted, the Engineer is still required to make fair determinations under Sub-Clause 3.5 of the Contract wherein it is stated that:

> *"Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due account of all relevant circumstances".*

In my experience, Engineers appointed under FIDIC Contracts do not always appear to have sufficient resources to carry out their role of supervision and contract administration and the delegated assistants often lack the necessary experience. Additionally, some Engineers are put under pressure from Employers, because the Employers in turn are in part controlled by their Funding Agencies, to control costs within artificially set and unrealistically low budgets. These outside factors may well sometimes contribute to unfair and late determinations being made by

the Engineer and his inexperienced assistants, of the Contractor's legitimate entitlements to claims for time and money.

Accordingly, disputes arise and the only recourse is for these to be referred to the DAB. Anecdotal evidence suggests that some of these shortcomings may be the result of Employers selecting and appointing Engineers on the basis of competitive tenders and lowest price when construction takes place, where the appointed Engineer has had no prior design input or involvement, rather than on the basis of proven capability, reputation, knowledge of the design and actual contract resource requirements. In such situations, where the commission has been secured on a competitive price basis, there can be considerable reluctance on the part of Engineers to become involved in the key decision-making activities themselves but instead delegate these important tasks to the assistants on Site. Unlike the ICE Form of Contract, the FIDIC Form does not prevent the Engineer from delegating all matters except the Sub-Clause 3.5 [*Determinations*]. In my opinion, in order for an Engineer to carry out this important decision-making function, namely to agree or determine any matter pursuant to Sub-Clause 3.5, he should as an absolute minimum retain, not delegate, a similar degree of authority to that imposed under Clause 2(4)(c) of the ICE Form of Contract. This requires the Engineer to take more than a passing interest concerning the ongoing day-to-day activities thereby enabling him to reach fair determinations when required to do so.

The role of the Employer

As mentioned above some Engineers are put under pressure from Employers, because the Employers in turn are in part controlled by their Funding Agencies, to control costs within artificially set and unrealistically low budgets. Such situations can be further exacerbated if the Employer is prevented from carrying out his intended role by outside factors. The contracting parties in a specific FIDIC "Red Book" contract for rehabilitation and partial reconstruction of certain roadworks were the Contracting Authority (part funding authority and signatory to the Contract) and the Contractor. However, as a result of a Particular Condition of the FIDIC Contract the Employer, in terms of the FIDIC Conditions of Contract, was defined as a separate party.

Further Particular Conditions of Contract required the Engineer to act impartially when making determinations pursuant to Sub-Clause 3.5, but the Engineer was required to consult and obtain specific approval of the Employer before, *inter alia*:-

- Determining an extension of time under Sub-Clause 8.4 and

- Issuing variations under Sub-Clause 13.1 with a value in excess of €50,000.

As regards any claim from the Contractor for an Extension of Time for Completion, the Engineer was required to *"make comments to the request for extension and shall forward it to the Employer for approval. Extension of time is approved by signing Addendum to the Contract."* Clearly such requirements were in direct conflict to the obligation for the Engineer to act impartially. In the event, the Engineer made several formal evaluations (or "comments") of claims for Extension of Time for Completion for the Employer's approval but these in turn were not approved. The Contracting Authority were reluctant to authorise any further payments despite the Engineer's views that such Extensions of Time were due because of clear design errors, omissions and other circumstances beyond the Contractor's control and for which he was not contractually liable. Hence disputes arose and were referred to the 'ad hoc' DAB but not before the Contractor had terminated the Contract citing the grounds that *"the Employer substantially fails to perform his obligations under the Contract"* (Sub-Clause 16.2 (d)).

Appointment of the DAB

In my experience many contracts which incorporate DABs only make provision for their appointment as an ad-hoc DAB, who are only appointed if and when a particular dispute arises and whose appointment typically expires when the DAB has issued its decision on that dispute. In addition it is increasingly apparent that the full-term DAB provisions of the FIDIC Conditions of Contract for Construction, First edition, 1999 ("Red Book") are often amended to an ad-hoc DAB, as in the case of the earlier example for the rehabilitation and partial reconstruction of roadworks. The ad-hoc DAB consisting of a sole member, is clearly analogous to an appointment as an adjudicator under the UK Housing Grants, Construction & Regeneration Act 1996 (Act) but all the advantages of the full-term DAB are then lost.

With an ad-hoc DAB, the DAB will rapidly need to become conversant with the project developments that led to the dispute, in order to deliver a fair and robust decision. Whilst the timescale is more generous (84 days) than that allowed under the equivalent UK Construction Act compliant procedure (28 days), there is more potential for the decision not to satisfy one or other of the Parties and for the dispute to proceed to arbitration or litigation, particularly if the dispute is of a complex nature.

With the ad-hoc DAB arrangement there is also the tendency for the referring Party to delay the formal notification of its intention to refer a dispute, and sometimes the submission of full and detailed particulars in support of a claim, until well after the event that first gave rise to the claim. Whilst such a delay may be in part understandable, in the hope and expectation that extended discussions/negotiations might resolve the matter without the need for adjudication, such delay will invariably result in a greater *impass*e between the Parties, more time delays and greater costs assigned to the overall project execution whilst the *impass*e persists. Irrespective of the subsequent outcome of the dispute as regards which Party the DAB decides is contractually liable, some of the time and costs associated with the disputed matter undoubtedly could and should have been averted had the matter been referred to a full-term DAB as soon as it became clear that the Party's differences were unlikely to be resolved amicably.

The full-term DAB is usually paid a monthly retainer fee (typically equivalent to 2 or 3 days fee) plus fees on a daily basis and expenses. The fees remain fixed for the first 24 calendar months. The ad-hoc DAB is paid a daily fee and expenses, with no retainer, but as soon as the Dispute Adjudication Agreement takes effect, the DAB is entitled to invoice the Parties, through the Contractor, for 25% of the estimated total amount of daily fees and an advance equal to the estimated total expenses to be incurred. As this is expected to be a short term appointment, there is no provision for the fees to remain fixed for the first 24 calendar months.

Dispute

Either Party may refer a dispute to the DAB [Sub-Clause 20.4] but in some cases there may be some disagreement between the Parties as to the existence or otherwise of a dispute. This in turn may result in one of the Parties being unwilling to sign the Dispute Adjudication Agreement (DAA), especially with the ad-hoc DAB arrangement. After the DAA has taken effect the Employer and the Contractor empower the DAB to decide upon its own jurisdiction, and as to the scope of any dispute referred to it [Annex - Procedural Rule 8(b)]. If, on the other hand, the DAA cannot be completed because of one Party's refusal to sign it, then the DAB have to proceed with care. On the assumption that the DAB reach the opinion that on balance there is a dispute capable of being submitted to the DAB and, in not signing the DAA, that Party is in material breach of its contractual obligations, it is nonetheless prudent to ensure that the referring Party are informed that (i) they would be responsible for seeking a declaration from the appropriate local Court that any DAB decision would be valid even though one Party has not signed the DAA, and (ii) that

they would also have to agree to pay all the DAB's fees & expenses, reasonably incurred, by regular stage payments suitably invoiced periodically and (iii) the referring Party would then be responsible for Court or Arbitration enforcement of the DAB's Decision(s) should this become necessary. Subject to the foregoing provisos the DAB could then proceed with the referral.

A particular "Yellow Book" contract provided that the DAB would consist of one Member.

Clause 20.3 provides that, in the event of the Parties not agreeing upon the appointment of a sole member of a DAB, the appointment shall be made by the appointing entity or official named in the Appendix, after due consultation. The appointment is final and conclusive and each Party is responsible for paying one half of the remuneration of the appointing official. In this instance the appointing official was the President of FIDIC.

Clause 2 of the General Conditions of the Dispute Adjudication Agreement stipulates that;

> *"The Dispute Adjudication Agreement shall take effect when the Employer, the Contractor and each of the Members (or Member) have respectively each signed a dispute adjudication agreement.*
>
> *When the Dispute Adjudication Agreement has taken effect,* (i.e. after signing), *the Employer and Contractor shall each give notice to the Member accordingly .If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective".*

Sub-Clause 20.4 states that:

> *"If a dispute (of any kind whatsoever) arises between the Parties…..* then, after a DAB has been appointed in terms of Sub-Clause 20.3, (i.e. by the appointing authority), *either Party may refer the dispute in writing to the DAB for its decision.*
>
> The DAB is required to give its decision within 84 days after receiving the reference, or the advance payment, whichever date is later, or other period agreed. However, the DAB shall not be obliged to give its decision until full payment of all of its submitted invoices has been received.

Clause 6 of the General Conditions of Dispute Adjudication Agreement states that, immediately after the DAA has taken effect, (i.e. after signing by both parties), the DAB shall, before engaging in any activities under the DAA submit to the Contractor, with a copy to the Employer, an invoice for an advance payment in respect of fees and expenses. The Contractor is required to make payment upon receipt of the invoice and recover the Employer's portion through the contract. The DAB is not obliged to engage in any activities in terms of the agreement prior to receipt of payment of this advance.

Notwithstanding the appointment of the DAB by the President of FIDIC, the Employer refused to sign the Dispute Adjudication Agreement, and consequently having regard to the terms of Clause 2 of the General Conditions of the Dispute Adjudication Agreement, it did not take effect. Furthermore, as the Employer also did not give the required notice of the agreement coming into effect to the DAB, the agreement was void and ineffective.

There is clearly an element of conflict between the terms of Sub-Clause 20.3 of the General Conditions of Contract, which enables referral to the DAB after its appointment by the appointing authority, and Clause 2 of the General Conditions of the Dispute Adjudication Agreement which requires the signature of both parties before it becomes effective. This conflict results in uncertainty about the jurisdiction and authority of the DAB. The Contractor could possibly, as it could be argued that notwithstanding the appointment by the appointing authority no DAB was in place, proceed in accordance with Sub-Clause 20.8, i.e. directly to arbitration under Sub-Clause 20.6. By taking this course of action the Contractor would forfeit the advantages of the DAB procedure to which the Parties had agreed by their acceptance of the Contract, and would allow the Employer to effectively avoid referral of any dispute to a DAB by reason of its default.

In the event the Contractor was unable to find a satisfactory answer to the conundrum and elected to proceed with the DAB route notwithstanding the ambiguity and possible consequential argument relating the DAB's jurisdiction. As the DAB, I decided to proceed on an *ex-parte* basis pursuant to Procedural Rule 4, after which the Employer, albeit reluctantly, joined in, but nevertheless refused to sign the Agreement.

Whilst most Contracts do not define what is meant by the word "dispute" (e.g. FIDIC) it is reasonable to presume that the word would have its normal meaning i.e. any statement, request,

allegation or claim which has been rejected and the rejection is not acceptable to the person who made the original statement or complaint. For example, under a FIDIC Form of Contract it is clearly not necessary for a claim to have been considered by the Engineer under the Sub-Clause 2.5 or 3.5 procedure in order to create a dispute. Furthermore, Sub-Clause 20.4 of the FIDIC Conditions of Contract "Red Book" states that a dispute can be *"of any kind whatsoever"*, all as reproduced below:-

> *"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, valuation of the Engineer, then after a DAB has been appointed pursuant to Sub-Clauses 20.2 [Appointment of the Dispute Adjudication Board] and 20.3 [Failure to Agree Dispute Adjudication Board] either Party may refer the dispute 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"*

Sub-Clause 20.1

Under FIDIC Contracts, disputes often result from a difference of opinion between the Parties as to the correct interpretation of Sub-Clause 20.1 wherein it is stated that:-

> *"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance."*
>
> *"If the Contractor fails to give notice of claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged form all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply."*

Failure to comply with this notice provision results in the Contractor forfeiting his right to an extension of Time for Completion and to additional payment and the Employer is then discharged

from his liability in connection with the event. Differences as to the correct interpretation of this Sub-Clause exist. For example, suppose a Contractor requires additional drawings from the Employer in order to complete his Works and gives written notice to the Engineer to the effect that these drawings are required within 6 weeks (say) of this request in order to avoid delays and associated costs. My view is that such a notice cannot reasonably be construed as the claim notification under Sub-Clause 20.1 because there is no claim at this time, rather this is an "early warning notice", the event or circumstance giving rise to the claim has not occurred and indeed a claim will not ensue if the Contractor receives the drawings within the requested 6 week period. The notice required by Sub-Clause 20.1 would only become necessary if the drawings are not forthcoming within the 6 week period and the Contractor is unavoidably delayed. Hence *"the event or circumstance giving rise to the claim"* only occurs after it becomes clear that the lack of drawings and/or instructions is now definitely going to delay the Time for Completion; it is not the earlier notification. The counter viewpoint is that the *"the event or circumstance giving rise to the claim"* under Sub-Clause 20.1 occurs at the time the earlier request for drawings was made and therefore if the Contractor does not submit his notice of claim for time and cost until after the 6 weeks has elapsed, when it is clear that he can no longer accommodate the drawing delays within his programme without the award of an extension of Time for Completion, he forfeits his entitlement to claim because it is now time-barred.

The Referral

If a dispute is referred, the DAB proceeds in accordance with the appropriate DAB Procedure and Rules [Annex - Procedural Rules refers].

The DAB is required to *"act fairly and impartially as between the Employer and the Contractor, giving each of them a reasonable opportunity of putting his case and responding to the other's case."* [Procedural Rule 5(a)].

Thus when establishing the timetable, the DAB must take this into account which in turn is also subject to the overall time allowed (84 days) for the decision.

The DAB must also *"adopt procedures suitable to the dispute, avoiding unnecessary delay or expense."*[Procedural Rule 5 (b)]. This provision is also mentioned in Procedural Rule.8 (a) which empowers the DAB to *"establish the procedure to be applied in deciding a dispute."*

Accordingly, the DAB should take account of the views of the Employer and the Contractor on the procedures they would prefer, or may have agreed. The full procedure for a complex dispute could entail:-

1. the referral
2. the other Party's response
3. the referring Party's reply to 2.
4. the other Party's reply to 3.

Unless the dispute is sufficiently straightforward for the DAB to prepare its decision based upon documents only, a formal hearing may be convened after these submissions. Additionally, particularly where the DAB is constituted as an ad-hoc DAB, it may be appropriate to set aside some time in the programme for Site visits.

The referral must include full details of the referring Party's case, the various assertions and arguments on which it relies, and the detailed decision which it wishes the DAB to make. Overall this position paper defines the matters which are referred to the DAB for its decision, and thus defines the scope of the dispute and the DAB's jurisdiction. The other Party will then typically prepare its own position paper, with full details of its case, etc. agreeing, wherever possible, with the facts as presented by the referring Party and providing counter arguments and other particulars, perhaps overlooked by the referring Party, which are considered relevant.

In other cases, for example, the Parties may wish that the DAB first decide upon the admissibility, or otherwise, of an extension of time claim before moving on to matters of quantum. In such cases it may be appropriate to establish the 84-day timetable allowing for two hearings, moving on to the second submissions and hearing to deal with quantum after the matters relating to the extension of time have been concluded.

In addition, it may be appropriate for the DAB to propose issuing decisions on a complex dispute in stages, rather than issuing one decision dealing with all aspects of the dispute.

However, it should be noted that with the ad-hoc DAB arrangement, such as that outlined under FIDIC "Yellow" & "Silver" Books in Sub-Clause 20.2, the appointment of the DAB expires when the DAB has given its decision on the dispute referred to it under Sub-Clause 20.4, unless other disputes have been referred to the DAB by that time under Sub-Clause 20.4, in which case the relevant date is when the DAB has also given decisions on those disputes. In some cases it

may therefore be appropriate for the referring Party to request that for a complex dispute it be separated and considered by the DAB in stages, e.g., first and foremost seeking a declaration on the principle of the claim as the first dispute and only moving forward to consider subsequent disputes, covering time and money (say), should the DAB find in favour of the referring Party on the principle.

The Hearing

If there is a Hearing, it should be no more formal than necessary, although the DAB must control the proceedings. It is important that the Hearing should be conducted in a manner that encourages openness, and a thorough disclosure of all pertinent information relevant to the matters in dispute.

The Hearing will normally consist of the following stages:-

1. Registration
2. Procedural matters
3. Preliminary matters
4. Jurisdictional matters
5. Referring Party's opening statement
6. Other Party's response
7. DAB's questions to either Party
8. Follow up replies by Parties to DAB's questions as appropriate.
9. Each Party may then be given a further opportunity of replying to the various points made by the referring/other Party as appropriate.
10. Referring Party summing up
11. Other Party summing up

If there are a number of issues in dispute it may be prudent to repeat item numbers 5. to 9. for each issue in turn. It is important for the DAB to ensure that each Party considers that it has had a reasonable opportunity of putting both its case and its response.

Before the Hearing commences, the DAB may need to describe the procedure for the information (and agreement, if possible) of both Parties. For example, it may be beneficial for each Party to

provide a written summary of the oral presentation immediately before giving it, including print-outs of any visual display.

The hearing will be convened at a suitable location for both Parties and could be on the Site. The hearing rooms will need to be provided with any necessary equipment for presentations, etc. and in addition side rooms should be provided for each Party for use during the adjournments in the proceedings and for private discussions. The DAB can *"refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer"* [Procedural Rule 7]. The DAB will endeavour to keep representation by the Parties to an absolute minimum with only those persons present who are vital to the proceedings. However, in practice it is more difficult to restrict numbers as the DAB has an overriding obligation to act fairly and impartially. It is normal practice for the DAB to request a list of proposed representatives from each Party beforehand, also identifying each representative's role and involvement, and then to seek confirmation from each Party that they have no objection to inclusion of any of the proposed representatives.

The DAB is empowered to adopt an inquisitorial role [Procedural Rule 7] and to that extent it lessens the adversarial atmosphere at the hearing. This is a very useful feature, providing the DAB with the power to ask questions and enquire into the causes of the dispute. To facilitate this role at the hearing, the DAB might adopt a seating arrangement that places the Parties side by side opposite the DAB rather than the usual confrontational seating arrangement with the Parties facing each other across the table.

The DAB is also empowered to proceed in the absence of any Party who the DAB is satisfied received notice of the hearing [Procedural Rule 7]. It is prudent for the DAB to ensure that prior to proceeding in any hearing *ex-parte* it is satisfied that the absent Party has no valid reason for non-attendance and that all possible attempts to ensure attendance have been made. Notwithstanding the non-attendance of a Party it is imperative to ensure that the hearing is conducted fairly and impartially and that any documents put in evidence before, during or after the hearing are also made available to the absent Party.

Unless special reasons exist or the Parties request, there should be no video recordings, no tape recordings and no minutes. Parties may wish to make their own notes, but generally no transcript is made. Examples of special reasons when a transcript might be appropriate are:-

1. When proceeding with the hearing *ex parte*
2. When one Member of a three-person DAB is unavoidably absent from the hearing due to illness, etc., in spite of the fact that two Members may proceed to make a Decision where a Member fails to attend a meeting or hearing, or fulfil any required function [Procedural Rule 9(c)].

The DAB Members must not express any opinions during any hearing concerning the merits of any arguments advanced by the Parties [Procedural Rule 9] nor must they show favour to either Party at any time.

Before formally closing the Hearing, and after recording any actions arising, it is usual for the DAB to ask each Party in turn to briefly summarise its case and then to ensure that each Party considered that they had sufficient opportunity of making their case.

The Decision

Following the hearing a three-member DAB will meet in private to have discussions and prepare its decision [Procedural Rule 9 (a)]. The DAB endeavours to reach a unanimous decision but if this proves impossible the applicable decision is made by a majority of the Members. [Procedural Rule 9 (b)]. In such cases the majority of the Members may require the minority Member to prepare a written report for submission to the Parties. Clearly, it is in the interests of both Parties that the decision should be unanimous and the DAB should make every effort to reach unanimity. Whilst the DAB process leaves intact the traditional arbitration provisions in the Contract, in the event that either Party is dissatisfied with the DAB decision, the Parties are more likely to accept the DAB decision and not proceed to arbitration if the decision is unanimous.

The new "Gold Book" (DBO) provisions

The First Edition of the FIDIC Conditions of Contract for Design, Build and Operate Projects ("Gold Book") was published on 10 September 2008. FIDIC has chosen to adopt the green-field Design-Build-Operate scenario, with a 20- year operation period, and has opted for a single contract awarded to a single contracting entity (which will almost certainly be a consortium or joint venture) to optimise the coordination of innovation, quality and performance, rather than award separate contracts for design-build and for operation. The Contractor has no responsibility

for either financing the project or for its ultimate commercial success. This is the basis upon which this document has been prepared.

Clause 20 still deals with claims, disputes and arbitration but there have been some significant changes. In particular the very strict time bar contained in the second paragraph of Sub-Clause 20.1 in the other long forms of contracts may be overruled by the DAB if the DAB considers the circumstances justify late submission. Significant changes to the details required to be furnished within the 42 day period following the Contractor becoming aware of his entitlement have also taken place and a time bar has been introduced which once again may be overruled by the DAB under certain circumstances. However, no guidance is given as to the 'rules' or situations that might permit an overruling by the DAB and it is also unclear as to why the Employer's Representative is not given the same express authority to overrule the strict 28-day time bars?

The appointment of the one or 3-person DAB expires upon the issue of the Commissioning Certificate and accordingly the construction phase DAB does not function during the Operation Service Period. The DAB is then replaced during the Operation Service Period with a one-person DAB jointly agreed between the parties at the time of issuing of the Commissioning Certificate. The period of appointment is for 5 years but may be extended by agreement between the parties. The fall-back position remains arbitration under the rules of arbitration of the International Chamber of Commerce.

Conclusion

As can be seen from the above examples, a number of practical problems have been encountered with the DAB procedures. Within the UK jurisdiction, most of the jurisdictional and other problems sometimes encountered by adjudicators have been considered, decided and documented by the courts. When operating outside of UK jurisdiction, the same amount of feedback is not readily available to Parties and DABs. It is hoped that these reported examples will go some way towards promoting further feedback from others and encourage a wider debate on these and other issues.