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ANNUAL SUMMER SEMINAR : DISPUTE AVOIDANCE

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DISPUTE BOARDS AND DISPUTE AVOIDANCE

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1 What is a Dispute Board?

- 1.1 A Dispute Board is typically a group of professionals appointed by the Parties to a construction project, often a civil engineering contract, process plant or major infrastructure project (but also now sometimes a building project such as the construction of a hotel, shopping centre or apartment block).

Standing and Ad Hoc Dispute Boards

- 1.2 In some contracts provision is made for the Board to be appointed at the start of the project and there are requirements in many of the standard forms for the Board to be appointed by a particular date.
- 1.3 However, in a number of the standard forms the Board is not appointed until a dispute arises; this is the case with the FIDIC Conditions of Contract for EPC/Turnkey projects (Silver Book) and the FIDIC Conditions of Contract for Plant

and Design-Build (Yellow Book). In both of these contracts, clause 20.2 of the Conditions provides for the Parties to:

"jointly appoint a [DB] by the date 28 days after a Party gives notice to the other Party of its intention to refer a dispute to a [DB]".

- 1.4 The concept of a standing Dispute Board is unique in construction, where a team of "dispute resolvers" is available to deal with matters even before disputes have arisen. On that basis, it should in practice be unnecessary for the Parties to take positions relating to the composition of the Board depending on the exact nature of the dispute which has arisen – the Board is constituted at the outset of the project when disputes will not yet have arisen and it will be all the more easy for the Parties to agree what type of Board they wish to have and how it should act.
- 1.5 Because the Ad Hoc Dispute Board is analogous to an Adjudication Panel named in a contract to which the HGCRA 1996 applies and therefore familiar to UK construction professionals much of this paper will focus on Standing Dispute Boards.

Recommendations/Interim Binding Decisions

- 1.6 A Board may, when disputes arise, either give recommendations (in which case it is called a "Dispute Review Board"), or it may make interim binding decisions (in which case it is usually called a "Dispute Adjudication Board"). The Dispute Review Board or DRB is much more common in the United States and the Disputes Adjudication Board or DAB is much more common on projects where the Parties have chosen to use the FIDIC Suite of Contracts or the ICE Dispute Resolution Board Procedure. I deal below with the various advantages and disadvantages of these different types of Dispute Boards.

Purpose of the Board

- 1.7 The purpose of the standing Dispute Board is to be actively involved throughout the construction process and to assist the Parties in concluding the contract either without disputes, or in the event that disputes arise, to resolve those disputes with the minimum of time and cost so that the Parties can concentrate on completing the project. Although they are best suited to construction projects, it is possible that they

may have an increasing role in long term operational and maintenance contracts, particularly in the IT field, or in the financial services sector.

Brief History of Dispute Boards

1.8 It is thought that the first recorded use of a DRB was in the 1960s but the first documented use was in 1975 for the construction of the Eisenhower Tunnel in Colorado. It is believed that the first use outside the United States was in 1980 in the El Cajon Dam in Honduras. This was a project financed by the World Bank who believed that potential difficulties between the employer, contractor and the engineer – all of whom came from different countries – could be overcome by the establishment of a Dispute Board.

1.9 Since then, Dispute Boards have been used in many projects around the world and the expansion of the Dispute Board concept has relatively recently been significantly boosted by the production of a new form of contract first issued in 2006 and known as the FIDIC Multi-Lateral Development Banks Harmonised Conditions of Contract for Construction (Pink Book). It is a condition of the funding arrangements that the Dispute Board should be appointed at the outset of the contract. This contract is very much in its infancy and its impact is yet to be established, but the fact that the major development banks such as the World Bank and the Asian Development Bank have signed up to a contract which makes a Dispute Board compulsory (at least in theory) can only increase the use of Dispute Boards worldwide.

2 Composition and Appointment of a Dispute Board

What type of Dispute Board?

2.1 It is important that each member of a Dispute Board is entirely independent. A member of the Board is not appointed to act as the Party's representative or spokesperson. The ICC Dispute Board Rules ("the ICC Rules") state in Article 8 that:

"Every DB Member must be and remain independent of the Parties.

Every prospective DB Member shall sign a statement of independence and disclose in writing to the Parties, to the other DB Members ... any facts or

circumstances which might be of such a nature as to call into question the DB Member's independence in the eyes of the Parties".

2.2 There are specific provisions in the FIDIC Suite and clause 9.3 of the ICE Dispute Resolution Board Procedure ("the ICE Procedure") which set out requirements to be met by the DB Members. These are much more specific than in many other rules and deal in some detail with financial interests, previous employment, availability, confidentiality and the like. Each Member of the DB under the FIDIC Suite warrants that he is independent and impartial as well as experienced in the type of work to be undertaken under the Contract.

Number of Members

2.3 Generally a three member Dispute Board is appointed for most projects. It is perfectly possible for all three Members to be of the same discipline, but this is by no means essential. In the United States, where the involvement of lawyers is, perhaps surprisingly, frowned upon, the overwhelming preponderance of the Dispute Board Members are engineers. A lawyer will occasionally be chosen to act as chairman but this is the exception rather than the rule.

2.4 Outside the United States, it is becoming more prevalent for a lawyer to be appointed as chairman. The very nature of the Dispute Board militates in favour of having one, or most probably two, Members who are wholly conversant with the technical nature of the project, whether it be process plants, tunnelling, road building or the like. In practice many of those who sit on Dispute Boards are regularly dually qualified engineers and lawyers.

Exceptions for Large Projects

2.5 Hong Kong Airport: This had a DRB of six members plus a convener dealing with the major contracts awarded by the Airports Authority. When disputes arose, a panel comprising either one or three members was chosen to hear the dispute depending on its size and nature.

2.6 Boston Big Dig: This enormous project had a three member panel for each contract with disciplinary-specific expertise and dispute resolution/DRB experience. This was fixed at ten years for a panel member and fifteen years for the Chairman.

The panel dealt with 30 submissions with amounts in dispute ranging from US\$100,000 to US\$20m.

Smaller Projects

- 2.7 It is perfectly possible to have a single member Dispute Board for smaller projects. FIDIC and the World Bank both encourage one member dispute Boards for such smaller projects. That one person would almost certainly need to be an expert in the method of construction and is often described as a "Dispute Review Expert".

Appointment of the Dispute Board

- 2.8 Although there are different provisions in the various sets of Rules, generally speaking each Party nominates one member of a Dispute Board within a particular time frame.
- 2.9 The Chairman is generally chosen by the two Party nominated members or by application to the appropriate appointing authority. Even when there are no specific rules appointing authorities have their own preferences: for instance, the ICC will usually appoint a chairman who is not a national of the country of origin of either Party.
- 2.10 The Dispute Board Federation, in contrast, appoint the Chairman first and then select the other two members in consultation with him.

The Lawyer's Role

- 2.11 A lawyer is normally a suitable chairman of a Dispute Board although he may not necessarily be a suitable Party nominee. It is important that the board as a whole has a good understanding of technical matters which are likely to arise during the course of the project and a lawyer who has little or no experience of, for instance, engineering would not be a suitable member of a Dispute Board. He should also have a good knowledge of contract administration and should be well versed in interpretation of contractual provisions. The ability to write cogently and clearly in the language of the contract is also crucial because a Dispute Board will normally publish its recommendations or decisions accompanied by reasons. It goes without

saying that if those reasons are incoherent it will reflect no credit on the Board and possibly cause damage to the project as a whole.

3 Dispute Review Board or Dispute Adjudication Board?

Differences between a DRB and DAB

- 3.1 Dispute Adjudication Boards are provided for under the FIDIC suite of contracts and under the ICE Procedure. It is also possible to provide for a Dispute Adjudication Board under the ICC rules. The DAB issues decisions which are binding on an interim basis. I will deal later with the issue of challenging a DAB decision, but for present purposes it is sufficient to know that they are rather akin to the decision of an adjudicator under the HGCR 1996.
- 3.2 A Dispute Review Board, on the other hand, does not issue decisions, rather recommendations. Such recommendations have no binding effect on either Party and can be complied with or disregarded entirely as the Parties wish. There are, however, as we will see, sometimes provisions in contracts which make a recommendation binding if certain steps are not taken by one or other of the Parties.
- 3.3 The fact that a DRB's recommendation is generally non-binding does not appear to have affected the way in which Dispute Boards have functioned in the United States. It has certainly not made them any less effective. Perhaps the fact that DRB's are much more prevalent in the United States, making recommendations rather than issuing decisions, is allied to the fact that, as already mentioned above, the overwhelming majority of Dispute Board members are non-lawyers.
- 3.4 The way in which a DRB and DAB approaches its task is also different because of the differences in their dispute resolution roles. A DRB, whilst generally taking into account the provisions of the contract and the applicable law, can also bring into consideration the interests of the Parties. A recommendation can therefore be an "interests based" as opposed to a "merits based" document. In contrast, a DAB will necessarily feel that it should follow the provisions of the contract and the applicable law and is likely to adopt a more formal procedure so that these issues can be properly fleshed out. It is unlikely that a DAB would ever take into account the interests of the Parties and thus its decision is always likely to be based substantially on the merits of the case.

Advantages/Disadvantages of a DRB

3.5 With the exception of the United States, the tide seems to be moving slowly in the direction of establishing a DAB which will give interim binding decisions. However, because of the possibility under the ICC Rules that a DRB or a CDB can be established, and also because of the antipathy in the United States to Boards making interim binding decisions, there will still no doubt be a significant number of DRBs established throughout the world. The proponents of DRBs cite a number of perceived advantages and some of these are as follows:

- The process leading up to the recommendation is less adversarial.
- The hearings tend to be shorter and simpler and therefore cheaper.
- Recommendations can be interests based rather than purely merits based.
- Frequently the stature of the Dispute Board is such that even a recommendation is treated very seriously by the Parties.
- Even if not accepted by one of the Parties, if the dispute, the subject of the recommendation, proceeds to arbitration or litigation the recommendation will be disclosable and a tribunal or court would normally be expected to give some significant weight to the recommendation by an experienced and hands on Dispute Board.

3.6 The disadvantages of a DRB that are usually quoted are:

- The losing Party can simply delay matters by serving a requisite notice if that is required under the contract.
- The recommendation can then safely be ignored by the losing Party and the successful Party has no contractual means of enforcing it.

Advantages/Disadvantages of a DAB

3.7 The advantages of a DAB are virtually the mirror image of the disadvantages of a DRB and broadly comprise the following:

- Generally a decision can be immediately enforced even though it is only temporarily binding (like an adjudication decision in the UK).
- The fact that a decision is binding may focus the Parties' minds on the dispute and possibly lead to an early settlement.
- The losing Party is unlikely simply to ignore the decision.
- In some parts of the world it is generally easier for public bodies to pay against a decision rather than against a recommendation, the latter of which has no binding effect and is not compulsory.

3.8 The disadvantages of a DAB are broadly seen as the following:

- As a decision is binding there is likely to be much heavier preparation and there is a risk of matters becoming adversarial, as they so often do in adjudication.
- Accordingly, as the stakes are higher, so will the costs be increased.
- The potential adversarial nature of the process means that the Parties may find it more difficult to work together on the project.
- Again, as one so often sees in adjudication, it is difficult to compress a complex dispute into a short period and the risk is then run of there being an unsatisfactory decision reached in too short a time period.

The ICC Dispute Board Rules

3.9 These Rules were published in 2004 and break new ground principally in the way in which they enable the Parties to have a choice about what type of Dispute Board they wish to have for their project. Thus, at the outset the Parties can decide whether they wish to have a DRB or a DAB and they are also given the option of having a hybrid animal called a Combined Dispute Board or CDB.

3.10 DRB: under Article 4 of the ICC Rules, the DRB in the usual way issues recommendations with which the Parties may comply, although they are not required

to do so. The sting in the tail, however, is to be found in Article 4(3), which provides as follows:

"If no Party has sent a written notice to the other Party and the DRB expressing its dissatisfaction with a Recommendation within 30 days of receiving it, the Recommendation shall become binding on the Parties. The Parties shall thereafter comply with such Recommendation..."

- 3.11 However, all that a Party needs to do under the ICC Rules is to serve a Notice of Dissatisfaction and this does not even have to specify the reasons. If an appropriate notice is given, then the dispute which is the subject of the recommendation is dealt with by arbitration or litigation as provided for in the contract.
- 3.12 DAB – Article 5: The provisions of Article 5 in relation to DABs are very similar to those of Article 4 in relation to DRBs, save for the very important distinction that a decision issued by the DAB is binding on the Parties. This is so even where a Notice of Dissatisfaction has been sent within 30 days by one Party to the other. In this case, the Parties are still bound to comply with the decision on an interim basis unless or until the dispute the subject of the decision is dealt with in arbitration or litigation as the case may be.
- 3.13 CDB – Article 6: The CDB is, as mentioned above, an innovation in the ICC Rules. This is a Board which can issue either recommendations or decisions. The default position is that it will issue recommendations, but if one Party requests that a decision should be issued and there is no objection from the other Party, then the CDB is bound to issue a decision. If there is an objection by the other Party, then the CDB must decide whether it should issue a recommendation or decision. The ICC Rules set out in Article 6(3) the considerations which it must take into account. These are:-

"Whether, due to the urgency of the situation or other relevant considerations, a Decision would facilitate the performance of the Contract or prevent substantial loss or harm to any Party;

Whether a Decision would prevent disruption of the Contract; and

Whether a Decision is necessary to preserve evidence".

- 3.14 It can therefore be seen that a CDB is much more likely to issue a recommendation where the Parties do not agree on the nature of the document that should be issued. The CDB does, however, give the Parties flexibility to decide at the time whether their interests are best served by having an interim binding decision or a recommendation which may have little immediate effect.

4 Operation of a Standing Dispute Board

Regular Site Visits

- 4.1 FIDIC Conditions – Procedural Rules: The procedural rules annexed to the FIDIC Suite Conditions provide for the Dispute Board to visit the site at intervals of not more than 140 days. This must include times of what are described as "critical construction events". The Parties can agree that the visits shall be less or more frequent but the period between visits should not be less than 70 days.
- 4.2 ICC Dispute Board Rules: These provide that the Dispute Board shall establish a schedule of meetings and site visits. The site visits are to be sufficiently frequent so as to keep the Dispute Board "informed of the performance of the contract and of any disagreements", with a minimum of three site visits per year.
- 4.3 ICE Dispute Resolution Board Procedure: This document, produced more for the UK domestic market, provides that the Dispute Board visits the site at intervals of not more than 120 days, again including "times of critical construction events". The period between consecutive visits is not to be less than 60 days. Generally the ICE Procedure closely follows the procedural rules in the FIDIC Conditions.
- 4.4 Regular site visits are vital if the Dispute Board is to fulfil its function properly. It is important that the members of the Dispute Board should be aware of the progress of the project and well placed to avoid disputes. In some loan agreements lending institutions will suspend funding until the Dispute Board has been appointed and has started its regular site visits. This emphasises the importance that the lenders ascribe to regular site visits.

Procedure During Site Visits

- 4.5 It is for the Dispute Board and the Parties to establish the procedure to be adopted during the site visits.
- 4.6 What might typically happen is for the Dispute Board to be provided with a progress update to be followed by a site inspection. The Parties are generally encouraged to interact positively with the Dispute Board so that the members of the Board are fully aware of any issues, potential or actual, that may arise or have already arisen between the Parties.
- 4.7 Informal review meetings during routine site visits are frequently adopted, during which the Dispute Board encourages the Parties to prepare schedules of "matters of concern" on a monthly basis. The purpose of these schedules is to set out any issue which concerns either Party so that it can be debated during the course of these meetings. As items on the schedule are dealt with they are crossed off and if it appears that an item on the schedule is causing difficulty the Dispute Board can take appropriate steps to deal with it. This might even include suggesting that the Parties agree that the matter should be referred to the Dispute Board either for a recommendation or a determination, depending on the terms of the contract.

Post-Visit Report by the Dispute Board

- 4.8 Many contracts, including the FIDIC Suite, provide for the Dispute Board (usually through its chairman) to prepare a report once the site visit has been concluded, but before the members of the Board leave site. There is no set format for such a report but it should probably include a note of any points arising from the site inspection, notes of the meetings with the Parties and suggestions as to how matters of concern should be dealt with.

Receiving Regular Reports

- 4.9 It is important that the members of the Dispute Board are kept informed of the progress of the project during the periods between their regular site visits. This is usually accomplished by their being sent routine progress reports. The Parties may of course agree on a different method of keeping the members in touch with developments on the project, for instance by copying them in with important

correspondence. This should not, however, be a substitute for receipt of site progress meetings as these are generally the raw material which will enable the members of the Dispute Board to attend the next site visit with a good knowledge of what has occurred since their last visit.

5 Dispute Avoidance

The FIDIC Gold Book

- 5.1 The First Edition (2008) of the FIDIC Conditions of Contract for Design, Build and Operate Projects (Gold Book) contains an innovation enabling the Dispute Board to endeavour to avoid disputes. Entitled "*Avoidance of Disputes*", clause 20.5 states:

"If at any time the Parties so agree, they may jointly refer a matter to the DAB in writing with a request to provide assistance and/or informally discuss and attempt to resolve any disagreement that may have arisen between the Parties during the performance of the Contract. Such informal assistance may take place during any meeting, Site visit or otherwise. However, unless the Parties agree otherwise, both Parties must be present at such discussions. The Parties are not bound to act upon any advice given during such informal meetings, and the DAB shall not be bound in any future Dispute resolution process and decision by any views given during the informal assistance process, whether provided orally or in writing.

If a Dispute of any kind whatsoever arises between the Parties, whether or not any informal discussions have been held under this Sub-Clause, either Party may refer the Dispute in writing to the DAB according to the provisions of Sub-Clause 20.6 [Obtaining Dispute Adjudication Board's Decision]. "

- 5.2 The intent of clause 20.5 of the Gold Book is clear from the heading of the clause – "*Avoidance of Disputes*". The idea that the Dispute Board should "provide assistance and/or informally discuss and attempt to resolve any disagreement" is extremely wide. The clause specifically provides for the possibility that the parties might agree that both need not be present at any discussions with the Dispute Board. The fact that the parties are free to ignore the advice and that the Dispute Board is not bound by any views expressed during the informal assistance process should make that

process more open and the parties more flexible in the approaches they feel able to adopt in their endeavours to avoid formal disputes.

The Other Contracts in the FIDIC Suite

- 5.3 The other contracts in the FIDIC Suite do not (at least at the present time, although this may change in the future) contain a clause such as clause 20.5 in the Gold Book. Rather, the only nod towards alternative dispute resolution methods is contained in clause 20.5 of the Conditions, entitled "*Amicable Settlement*".
- 5.4 This clause does not, however, seek to avoid disputes: rather, it deals with the situation following receipt of the dispute board's Decision when there is a "*cooling off*" period of 56 days within which the parties may attempt to settle the dispute amicably prior to commencement of arbitration. However, either party is permitted to commence arbitration proceedings on or after the 56th day even if there has been no attempt to achieve an amicable settlement.

Informal Opinions

- 5.5 The other contracts in the FIDIC Suite providing for a standing Dispute Board (the Red and Pink Books) contain a provision which enables the Parties to agree to refer jointly a matter to the Dispute Board for it to give its opinion. Similarly, the Dispute Board members agree under the Dispute Adjudication Agreement to be available to :

"Give advice and opinions, on any matter relevant to the Contract when requested by both the Employer and the Contractor, subject to the agreement of the Other Members (if any)."

- 5.6 There would therefore appear to be scope under the Red Book and Pink Book for the Dispute Board to give advice or informal opinions so long as the members are requested to do so by the parties acting jointly. The wording is sufficiently wide to encompass advice on potential settlement. Provided any discussions were held strictly on the basis that both parties were involved and unilateral discussions did not take place with one party in the absence of the other, there would appear to be no reason why a Dispute Board acting under the Gold Book should not recommend terms of settlement, give advice as to the way in which a dispute or potential disagreement could be handled or how any such issue might be resolved if it were to

be referred formally to the Dispute Board for a decision. Whilst falling short of a full blown mediation process as understood in common law jurisdictions, such a process comes very close to a facilitative, as opposed to an evaluative, methodology.

6 Procedures in Determining Disputes

FIDIC Conditions

6.1 The FIDIC Suite contains provision for disputes to be dealt with by a Dispute Adjudication Board and sets out various procedural rules in relation to the operation of the DAB in dealing with such disputes.

6.2 Timescale for Decision: Clause 20.4 of Red and Pink Books provides that the decision of the Dispute Board shall be made within 84 days after receiving the document referring the dispute to the Dispute Board for its decision. Quite frequently this period is shortened to 56 days in Special Conditions: the time period can be extended by agreement by the Dispute Board and the Parties. However, unlike the adjudication provisions in the UK, all Parties must agree to any extension and the consent of the Referring Party alone is not sufficient.

6.3 General Procedures: It is for the Dispute Board to establish the procedure it shall adopt in determining the dispute. It has power, amongst other things, to:

- Decide upon its jurisdiction.
- Decide the scope of any dispute referred to it.
- Conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the contract and the procedural rules.
- Act inquisitorially.
- Make use of its own specialist knowledge.
- Decide upon any provisional relief.

- Open up, review and revise any certificate or formal document produced by the Engineer.
- 6.4 Generally speaking the Dispute Board will most likely adopt a procedure not wholly dissimilar to that adopted by adjudicators in the UK, including:
- Ordering exchanges of submissions between the Parties.
 - Considering whether a site visit is necessary.
 - Considering whether a hearing is necessary.
 - Reviewing the timescale for the decision.
- 6.5 Challenging the Decision: the decision is binding on the Parties and must be complied with irrespective of the Parties' views upon it. However, a dissatisfied Party may, within 28 days of receiving the decision, give notice to the other Party of its dissatisfaction and its intention to commence arbitration proceedings. In that event, the decision of a Dispute Board will then be opened up to review by the Arbitral Tribunal.
- 6.6 If, however, no Notice of Dissatisfaction has been given by either Party within 28 days after receipt of the decision of the Dispute Board, then the decision becomes final and binding upon both Parties. This is of course different from the adjudication provisions in the United Kingdom and very much focuses the Parties' minds on the outcome of the Dispute Board's decision and whether the Parties are prepared to live with it for all time.
- 6.7 If the losing Party fails to comply with the Dispute Board's decision then the other Party has the option to refer that failure itself to arbitration without the necessity of awaiting the expiry of the 56 day period, provided in clause 20.5, for possible amicable settlement.

ICC Dispute Board Rules

- 6.8 Submissions by the Parties: Articles 17 and 18 of the ICC Rules set out in reasonable detail the requirements for service of a Statement of Case and a Response.

A Response is to be served within 30 days of receipt of the Statement of Case. If the Dispute Board is a CDB either Party may request that the CDB issues a decision, setting out the reasons why the Party requesting the decision believes this to be the correct course of action in the circumstances. The Dispute Board can then request either Party to submit additional written statements or documentation to assist the Board in reaching its decision.

- 6.9 Hearing: Interestingly, Article 19 of the ICC Rules provides that a hearing shall be held unless the Parties and the Dispute Board agree otherwise, such a hearing to be held within 15 days after service of the Response. This timescale can be amended by the Dispute Board. Article 19 sets out provisions for the conduct of the hearing, providing that the Dispute Board shall be in full charge of the hearing and shall ensure that each Party has a reasonable opportunity to present its case.
- 6.10 Timescale for Determination: The determination (whether it be a recommendation or decision) is to be made within 90 days following receipt of the Statement of Case. The Parties may, in consultation with the Dispute Board, agree to extend this time limit. Potential disagreements within the Dispute Board are catered for within the ICC Rules which provide that a determination may be given by a majority or, if there is no majority, by the Chairman alone. Any dissenting opinion by a Board member is to be given in a separate written report which does not form part of the determination but which is to be communicated to the Parties.
- 6.11 Challenging the Recommendation/Decision: Under Article 4, a recommendation becomes binding on the Parties if neither sends a written notice to the other Party and the Dispute Board expressing its dissatisfaction with the recommendation within 30 days of its receipt. Although the Article uses only the word "binding" and not the words "final and binding", it is clear from the wording of the Article that a failure to give a Notice of Dissatisfaction renders the recommendation final and binding because the Parties agree to waive any rights they may have to contest the recommendation or resubmit that particular dispute to an Arbitral Tribunal or court. It is therefore very important that a dissatisfied Party should give Notice of Dissatisfaction within 30 days unless it is content that the recommendation should become final and binding.

6.12 The procedure for challenging a decision is broadly similar in that a Notice of Dissatisfaction must be given within 30 days to avoid the interim binding decision becoming final and binding.

7 The Future of Dispute Boards

A Success Story So Far

7.1 The general view of the construction community is that Dispute Boards have been very successful in resolving disputes in a timely and cost effective fashion. The Dispute Resolution Board Foundation ("DRBF") has conducted research which indicates that, as at the beginning of 2007:

- Over 1,700 projects have been completed or are undergoing construction utilising Dispute Boards, with a total value of US\$100bn.
- Around 3,000 disputes have been the subject of Dispute Board decisions or recommendations.
- In less than 2% of cases (under 30 reported to date) has a Dispute Board's decision or recommendation on a substantive dispute been referred to arbitration or the courts.
- In less than half of those cases the Dispute Board's decision or recommendation has been overturned.

7.2 Dispute Boards have been used in numerous countries. Projects in Eastern Europe, particularly Romania, Bulgaria and Czech Republic, are utilising Dispute Boards. China has used Dispute Boards for over 10 years and other countries in Asia, including India, Pakistan, Bangladesh and Vietnam are also embracing Dispute Boards.

Deletion of the Dispute Board Clause

7.3 At the last FIDIC Users' Conference in London in December 2010 a straw poll was conducted amongst the audience to assess the extent to which Dispute Board clauses

were being deleted or ignored by the parties (ie where the contract contains a requirement for a Standing Board to be constituted but this does not happen).

7.4 The results were:

- Number of projects in which the members of the audience had been involved using the FIDIC Conditions: 647
- Dispute Board clause deleted: 222
- Dispute Board clause ignored: 175

This demonstrates that, perhaps sadly, a Dispute Board is utilised much less than it could be.

8 Incorporating Dispute Boards into UK Construction Contracts

ICE Dispute Resolution Board Procedure

Introduction

8.1 In 2005, the Institution of Civil Engineers in the UK issued its Dispute Resolution Board Procedure. It is divided into two parts, one of which is alternative to the other. The first is intended for use on international projects and UK contracts which are not subject to the provisions of the HGCRA 1996; the second is a procedure which is compliant with the HGCRA 1996. Although in theory it would be possible to use the "domestic" procedure on international projects, it is inherently unlikely that international users will wish to bind themselves to a particularly UK dispute process with which it might be wholly unfamiliar.

8.2 The Dispute Board is called a "Dispute Resolution Board" although it acts as a Dispute Adjudication Board and makes binding decisions rather than gives recommendations. It is a Standing Board and there are provisions in the procedural rules for site visits, the supply of documents to the Dispute Board and other features similar to those found in the FIDIC Suite of contracts. These provisions are to all intents and purposes identical whether the project falls within the ambit of the HGCRA 1996 or not; the differences are to be found in the provisions regarding the

resolution of disputes and, as one would expect, the main features of the rules to be adopted where the HGCRA applies is that the time limits are much shorter.

HGCRA 1996 Compliant

- 8.3 The procedure and the timescale contained in this alternative will be very familiar to those experienced adjudication practitioners in the UK. The Dispute Board's decision is to be reasoned and is immediately binding on the Parties and enforceable by the successful Party.

HGCRA 1996 Non-Compliant

- 8.4 As one would expect, the procedure to be adopted in contracts where compliance with the HGCRA 1996 is not essential is somewhat different with an extended timescale for the Dispute Board's decision. The procedure is broadly based on the FIDIC Harmonised Conditions, allowing for an 84 day period for the decision.
- 8.5 Although the procedure is one of the Dispute Board reaching decisions rather than making recommendations, there is an interesting provision in the ICE Procedure under which the Parties may agree to refer jointly what is described in the procedure as "a matter to the Dispute Board for it to give its informal opinion". There is no procedure or timescale set out for the giving of this informal opinion and doubtless it is anticipated that if the Parties have agreed that this is an appropriate course of action they will also be able to agree upon a procedure and timescale. It should be noted that this procedure must be consensual and neither Party is entitled to consult the Dispute Board on any matter without the agreement of the other Party. If this procedure leads to the Dispute Board issuing any form of document which might be akin to a recommendation, then the procedure is silent as to the effect of this recommendation and presumably, in the absence of express consent by the Parties, it would have no binding effect. It is notable that this provision does not appear in the procedural rules applicable to projects subject to the HGCRA.

Challenging the Decision

- 8.6 As one would expect, under the HGCRA 1996 Compliant Procedure, the unsuccessful Party is bound by the Dispute Board's decision and this is not open to challenge (presumably in the absence of circumstances which would render an adjudicator's

decision unenforceable in the UK). What is different is that a dissatisfied Party may give a Notice of Dissatisfaction within 28 days after receiving the decision and in the absence of such a notice being served, a decision becomes final and binding, as the Parties are not entitled to commence arbitration in relation to a dispute already referred to the Dispute Board unless a Notice of Dissatisfaction has been given.

- 8.7 The HGCRAs Non-Compliant Procedure provides for a similar Notice of Dissatisfaction to be given within 28 days of receipt of the decision, failing which the decision becomes final and binding.

Amending Adjudication Provisions in Other Contracts

JCT/The Scheme

- 8.8 It would seem to be a relatively simple matter to amend the JCT Articles of Agreement so as to incorporate Dispute Board Provisions. Assuming that a Standing Board is required then this could be achieved either by incorporating provisions akin to those found in clauses 20.2-20.10 of the FIDIC Red Book (ideally bringing in the amendments and improvements to be found in the Gold Book). There would doubtless need to be some amendments made for the Dispute Resolution Clauses to gel with the remainder of the JCT Contract and in particular it is thought that most UK users would be uncomfortable with the idea of the Dispute Board acting as dispute avoiders if they were then likely to go on and act as Adjudicators. Similarly, the procedural rules allowing for the giving of informal opinions might well be thought to be at odds with the concept of binding adjudication in the UK.

- 8.9 An alternative would be to incorporate the ICE procedure (HGCRAs compliant) and that would doubtless require less amendment to the contract as a whole. The appointing body could be changed to that of the RICS. As it has not been officially launched yet I will say little but it is likely that in the very near future the RICS will adopt a list of accredited Dispute Board members from whom candidates could be chosen by the RICS upon request from interested parties.

NEC

- 8.10 Similarly, it would be relatively simple for the parties to an NEC Contract not to adopt either Option W1 or W2 and use a procedure either taken from the FIDIC Suite

or alternatively from the ICE Dispute Resolution Board Procedure. It seems to me that this would fit quite well with the NEC Provisions for early warning and for dispute avoidance. This would be a workable alternative to the solution adopted on the 2012 Olympics construction work where separate panels of dispute avoiders and Adjudicators have been established. Provided that the independence and integrity of the Dispute Board members to act as Adjudicators in connection with potential disputes is not compromised by any quasi-mediation role that they may be called upon to play, then it is thought that the use of Dispute Boards in NEC Contracts would make good sense.

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