

FIDIC AND DISPUTE ADJUDICATION BOARDS (DAB(s))

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Outline

- I. Historical Background
- II. The Development of Dispute Boards for Major Projects
- III. Dispute Boards in Practice
- IV. Conclusion



I. Historical Background

A. Pre-Arbitral Settlement of Disputes by the Engineer

When FIDIC published its first international standard form of construction contract for civil engineering works – the “Red Book” – in 1957, it was based on the Conditions of Contract of the English Institution of Civil Engineers – the ICE Conditions.

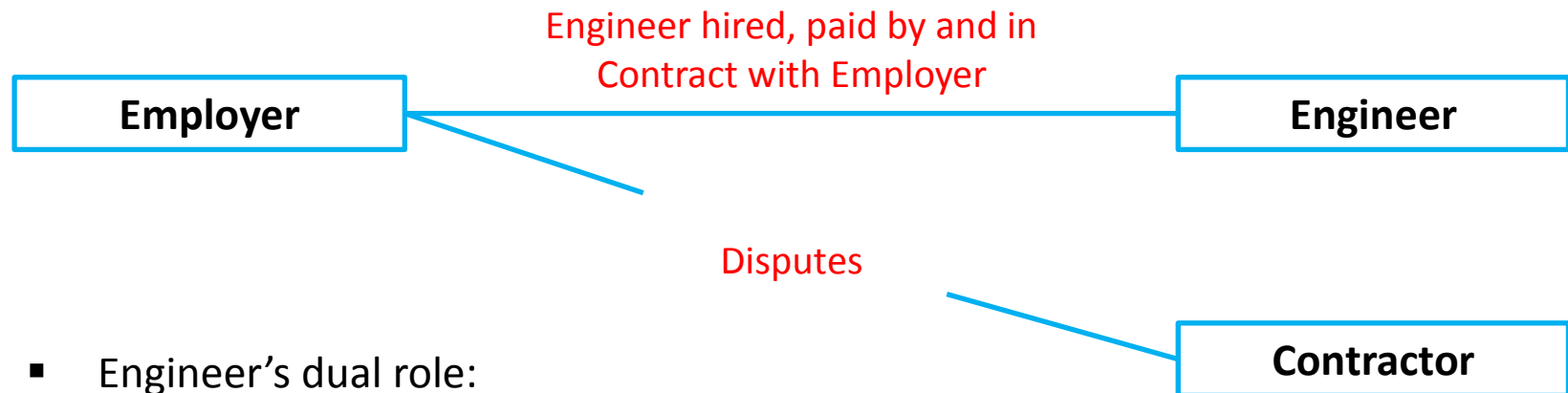
Accordingly, the FIDIC Red Book incorporated the traditional English system for the pre-arbitral resolution of disputes by the Engineer.



I. Historical Background

A. Pre-Arbitral Settlement of Disputes by the Engineer [continued]

- Under FIDIC construction contracts from 1957 until 1987, all “disputes” had initially to be referred to the Engineer for a decision before they could be referred to arbitration.



- Engineer’s dual role:
 - (1) Employer’s agent in some cases; and
 - (2) In others, duty to act impartially between the Employer and the Contractor including when deciding disputes between them.

I. Historical Background

A. Pre-Arbitral Settlement of Disputes by the Engineer [continued]

- However, while this practice is widespread in common law countries, it is generally unknown in civil law countries.

B. Why the Pre-arbitral Settlement of Disputes by the Engineer Declined

- As hired and paid by the Employer, the Engineer was subject to commercial pressures that made it difficult to act impartially.
- Contractor's claims might call into question the Engineer's conduct as designer and/or administrator of the works, creating a conflict of interest.

As a result, the Engineer has lost credibility as a settlor of disputes and has been replaced by a Dispute Board (“**DB**”).

II. The Development of Dispute Boards for Major Projects

A. What is a Dispute Board (“DB”)?

- Normally set up at the outset of a contract. Remains in place for its duration.
- Consists of 1 or 3 persons, usually engineers, ideally experienced in the work of the contract.
- They must be independent of, but must all be approved by, the parties.
- They must be provided with the contract documents and other project documents and become familiar with the project.
- Originally developed in the United States for use in settling on-site disputes in large civil engineering projects, *e.g.* tunnels, dams, *etc.*

II. The Development of Dispute Boards for Major Projects

B. How Does a DB Work?

Promotes resolution of differences or disputes through:

- Regular visits to the site (every 3-4 months) and meetings with the parties,
- Identification and discussion of issues before they become disputes,
- Providing informal opinions on issues if both parties so request,
- Organizes full hearings, if necessary, to hear the parties, and
- Makes written “recommendations” or “binding decisions” on disputes referred to it by the parties, which may later be submitted in arbitration.

Normally paid a monthly retainer and a daily fee for site visits, *etc.*

II. The Development of Dispute Boards for Major Projects

C. The Development of the Dispute Review Board (“DRB”) *i.e.*, a DB that makes recommendations rather than decisions binding on the parties

- **The U.S. Experience:**

- 1975 First Domestic DRB in U.S. (Eisenhower Tunnel).

- **Development of DRBs Internationally:**

- 1981 1st international DRB (El Cajón Dam, Honduras).

- 1995 World Bank makes DRBs mandatory for all World Bank-financed projects over US\$ 50m (later reduced to projects over US\$ 10m).

- 1996 Asian Development Bank and EBRD adopt DRB approach.

II. The Development of Dispute Boards for Major Projects

D. The Development of the Dispute Adjudication Board (“DAB”) *i.e.*, a DB that makes binding decisions rather than recommendations

- 1987-93 Successful use of a particular type of DAB for the Anglo-French Channel Tunnel project.
- 1995 FIDIC introduces a DAB into a standard form (the “Orange Book”).
- 1996 FIDIC proposes DAB as an “acceptable alternative” to the Engineer as dispute-settlor in the “Red Book”.
- 1999 FIDIC adopts DAB approach as mandatory in its forms for major works.
- 2005 World Bank and other multi-lateral development banks adopt DAB approach in their standard form (harmonized edition of FIDIC “Red Book”).



II. The Development of Dispute Boards for Major Projects

E. Use of DABs in FIDIC Contracts

- The introduction of the DAB into FIDIC contracts was a logical development from the procedure for the pre-arbitral settlement of disputes by the Engineer.
- The FIDIC contracts provide for both a permanent DAB (Red and Gold Books) and an *ad hoc* DAB (Silver and Yellow Books):
 - Permanent DAB: Maintains familiarity with project, visits site periodically throughout project, decides disputes that arise by (provisional) binding decisions.
 - *Ad hoc* DAB: Constituted for and decides an individual dispute by a (provisional) binding decision and is then disbanded.

II. The Development of Dispute Boards for Major Projects

F. Use of DABs in FIDIC Contracts

- The DAB procedure is similar to that when disputes were decided by the Engineer.

Settlement of Disputes by DAB



II. The Development of Dispute Boards for Major Projects

F. Use of DABs in FIDIC Contracts [continued]

- FIDIC favoured a “binding decision” over a “recommendation” because:
 - It was a continuation of the binding decisions made by the Engineer,
 - It was felt that a binding decision procedure was more appropriate in international construction contracts as FIDIC contracts were (and perhaps still are) mainly used by public bodies, and public servants are often reluctant to take important decisions, and
 - Public servants who agreed to a settlement based merely on a “recommendation” might be exposed to criticism, investigations or allegations of corruption.

II. The Development of Dispute Boards for Major Projects

G. Dispute Avoidance

- Dispute avoidance – and not merely deciding disputes – is recognized as an increasingly important role for the DB.
- Thus, FIDIC’s Design Build Operate form (the “Gold Book”), 2008, provides as follows:
 - “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.” (Sub-Clause 20.5)

III. Dispute Boards in Practice

A. Enforcement

Arbitral tribunals and courts have given effect to the parties' agreement providing for a DAB:

- they have confirmed that disputes must be referred to a DAB before arbitration (e.g. English and Swiss courts); and
- they have enforced the decisions of DABs, whether “binding” or “final and binding” (e.g. Singapore and South African courts).

III. Dispute Boards in Practice

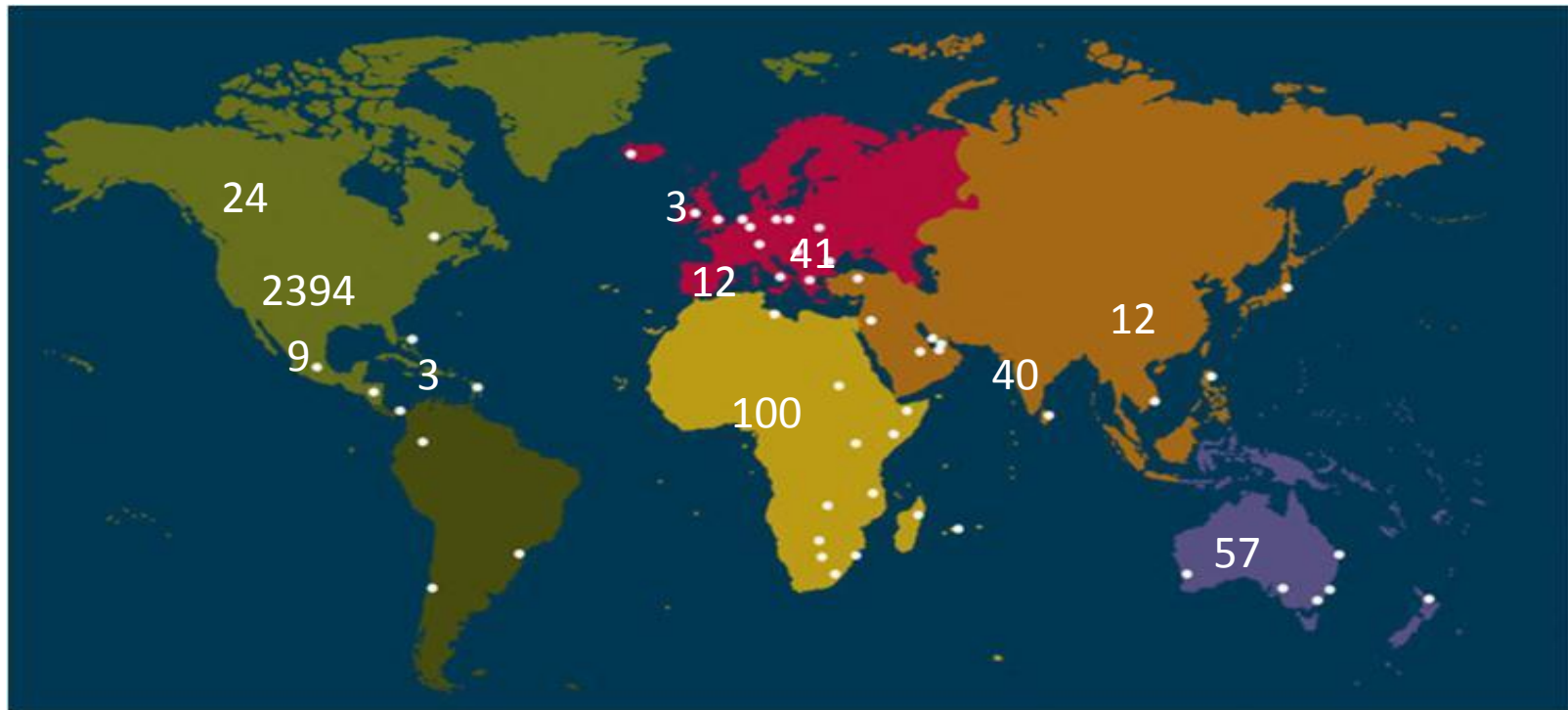
B. Statistics

- While there is no systematic reporting on the use of DBs, there is no doubt that they are being used increasingly on international projects.
- The Dispute Resolution Board Foundation (“DRBF”) has published statistics about the use of DBs in the U.S. and the world as a whole.
- According to the DRBF, DBs have been used in over 2,700 completed projects (overwhelmingly in the U.S. so far) having a total construction value of over US\$ 225 billion.

III. Dispute Boards in Practice

B. Statistics [continued]

DB Projects through 2014 (cumulative figures since 1982):



Source: DRBF



III. Dispute Boards in Practice

C. Cost of DABs

- Given their greater rapidity and informality, they will be much less costly than arbitration.
- For a multi-hundred million dollar project, a three-member DAB can cost much less than 1% of project costs, whereas international arbitration may cost 10 to 15% or more of project costs.
- *Ad hoc* DABs are less costly than permanent DABs but, arguably, are not true DABs as they cannot perform a dispute prevention function.
- According to the DRBF, over 98% of disputes referred to DBs conclude the matter in issue, either directly or as a result of the parties using the DAB's decision or DRB's recommendation as a basis for settlement.

IV. Conclusion

1. FIDIC, like the World Bank, is a strong believer in DABs.
2. However, the use of DABs is still in its infancy internationally; they do not yet enjoy wide acceptance by Employers. Yet acceptance is vital as they cannot work unless they enjoy the confidence of the parties.
3. DABs are a great concept. Like an insurance policy, they protect against far more costly and much more lengthy arbitration.
4. Nevertheless, they are not a universal panacea. Whether and how they are used in any project, needs to be determined in light of the features of that project.

Thank You

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