

Chapter 10

Dispute Boards

Multinational Development Banks, other International Financial Institutions and PPP Projects

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The use and growth of dispute boards internationally has been fueled by the support of many factors and institutions working together. Obviously, the promulgation of dispute board rules by the ICC since 2004 and the support services offered through the ICC International Centre for ADR have been one important contributor to growth and of course the inclusion of dispute board provisions in FIDIC contracts since the mid-1990s has been a major vector. However, the Multilateral and Unilateral Development Banks (the International Financing Institutions or “IFIs”) are another important stakeholder whose contribution to the expansion of dispute boards is often under appreciated. This article will discuss the importance of the IFI’s support, which is set to expand both in regard to dispute board implementation on traditionally procured projects and Public Private Partnership (PPP) initiatives.

1.**IFI’S MOTIVATION FOR USE OF DISPUTE BOARDS**

By their very nature as publicly funded agencies, created to foster growth in developing countries, IFIs have a mandate not only to improve infrastructure, but to promote best practice and capacity building and to fight corruption. Many IFIs have found dispute boards to be an effective tool in helping them achieve their objectives.

By calling for dispute boards through the use of FIDIC-based contracts in their Standard Bidding Documents, the IFIs consider international participation in tenders is increased and it is general believed the use of dispute boards, especially standing dispute boards, will have a positive impact on a project’s bottom line in terms of final price and delivery time. In other words economically speaking the presence of dispute boards on a project bring better tenders, lower final cost and improved completion times. These results should be of interest to any project owner or financier, private or public.

However, IFIs are also attracted to dispute boards as ways of promoting their “soft” objectives, including good governance and capacity building. Standing dispute boards encourage transparent administration of contracts and timely resolution of disputes. Government officers working with dispute boards have access to experienced and neutral experts whose knowledge is transmitted through site visits with the dispute board, in addition to the opinions and decisions issued by the board. The existence of dispute boards

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often provides support to project-level officers for pushing through difficult decisions, which ordinarily may be weighed down by suspicion of corruption in the procedure.

2.

WORLD BANK – NEW PROCUREMENT FRAMEWORK POLICY

Starting in 2012 the World Bank began its largest effort to reform its procurement policies since the bank's creation over 60 years ago. The process is complete, and roll out began in 2016 and continues into 2017. Readers interested in examining the final policies and procedures can find them on the World Bank website: <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=4005>

Key Objectives of the Reform

The World Bank's Chief Procurement Officer, Cristopher Browne, explained to business leaders in Paris in 2014, that the new framework was intended to modernize the bank's procurement policies. The new policy embraces a larger involvement of the bank at both the procurement and the execution phase of large infrastructure projects, combined with a more flexible array of procurement methods designed to take into account that one size does not fit all. Mr. Browne explained that more working groups would be developed with industry with the intent of seeking a dialogue and input of creating consistency across the bank's operations including in areas such as technical specifications, contract conditions and anti-corruption practices. In the past the bank has been cautious about cooperating with business for fear of conflicts of interest, but Mr. Browne indicated that in the modern world the benefits of dialogue outweigh any other concerns.

Going forward, World Bank financed projects will allow selection of contractors based on value for money where the technical nature of the project may warrant a departure from the lowest bid rule used by the bank up to now. The borrower and contractor community will see a greater flexibility in the procurement procedures which will be applied in various situations.

Where the World Bank is co-financing the project they may accept to let sister MDBs take the procurement lead. More importantly, the new policy will likely allow the use of local procurement procedures if the country in question is a full member of the World Trade Organisation with a government procurement agreement (GPA) in place. This could have particular impact in Central and Eastern Europe where EU procurement rules already apply. Mr Browne was careful to note that the bank will still apply its own procurement policies even in countries that are full WTO members if they have concerns of the sufficiency of enforcement of the rules by any particular agency or government.

Public Private Partnerships (PPPs) will also be covered within the new framework and here the bank plans to take inspiration from the PPP procedures already practised by its sister bank the IFC whose main remit is private sector financing where the PPP model is already more prevalent and within the World Bank's own portfolio of loans which is focused on government backed projects.

Capacity Building

It is also clear that the bank will be more involved in the procurement phase and the execution phase of the project. The new framework will give the bank's procurement team a wide choice of tools during the procurement phase, ranging from the provision of reference materials and coaching through hands-on management and control of the entire procurement phase depending on the circumstances. Anti-corruption measures will also be stepped-up, most probably in the form of additional surveillance during the procurement phase, which may be handled by outside firms such as the major accounting consultancies, or possibly by NGOs such as Transparency International. Additional involvement in project execution also seems to be in the cards and here dispute review boards and dispute review experts appear to hold a privileged place in the bank's new strategy.¹

The bank intends to implement these new procedures without requesting additional funding from the board of directors. To achieve this, they are scaling back their current practice of handling approximately 14,000 "prior reviews" of their projects. Up to 80% of these reviews involve very small capital outlays. The bank's procurement staff will be reassigned from such reviews and be retrained in the areas of procurement and project supervision.

In addition to providing more support to project procurement and execution, either directly or through reinforcing borrowers' existing teams, the bank will be investing in training programmes, and other broad capacity development initiatives including training in project management and it is anticipated this will include programmes covering the best practice use of dispute boards.

Standard Bidding Documentation

Now the New Procurement Framework is in place, the bank is working on the next generation of standard bidding documents (SBD). Updating of the SBD is expected to be a two-phase effort. The first phase, which users can be expect to see in the near term, will be limited to minor adjustments and improvements in large part aimed at closing deficiencies in the current SBDs which have become apparent to the international community over recent years. We might assume that these limited changes will be aimed at items such as the disputed "gap" which some consider to exist in sub-clause 20.6 of the FIDIC suite of contracts regarding the enforcement of DAB decisions and the like.

The World Bank community can expect, however, a more substantial phase two reform of the SBDs which will be a top-down redesign of the whole document on a "back to basics" approach. We can expect the eventual new SBD to be simpler than the existing 150-page document, which will be more closely aligned with procedures found in private industry. An extremely important aspect of the new SBD from the dispute board perspective is that FIDIC forms of contract will no longer be imposed by the bank as the exclusive set of general conditions. Rather, FIDIC will be one of several options available to borrowers. The bank intends to give borrowers the choice between the use of FIDIC forms of contracts and other international and industry standard forms.

The role of dispute boards in the new WB procurement framework and future SPDs.

How precisely dispute boards will look in the future World Bank policies and SBDs is still not entirely clear even in the final documents as they currently stand, and there is reason for concern in the dispute board community regarding the bank's plan to end their near exclusive relationship with FIDIC in favour of an à la carte menu of possible contract conditions. The incorporation of dispute adjudication boards in FIDIC forms of contract since the 1990s and the integration of various forms of FIDIC contracts including the Multilateral Development Bank Harmonized Edition in not only the World Bank's SBDs but in the vast majority of IFIs bidding documents has undoubtedly been the single largest source of growth for dispute boards in the international community. Moreover, provisions for standing dispute boards have not been integrated into any of the other primary standard forms of contract that can be found from time to time in international use. The writer is also concerned that other existing forms of contract tend to be "uni-national" in that they emanate from a single country and represent the practices found in only one culture and/or legal environment. Moreover, no other standard form of contract benefits from the huge international body of published doctrine and international case law. Continental construction companies have been known to criticise the FIDIC conditions for having a bias towards UK custom and practice, however the FIDIC drafting committee is now made up of a large number of continental practitioners. Recourse to standard forms of contract such as the New Engineering Contract (NEC3) or JCT models of contract will not solve the critique of the existence of a common law bias in international standard forms and are likely to be even more unfamiliar to the international contracting community. This may increase disputes due to a lack of understanding of contract terms as contract management staff may be faced with different conditions on every project they administer, making it difficult to master any specific form of contract.

Due to the plans to accept local procurement procedures more frequently and the plans described above to allow borrowers to choose from a menu of standard contract conditions it is possible that we will see fewer contracts financed by the World Bank with FIDIC general conditions. The general conditions that will be in use besides FIDIC will be a variety of local procurement conditions, international standards possibly including NEC3, JCT, Japanese ENAA and possibly some kind of adaptation of the World Bank's existing standard form of contract for civil law countries published in 2012 (currently available only in French), and why not the ICC model turnkey contract for major projects. How exactly borrowers will react to the increased flexibility remains to be seen however.

Despite the fact that most of these forms of contract have no dispute board provisions, Mr. Browne's public statements have made it clear that the use of dispute boards will feature prominently on projects financed by the bank. While not stated specifically in the text of the draft or final version of the new policy, nor stated specifically by Mr. Browne, it would seem that "dispute review boards" or "dispute review experts" are to be implemented on future World Bank projects. For this to happen the bank will need to add dispute board provisions by particular condition for any project borrower who chooses to use a non FIDIC form of contract. This seems like a perfect

opportunity to expand the use ICC's Dispute Board Rule. Depending on how many model forms of contract the bank proposes to offer borrowers, it would seem eminently more efficient to graft on dispute board provisions by simple reference to the ICC Rules as opposed to drafting a multitude of bespoke particular conditions incorporating the necessary dispute provisions, model dispute adjudication agreements and procedural rules.

Nevertheless, the World Bank's full backing of Dispute Review Boards in bank-financed contracts was evident in the 2014 draft borrower's procurement procedures at Section F – Accountability, §1.18, (c) and (d) which included the following positive statements:

- (c) Increase access to independent Dispute Review Boards in bank financed contracts;
- (d) Include, as part of bank project supervision, reviews to ensure that agreements made in the contract e.g., to establish a Dispute Review Board are carried out and are functioning appropriately...

Mr Browne clarified that the bank's intention is indeed to use Dispute Review Boards as a general portfolio-wide policy and their intention is to be more vigilant in ensuring that the dispute board is put in place at the outset of the project as opposed to allowing the parties to wait for a dispute to arise which has often been the case until now, despite contract provisions calling for its implementation at the outset. The bank is also considering expanding the use of dispute review board to contracts involving the purchase of major plant and other goods.

Obviously, dispute boards are not adapted for all of the construction contracts the bank lets each year, but the bank is in the process of determining cut-off levels for the implementation of a dispute board which will seemingly be based on the value of the contract.

Conclusions

Historically, the World Bank's policies on procurement have greatly influenced procurement policies at other major IFIs and we can expect that the New Procurement Framework will once again have important repercussions across the board.

These changes may have a major impact on how dispute board services are delivered in the international market, including the need to adapt to the application of dispute boards in contexts other than the FIDIC format, however it seems likely FIDIC will remain the leading form of international contract, but there will be a broad increase in the efficiency and general use of dispute boards led by the World Bank whether or not FIDIC contracts are used.

3.

OTHER IFIS INVESTMENT IN DISPUTE BOARDS

While the World Bank has announced intentions to take a more active role in supporting the use of dispute boards, other IFIs have already implemented helpful programmes to increase users' awareness and push their borrowers to implement them.

The Japan International Cooperation Agency (JICA) has provided dispute board training for its borrowers and staff for many years. Moreover, they have financed the training and testing of a national list of Japanese

adjudicators in cooperation with the Japanese FIDIC Member Association, AJCE.² Most importantly, JICA accepts to include the cost of financing dispute boards in their loan agreements, which is not always the case with other IFIs.

The Asian Development Bank has also invested heavily in training programmes and has generally been supportive of the implementation of dispute boards.

Like the Japanese development agency, other “unilateral” national institutions, have actively supported the use of dispute boards. The American Millennium Challenge Corporation provides grant funding as opposed to loan funding to selected countries, which allows them a higher degree of control in the project execution and they are vigilant in imposing the early appointment of the dispute board. The German development agency KfW announced in 2016 that going forward, advance payment disbursements would be linked to the appointment of dispute boards. The French AFD and the European Union all use FIDIC contracts on many of their foreign aid projects, which include dispute board provisions.

The European banks however have not actively embraced the use of dispute boards compared to other IFIs, despite maintaining them in their standard bidding documents. Neither the EIB nor the EBRD accept to include the cost of dispute boards within their part of the project financing package as the dispute board expense is considered to be a legal cost, which the European banks have always excluded as a matter of policy. This is an unfortunate misconception, which the dispute board community has failed to dispel to date. The author has never understood the EIB and the EBRD views on this topic when they do finance the cost of the FIDIC Engineer, who issued, and still issues, binding decisions and determinations.

Finally, the dispute board community is waiting to see what impact the newest arrivals in the MDB market will have on dispute boards. The creation in recent years of several large new development banks, including the Shanghai based development bank announced on July 15, 2014 which will include shareholders from Brazil, Russia, India, China and South Africa (BRICS group of countries), originally known as the BRICS Bank, it has now become the New Development Bank (NDB). The Chinese government is contributing US\$41 billion in capital and the overall bank capitalization is expected to reach US\$100 billion initially, with US\$34 billion a year in aid packages. In reality, the NDB has had a slower start than expected and is being eclipsed by the Asian Infrastructure Investment Bank (AIIB), with 57 signatory countries, led by China. AIIB has been the first of the two new banks to commence project lending, however only nine projects have been approved as of February 2017 for an investment of US\$1.7 billion in 2016. Many of AIIB’s project loans to date have been as co-financiers with more experienced development banks.

How these potentially giant new players on the MDB financing market will eventually view dispute boards remains to be seen, but the first indications are that AIIB is working diligently to be a global MDB working with international best practices in terms of development policy and governance. As of February 2017, AIIB’s website indicates that “Guidance on Model Forms of Contract to be used for Infrastructure Projects” is under development³. It seems likely that international standard forms of

construction contracts will feature in AIIB's Standard Tender Documents (STDs) when published and at the moment they officially sanction the use of STDs in use by the World Bank, EBRD and the ADB. The author is optimistic that the arrival of the new banks will boost the use of dispute boards over time.

4.

THE ROLE OF DISPUTE BOARDS IN PPPS

The inclusion of dispute board provisions in Public Private Projects (PPP) is relatively rare and where they have been used they resemble traditional dispute boards interfacing between the concession company and a design build contractor.⁴ Here again however, the IFIs may lead the way in developing a new application for broader use of dispute boards in the PPP context and organisations such as the World Bank, and the United Nations Economic Commission for Europe (UNECE) are weighing the question of dispute board use in their deliberations on the development of international PPP standards.

The key questions are whether dispute boards have a role at the level between the concessionaire and the government and if so at how early should a dispute board be activated; during negotiations, or only afterwards? Downstream, the question of integrating dispute boards into the operations phase is also being studied. Another challenge in considering an expanded role for dispute boards on PPPs is the structure of the board itself given the range of skills required to accompany a PPP from inception to the end of the concession period. Should there be one expanded board with members skilled in project finance, construction and operations, with a convener who would designate appropriate sub-panels to address a given matter, or would multiple dispute boards, inserted at different interfaces, be more effective?

Whether the expansion of dispute boards into the PPP sector is even desirable is a debatable point, but if a trend to include them does develop it is likely that it will be born from projects with a MDB component in the financing package, as the private banks may be more likely to consider a dispute board as a risk to their control over the project.

Given the statistics below on the high level of renegotiation rates plaguing PPP projects, it does seem however there is potential for dispute boards to be of use even from the early stages of PPP negotiations.

	Renegotiated Concession Contracts	Average Time to Renegotiation
All Sectors	61%	1.8 years
Electricity	25%	2.1 years
Transport	73%	2.9 years
Water	87%	1.3 years
Mega and Natural Resources Projects	53%	2.0 years

Source: Guasch (2010) updated

	Both Government and Operator	Government	Other
All sectors	13%	26%	61%
Water and Sanitation	10%	24%	66%
Transport	16%	27%	56%

	Percentage of renegotiated concession contracts with that outcome
Delays on Investment Obligation Targets	69%
Acceleration of Investment Obligations	18
Tariff Increases	62
Tariff Decreases	19
Increase in the number of components with automatic pass-through tariff increases	59
Extension of Concession Period	38
Reduction of Investment Obligations	62
Adjustment of annual fee paid by operator to government	
Favorable to operator	38
Unfavorable to operator	17
Changes in the Asset-Capital Base	
Favorable to Operator	46
Unfavorable to Operator	22

Source: Guasch (2004) *Granting and Renegotiating Infrastructure Concession: Doing it Right* — Analysis of Renegotiated Concessions in Latin America and the Caribbean, Mid-1980s to 2000



5.

RECURRENT ISSUES

A common request from the IFI's is for statistical evidence of the effectiveness of dispute boards. Some data has been compiled by the Dispute Resolution Board Foundation (DRBF) on the use of dispute boards and studies have been made, notably in the USA, which corroborate the statement that the use of dispute boards reduces delays and budget overruns, however better international studies are badly needed.

Unfortunately, the IFIs, or the executing agencies they finance, are themselves in possession of the best data required to make a robust study of issues such as the impact on project benchmarks and the capacity of the dispute board to reduce disputes. To date no IFI has accepted requests to analyse their data either on their own or in cooperation with outside organisations. The author regrets this situation and hopes it will change in the near future.

Another recurrent issue is the need for a larger pool of dispute board experts. The need to find individuals with the requisite technical understanding and competence in contractual and legal issues means that

training and evaluation of potential members must be an important part of meeting growing demand. If there is a failure to meet the skill requirements, the system will risk collapse. All the stakeholders in the dispute board process including the ICC, FIDIC, the DRBF and the IFIs should be working jointly to pool their resources to train and expand the pool of qualified board members.

6.

CONCLUSIONS

The growth of dispute boards owes a great deal to the not-so-hidden hand of the International Financing Institutions and it is likely that their support is about to expand. The dispute board community must become more structured and increase our training actions in order to assure we can deliver the feedback and the skilled operatives that growth in demand will require. In both these endeavours, the IFIs should be considered to be partners and clients alike.

NOTES

- 1 The World Bank's procedure and policies have historically used the term « dispute review boards » however for clarification, when FIDIC is used in their Standard Bidding Documents, which is the majority of cases, they have traditional FIDIC dispute Adjudication Boards with the power to render binding decisions.
- 2 JICA has published a useful « Dispute Board Manuel » in March 2012, which is available on their website at https://www.jica.go.jp/english/our_work/types_of_assistance/oda_loans/oda_op_info/guide/c8h0vm0000aoeprl-att/guide09.pdf
- 3 See paras. 11.1 Genera and 11.13 Contract Arrangements, Interim Operational Directive on Procurement Instructions for Recipients, June 2, 2016, https://www.aiib.org/en/opportunities/business/.content/index/_download/20160616030437630.pdf
- 4 See conference slide presentation at slide 10 for an example of the LGV SEA Tours – Bordeaux example of a PPP dispute board on a fast rail project in France.