

James C. Perry  
AAE Membership Number 32672

**The Introduction to Dispute Boards and All Its Forms**

June 30 – July 3, 2013

# 2013 AACE International Annual Meeting

*30 June – 3 July 2013 Washington, DC*

## *The Introduction to Dispute Boards and All Its Forms*

CDR-1213: Introduction to Dispute Boards and all Its Forms

Primary Authors: Mr. James Perry, *PS Consulting* France and David Brown, *Clyde & Co.* France

Audience Focus: Intermediate

ABSTRACT: This paper reviews the workings of an alternative dispute resolution mechanism broadly known as a Dispute Board. Dispute Boards are a form of adjudication, or conciliation, featuring a panel of experts named at the outset of the project. The Board visits the job site regularly during construction and keeps current on the project's progress, even when there are no formal disputes.

This paper covers the historical beginnings of Boards in the Americas, through their adoption by FIDIC (International Federation of Consulting Engineers) in their standard forms of Contract in 1999, and later by many multilateral development banks and international finance institutions, notably through the promulgation of the FIDIC MDB version of its Construction Contract issued first in 2005, and also through the publication and promulgation of the ICC Dispute Board Rules in 2004.

The paper also describes the various types of Boards found in the FIDIC suite of contracts (standing and *ad hoc*) and rules for the use of the various Boards under the ICC Rules (DRB, DAB and CDB). The mechanics of operation are covered, and the advantages of the systems, especially the forms which allow the Board to play an advisory role.

### INTRODUCTION

Dispute Boards have developed in recent decades as a reaction to the time and expense of costly traditional means of resolving construction project disputes, namely court proceedings and arbitration.

They originated in the mid 20<sup>th</sup> century in the United States, where the standard approach to dispute resolution – including onerous document production and witness evidence – had become a strong disincentive to the rapid and efficient treatment of disputes and differences arising during the course of the works. They have spread in recent decades from the States to projects around the world, and have proved successful on such major ventures such as Eurotunnel and the Hong Kong Airport. Dispute Boards are also operational in The Middle East, Europe, Africa, Asia and Latin America.

The purpose of a Dispute Board is to provide a forum for the contracting parties to resolve issues arising in relation to the performance of their contract, in order to maximise their chances of avoiding court or arbitration proceedings with respect to those issues.

How a Dispute Board operates is purely a matter for the parties to establish. They may opt for Dispute board members of their choice, and these are generally engineers or lawyers with appropriate experience, or a combination of the two. Assistance with the choice of members is available in the form of official lists kept by certain institutions - and indeed there is a recently constituted French List managed by Syntec and approved by FIDIC, for example.

Parties may also leave it to the Dispute Board to establish the procedure to be followed. There are however numerous sets of rules and guidelines that the parties may adopt, including a set of Rules first published by the International Chamber of commerce in 2004 [1]. Further, some standard form contracts, such as the FIDIC contract conditions since 1999, propose detailed provisions for Dispute Boards.

Dispute Boards generally comprise either a sole member or a panel of three members. They are either set up at the outset of a project to last for the duration of the project – commonly called a 'standing' board – to deal with issues as and when they arise, and if possible to prevent issues turning into real disputes; or they are only set up when a dispute has crystallised – generally known as an '*ad hoc*' board – in which case they will cease to exist once the dispute has been dealt with.

If a Dispute Board is required to give a view with respect to a dispute, the rules tend to speak of a 'Recommendation' of such view will not bind the parties; or a 'Decision' if it will bind the parties, and therefore have to be complied with, even if the issue in question can nevertheless be referred to a court or arbitration for a definitive finding that may modify the view expressed by the Dispute Board.

The findings of Dispute Boards are generally characterised as either Recommendations or Decisions. The difference is that the former do not necessarily have to be complied with. In both cases there is generally provision for the findings to be reviewed and revised, if appropriate, in court or arbitration proceedings. If however, the findings take the form of a Decision, there will generally be an explicit contractual obligation to comply immediately, even if it may be possible to have the Decision revised by a judge or arbitrator in due course.

Standard Dispute Board rules will therefore provide either for proceedings resulting in either Decisions or Recommendations. Or, as in the case of the ICC Rules, they provide separate rules for each, and leave it to the parties to choose. The ICC Rules, also give the parties the chance to opt for a 'Combined Dispute Board'. Under this alternative, the choice of a Decision or Recommendation will only be made once the dispute has arisen. Any disagreement between the parties as to whether a Decision or a Recommendation should be issued will be decided by the Dispute Board itself.

In view of the very different potential outcome according to the type of Dispute Board chosen, it is important therefore for a contracting party to decide which sort of Dispute Board it wishes to have. Approaches taken to this issue vary – in the United States, for example, the preference has almost

exclusively been for Recommendations. It would appear that in this market there are few Recommendations that are not applied voluntarily. FIDIC, however, has opted for a procedure resulting in binding Decisions – and the panel is itself known as a Dispute Adjudication Board. This is understood to reflect a need in certain areas, and particularly when dealing with State entities, to have a more easily enforceable product.

Whichever alternative is chosen, the general expectation is that the fees and expenses of the Dispute Board will be shared equally by the parties. The cost of a standing board appointed early on may seem excessive, particularly if no disputes arise during the course of the project. It is often said, however, that Dispute Boards are a worthwhile investment in any event, since they very frequently enable parties to avoid the very much higher cost of referring disputes to the courts or arbitration.

Last but certainly not least, even though this presentation has focused on the function of the Dispute Board as a dispute resolution mechanism, it can and should also play an important role in helping the parties to manage issues that may arise in order that they do not turn into disputes for which a formal determination is required. Rules proposed for Dispute Boards – for example the ICC Rules, and those incorporated into the FIDIC standard conditions of contract. There is considerable potential for a Dispute Board to carry out this role if it is set up at the outset of the works, and it is important in such cases to choose members able to act as conciliator or judge as the situation may require.

#### HISTORICAL BEGINNINGS OF DISPUTE BOARDS

It is generally accepted that Dispute Boards have their origin in the United States and were first implemented following a study sponsored by the US national committee on tunneling technology called Better Contracting for Underground Construction in 1974. This led to the implementation of Dispute Review Boards on six US tunneling projects, most notably for the first bore for the Eisenhower road tunnel in Colorado.

This concept of a Review Board, without the power to make a binding decision, was subsequently widely promulgated in the United States by the drafters of this original study, notably Al Matthews, a founder of the Dispute Resolution Board Foundation.

The concept was quickly taken to the international market and one of the first known Dispute Review Boards was implemented on the El Cajon hydroelectric project in Honduras in 1981. This project was financed by the World Bank who over later years gradually introduced dispute boards into more and more of their projects, and in 2005 Dispute Adjudication Boards were integrated into their standard tendering documents in the form of the 2005 Multilateral Development Bank edition of the FIDIC Conditions of Contract for Construction. [2]

Well known projects such as the Euro Tunnel, Hong Kong International Airport, the Panama Canal expansion, and a number of important infrastructure projects throughout Africa, Asia and the Middle East have all use dispute boards.

One of the first internationally published standard conditions of contract to incorporate the use of Dispute Boards was the FIDIC 1996 Supplement to the 4<sup>th</sup> edition 1987 of the Conditions of Contract for Works of Civil Engineering Construction [3] (often referred to as the FIDIC Red Book). This addition to the FIDIC conditions set up a Dispute Adjudication Board under Sub-Clause 67.2 [Procedure for Obtaining a Decision]. The procedure called for the Dispute Board to issue a “decision” and requires the parties to give effect to these decisions unless, and until, revised by amicable settlement or an arbitral award. This feature categorises the FIDIC Dispute Board as a “DAB” (Dispute Adjudication Board) and represents an important departure from the persuasion oriented form of dispute board used in the United States known as a “DRB” (Dispute Review or Recommendation Board) whose role is limited to providing advice and encouragement to conciliate.

Nevertheless, an important misunderstanding seems to have developed in regard to the FIDIC DAB and other known DABs. Namely, Dispute Adjudication Boards, especially in the case of FIDIC contracts, are not exclusively created to issue decisions once disputes have developed. On the contrary, if the DAB has been established as a Standing Dispute Board, as found in various forms of the FIDIC contracts discussed *infra*, then the Dispute Board’s primary role is dispute avoidance and the terms of the Dispute Adjudication Agreement and procedural rules may allow the Dispute Board the power to advise and issue opinions if the parties both consent to the DAB performing this role.

For example, in the Guide to Amended Clause 67 of the Supplement to the 4<sup>th</sup> Edition 1987 of Conditions of Contract, the authors state the following with regard to Sub-Clause 67.2[Procedure for Obtaining a Decision]: “...*the parties should not have disregarded the possibility of jointly seeking an opinion from the Board on any matter relevant to the avoidance of a potential dispute.*” [3]

In 1995, one year prior to publishing the Red Book Supplement, FIDIC published the first edition of the Conditions of Contract for Design – Build and Turnkey [4] (known as the Orange Book), including dispute Board provisions in Sub-Clause 20 [Claim, Disputes and Arbitration]. As with all FIDIC Dispute Boards past and present, this was a DAB with the power to make binding, but not final decisions. (The term “binding but not final decision” will be used in this paper to refer to the contract requirement for the parties to execute a Dispute Board’s decision unless or until revised by amicable settlement or arbitral award).

Most importantly, in 1999, FIDIC revised their entire suite of contracts and standardized as much as possible the structure of their general conditions and the language used. These contracts are the following:

- Conditions of Contract for Construction for Building and Engineering Works designed by the Employer (the Red Book), [5]
- Conditions of Contract for Plant and Design Build for Electrical and Mechanical Plant, and for Building and Engineering Works, designed by the Contractor (the Yellow Book, which replaced the Orange Book cited above) [6]
- Conditions of Contract for EPC Turnkey Projects (the Silver Book). [7]

Later, in 2008, FIDIC issued the Conditions of Contract for Design, Build and Operate Projects (the Gold Book) [8].

In addition to FIDIC's own suite of contracts, FIDIC has also collaborated many multilateral development banks in the development of their standard contract conditions. These conditions were largely based on the FIDIC Red Book but there were numerous variants between the documentation produced by the World Bank and other major institutions.

After a joint effort launched by the heads of procurement of various institutions known as Participating Banks, FIDIC issued the Conditions of Contract for Construction MDB Harmonized Edition for Building and Engineering Works designed by the Employer in 2005 [9]. Successive editions of this document were issued in 2006 and 2010. Participating Banks include the International Bank for Reconstruction and Development (the World Bank), the Islamic Bank for Development bank, Asian Development Bank and the African Development Bank, among others.

In addition to the Participating Banks, other international financing institutions such as the Japan International Cooperation Agency (JICA) and the Millennium Corporation Challenge Fund frequently use the MDB Edition in their standard bidding documents. Moreover, many projects financed by the European Union, including funding to European Delegations for accession countries and for aid projects in African, use the standard FIDIC Red Book in their programmes.

Three out of the five FIDIC standard documents mentioned above call for Standing Dispute Adjudication Boards, which are intended to be designated at the beginning of the project, and are empowered with the possibility to provide advice and opinions under certain circumstances, and are generally meant to be dispute avoidance tools. The other two FIDIC model contracts, the Plant and Design Build (Yellow Book) and the EPC/Turnkey Projects (the Silver Book) do not currently have Standing Boards but use the *ad hoc* Dispute Adjudication Board format.

The *ad hoc* Board, it will be recalled, is only convened once a dispute has developed, and while such boards may contribute to avoiding arbitration or court litigation, they do not afford the users the full benefit of the dispute avoidance role available when the Board is formed at the beginning of a project and makes regular site visits as in the Standing Board format.

The *ad hoc* form of Dispute Board is widely considered to be less successful than the Standing Board format and it is generally anticipated that in 2012 FIDIC will issue a 2nd Edition of the Conditions of Contract for Plant and Design Build in which the *ad hoc* Board will be replaced by a Standing Board.

The following table is a summary of the Dispute Board formats available in the current family of the FIDIC contracts as of the date of this paper.

FIDIC CONTRACT	ADJUDICATION OR REVIEW BOARD	STANDING OR <i>AD HOC</i>	ADVISORY ROLE POSSIBLE
"Construction" Red Book	Dispute Adjudication Board	Standing	Yes
"Plant and Design Build" Yellow Book	Dispute Adjudication Board	<i>ad hoc</i>	No
"EPC/ Turnkey Projects" Silver Book	Dispute Adjudication Board	<i>ad hoc</i>	No

“ Design Build and Operate” Gold Book	Dispute Adjudication Board	Standing	Yes
MDB Harmonised	Dispute Adjudication Board	Standing	Yes

**Table 1 – Comparison of dispute board types in the FIDIC family of contracts**

The promotion and use of the Dispute Boards has also developed thanks to another very important institution, the International Chamber of Commerce. In 2004, the ICC Dispute Board Centre, which is part of the ICC’s International Centre for ADR, published a set of dispute board rules and began offering a number of administrative services to assist parties in setting-up and operating a Dispute Board. [1].

The ICC dispute board services include; appointing Dispute Board members, deciding on challenges against the Dispute Board members and review of the decisions by Dispute Adjudication Boards and Combined Dispute Boards. Indeed, the ICC rules cover three options for parties in regard to choice of Dispute Board including the now familiar Dispute Review Boards (DRBs), Dispute Adjudication Boards (DABs) and a new type of board called the Combined Dispute Board (CDBs) which is a hybrid form whereby the board is essentially a DRB but under certain conditions it is able to upgrade its authority and issue decision.

The first form, the ICC DRB, issues Recommendations as opposed to Decisions, however it should be noted that these Recommendations will subsequently become binding if neither party has expressed its dissatisfaction with the Recommendation within 30 days of receiving it. [1][ICC Rules Article 4] Moreover, if the parties do not send written notice expressing dissatisfaction with the Recommendation, the Recommendation shall become binding upon the parties without recourse to arbitration or the courts with regards to the merits of the dispute, subject to possible restrictions due to applicable local law.

The ICC’s second option is the Dispute Adjudication Board (DAB) format. In this case the Board issues binding Decisions on the parties which are to be complied with without delay. Like in the case of a Recommendation however, the parties have a 30 days window to express dissatisfaction with the Decision.

In both DRBs and DABs, a party’s right to initiate arbitration or a court action, depending on the terms of their contract, is preserved if they issue timely notice of dissatisfaction. In the case of a DAB, the parties remain bound to comply with the Decision unless the arbitral tribunal or court decides otherwise. [1][ICC Rules Article 5]

The final option under the ICC Rules is called a Combined Dispute Board (CDB). This type of Board is a hybrid between the Dispute Review Board which makes Recommendations and the Dispute Adjudication Board which issues Decisions. Normally the CDB issues Recommendations just like a DRB. However, under certain circumstances the CDB may issue Decisions like a Dispute Adjudication Board.

The mutation of a CDB from a Recommendation to a Decision is initiated by either party's request to issue a Decision with respect to a given dispute. If no other party objects, then the CDB shall issue a Decision rather than a Recommendation.

In the event the opposing party objects to the Board's transformation from a recommending authority to a deciding authority, then the CDB itself judges whether it will issue a Recommendation or a Decision. Article 6, paragraph 3 of the ICC Rules gives the following non-exhaustive list of factors to be considered in the choice of Recommendation or a Decision:

*“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.” [1]*

In Article 66 [Claims, dispute resolution and arbitration] of the ICC's own Model Turnkey Contract for Major Projects, published by in 2007 [10], the ICC has elected to incorporate Combined Dispute Boards.

#### HIGHLIGHTS OF THE OPERATION OF FIDIC DISPUTE BOARDS

As already mentioned, the FIDIC's Conditions of Contracts for Construction (the Red Book) published in 1999 and the Conditions of Contract for Construction [5], MDB Harmonized Edition [9] published in 2010 both call for Standing Dispute Adjudication Boards. The key features of both these contracts are essentially the same.

This paper describes the workings of the Red Book DAB. The DAB under the MDB Harmonised Edition is indeed similar, but the reader should take care to check his own contract for the occasional difference if working under the MDB Edition.

Since these are Standing Dispute Boards, the DAB members should be named shortly after the contract signature, the exact date for nomination of the DAB is to be stated in the Particular Conditions. The Dispute Board may have one or three members as stated in the Appendix to Tender. However, if the number is not stated in the Appendix, and the parties do not agree otherwise, the DAB shall comprise three persons [*viz.* the Red Book Sub-Clause 20.2] [5].

It is also very clearly stated in the Sub-Clause that: *“If at any times the parties so agree, they may jointly refer a matter to the DAB for it to give its opinion.”* This is of course the key feature of a Standing Board and the parties' use of this provision is widely seen to be the key to a successful Dispute Board.

Each party proposes a Dispute Board member, who shall act independently, for approval of the other party. Unlike in arbitration, the parties have very broad power to reject the other party's proposal.



This is another incentive to be sure the Board is put into place as early as possible, and as experience shows, it is easier for parties to reach an agreement on matters such as this at the early stage of the works.

There is, of course, a provision for recourse to an outside institution to assist the parties in designating board members in the case the parties fail to agree. The appointing body on the standard FIDIC suite of contract is the president of FIDIC or a person appointed by the president. However, the parties are free to insert the name of any other appointing body, and indeed this item is left blank in the MDB version and care must be taken to complete this item at the tendering stage. Alternatives to using the FIDIC President include the ICC in Paris, as already mentioned, and there are several national lists of adjudicators administered by FIDIC member associations including in France (Syntec-ingénierie), Germany (VBI) and Japan (AJCE) [11]. Sub-Clause 20.4 [Failure to Agree Dispute Adjudication Board] states that the appointing authorities' nominations are final and conclusive.

Once the parties have agreed on the members of the Board, or an outside authority has made the appointment, the individual board members must sign a Dispute Adjudication Agreement with both parties, often referred to as a Tripartite agreement. It is recommended to use the model Dispute Adjudication Agreement which is attached to the FIDIC general conditions of contract. The FIDIC model agreement also has an annex with a short set of functional procedural rules. It is recommended not to add additional procedures unless absolutely necessary. This is because the rules have been designed to allow Dispute Board members a maximum flexibility in managing site visits, advisory opinions and the 84 day time period in case of a referral request for Dispute Board Decision.

The Tripartite agreement states at Article 6 that each board member shall be paid a monthly retainer fee which should cover several items, including guaranteeing his or her availability on 28 days' notice for all site visits and notably for hearings in the case of a referral, becoming and remaining conversant with all project developments and the member's overhead expenses, including secretarial services etc. It is not uncommon, however, to substitute the fixed retainer for a fee structure based on actual time spent by the member for reading project documentation.

Each member shall also be paid a daily fee for time spent on site visits, hearings or preparing Decisions, plus his travel time and reasonable expenses.

The total cost of a Dispute Board varies depending on the quality of the individuals serving and the number of dispute referrals the parties eventually make. However, on many projects of 50 M\$ or more the percentage of total cost maybe 0.5% or less. Given the high cost of international arbitration, the cost of operating a DAB is likely to be money well spent. The DAB members are all paid by the contractor who in turn includes 50% of the incurred costs in his monthly statements for payment.

The DABs first duty is to make regular site visits at intervals of not more than 140 days or less than 70 days, except as required to convene a hearing.

These basics of the site visit obligation are not found in the general conditions of contract for construction themselves but rather in the DAB procedural rules 1 through 3. The DAB and the parties shall agree the timing and the agenda of each visit, although in the case of a failure to agree the DAB shall be able to unilaterally set timing and agendas. The site visits are to be attended by the Employer, the Contractor and the Engineer and shall be organised by the Employer in coordination with the Contractor.

A site visit will normally include a thorough site walk based on a pre-determined route designed to focus on current achievements or issues. The site walk is then followed by discussion sessions with the parties including the Engineer and the DAB. These site visits and discussions are extremely important and the main vehicle by which the DAB can promote constructive exchanges between the parties with a view to encourage constructive and timely settlement of issues before, and hopefully without, a referral to the Board for a Decision.

For a Board to be effective, it must be independent and maintain all appearances of independence. This means that during the site visit, and at all other times, the Board must not communicate either collectively or as individuals with either party alone. This means that the DAB members need to be careful about travel arrangements, hotel accommodation and dining and even avoid breaking away during the site tour with either party alone.

Moreover, it is likely that a well-chosen board will include at least one engineer specialized in the type of construction involved, but the Board members should refrain from spontaneously giving technical construction advice on methods, management or design or on contractual matters.

Finally, the DAB should issue a site report before disbanding which summarizes its activities during what is usually at least a two day visit and notably summarizing the issues discussed in the sessions following the site walk.

In between regular site visits the parties should provide the DAB members with regular packages of relevant project documentation. These documents typically include monthly reports prepared by the Contractor and often the Engineer, and all current and updated project programmes, plus all relevant project correspondence including letters and minutes of meetings. The Board should of course also be supplied with a full set of contract documents including the technical and contractual sections of the contract.

Another key obligation of the DAB is spelled out in paragraph (k) of Article 4 of the Tripartite agreement which states that the DAB should 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 agreement by the Other Members (if any). As mentioned before, this is a very powerful dispute avoidance tool. The parties may wish for example, to ask for a non-binding opinion from the Board in regard to the underlying legal or contractual liability in respect of any given claim, without asking the Board to enter into details of associated extensions of time or damages calculations. If the parties are willing to act on the Board's opinion, they often are then capable of working through the time consuming issues of time and money. In practice, a Dispute Board is likely to encourage the parties to

avail themselves of this possibility to request an opinion when they can see serious problems dragging out for months and months.

These three elements of; site visits, reading-in to project documentation, and advisory opinions are the elements which make the Standing Dispute Board a Dispute Avoidance tool as opposed to a simple adjudicatory process. Undertaken correctly, a Standing Board could be called “partnering with teeth.” Nevertheless, disputes can and do arise of course. When they do, either party may refer the dispute to the DAB under Sub-Clause 20.4 [Obtaining Dispute Adjudication Board’s Decisions]. The Dispute Board has only 84 days after receiving the referral in which to give a reasoned decision. Like with the ICC DAB Rules, these Decisions shall be binding on both parties unless and until it shall be revised in an amicable settlement or arbitral award. In the event a party is dissatisfied with the opinion they must give notice within 28 days after receiving the same, otherwise the Decision shall become final and binding and the party will lose its right to an arbitral proceeding on the merits of its position.

The 84 days from the date of referral to the date of issue of the Decision is obviously very short. Under the procedural rules a DAB therefore has broad powers to set a procedural timetable which is adapted to the complexities of the issue. A typical procedural timetable will allow for one exchange of position papers between the parties and possibly two exchanges. A method for gaining time is to call for these exchanges to be made simultaneously. An important consideration is whether or not a hearing is required as opposed to proceeding directly to deliberation and issuing a Decision based on documents only. On any complex project a hearing will likely be necessary and keeping in mind that a Standing DAB is there throughout the project, it may be possible to witness the impact of the referring party’s complaints.

If the Board does call for a hearing, these may take several days and it is usually useful to hold them near the site. The Board also needs to consider how the hearing should be conducted. It is generally recommended that the party representatives be the ones to present their respective positions and of course care needs to be taken that both parties receive equal time to speak.

The question is often raised – what about the parties’ lawyers? While the Board has the power to exclude anyone from the hearing, including the lawyers, it is not recommended to do so. A lawyer’s skill in organizing formal adversarial exchanges may help structure the proceedings. Moreover, many issues may turn on legal questions and a Board will want to have these questions professionally developed and argued. Nevertheless, a Board should not hesitate to insist that the party representatives remain the primary spokesmen. The same question may apply to any expert witnesses a party may wish to use. Again, it is not recommended to exclude the use of expert witnesses, however, it is recommended that the DAB address these procedural issues as early as possible in the 84 day time frame. For example, the DAB may require the parties to disclose in writing who they expect to invite to the hearing and whether or not they intend to use experts in any particular field. Each party should be given a limited amount of time to react to the other party’s list of attendees and possibly modify their own. This is recommended in order to avoid one party arriving at the hearing with a lawyer or expert, leaving the other party feeling disadvantaged.

Given the very short time frame to reach a decision, it is recommended that the DAB conduct the hearings in the inquisitorial style as practiced in civil law countries. The DAB should therefore feel free to ask each party probing questions and to produce documents it may feel are relevant to the case.

Finally, the DAB should set the hearings as early as possible in the 84 day cycle and always allow themselves a minimum of 30 days to deliberate on the issues and draft their Decision.

*The ad hoc DABs found in FIDIC's Conditions of Contract for Plant and Design Build (Yellow Book) and the EPC/Turnkey Projects (Silver Book) forms of contract.*

The Yellow Book [6] and Silver Book [7] forms of contract have Dispute Board provisions also, but unlike the Red Book [5] and the MDB edition [9], these forms of contract have only *ad hoc* Dispute Boards, which are put in place only in the event a dispute arises between the parties. Contracts with *ad hoc* Boards therefore lose all the benefits of the dispute avoidance roles played by Standing Boards. Time has shown, however, that the dispute avoidance role enjoyed by Standing Boards, coupled with the fact they have gained in-depth knowledge of the project through site visits and studying project documentation throughout the project execution, lead to higher chances of avoiding a major dispute in arbitration and higher user satisfaction. As mentioned *supra*, future editions of the FIDIC Yellow Book are likely to replace *ad hoc* Boards with Standing Boards.

Under the Yellow and Silver Books, a DAB is only formed once a dispute has arisen, this may well be late in the project execution. The procedure for forming the Board, other than the timing, is the same as that described above under the Red Book. In an *ad hoc* Board, there is of course no provision for regular site visits or for the DAB to be provided regular documentation, the DAB's sole role is to adjudicate a dispute.

Likewise, the procedure for handling a dispute referral and hearings are also the same as described above.

A final difference to note between the *ad hoc* and Standing FIDIC DABs is the date at which a DAB appointment expires. Under an *ad hoc* DAB, the members' appointment expires when the DAB has given its decision on the dispute referred to it. Under a Standing DAB, the appointment expires only in the final stages of the Contract, after the expiry of the Defects Notification Period and after a final statement has been certified by the Engineer and the Contractor has issued its final "discharge".

#### HIGHLIGHTS OF THE ICC DISPUTE BOARD RULES

The choices of various ICC forms of Dispute Board has been described *supra* (DRB, DAB, CDB). The general mechanics of the ICC Rules are broadly similar to those found in the *ad hoc* or Standing Board formats under the FIDIC forms of contract. Like the FIDIC form of contract, the ICC Rules contain a model Dispute Board member agreement and in the event an ICC Board is called upon to make a Decision, the time period is 90 days as opposed to 84 days.

One interesting difference is that pursuant to Article 16 of the ICC Dispute Board Rules, the role of informal assistance with disagreements is made even more prominent than under the FIDIC Conditions of Contract for a standing Board. Article 16 (2) even specifically states that the Board may hold separate meetings with individual parties so long as there has been prior agreement to do so.

Finally, recall that the ICC Rules can be easily incorporated into any bespoke or standard form of contract at the time of tendering or negotiation.

#### FURTHER READING

For more information on Dispute Boards and their operation, please see details at the following reference notes below; [12], [13], [14].

#### REFERENCES

- No. 1 International Chamber of Commerce **Dispute Board Rules**  
International Centre for ADR  
38, Cours Albert 1er, 75008, Paris France  
[xxx.icwbo.org](http://xxx.icwbo.org)
- No. 2 **The Inherent Dispute Avoidance Properties of Dispute Boards**  
Allione, R  
2012  
DRBF 12<sup>th</sup> Annual International Conference  
Sydney, Australia 3-5 May 2012  
[www.drbfconferences.org/document/Sydney/AllionePaper.pdf](http://www.drbfconferences.org/document/Sydney/AllionePaper.pdf)
- No. 3 **FIDIC 1996 Supplement to the 4<sup>th</sup> edition 1987 of the Conditions of Contract for Works of Civil Engineering Construction.**  
International Federation of Consulting Engineers  
Geneva, Switzerland
- No. 4 **FIDIC Conditions of Contract for Design – Build and Turnkey (The Orange Book)**  
First Edition 1995  
International Federation of Consulting Engineers  
Geneva, Switzerland  
ISBN 2-88432-010-5
- No. 5 **Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer (The Red Book)**  
First Edition 1999  
International Federation of Consulting Engineers  
Geneva, Switzerland  
ISBN 2-88432-022-9

- No. 6 **Conditions of Contract for Plant and Design Build** for Electrical and Mechanical Plant  
Designed by the Contractor (The Yellow Book)  
First Edition 1999  
International Federation of Consulting Engineers  
Geneva, Switzerland  
ISBN 2-88432-023-7
- No. 7 **Conditions of Contract for EPC Turnkey Projects** (The Silver Book)  
First Edition 1999  
International Federation of Consulting Engineers  
Geneva, Switzerland  
ISBN 2-88432-021-0
- No. 8 **Conditions of Contract for Design, Build and Operate Projects** (The Gold Book)  
First Edition 2008  
International Federation of Consulting Engineers  
Geneva, Switzerland  
ISBN 2-88432-052-0
- No. 9 **Conditions of Contract for Construction MDB Harmonized Edition** for Building and  
Engineering Works Designed by the Employer (The Pink Book)  
MDB Harmonised Edition 2010  
International Federation of Consulting Engineers  
Geneva, Switzerland  
ISBN 2-88432-044-X
- No. 10 **ICC Model Turnkey Contract for Major Projects**  
2007  
ICC Services, Publication Department  
ICC Publication N°659 E  
ISBN 978-92-842-1340-5
- No. 11 Websites for **FIDIC National Adjudicator Lists**  
FRANCE: <http://www.syntec-ingenierie.fr/international/fidic-adjudicateurs/>  
JAPAN: <http://www.ajce.or.jp/en/Adjudicator/Adjudicator.html>  
GERMANY :<http://www.vbi.de/english/liste-der-da/>
- No. 12 **DRBF Practice and Procedures**  
2007  
The Dispute Resolution Board Foundation  
Seattle Washington  
[www.drb.org](http://www.drb.org)
- No. 13 **Dispute Boards: Procedures and Practice**  
Owen, G  
2008  
Thomas Telford, London  
ISBN 978-0-7277-3508-9
- No. 14 **Chern on Dispute Boards**  
Chern, C  
2008  
Blackwell Publishing, Oxford  
ISBN 978-1-4051-7062-8