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INTERNATIONAL CONFERENCE ON
BOO/BOT CONTRACTS

Hurghada, Egypt
October 1996

DISPUTE RESOLUTION IN BOT PROJECT CONTRACTS

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(DISPUTE RESOLUTION IN BOT PROJECT CONTRACTS)

by

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DISPUTE RESOLUTION UNDER THE NEW FIDIC DESIGN-BUILD CONTRACT

The dispute resolution clause of the FIDIC Design-Build Contract ("Orange Book") (Clause 20) is a distinct departure for FIDIC. At the outset we might remark with respect to the title "Claims, Disputes and Arbitration" that it is both more fulsome and more accurate than the heading in the Red Book which had read, "Settlement of Disputes." It is more fulsome because there are consolidated here (1) the provisions with respect to the presentation of notice of claim and the keeping of contemporary records, found in the Red Book at Clause 53, (2) the provisions for the dispute decision in the first instance, (3) provision for an intermediate attempt at amicable settlement, and (4) provision for arbitration, all found in the Red Book separately at Clause 53 and Clause 67. This is an editorial improvement. The title of Clause 20 is also somewhat more accurate than its predecessor in the Red Book because the expression "SETTLEMENT of Disputes" readily connotes an AGREED settlement which is definitely not what occurs when a dispute is resolved after an arbitration has been conducted and an enforceable award has been rendered in favor of one party.

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Moving past the title, when we examine the substance of the Disputes clause we see that while the three-step process of the Red Book is roughly maintained, culminating in arbitration, there is a radical change in the first decisional step: what had been a reference in writing made to elicit the decision of the Engineer "in the first place" with respect to a dispute, in the Red Book, is a reference, in the Orange Book, to a "Dispute Adjudication Board" to elicit its decision (Clause 20.4). There are at least three reasons why this is a constructive modification by FIDIC although there will be a certain nostalgia for the concept of THE Engineer's Decision (presumably to be continued nevertheless in future editions of the Red Book?). First, the role of the Engineer does not exist in the design-build context as it does in the traditional design-bid-build context. In the role candidly called the "Employer's Representative," he is not expected to exercise his discretion "impartially within the terms of the Contract," as required by Sub-Clause 2.6 of the Red Book. But he is required in the Orange Book, when making determinations as to value, Cost or extension of time to endeavor to reach agreement and then to determine the matter "fairly, reasonably and in accordance with the Contract" as required by Sub-Clause 3.5.

Secondly, the referring of the dispute in the first instance to a third entity for resolution has the effect, because of the procedure for the constitution of that third entity, the Dispute Adjudication Board, of earlier facing up to the dispute by the parties. Thus putting the problem on the table for resolution promptly is consistent with the salutary trend discussed above in connection with the Red Book in particular and with the trend in the construction industry generally. It is an approach which engineers find practical. The only aspect which is surprising is that the old approach of postponing problems lasted so long.

It will be quickly noticed that while the language of Orange Book Sub-Clause 20.4, Procedure for Obtaining Dispute Adjudication Board's Decision, tracks the language of the Red Book Sub-Clause 67.1, Engineer's Decision, there is a SHORTER time period in which the Board must render its decision - 56 days - than the period for the Red Book Engineer - 84 days. In short, the days of leisurely meditation on the Contractor's claim when his financial life may be at stake are over. How is it expected to be possible for this third entity, not involved in the preparation of either the contract or of the design, to act with greater rapidity on a dispute than the Engineer? The answer is in the composition of the Board and the ongoing familiarity of the Board with the project, by means of regular visits to the site and review of the correspondence.

Thirdly, the use of an independent Dispute Adjudication Board in lieu of the FIDIC Engineer to decide, in the first instance, upon disputes with the Contractor abolishes the argument that a fair decision could not be obtained from an engineer who was not only in the pay of the Employer but whose own acts or failures to act may have been at the core of the Contractor's claim. The latter objection had been made to sound more solemn by invoking the Latin maxim: Nemo in propria causa judex esse debet - no one ought to be a judge in his own case.

Clause 20.3: The Dispute Adjudication Board - Not a "DRB"

The approach of having a Dispute Adjudication Board is somewhat similar to but distinct from the Dispute Review Board concept ("DRB"). We are into the era of relatively new acronyms everywhere, especially in connection with the various forms of alternative dispute resolution ("ADR"), but only some of these new terms have developed precise meanings. (And some words have different meanings in different contexts.)

The concept of the Dispute REVIEW Board is being very aggressively promoted by the American Society of Civil Engineers ("ASCE") which has a long list in its current publication on the subject demonstrating its success[2]. DRBs are currently being used on major projects in the United States, particularly in the Boston area for the work on the Harbor cleanup and the Central Artery/Tunnel work but elsewhere as well.

As the valuable ASCE publication on the subject expresses it, "a Dispute Review Board utilizes experienced and trusted construction professionals with appropriate technical backgrounds to address prevention and resolution of disputes." (ASCE, Technical Committee on Contracting Practices of the Underground Technology Research Council, Avoiding and Resolving Disputes During Construction, 1991 p.10 Emphasis added.) There are two messages here: (1) since disputes are usually factual and technical, rather than legal, construction professionals should be involved, and (2) these experts should be involved to prevent as well as resolve disputes, that is, early. As an aside, it can be noted that the ASCE report does indeed acknowledge that, for Board service, "a legal background is not a disqualification" (p.6); this will afford a modicum of relief to the lawyers who read earlier in the same report that an objective of the engineers is the "returning of construction back to the engineer and construction professionals." (The redundancy seems designed to hammer us with the point that construction has been somewhere else, presumably in the grimy hands of the lawyers.)

The significance of Subclause 20.5, Amicable Settlement, is threefold: The language, however vague and precatory it may sound, does remind the parties that an attempt to settle can

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[2] Cf. Avoiding and Resolving Disputes During Construction, Technical Committee on Contracting Practices of the Underground Technology Research Council, ASCE (1991).

be made at any time, even when positions as to disputes have begun to harden like 28-day concrete (and we can recall that the FIDIC forms are meant to be instructional as well as to fix legal obligations). Secondly, for those legal systems which, or supercautious bureaucrats who, need authorizing contract language in order to discuss settlement, the basis is provided And thirdly, the "attempt" language, although it appears as a second step in the dispute resolution sequence of the Orange Book, does not create a blocking condition precedent with which there must be compliance somehow established before a party can move on to arbitration, the only limitation is that the 56-day period must elapse (which may be too long) In that period the attempt to settle may be negligible or non-existent but the opportunity is there.[3]

The basic idea is the addressing of job problems early, as mentioned above but the important distinction from what has been incorporated in the Orange Book is that these DRBs are usually set up to give prompt RECOMMENDATIONS to the parties - i.e , of a non-binding nature. In the case of the Orange Book Dispute ADJUDICATION Board, the Board action results in a DECISION - binding. In fact, the language of Sub-Clause makes it explicitly clear: If no notice of dissatisfaction is given within 28 days of the receipt of the Board's decision, the decision is final and binding, the language is close to that with respect to the Red Book Engineer's Decision, except that the time for "appealing" to arbitration is SHORTER (28 days rather than the 70 days of the Red Book).

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[3] For international work, it should be noted that an early article in the International Construction Law Review by G. Lodigiani ("A Claims Review Board As A Way for an Amicable Settlement of Disputes," 3 ICLR 498, 1986) described a successful DRB on a dam project in Central America.

Clause 20.5: Attempting Amicable Settlement

Dissatisfaction with the court system has led the business community in general to cast about for alternatives. The words forming the acronym ADR may not need spelling out but there is a wide variety of meaning to the term, somewhat like the varieties of "construction manager." It's not exactly precise. When someone invokes the nouveau term, "ADR," it includes the whole spectrum from the old-fashioned shouting match of a (non-binding) settlement meeting to an arbitration proceeding, pursuant to contract, resulting in a quite binding and enforceable award. Of the many varieties of ADR within this range, four have applicability in the construction industry - dispute review boards, mini-trials, mediation and, of course, arbitration. What Sub-Clause 20.5 does is to encourage the parties to make the settlement effort before moving on to the ultimate ADR step of arbitration.

Conclusion

The new FIDIC Orange Book for design-build is more user friendly than the Red Book and it benefits from a determined effort by its drafters to consolidate and clarify related clauses. Its dispute resolution provisions should foster the early addressing of claims while preserving the right to international arbitration.

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