WHAT DO CONTRACTORS THINK OF DABs 10 YEARS AFTER USING FIDIC 1999 CONTRACTS

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- Using Dispute Boards. The Romanian experience of Dispute Boards
- Enforcement of a DAB decision through an ICC partial award; (co-author Mark Tiggeman – Partner of the international law firm Kennedys)

1. BACKGROUND

This short paper is based on the author's[1] experience while acting, for the past 10 years, as Counsel for various international contractors in 32 separate DAB proceedings and 11 ICC Arbitrations. The author and his firm (Techno Engineerig & Associates) have also been involved during the same period in the appointment procedures of various Dispute Boards of standing and ad hoc status under the provisions of the FIDIC 1999 red and yellow books. The above took place in the legal jurisdiction of the country of Romania, yet further research was performed on this matter in the countries of Bulgaria and Poland.

1.1 COMMON ATTITUDES IN ROMANIA AND THE DEVELOPMENT OF AN AVERSION FOR THE DAB

The attitude of most Contractors

The use of Standing Dispute Boards, in Romania, in accordance with FIDIC 1999 red and yellow books started around the Year 2004.

Since then, based upon Techno Engineerig & Associates TE&A's Romanian experience, appointing a Standing DAB within a specified period from Commencement Date of a project has been followed reluctantly by most Contractors.

This reluctance stemmed fundamentally from the entrenched principle, within most Contractors' mentality, that if the Contractor shows eagerness in appointing the Standing DAB from the outset, then the Employer and the Engineer may both think that the Contractor was dispute and indeed claim oriented.

In the majority of cases if the Employer did not make an effort in respect of appointing the DAB, then Contractors have avoided volunteering to appoint the Standing DAB until, in some cases, it was indeed too late for any appointment to take place.

TE&A statistics, particularly over the period 2004 – 2011 show that in respect of projects we were involved in for which the appointment of a Standing DAB was envisaged by the respective contracts within a specified period of time, the DAB was never appointed within the period specified in the Appendix to Tender to the

1 The author is the President and Senior Partner of the international Consulting firm Techno Engineering & Associates (TE&A)

Contract but instead much later and in some cases it did not take place until the Contract was terminated by one party or the other or did not take place at all. It is only lately that a few Contractors have finally realized that the prompt appointment of the Standing DAB is an important step.

The aversion of most contractors against the use of the DAB has however grown stronger over the past four years due to their disappointment with: (i) the endemic Employers' evident disrespect of the DAB's advice, opinions and decisions, and (ii) some really bad and ambiguous decisions received from the DABs in respect of contractors' entitlement to extra time and quantum thereof, which have contributed to further disagreements between the parties and in disputes that did end up in arbitration.

The attitude of most Employers

On the other hand, most Employers initially envisaged the early appointment of the Standing DAB as purely a cost that would start accruing too soon during the life of a project, whereby any opportunity for late appointment of the DAB would be welcomed as a cost saving measure.

In this regard, most Employers remained tacit and awaited for the Contractors to take the initiative of appointing the DAB and when this was not forthcoming by the Contractor, they conveniently did not raise the issue either.

Lately, Employers have opted for either the Engineer to act as DAB or not to have a DAB in the first place by switching from FIDIC to *ad hoc* conditions of contract, which, although there are only a few, these contracts in my opinion are disjointed and indeed unbalanced.

The aversion of most Employers to the use of the DAB has grown even stronger over the past 4 years due to the majority of DAB decisions received being mostly against the Employers, the increased cost of Dispute Boards and the Employers realization that they do not have personnel in their structures with the required sophistication to deal with DAB matters.

2. THE DAB "TALK" MAY NOT BE MATCHED BY THE DAB "WALK"

After 10 years since FIDIC introduced the 1999 edition of its red, yellow and silver books, much disillusionment exists in the Construction industry about the reality of the DAB message as perceived from the many conferences and seminars that have taken place about the use of Dispute

Boards, and what in practice has indeed been the use and misuse of said Boards over the past 10 years.

In certain jurisdictions, the DAB clause is either being struck out in favour of resolution by national courts in the particular conditions of contract or does not appear in the national language version of FIDIC being used. The trends show that this is becoming common practice in all countries after they have achieved the status of EU membership.

Additionally, and equally important, the question of whether there is a big enough pool of experienced DAB professionals to act as DAB members is frequently asked amongst Contractors. The usual conundrum is that the top people are very busy and there is little mechanism for bringing new blood through.

3. WORRYING LACK OF INTEREST FROM THE FUNDERS

A perception, at least in Europe, is also shared in the Construction community as to how the various Employers are using EU money in respect of the proper implementation of FIDIC contracts funded by EU taxpayers, whether under EU grants or structural funds.
The EU needs to get a grip on this matter because that perception extends to whether the Funders are indeed paying any attention to this or no attention at all. This manifests itself as a lack of interest on the Employer's side in DAB's, particularly standing DABs, and the dispute avoidance and dispute resolution area as a whole, which will inevitably afflict the entire EU Construction industry.

This is so due to the fact that most Employers are taking liberties like deleting the function of the DAB from Clause 20 of the FIDIC red and yellow books. The EU Funders should not allow these Employers and countries to do that.

4. THE DAB PROCESS HAS BECOME OVER-FORMALIZED AND EXPENSIVE

This view has developed not least because of ad hoc DABs, which in some instances tend to conduct themselves in a manner much more like mini-arbitration, not least because on the minority of cases that is all they have time to do.

When to the above is added to the level of fees that Dispute Members have been requesting during the past two years, coinciding with an unfortunate economic downturn climate in Europe, it is quite understandable how this view about the

expensiveness of Dispute Boards was formed.

5. EMPLOYER ABUSE OF DAB PROCESS IS COMMON PLACE

Obstructing the appointment of the DAB, not turning up to DAB hearings and the like are common Employer tactics aimed nowadays at undermining the concept of Dispute Boards.

DAB decisions will always receive an Employer's Notice of Dissatisfaction against the decision, even in instances when the Employer is plain wrong and it knows that. This is obviously the product of a common ill thought public servants' mentality, whereby liability must be denied always and at all costs even when that denial would just be plainly bad, despite that legislation exists in most jurisdictions in Europe, which facilitates Public Authorities in accepting DAB decisions and performing the payment of public sums in compensation of Contractors, awarded by the DAB.

This situation is then made worse by Employers and Engineers who will not or cannot engage in meaningful discussions and negotiations. This is not helped typically by the Civil Law position on without prejudice negotiations and, hugely ironically, by laws designed to prevent corruption, which make Employers less likely to go for anything other than a binding and enforceable adjudication or arbitral award.

6. WHAT COULD BE DONE TO IMPROVE THE CURRENT STATUS QUO

EU Funders, World Bank, Millenium, EBRD and EIB need to get together and design ways, whereby the Employers which receive grants, structural funds and loans are obliged by agreements ratified in the respective countries parliaments to implement the FIDIC contracts and the use of Dispute Boards, if they want to receive those funds.

Further beneficial developments would certainly also include the ability to enforce DAB Decisions through national courts, even where the DAB process has been conducted ex parte, that is without the Employer taking part. This aspect should also be facilitated by the Funders through loan and financing agreements to be accepted by the countries receiving the above mentioned funds. That is if they want to receive them!

7. THE AUTHOR'S BACKGROUND

Techno Engineering & Associates (**TE&A** for short) have in their capacity as "**Attorney**" and "**Counsel**" for Contractors represented and defended various International Contractors during 32 International Dispute Adjudication Procedures and 11ICC Arbitrations under Contracts governed by FIDIC Red and Yellow books, 1st Edition 1999.

The above mentioned disputes have all arisen in Romania during the period 2005 – 2011 on projects financed by either the EU and/or Banking Institutions (i.e. EIB, EBRD and World Bank) between various international contractors and Employers regarding infrastructure works of a civil engineering nature.

TE&A have also provided during the above-mentioned period and still continue doing so, *inter alia*, Contract, Claims and Project Management assistance to many international Contractors operating on Romanian soil and internationally. The author, Giovanni Di Folco, is a practising Civil Engineer and the President and Senior Partner in the firm, specializing in international Disputes and Claims resolution and International Arbitration.

The views and opinions expressed here in are those of the author and do not necessarily represent any specific Contractor's views or opinions.

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