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UNDERSTANDING DISPUTE BOARDS

A PAPER BY NIGEL GROUT ON OBTAINING INFORMAL ADVICE AND OPINIONS FROM THE DISPUTE BOARD

Most of us who are familiar with FIDIC and Dispute Boards are aware that one of the main purposes of a Dispute Board is to resolve disputes between the parties to a contract. However, in my opinion, an equally important role of the Dispute Board is the potential to prevent or avoid disputes.

In considering this dispute prevention role, this presentation paper deals with the practical aspects of obtaining informal advice and opinions from the Dispute Board under the FIDIC Conditions of Contract.

Other important aspects of dispute prevention by the Dispute Board, such as informal assistance with disagreements, discussions with the parties of potential problems, claims and matters of concern during the site visits of the Dispute Board, are not considered in this paper as they are dealt with by other speakers at the conference.

Informal advice and opinions as compared to a formal recommendation or decision of the Dispute Board

A recommendation or decision by a Dispute Board relates to a matter which is already a dispute, and has been formally referred to the Dispute Board for a determination under clause 20.4 of the contract.

If the matter is already a dispute, it cannot be referred to the Dispute Board for an opinion.

Thus, asking the Dispute Board for its opinion would be for something less than a full dispute; eg. a misunderstanding or disagreement.

An advisory opinion is meant to supplement the dispute resolution facility of the Dispute Board; it is not intended to replace the dispute resolution process.

Why request the Dispute Board to give informal advice /opinions

A small presentation by the parties on the referred matter will often lead to an informal discussion between the Dispute Board and the parties, and on many occasions this will facilitate the issue to be resolved.

Informal advice and opinions from the Dispute Board, which hopefully has the confidence and respect of the parties, can help to persuade or give the parties impetus to agree a mutually satisfactory settlement of the problem, thereby avoiding the subsequent need for the matter to be referred to the Dispute Board as a formal dispute.

An unbiased opinion from a Dispute Board can help explain a situation to one of the parties, and clarify the issues for the parties.

If the process does not depend on decisions that are binding, there is far less danger of relationships being damaged by a failure to implement or enforce them.

An opinion of the DB may be useful for presentation by one of the parties when being consulted by the Engineer as part of the clause 3.5 determination procedure.

Advisory opinions are typically used soon after the parties find they have a potential dispute and have carefully considered and formed their positions and held preliminary negotiations, but before significant expenditure of additional resources and further hardening of the parties' positions.

Examples of matters referred to a Dispute Board for advice or opinion

Can be any matter that is relevant to the contract. However, typically suited for:

- Interpretation of a contract condition
- An opinion as to a contractual right or obligation of a party
- Considering the merits of a particular issue
- Programming issues; eg. criticality of work activities
- Where the parties need guidance on a contractual or specification interpretation that is preventing the settlement of a dispute

Contractual basis for the Dispute Board providing advice and opinions

As the powers of a Dispute Board arise from the contract, the potential to provide informal advice and opinions will depend upon the terms of its appointment. This includes the type of Dispute Board used for the project.

If there is no provision in the contract for informal advice and opinions, it can only be included by agreement of the parties.

The FIDIC suite of contracts require either a full-term standing Dispute Board established at the start of a project, or an adhoc Dispute Board that is appointed after a dispute has arisen. An adhoc Dispute Board is only concerned with dispute resolution and thus does not have the function of dispute prevention. This paper focuses on the FIDIC contracts that provide for a full-term Dispute Board, as this is the type of Dispute Board that has the potential for dispute prevention. The relevant FIDIC contracts are:

- i) 1999 Conditions of Contract for Construction (“Red Book”) for works designed by the Employer;
- ii) 2006 Conditions of Contract for Construction (MDB Harmonised Edition) for works designed by the Employer.

The powers of the Dispute Board to provide advice and opinions under both the above FIDIC contracts are given as follows:

Clause 20.2 *If at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion. Neither Party shall consult the DAB on any matter without the agreement of the other Party.*

Under this clause, the DAB has no authority to consider any matter for its opinion which has been referred unilaterally by one of the parties. This is in contrast to a dispute, which can be referred to a Dispute Board under clause 20.4 by one party.

The obligations of the parties with regard to informal advice from the Dispute Board is also covered by Section 5 of the General Conditions of Dispute Adjudication Agreement. Under the 1999 FIDIC “Red Book” the Dispute Board members shall not be asked for advice or consultation, other than in the normal course of the Dispute Board’s activities under the Contract, without prior agreement of the other party and the other Dispute Board members. It should be noted that the 2006 MDB Harmonised Edition is different, as the parties and other members are not permitted to give their prior agreement.

Section 4(k) of the General Conditions of Dispute Adjudication Agreement also requires that the Dispute Board Member shall be available to give advice and opinions when requested by both parties and subject to the agreement of the other Dispute Board Members.

Although the FIDIC Red Book and MDB Harmonised Edition provide for informal advice and opinion by the Dispute Board, the contract conditions contain no rules for such a procedure. The Annex Procedural Rules in FIDIC only relate to referred disputes, and make no reference to the provision of advice or opinions by the Dispute Board. As such, the adoption of suitable procedures is left to the Dispute Board, and it is thus imperative that they discuss and agree with the parties at an early stage of the project what ought to happen.

Procedures for referring a matter to the Dispute Board for informal advice or opinion

Normally a relatively simple procedure. The Dispute Board can either ask each party to provide a written position paper, and/or request each party to present its case orally at an informal meeting or hearing. The adopted procedures are likely to vary to some degree for each project, as each Dispute Board will have their own favoured approach. It will also depend on what the parties require, and the nature of the particular issue referred.

Under FIDIC, requests for the advice or opinion of the Dispute Board should only be made by agreement between both parties, and may be made jointly. All such requests should be concise and be limited in extent.

Ideally the request is made by a joint statement of the parties stating what exactly the Dispute Board should give its opinion on, and outlining the facts of the disagreement. This would include the agreed positions of the parties and where they differ, the contract provisions which are relied upon and the nature/background of the issue. Supporting documentation should be limited and specific to the issue.

If a joint request is not made, then the party initiating the request will by agreement first submit its brief written position paper and supporting information. The other party will then have a short period of time (approx 14 days) in which to provide a short written response to the referred issues including any supporting particulars.

If required, the Dispute Board may ask the parties for further details or explanations, and may also convene a meeting or informal hearing before commencing its deliberations.

The Dispute Board should endeavour to reach its opinion in a relatively short period of time; so a consideration period of 14 days from receipt of the response would be reasonable.

As stated previously, the procedure for informal advice and opinions can be entirely oral where no documents are presented, and the parties put their cases to the Dispute Board in person at a meeting or hearing. In some cases this may be entirely suitable. However, the limitation of this procedure is that it may be perceived as more of a facilitation role by the Dispute Board, with no more than the “airing” of the parties’ views that is normally encouraged at and forms part of the routine site visits of the Dispute Board.

How is the advice/opinion given by the Dispute Board?

This can vary from just a few words on the matter, or can be given in writing in a letter or a written opinion. As with all communications, the Dispute Board should provide the advice or opinion to both parties at the same time and by the same means.

The format of the advice or opinion is brief, but should include reasoning as to how the Dispute Board reached its conclusions. The advice or opinion should be given in a clear manner so that no issues are left outstanding. It is also prudent for the Dispute Board to state that its opinion is based on the presentations, submissions and documentation provided to it-the Dispute Board is not then restricted from adopting a different view if the matter subsequently develops into a full dispute.

If informal advice or opinion is given by the Dispute Board during the course of a site visit, this activity should be included as part of the Site Visit Report issued by the Dispute Board in accordance with Procedural Rule 3 of FIDIC.

Status of the Dispute Board advice or opinion

Non-binding. Either party may still refer the matter to the Dispute Board as a dispute under clause 20.4 if it so desires.

If the Dispute Board is subsequently called upon to make a decision or recommendation on a matter which it has previously provided informal assistance or an opinion, it is not bound by any views which it may have given in the course of its informal assistance or opinion.

NIGEL GROUT FCIArb, FCIHT, DipICArb

Tel: +44 (0)7966 165797

info@nigelgrout.com

www.nigelgrout.com