



Giovanni Di Folco

USING DISPUTES BOARDS THE ROMANIAN EXPERIENCE ON DISPUTE BOARDS

Techno Engineering & Associates s.r.l.



Other articles written by the same author:

- Enforcement of a DAB decision through an ICC partial award; (co-author Mark Tiggeman - *Partner of the international law firm Kennedys*);
- Schedule and forensic delay analysis services;
- Quantum damages analysis services cost based claims;
- Dispute boards - a Contractor's perspective;
- What do Contractors think of DABs 10 years after using FIDIC 1999 Contracts;
- The use of the Primavera software for the Management of Infrastructure Projects in Romania;
- International Contracting - A Consulting Engineer's Perspective;
- Letters of intent, Bonds & Guarantee, Defects Liability Periods.

THE ROMANIAN STATUS QUO

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

The attitude of most Contractors



Based upon Techno Engineering & Associates and the author Romanian experience, appointing a Standing DAB within a specified period from Commencement Date of a project has been followed in the past reluctantly by most Contractors.

This reluctance stemmed fundamentally from the entrenched ill principle, within most Contractors' mentality, that if the Contractor shows eagerness in appointing the Standing DAB from the onset, then the Employer and the Engineer may both

think that the Contractor is disputes' oriented.

In the majority of the 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 over the period 2005 - 2009 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 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 grown stronger over the past four years due to their disappointment with the endemic

Employers' evident disrespect of the DAB's advice, opinions and decisions, 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 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, for reasons that will be discussed later herein, 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.

PRACTICAL ISSUES

When the Standing DAB was appointed within the first 12 months



On the other hand, when the appointment of the Standing DAB was reached within the first 12 months of the Contract, it helped in most circumstances to keep in check at least the abuses and the bad faith evidenced to have been exerted by the majority of the Engineers.

Unfortunately it did not help to keep in check the Employers and their well-known abuses of rights in this country.

When disputes were referred to the DAB early in the life of a Project

In a few instances, when the Contractor was brave enough to refer discrete matters in dispute between the parties to the DAB within a reasonable time from the moment a dispute was born, the DAB decisions helped to a certain extent and in most circumstances to ease the soured relations between the parties and to resolve at least part of the disputes.

However, when disputes were left unresolved for a long period of time, they consequently became more complex and when in the end they were referred to the DAB, the latter decisions did not resolve the disputes and these disputes have almost all been referred to arbitration for reasons such as the decided quantum being too large or the decisions being ambiguous and open to interpretation or due to matters left undecided within the DAB decisions.

WHY DISPUTE BOARDS SHOULD STILL BE USED

The question I have struggled with lately is why anybody should be bothered with the use of Dispute Boards in Romania, when the results over the past four years of using them have been rather disappointing?



The answer to this question came of late after having evaluated the performance of the only two infrastructure Contracts in Romania that did not make use of Dispute Boards because they are not FIDIC contracts but *ad hoc* contracts which have proved to be lousy attempts at contract.

The alternative to a disappointing four years' period of using Dispute Boards in Romania or indeed the misuse of Dispute Boards for that matter is on the other hand quite grim.

The new generation of Supervising Engineers dealing with these *ad hoc* forms of contract, which are called Independent Engineers, are incapable of taking decisions, despite the fact that they are supposed to be independent. It goes back to the old argument that existed when the FIDIC 4th Edition of 1987 was used.



The majority of supervising Engineers did not act impartially and independently back then for the same and obvious well known reasons to most practitioners in this industry, which prevent them from acting as such now.

The unfortunate madness created of late by the new class of public servants in the employment of the various Employers, who have proved to be individuals that are not prepared to take any decisions whatsoever, has created the untenable situation that all disputes will have to be referred to either international arbitration or the local Courts of law in

order to be resolved, as indeed has been the case during the past two years.

Therefore, Dispute Boards can have an important role and indeed make a positive mark in Romania on contracts where they are currently used and will be used in the future. However, due to the foregoing, a radical new approach is indeed required.

PROPOSED BEST USE / WRONG USE

PROPOSED BEST USE

Although this may sound radical, the only manner for Dispute Boards to be effective and be appreciated in Romania and most probably elsewhere is for their appointment as Standing Boards to become a condition precedent to the receiving and disbursement of the funds for a given project.

Therefore, the EU, major lenders such as the World Bank, the EIB and the EBRD, FIDIC, the DRBF, the ICC and the DBF should take the joint initiative to clearly impose onto the Employers the use of Standing Dispute Boards, whereby these Boards should be appointed within a maximum time of 42 days from Commencement Date and their

appointment would expire only after payment of the Final Payment Certificate and the return of the Performance Security has taken place.

Major regulators like the EU and the World Bank should impose as a conditions precedent on the countries that wish to receive financial aid that their legislation should be amended by way of allowing enforcement in their Courts of law of binding and final and binding DAB Decisions.

Enforcement could be either on an interim basis, in the case of binding DAB Decisions, until the decision shall be revised in an amicable settlement or by an arbitral award, or on a final basis in respect of decisions that have become final and binding.

FIDIC should also issue a revised form of the Yellow book wherein the DAB is changed from the *ad hoc* type to the Standing DAB. Alternatively, lenders should insist that the Particular Conditions should be mandatorily amended by the Employers in order to provide a standing DAB in lieu of *ad hoc* DAB when dealing with Design-Build projects under the 1999 First Edition FIDIC Yellow book form of contract.

The use of Standing Dispute Boards from the onset of a project is the only way forward. This condition which was the very foundation of the FIDIC Red book has in one way or another always tried to be ignored and it is submitted that the failure and inefficacy of Dispute Boards in Romania is in the main due to this.

The Dispute Boards should always be composed by three members and balanced by way of having at least one construction lawyer serving as board member or Chairman in some instances.



DAB persons should be members of the FIDIC President's List, or the DRBF, DBF, ICE and ICC lists, which ensures that members have passed strict examinations. Having vast experience and training should be the norm in order to appear on any of these lists. An age limit should also be imposed.

The training of adjudicators should encourage them to use independent assessors specializing in forensic delay analysis and quantum analysis when dealing with complex disputes, whenever the Dispute Board is required to determine and give its decision on matters of substantial extension of time and quantum.

DAB members should not be prejudiced against the type of disputes before them.

The Institutions providing lists of adjudicators should embrace the policy that when a valid complaint is received in respect of an adjudicator, it should be examined and dealt with effectively.

DAB Procedural rules should be standardized as far as possible and not left to the mercy of each Board.

The DAB should be allowed to take proactive measures in mediating problematic issues before they could turn into a full blown dispute and referral.

Last but not the least, the role of the Engineer and the manner in which he is employed should be seriously reassessed.

WRONG USE

There have been during the past four years many instances where the use of the DAB was inappropriate.



Chiefly amongst many of the above referred instances, Contractors were referring complex and large claims to the Standing DAB. In these instances the DAB either gave a non-decision, or left many parts of the dispute undecided, especially in respect of extension of time and related quantum.

In order to avoid the recurrence of the above we helped to implement the use of independent Delay Analysis assessors to advise various DABs.

This alleviated the endemic issue related to the inability of most boards to deal with matters of Critical Path and Time Impact Analysis. However, the problem in

respect of the related quantum of compensation remained unresolved.

A new initiative we are about to implement is the use of independent Quantum Analysis assessors by a Dispute Board. We will have to wait and see if this initiative will resolve the problem of some boards being generally against giving decisions on quantum or being prejudiced against large quantum claims. The jury is still out on this one.

CONCLUSIONS AND POSSIBLE WAYS FORWARD

Due to the foregoing and based upon a substantial number of DAB proceedings experienced during the past four years, it seems quite appropriate and indeed fair to say that after having experienced dealing with the new generation of hybrid contracts in Romania where there is no DAB, the use of Standing Dispute Boards on the balance of probabilities is still the best way forward to achieve balanced contracts.

However, a new drastic approach should be adopted in order to avoid repeating the errors experienced during the past 4 years in Romania, which may very well be

similar to those experienced in other countries.



In this regard the following would be advisable:

- Standing boards should be imposed by Lenders to the Employers as a condition precedent for the disbursement of loans and grants.
- Major regulators like the EU and World Bank should impose on the Countries that receive financial aids that in order to receive these funds they should amend as a condition precedent their legislation, in order to allow the DAB Decisions to be enforced by their Courts of law on an interim basis, until revised by an arbitral award.

- Standing boards should comprise three members at all times.
- The use of independent experts specializing in Time Impact Analysis and Quantum Analysis should be encouraged by the



parties as a support to the DAB when dealing with large and complex disputes dealing with extension of time and quantum thereof. It has been apparent that DABs are reluctant to admit that they do not possess either delay analysis nor quantum analysis skills and after a Decision is published, it is too late for any recompense.

- The Standing Board should be appointed within 42 days from commencement date of a Project and this should be a condition

precedent imposed by Lenders on the Employers in order to be able to use the funds.

- Design-Build contracts should have Standing Dispute Boards at all times.
- The DAB should be allowed to mediate problematic issues before they become full blown disputes and referrals.



- The Engineer should be independent of the parties and his fees should be paid equally by the parties, while his contract should be of the tripartite type.

About the author

Giovanni Di Folco is the Senior Partner and President of Techno Engineering & Associates. He is a highly motivated expatriate multi-discipline professional Civil Engineer with 30 years of experience in the construction and consulting industry (transportation and heavy civil works). Experienced as Projects/Contracts Manager and Claims Expert with extensive international experience gained in multi-disciplinary Civil Engineering Projects in Italy, Iran, Libya, South Africa, Kingdom of Lesotho, Sultanate of Oman, United Arab Emirates, Greece, Bulgaria and Romania, who attained professional recognition. He demonstrated acumen for construction and design Engineering and management at all levels, acute awareness of cost control and project planning, ability to provide an immediate and calculated response to situations in the financial, contractual, legal and technical sectors of the profession, proven ability to sustain responsibilities from high level management through to operational level.

He possesses acute awareness of specific Countries and International Law, the importance of quality and safety and the moral and legal responsibilities that they impose. Trained and operates to the most modern standards of ISO 9000, ICE, NEC, JCT and FIDIC Conditions of Contract and the strict and controlled safety regimes in force internationally. Although specialized as a Pavement Engineer by profession, the international experience gained has enabled his development of a wide diversity of his skills within the Civil Engineering Industry. During his career he has held positions of high responsibility such as “Counsel”, “Engineer” in the sense of “FIDIC”, Project Manager, Country Manager, Claim Expert and Adjudicator on major construction projects.

He is a FIDIC expert in his own right. He possesses a vast experience in adjudication using the DAB procedure and ICC arbitration either as Expert of opinion, Attorney or Counsel for Claimant or Respondent.

www.technoeng.com

Bucharest, ROMANIA

22 Muzelor Street, Sector 4

Tel: +40 21 336 30 76/77

Fax: +40 21 336 30 78

Sofia, BULGARIA

1517, "Haji Dimitar"

Residential Area, 2j "Vitinya" Street

BENI Building, entrance C

Tel: + 359 2 421 92 92 (3)

Fax: + 359 2 421 92 94

Doha, QATAR

Al Muthanna Complex

Salwa Road, PO BOX 22142

Tel: + 974 4465 3224

Fax: + 974 4465 4958