

4.2 History

The World Bank, the Fédération Internationale des Ingénieurs-Conseils (FIDIC), and the International Chamber of Commerce (ICC) have advocated multinational use of the DB process.

4.2.1 The World Bank and Other Development Banks

The first use of a DB by The World Bank was on the El Cajon hydropower project in Honduras in the 1980s. The project involved the tallest concrete arch dam in Latin America. The success of the DB at El Cajon, on which all disputes were resolved amicably by the time construction was complete, led The World Bank to suggest wider use of the technique for projects they financed.

DBs were first introduced in The World Bank's "Sample Bidding Documents for Procurement of Works" in the December 1991 edition. Developers of major projects were "encouraged to consider" a DB within the contractual procedure for settlement of disputes.

In January 1995 The World Bank published a new edition of one of its standard bidding documents entitled "Procurement of Works." As with earlier editions, it used the general conditions published by FIDIC, called "Conditions of Contract (International) for Works of Civil Engineering Construction." However, the FIDIC provision that gave "the Engineer" the duty of deciding disputes was deleted, and the use of a DB, with provisions similar to those used at El Cajon, was substituted. These provisions required the use of a DB from the outset of the contract, and all disputes were submitted to the DB for a written report and recommendation. If neither party gave written notice of objection within 14 days of receipt, the recommendation became final and binding. However, if a timely notice of objection was made, the recommendation was not binding, and it was left to the parties to continue to negotiate, with ultimate recourse to international arbitration.

Later, The World Bank provided that a three person DB must be used if the estimated cost of the contract, including contingencies, is US\$50 million or more. If the estimated cost is less than US\$50 million, the borrower can have a three or one person DB. If the estimated cost is US\$10 million or less, the borrower can use an adjudicator, appointed after a dispute arises.

Other multilateral development banks, such as the Asian Development Bank, used the same provisions, although most of the other banks simply recommended, and did not require, that borrowers adopt the DB system.

In May 2000 The World Bank published a new edition of "Procurement of Works" and modified the DB procedure to follow that of FIDIC (see below) and make immediate compliance with the recommendation mandatory, unless and until modified by an award by an international arbitration tribunal.

In May, 2005, a group of multilateral development banks and international financial institutions reached agreement on a new document "Procurement of Works and User's Guide" which abandoned the use of the 4th Edition (1987, as amended) "Conditions of Contract (International) for Works of Civil Engineering Construction," discussed in 4.2.2, below, and in its place substituted a new set of Conditions of Contract, developed in collaboration with FIDIC, an organization mentioned in 4.2.2, below.

The new conditions are entitled "MDB Harmonized Conditions for Construction." They are a modification of the FIDIC 1999 Conditions for Construction, mentioned in 4.2.2, below. The modification is part of a "harmonization" of procurement of works by the major development lenders.

The “harmonization” will simplify financing of contracts jointly by two or more development lenders, and has created shorter and less complex documents for use by borrowers in contracting for construction work financed by the development lenders.

The new conditions require borrowers to have a Dispute Board for every contract for which any of the development lenders provide any funding, irrespective of the expected amount of the contract. The borrower has the option to select a three person Board or a one person Board, and is to indicate its choice in its Invitation to Bid. The consequence is that there will be many more Dispute Boards created, including in regions of the world where development lenders formerly recommended but did not require the use of Dispute Boards.

A sense of the sweep of this new requirement for Dispute Boards can be had from review of the institutions which have adopted the new Conditions: African Development Bank, Asian Development Bank, Black Sea Trade and Development Bank, Caribbean Development Bank, European Bank for Reconstruction and Development, Inter-American Development Bank, International Bank for Reconstruction and Development (The World Bank), Islamic Bank for Development Bank [sic], and Nordic Development Fund.

In March, 2006, the 2005 edition of the MDB Harmonized Conditions was revised, and is available from FIDIC, at www.fidic.org/bookshop, or at The World Bank website, www.worldbank.org.

4.2.2 FIDIC

FIDIC is an international federation of national associations of consulting engineers. It publishes model forms of contract for use in international construction. The first and principal form was one for international civil works, first published in the late 1950s, with the title “Conditions of Contract (International) for Works of Civil Engineering Construction.” It became commonly known by the color of its cover, the “Red Book.” The *Red Book* was designed for construction contracts in which the contractor built to the employer’s design and was supervised an engineer, usually a firm of consulting engineers, engaged for the purpose of overseeing the work of the contractor. As it is the leading model form for use in international civil works projects, The World Bank adopted it, with changes, as noted above.

The “FIDIC Conditions of Contract” resolved disputes by written decisions of the employer’s engineer, whose decision was final, subject only to being altered by an arbitral award. When the engineer’s written decision was issued, it was effective immediately, and the parties were obliged to comply with it. Unless objected to within a stated time limit, the decision became final. If objected to within the time limit, the dispute could be taken on to international arbitration.¹ Nevertheless, the parties still had to comply with the decision unless and until the award of the arbitral tribunal altered it, which might be years later.

FIDIC uses the term “employer” instead of “owner.”
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This approach had been in use by FIDIC since the earliest publication of its model “General Conditions,” but was argued by some to be unsatisfactory for various reasons. Some of these reasons included the fact that some employers used an engineer who was part of the employer’s organization, instead of being an independent consulting engineer, and the fact that many of the disputes which required such decisions were disputes arising from the actions of the engineer, so that the engineer in effect sat in judgement on his own behaviour. Dissatisfaction with written decisions of the employer’s

¹ When differing nationalities are involved in a single contract, it can be difficult to agree to a single national court to which to turn for final resolution of disputes. This led to using international arbitration instead of a particular national court for final resolution of disputes.

engineer led to many disputes, which often would not be settled until long after completion of construction.

In 1995, FIDIC published a separate set of conditions for use on design-build turnkey contracts with major changes to the conditions of its *Red Book*. In the design-build turnkey conditions, the contractor is responsible for both design and construction, based upon a set of requirements supplied by the employer. In this new form, disputes were to be resolved by a Dispute Adjudication Board or Dispute Adjudication Expert. This was similar to the DB of The World Bank, with one principal difference: the determination of the DB, like that of the engineer under the *Red Book*, was immediately binding on the parties, and had to be complied with even if the DB determination was referred to international arbitration.

In 1996, FIDIC published a supplement to the *Red Book*, providing an optional amendment to the *Red Book*, deleting the arrangements for the engineer to make written decisions on disputes and substituting a DB, just as in the FIDIC design-build turnkey conditions.

In 1999, FIDIC published three major sets of model conditions involving DBs. The *Red Book* was given a new title, “Conditions for Construction.” Another set of conditions originally published for use in contracts for electrical and mechanical works (the *Yellow Book*) became “Conditions for Plant and Design-Build.” The third was a new set of conditions, “Conditions for EPC Turnkey” (EPC stands for engineer, procure and construct). Thus, the 1995 Design-Build Turnkey form was split to put “Design-Build” with “Plant” and “Turnkey” with “EPC.”

Only the *Red Book* has a true DB, established at the outset of the contract, unless the parties agree otherwise. The Design-Build and the Turnkey use what FIDIC calls an “ad hoc” DB, established only if and after a dispute arises, thus lacking the essential characteristic of having been in place from the beginning of the contract. Thus the “ad hoc” DB is similar to an arbitral tribunal.

FIDIC provides standard contract clauses for DBs and a model Three-Party Agreement.

4.2.3 International Chamber of Commerce

The ICC is an international entity comprised of national committees established in most countries involved in international commerce. It is well known for its ICC International Court of Arbitration, a body based in Paris which administers arbitrations held in accordance with its rules, but carried out anywhere in the world. It administers more international arbitrations than any other organization, and a large number of those arbitrations involve disputes arising in the international construction industry.

The ICC has a commission on arbitration that in recent years has become active in alternative dispute resolution. This led to the evaluation of DBs. In September 2004, the ICC published its rules on DBs, which created documents for three types of DBs:

- A Dispute Review Board, which resembles the DB as used by The World Bank from 1995 until 2000, and makes determinations that are not binding if objected to within 30 days.
- A Dispute Adjudication Board, which produces determinations that are immediately binding, although subject to review by arbitration.
- A Combined Dispute Board, which issues determinations that are not binding. However, if requested by either party, and if the Combined Dispute Board is convinced a binding determination is essential to the progress of the project, it has the power to issue a determination which is immediately binding, although subject to review by arbitration.

The ICC rules provide standard contract clauses for DBs and a model Three-Party Agreement.

4.2.4 U.K. Institution of Civil Engineers

In July 2004, the U.K. Institution of Civil Engineers (ICE) published its “Dispute Resolution Board Procedures,” to establish DBs under contracts using the ICE’s model conditions of contract, and to be compliant with England’s statutory system for adjudication of disputes arising from construction contracts.

The ICE DB procedures are based on FIDIC’s DB procedures, but contain necessary amendments to be compliant with the U.K. Housing Grants, Construction and Regeneration Act of 1996.

Under this act, parties to almost all construction contracts awarded in the U.K. are provided with a statutory right to have disputes adjudicated, at any time, by an adjudicator selected by the parties, or whose name is agreed pre-contract and stated in the contract agreement, or appointed by any one of several officially recognized Adjudication Nominating Bodies. The procedure for the adjudication (appointment, time limits for decisions, power of the adjudicator, payment of fees, etc.) must comply with specified rules set out in the act, or absent such rules, the Statutory Scheme for Adjudication (a statutory instrument published by the U.K. government) applied by default.

The ICE provides standard contract clauses for DBs and a model Three-Party Agreement.