FIDIC, NEC and the dispute board concept: extent and style of adoption.

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FIDIC, NEC and the Dispute Board Concept : Extent and Style of Adoption

Abstract

The Fédération Internationale des Ingénieurs-Conseils (FIDIC) 2017-2022 and NEC4 Engineering and Construction Conditions introduced some significant amendments to the dispute resolution provisions in both Conditions of Contract. Both contract suites now have provisions on dispute boards. This article critically explores the extent and style of adoption of the dispute board concept by the two influential contract giants, gaps, and likely implications for their respective dispute handling strategies. The pathways of adoption of the concept are surprisingly similar but the infrastructure for delivery of dispute board services differ. Both contracts will benefit from additional reforms to introduce early dispute board involvement and a post-performance review or feedback system.

Keywords: Dispute Board concept, FIDIC, NEC, Adoption, Early Dispute Board Involvement.

Introduction

A previous review of the NEC3 dispute resolution framework shows that dispute options provided by the New Engineering Contract (NEC) do not align with its own relational and cooperative philosophy.[1] The 1999 FIDIC Rainbow suite of contract forms[2] have a range of dispute resolution mechanisms, but these are not expressly anchored in a driving philosophy.[3] Drafters of the recent FIDIC and NEC contract suites have

[1] See Mante, J, "Dispute Resolution under the FIDIC and NEC Conditions: Paradox of Philosophies and Procedures," (2018) 35(2) *International Construction Law Review*, 182-207 ("Paradox of Philosophies and Procedures").

[2] The Rainbow suite as used in this article refers to the Conditions of Contract for Construction (For Building and Engineering Works, Designed by the Employer) ("FIDIC Red Book,1999"); Conditions of Contract for Plant and Design-Build (For Electrical and Mechanical Plant, and for Building and Engineering Works, Designed by the Contractor) ("FIDIC Yellow Book, 1999"); and the Conditions of Contract for EPC/ Turnkey Projects ("Silver Book, 1999").

[3] Above fn 1.

introduced some significant amendments to the dispute resolution provisions in the respective Conditions of Contract. Both contract suites have dispute board provisions. This move follows a growing global trend of the use of dispute boards on construction and engineering projects. Given the status of these forms in the construction and engineering industry, several interesting insights could be gleaned from a study of how these organisations have incorporated the dispute board concepts into their respective forms.

Using the provisions of the FIDIC and NEC standard forms for engineering and construction, case law and relevant literature, this article critically explores the extent to which recent changes to the dispute resolution processes in the FIDIC 2017-2022 Rainbow suite[4] and the NEC4 Engineering and construction Contracts (NEC4 ECC) reflect the full extent of the dispute board concept. The article also explores and compares the style of integration of the dispute board concept by FIDIC and NEC, and whether these bring either set of forms any significant improvements. A brief exploration of the concept of dispute boards and the historical context within which it emerged is first provided. Then there is an examination of how FIDIC and NEC have utilized the dispute board concept. Finally, the positioning of the dispute board process among other mechanisms available to the construction industry is critically examined.

Dispute Board – Concept and history

The term 'dispute board' refers to several models of dispute resolution processes which derive from the Dispute Review Board (DRB) model.[5] A dispute Board has been described as a 'jobsite dispute avoidance and adjudication process'.[6] It entails the use of third-party neutrals for a variety of purposes including avoidance, management, and resolution of disagreements/disputes from a specified project. It may consist of one or three independent, experienced experts who are jointly appointed at the onset of a construction or engineering project to help prevent or resolve disputes. A distinct

4 Where both the 2nd editions (2017) and the 2022 Reprints (with amendments) of the Red Book, Yellow Book, or Silver Book are referred to together in this article, they shall be called FIDIC Rainbow suite 2017-2022. Where reference is to the 2017 original form and the reprint of a particular Conditions of contract, the following descriptions shall be used: FIDIC Red Book 2017-22, FIDIC Yellow Book 2017-22 or FIDIC Silver Book, 2017-22, respectively.

5 For a comprehensive explanation of the dispute board concept and principles, see Matyas, R. M., Mathews, A. A., Smith, R. J., and Sperry, P. E. *Construction Dispute Review Board Manual* (McGraw-Hill, New York, 1996).

6 Chapman, P, "Dispute boards on major infrastructure projects," [2009] MP1 *Proceedings of the Institution of Civil Engineers Management, Procurement and Law* 162, 7–16. (hereafter called "Dispute Boards"). See also Chern, C., *The Law of Construction Disputes* (3rd Edition, Abingdon, 2021), Ch 14 ("Construction Disputes").

feature of a dispute board is its 'standing' nature; it is appointed at the commencement of the project prior to the emergence of differences or disputes and plays an active overview role on the project from commencement to completion. In contrast, other dispute resolution mechanisms such as mediation and arbitration will primarily allow neutrals to become actively involved only when a dispute arises. Users of dispute boards operate on the assumption that disagreements and disputes are inevitable and thus plan to deal with them from the onset.

From the original idea of a board of professionals familiar with a project assisting parties to resolve their differences early and making non-binding recommendations, where necessary, the dispute board concept has morphed into variants. These include the Dispute Review Board (DRB),[7] Dispute Adjudication Board (DAB)[8] and Dispute Avoidance and Adjudication Board (DAAB).[9] The DAAB and the Dispute Avoidance and Resolution Board (DARB)[10] are similar in many respects. Then there are the Combined Dispute Boards (CDB)[11] and the Dispute Avoidance Boards.[12] The emphasis of each variant is apparent from their nomenclature.

The dispute board concept is flexible, and able to accommodate different approaches to dispute management and resolution such as facilitated negotiation, informal mediation, delivery of non-binding review/recommendations, and binding decisions separately or all combined in a single board. Non-binding processes such as the dispute review or avoidance boards produce recommendations. Parties are free to accept, reject or use the recommendation as a basis for further negotiations. It has been observed that parties often take a DRB's findings seriously because of the calibre/status of panel members[13] and the possibility that the findings will be considered by any subsequent body hearing the dispute when it is escalated.[14] Dispute boards can also deliver binding

7 Commonly used in the United States of America.
8 See FIDIC Red Book, 1999.
9 See FIDIC Red Book, 2017.
10 See the AAA-ICDR, *Dispute Avoidance and Resolution Board - Specifications, Operating Procedures, and Hearing Rules and Procedures* (October 2009).
11 A hybrid of the avoidance and adjudication versions adopted by the International Chamber of Commerce. See Appuhn, R, and Grove, J, "Comparative experience with Dispute Boards in the United States and Abroad" (2012) 32 *Construction Law*, 6, 9.
12 See NEC4 ECC, Option W3. Also listed in the Dispute Board Manual as types of DBs are the Dispute Resolution Advisor (Hong Kong), Dispute Board Panels, One member Boards, Ad hoc Boards etc. See Easton, G and Russo, A (ed.), *Dispute Board Manual: A Guide to Best Practices and Procedures,* Dispute Resolution Board Foundation (Spark Publications, North Carolina, 2019) Ch 7. (hereafter called "*Dispute Board Manual*")
13 Chapman, "Dispute boards", above fn 6, 9.
14 Chern, Construction Dispute, above fn 6 Ch 14.

outcomes (albeit interim), through its adjudicative process as is the case with a DAB.[15] The CDB straddles both ends of the dispute board range; the Board is given power to determine on case-by-case basis whether to issue a recommendation or a decision.[16] As part of the process, a CDB is required to consider effective performance, urgency and prevention of disruption, among other factors.[17] Most dispute board variants are generally expected to be set up at the beginning of a project and must remain in place until project completion.[18] This may not apply if the parties have agreed on an ad hoc dispute board.[19] Members of the dispute board must have knowledge of the project, be neutral and assist parties to resolve disagreements and disputes based on facts and relevant contract provisions.

Much of the burgeoning literature on dispute boards explore the characteristics, principles, rules and procedures of the process.[20] Some of the most accessible materials tend to be promotional,[21] setting out how to maximise the potential of dispute boards [22] and often highlighting the success stories of the process across different regions of the world.[23] Dispute boards variants are often explained in relevant literature.[24] Then there is literature which emphasises the practical benefits of using the procedures.[25] A handful of publications have reviewed some of the practical challenges associated with dispute boards.[26] Few literature comparatively studies the FIDIC and NEC approaches to the utilisation of dispute boards.

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15 Chapman, "Dispute boards", above fn 6, 9.
16 Appuhn, R and Grove J, above fn 9, 9.
17 Ibid 10.
18 In practice, this does not always happen. See Ndekugri, I., Chapman, P., Smith, N. and Hughes, W. "Best practice in the training, appointment, and remuneration of members of dispute boards for large infrastructure projects". (2014) 30(2) *Journal of Management in Engineering*, 185-193.
19 As is the case under the FIDIC Yellow Book, 1999, Clause 20.2.
20 Chern, C, *Chern on Dispute Boards* (4th Edition, Informa Law, Routledge, 2019) (hereafter called "*Chern on Dispute Boards*"); Chern, "*Construction Disputes*", Ch 14; Charrett, D, *The Application of Contracts in Engineering and Construction Projects* (Abingdon,2019), Part III ("Application of contracts"), Chs 22-24; Owen, G and Totterdill, B, *Dispute Boards: Procedures and Practice* (Thomas Telford, 2008).
21 See e.g., Easton and Russo (ed.), "*Dispute Board Manual*" above fn 7.
22 FIDIC, *Practice Note 1: Dispute Avoidance – Focusing on Dispute Boards FIDIC Dispute Avoidance and Adjudication*, International Federation of Consulting Engineers (Issue No.1, Version 1, 2023).
23 See Easton and Russo (ed.), "*Dispute Board Manual*", above fn 7, chapter 1. See also Jones, D, "Dispute boards: the Australian experience - Part 1", (2012) 7(2) *Construction Law International* 9-16; Charrett, "Application of contracts", above fn 20, Part III, Chapters 23 and 24; Chern, "*Construction Disputes*", above fn 6 Ch 14.
24 See e.g., Gould, N. *Dispute Boards*, CES (July/August 2011).
25 See e.g., Charrett, D, "Dispute Boards and Construction Contracts". A paper presented at Commercial Bar Association Seminar, Construction Law Section in Conjunction with the Society of Construction Law & Dispute Resolution Board of Australia (20 October 2009).
26 Ndekugri, I., Chapman, P., Smith, N. and Hughes, W. (2014) "Best practice in the training, appointment and remuneration of members of dispute boards for large infrastructure projects" (2014) 30(2) *Journal of Management in Engineering*,185-193 ("Best practice"). See also Bailey, J, "Current Issues with FIDIC Dispute Adjudication Boards", Paper presented at the American University in Cairo at a conference for the launch of the Society of Construction Law, Egypt (October 2014).

The origins of the dispute board concept,[27]the growing number of professional bodies with dispute board rules,[28] the role of the Dispute Resolution Board Foundation[29]and effectiveness of the dispute board process[30] is well known and need not be repeated here. It is sufficient to state that both FIDIC and the NEC[31] have historical connections to the development of dispute boards as explained in the following sections.

Dispute Boards Under FIDIC

DAB, a variant of the DRB, owed its widespread use mainly to the sponsorship of two key institutions involved in major infrastructure procurement and delivery in most parts of the world namely, the World Bank and FIDIC.[32] The dispute board process was adopted by the World Bank in 1994 for all bank-funded projects. Pursuant to this development, FIDIC incorporated the process into its Conditions of Contract for Design-Build and Turnkey (FIDIC Orange Book) in 1995.[33] In 1996, FIDIC issued a supplement to its Red Book which incorporated the DAB concept into its dispute resolution framework.[34] Since then, the dispute board process has remained part of FIDIC's dispute resolution strategy. FIDIC has two versions of the dispute board process, namely the DAB (standing or ad hoc Board) and the DAAB used in the FIDIC Rainbow suites,

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[27] See Easton and Russo (ed.), "*Dispute Board Manual*", above fn 12 Ch 1; Charrett, "Application of contracts", above fn 20, Part III, Chapters 23 and 24 and Chern, "*Construction Disputes*", Ch14.; Gould, N. *Dispute Boards*, CES (July/August 2011); Chapman, "Dispute boards" above fn 6 7-9.

[28] See *the ICC Dispute Board Rules*, 2015. Available here : icc-dispute-board-rules-english-version.pdf (iccwbo.org); *CRCICA Dispute Board Rules*, 2021; *The CIArb's Dispute Board Rules*, 2014. Available here: ciarb-dispute-board-rules-practice-standards-committee-august-2014.pdf; the *AAA Dispute Resolution Board Rules*. Available here: AAA_Dispute_Resolution_Board_Hearing_Rules_and_Procedures.pdf (adr.org).The JCT DB rules comprise four documents, the JCT/CIArb DB Rules, the JCT Module Agreement, The Enabling provisions for both the DB and MP forms and Guidance Notes. The ICE Dispute Resolution board Procedure was published in 2005. See Fenwick Elliot Comparison Table of Dispute Board Rules.

[29] A non-profit entity dedicated to the promotion of DRB in America and across the globe established in 1996. Previously called the Dispute Review Board Foundation. The name change occurred in 2002. For the announcement and the rationale see, The Dispute Review Board Foundation, "Changing Our Name to Dispute Resolution Board Foundation", (2002) 6(1) *Dispute Review Board Foundation Forum*.

[30] The revised Dispute Resolution Board Foundation (DRBF) data of project with dispute boards dated April 2017 (Data in excel spreadsheet on file with author) shows that dispute boards had been used on a total of 2813 major civil engineering and construction projects in the United States and in nearly sixty countries around the world. The DRBF statistics indicate a high success rate in dealing with disputes with dispute boards. Out of a total of 3249 recorded disputes which were heard by dispute boards as of 2017, 2627 were settled. Only 478 disputes were settled by other methods of dispute resolution. Current data from the DRBF shows that dispute boards have been used for projects around the world with aggregate construction cost of approximately US$ 270 billion. Between 85-98% of recommendations/ decisions are not challenged.

[31] To a lesser extent.

32 See Ndekugri , I, Smith, N and Hughes, W, "Dispute boards on international infrastructure projects: implications for the construction industries in developing countries" CIB W107 Construction in Developing Countries International Symposium "Construction in Developing Economies: New Issues and Challenges", (Santiago, Chile,18 – 20 January 2006).

[33] For more on the relationship between FIDIC and the World Bank and the rationale for the switch from Engineer's determination under the FIDIC Conditions of Contract for Works of Civil Engineering Construction (4th Edition 1987, reprinted 1988 with editorial amendments, reprinted 1992 with further amendments) (FIDIC Red Book, 4th Edition, 1987), Clause 67 to DABs, see Ndekugri, I, Smith, N and Hughes, W, "The Engineer under FIDIC's Conditions of Contract for Construction" (2007) *Construction Management and Economics* 25(7), 791–799 and Ndekugri, "Best practice", pp.185-189.

34 For explanation of the DAB under the supplements to the Red Book, 1996, see Seppala, C., "The new FIDIC provision for a Dispute Adjudication Board", (1997} 14(4) *International Construction Law Review* 443.

2017-2022. FIDIC made this version a standing board.[35] Five documents in the recent FIDIC suite are relevant to any conversation on DAABs. These are the main Conditions of Contract,[36] the Dispute Avoidance/Adjudication Agreement (DAAB Agreement),[37] the General Conditions of Dispute Avoidance/Adjudication Agreement (GCs),[38] the Contract Data[39] and the DAAB Procedural Rules.[40] The following discussion is based mainly on the relevant provisions in the Conditions of Contract as all the other documents derive from these provisions.

Standing DAB under FIDIC Red Book, 1999

The standing DAB under the FIDIC Red Book, 1999 retained some features of the original DRB but its name - Dispute Adjudication Board - implies that FIDIC's emphasis here was mainly on the adjudication aspects of the process. The board is to be set up at the inception of a project,[41] and the panel is appointed by the parties jointly[42] by nomination or from a prior agreed list of panel members.[43] Remuneration of the board members is to be borne by both parties.[44] Parties can refer matters to the DAB for its advisory opinion, but individual parties cannot consult the DAB without the agreement of the other party.[45] Similarly, one party cannot remove or replace a panel member without the other party's consent.[46] The 1999 FIDIC forms provide default provisions for instances where the parties may fail and/or refuse to perform their appointment roles.[47] The board is to be constituted by one or three members.[48]

35 FIDIC's notes on the preparation of Special provisions on subclause 21.1 acknowledges that in appropriate circumstances, parties may opt for an Ad hoc DAB. See FIDIC Red and Yellow Books, 2017-2022, Notes on the Preparation of Special Provisions, Clause 21.1.
36 Clause 21 – this is the main provision on DAAB in the main Conditions of the Red Book.
37 This is the tripartite agreement, which each DAAB member is required to sign with the Parties.
38 This document has extra provisions on the general obligations, warranties and behaviour expected from the DAAB. It also cover the general obligations of the parties, issues of confidentiality, indemnity, fees and expenses, and termination.
39 Details on when the DAAB is to be set up, its composition, list of proposed names – three names by each party are captured by the Contract data.
40 Contains detail procedural rules on how the DAAB is to operate.
41 FIDIC introduced what is referred to as 'ad hoc' DABs, which were only set up after a dispute has crystallised. Under Clause 20.2 of the Yellow and Silver Books,1999, the DAB was to be jointly appointed 28 days after a Party had given notice to the other of its intention to refer a dispute to the DAB.
42 The FIDIC Red Book, 1999, Cl.20.2. Under the 2017 edition of the Contract, the appointment of the DAAB is to be made jointly by the date set out in the Contract or in the absence of that 28 days after the Contractor receives the Letter of Acceptance – See Clause 21.1.
43 Ibid.
44 The FIDIC Red Book, 1999, Cl.20.2.
45 Ibid.
46 Ibid.
47 Ibid Cl.20.3.
48 The default position is three members.

The types and scope of disputes that may be submitted to the 1999 DAB are wide-ranging: '[A] dispute (of any kind whatsoever)' arising 'between the parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer' is to be referred to the DAB in writing.[49] Mante observes that the scope of subclause 20.4 of the 1999 FIDIC Red Book is broad and all-encompassing, granting the DAB power to address both contractual and common law rights under the contract.[50] DAB members are not to act as arbitrators or witnesses in subsequent proceedings. They have immunity from claims related to acts done or omitted to be done unless it can be established that they acted in bad faith. Parties to the 1999 FIDIC Red Book are required to grant the DAB access to the project site and facilities to perform their duties.

The DAB is to render its decision within 84 days of the submission of a dispute or within such time as may be proposed by it and approved by the parties,[51] after which parties have the right to serve notice of dissatisfaction (NOD) within 28 days. Parties are free to settle their disputes after a Board's decision, albeit within a limited timeframe.[52] The DAB decision is binding pending amicable settlement or a reference to arbitration. Some gaps in the original drafting of the 1999 FIDIC Red Book left doubt as to the status of the DAB decision after a NOD is served but before an arbitration award is made. The implication was that the FIDIC Rainbow suite 1999 provided no remedy for the enforcement of interim binding DAB decisions.[53] This concern led to a flurry of both judicial decisions[54] and academic writings[55] on the subject. Eventually, FIDIC released a

49 The FIDIC Red Book, 1999, Cl.20.4.

50 Mante, J., "Dispute Resolution under the FIDIC and NEC Conditions: Paradox of Philosophies and Procedures" (2018) 35(2) *International Construction Law Review* 182, 189.

51 Under Clause 20.4 of the Yellow Book, the DBA may refuse to deliver its decision until invoices of members for their services have been paid in full.

52 See FIDIC Red Book, 1999, Subclause 20.5 - 56 days.

53 Tweeddale, A, "FIDIC's Guidance Memorandum to Users – A half-baked solution?" (2014) 9 *Construction Law Journal* 23, 25.

54 See *CRW Joint Operation (Indonesia) v PT Perusahaan Gas Negara (Persero) TBK* ("*Persero I*") (HC) [2010] SGHC 202; 137 Con LR 69, *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia) ("Persero II") (HC)* [2014] SGHC 146; [2015] BLR 119 (Singapore High Court decision), *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation (Indonesia*) ("Persero II") (CA) [2015] SGCA 30; [2015] BLR 595 (Singapore Court of Appeal decision) (The Persero cases).

55 See Seppälä, C, "How Not to Interpret the FIDIC Dispute Clause: The Singapore Court of Appeal judgment in *Persero*" [2012] *International Construction Law Review* 4 ; Butera, G, "Untangling the Enforcement of DAB Decisions" [2014] ICLR 36 and Tweeddale, A, "FIDIC's Guidance Memorandum to Users – A half-baked solution?" (2014) 9 *Construction Law International* 23.

Guidance Memorandum to clarify the issue.[56] Subsequent FIDIC forms have resolved this issue. Are there lessons which the NEC could learn from this experience?

Dispute Avoidance and the 1999 FIDIC DAB

Unlike, the original DRB which focused on dispute avoidance, the 1999 FIDIC version of the dispute board could not resist the adversarial physiognomies of the construction industry in the UK and other common law jurisdictions at the time it was drafted. What was originally a dispute avoidance and management tool in the United States became known mainly as an adjudication system under the FIDIC 1999 arrangement. The avoidance role of the DAB was generally underplayed. Buried under the subclause on appointment of the DAB was the statement, 'if at any time the Parties so agree, they may jointly refer a matter to the DAB for it to give its opinion…'.[57] Party agreement was required to get a DAB involved in the pre-adjudication phase of any dispute. In the absence of such an agreement little (if anything) could be done by the Board to address issues informally or indeed provide its opinion on emerging disputes to help avoid a full-blown dispute.

Further, subclause 20.2 of the Red Book 1999 on dispute avoidance was narrow and unclear. Parties were to refer a 'matter'.[58] The kind of issues under the 1999 form which were covered by this term was unclear.[59] When a 'matter' is referred to the DAB, its response or role, per this provision, was limited to giving its opinion. The subclause lacked details, was inadequate and did not speak to a commitment to dispute avoidance.

Dispute Avoidance under the FIDIC Rainbow suite 2017-2022

Some of the significant changes to the dispute board in the FIDIC 2017-2022 forms include change of name, change in the scope and types of disagreements to be referred, and the extent of the DAAB's involvement in the avoidance process. The first and most obvious is the change of the name 'Dispute Adjudication Board' to include the

56 See FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1 April 2013. See Tweeddale, A, "FIDIC's Guidance Memorandum to Users – A half-baked solution?" above fn 55 and Mante, J., "Dispute Resolution under the FIDIC and NEC Conditions: Paradox of Philosophies and Procedures" above fn 50, 189,198-199.
57 See FIDIC Red Book,1999, subclause 20(2).
58 Ibid.
59 The Red Book,2017-2022 defines 'matters' as issues arising under specific subclauses listed under subclause 3.7.1 (a) of the form.

word 'avoidance'.[60] Under Clause 21.3 of the FIDIC Rainbow suite 2017-2022, FIDIC amplifies the relevance of the avoidance role of the DAAB. This constitutes a change in policy from a narrow emphasis on adjudication under the 1999 forms to a much broader twin goal of avoidance of disputes and 'real time ' dispute resolution.[61] A whole sub-clause of three paragraphs in each Condition (Red, Yellow and Silver Book) is now dedicated to the subject of dispute avoidance.[62] Recently, the FIDIC Dispute Avoidance and Resolution Forum has followed this up with a publication of a Practice Note setting out main drivers for success and failure of dispute avoidance.[63] It also provides information on best practices on tasks and techniques.[64] These developments represent some of the best indicators yet of FIDIC's commitment to dispute avoidance. Theoretically, these moves also signal a return to the original ideas that distinguished dispute boards from other dispute mechanisms; that is, the inherent ability of a standing board of professionals to offer dispute avoidance, management, and resolution options.[65]

Secondly, subclause 21.3 of the FIDIC Rainbow suite 2017-2022 flips the script on the types of disputes parties could refer to the DAAB for informal assistance. Unlike the position under the 1999 FIDIC Red Book which requires parties to '…refer a matter to the DAB for it to give its opinion…',[66] the FIDIC 2017-2022 books exclude 'matters' from the scope of issues which may be referred for assistance or informal discussion, unless the parties agree otherwise.[67] Instead, 'any issue or disagreement that may have arisen' between the parties 'during the performance of the Contract' may be referred in writing jointly by the parties for assistance and informal discussion by the DAAB.[68] What constitutes a 'matter' or 'matters' under the FIDIC 2017 forms was not defined, but it was obvious that this new term referred to a category of issues distinct from claims which were to be determined or agreed by the Engineer.[69] Under the FIDIC Rainbow

60 See FIDIC Red Book,2017-2022, subclauses 1.1.22 and 21.1-4.
61 FIDIC Red Book, 2017, Guidance, 50.
62 See FIDIC Red Book,2017-2022, subclause 21.3.
63 FIDIC, *Practice Note 1: Dispute Avoidance – Focusing on Dispute Boards FIDIC Dispute Avoidance and Adjudication*, International Federation of Consulting Engineers (Issue No.1, Version 1, 2023) 9.
64 Ibid.
65 See Easton and Russo (ed.), "Dispute Board Manual", above fn 12, preface.
66 See FIDIC Red Book,1999, subclause 20(2).
67 See FIDIC Red Book,2017-2022, subclause 21.3, para 2.
68 Ibid subclause 21.3, para 1.
69 See Red Book and Yellow Book, 2017, subclause 3.7; the Silver Book, Subclause 3.5.

suite 2017-2022, the distinction between 'matters' and 'claims' has been clarified. Subclause 3.7 separates the engineer's treatment of 'claims' from 'matters'.[70] Subclause 3.7(a)[71] list specific situations which constitute 'matters' under the contract forms.[72]

Paragraph 2 of Subclause 21.3 of the FIDIC Rainbow suite 2017-2022 creates a second exception to the rule on referrals. It states as follows: 'Such joint request may be made at any time, except during the period that the Engineer is carrying out his/her duties under Sub-Clause 3.7 [Agreement or Determination] on the matter at issue or in disagreement unless the Parties agree otherwise'. Requests for assistance or informal discussion are not to be made when the Engineer is performing his/her agreement or determination roles under subclause 3.7 on a matter at issue. This time-out (time exemption) makes perfect sense as it will be unsightly for the roles of the Engineer under subclause 3.7.5. and that of the DAAB under subclause 21.3 on avoidance to cut across each other. That said, if both parties agree otherwise, such a referral is possible.

There is also change regarding the extent of involvement of the DAAB in the avoidance process. The Red Book 1999 had stated that joint requests in relation to 'matters' were to be made to the DAB 'for its opinion'.[73] This could be interpreted narrowly to refer to an advisory opinion, not a recommendation or decision as such. The general conditions of the FIDIC Red Book 1999 were silent on other steps that the DAB could take to further its dispute avoidance mandate. The DAAB under the FIDIC Rainbow Suite 2017-2022 however is given a wider role in contributing to the process of resolving disputes quickly.

With the consent of the parties, the DAAB can contribute to the process of dispute avoidance in several specific ways. Firstly, the DAAB may provide assistance.[74] The meaning and scope of 'assistance' is opened to interpretation. It may imply providing technical insights which may help the parties understand their positions better. It may also imply making their neutral platform available for parties to air grievances etc.

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70 See subclauses 3.7(a) and (b), 3.7.2, 3.7.3(a) on one hand as against subclause 3.7.3(b) –(c)(i)&(ii).
71 Subclause 3.5(a) of the Silver Book.
72 These are as follows: (a) Subclause 4.7.3 – Agreement or determination of rectification measures, delay and or Cost;(b) Subclause 10.2 – Taking -over Parts; (c) Subclause 11.2 – Cost of Remedying defects; (d) Subclause12.1 – Works to be measured; (e)Subclause12.3 – Valuation of the Works; (f) Subclause13.3.1 – Variation by Instruction; (g) Subclause13.5 - Daywork (h) Subclause14.4 - Schedule of payments; (i) Subclause14.5 – Plant and materials intended for the works; (j) Subclause 14.6.3 – Correction or modification in relation to IPCs (k) Subclause15.3 – Valuation after Termination for Contractor's default; (l)Subclause 15.6 – Valuation after Termination for Employer's Convenience (m) Subclause18.5 - Optional Termination.
73 See FIDIC Red Book,1999, subclause 20(2).
74 FIDIC Rainbow Suite, 2017-2022, Clause 21.3.

Secondly, the DAAB may also 'informally discuss' issues or disagreements between the parties. Again, this is another role opened to interpretation. The discussions will be around seeking solutions to the issues or disagreements between the parties with the goal of avoiding a dispute. The DAAB, subject to the parties' agreement, is given a wide scope to explore, identify, highlight, clarify, query and offer opinions and suggestions on how the relevant issues could be nipped in the bud.

Thirdly, the DAAB may 'attempt to resolve any issue or disagreement that may have arisen between them [the parties] during the performance of the contract'.[75] This is another indication that the DAAB is expected to help the parties resolve disputes in real time even if informally.

Still in support of the view that the DAAB under the new FIDIC Rainbow suite has been given a much wider and clearer dispute avoidance mandate, subclause 21.3 empowers the DAAB to be proactive. It needs not wait for the parties to always approach it. If the DAAB becomes aware of an issue or a disagreement, it may invite the parties to make a joint request for informal intervention or assistance.[76] This is an important provision, which will allow the DAAB to proactively monitor the project delivery process for potential disputes and encourage the parties to address them.

The DAAB under the FIDIC 2017-2022 Rainbow suite can have informal meetings with parties at any time. Both parties are to be present unless agreed otherwise. Parties are not bound to act on advice given by the DAAB during such informal meetings or assistance. The DAAB is also not bound by any advice or decision made (orally or in writing) during the informal meetings in any future dispute resolution process or decision.[77]

Dispute resolution role of the DAB/DAAB

In addition to its avoidance mandate, the DAAB also has a significant role in delivering a real-time dispute resolution service. Indeed, parties can refer a disagreement or an

75 Ibid. Clause 21.3, paragraph 1.
76 Ibid.
77 FIDIC Rainbow Suite, 2017-2022, Subclause 21.3, paragraph 3.

issue to the DAAB for a formal decision whether informal discussions have been held on the matter or not.[78] The Engineer is to be copied into such a request.

In the FIDIC 1999 forms, parties are to refer a dispute 'of any kind whatsoever' arising between the parties in connection with or arising out of the contract or the execution of the works to the DAB.[79] The referral provisions are straightforward – it is to be made in writing, copied to the parties and the Engineer, and shall state that the referral is made under subclause 20.4 of the FIDIC Red Book 1999.

In the FIDIC 2017-2022 forms, the language has been drastically altered. The referral process is more prescriptive. For instance, there are more details on the sorts of disputes to be referred to the DAAB for resolution (a decision). Disputes are expressly defined[80] and this has resulted in different streams of disputes.

There are at least five separate categories of disputes which could be referred to the DAAB under the FIDIC 2017-2022 forms. The first are disputed claims rejected in whole or in part by the Engineer under subclause 3.7.2 of the Red and Yellow Books 2017,[81] for which a NOD has been served within 28 days of the Engineer's decision.[82] The second category are disputed 'matters'[83] determined under subclause 3.7 and rejected in whole or in part by the Engineer exercising his power under subclause 3.7.2 of the Red and Yellow Books 2017-2022 and for which NODs have been served.[84] The third category of disputes are 'deemed rejections' of claims. These arise where the Engineer fails to give a determination in relation to a claim within the relevant time limit and relevant NOD has been served.[85] As a fourth category, there are 'deemed' disputes which may arise from failure by the Engineer to give a determination on a matter within the relevant time limit.[86] Here, disputes arise without the need for the service of a NOD.[87] The final category are disputes specifically listed under paragraph 2 of subclause 21.4 of the recent forms. These include (i) failure under subparagraph (b), or a non-payment under

78 FIDIC Rainbow Suite, 2017-2022, Subclause 21.4, paragraph 1.
79 FIDIC Red Book, 1999, Subclause 20.4.
80 FIDIC Red Book, 2017 -2022 , Clause 1.1.29.
81 And Silver Book, 2017-2022, subclause 3.5(2) on the Employer's Representative's determination.
82 FIDIC Red and Yellow Books, 2017-2022, Subclauses 1.1.29, 3.7.2, 3.7.3 and 3.7.5, Silver Book, subclause 3.5.
83 'Matter' is defined by FIDIC 2017-2022, Subclause 3.7(a).
84 FIDIC Red and Yellow Books, 2017-2022, Subclauses 1.1.29, 3.7.2, 3.7.3 and 3.7.5, Silver Book, subclause 3.5.
85 Ibid. Especially, subclause 3.7.3(i); Silver Book, subclause 3.5.
86 Ibid., Subclauses 1.1.29; 3.7.3(ii); Silver Book, subclause 3.5.
87 Ibid. In that case both subclauses 3.7.5 [Dissatisfaction with Engineer's Determination and sub-paragraph (a) of Subclause 21.4.1[A reference of a Dispute to the DAAB] shall not apply.

subparagraph (c) of subclause 16.2.1[Notice] of the FIDIC 2017-2022 Red and Yellow Books 2017-2022;[88] (ii) non-payment of a contractor's finance charges under subclause 14(8)[89] by the Employer within 28 days of request;[90] (iii) where a party has given a Notice of intention to terminate the Contract under subclause 15.2.1 or subclause 16.2.1[91] and a party disagrees with the other party's entitlement to give such notice;[92] (iv) where a party has given a notice of termination under subclause 15.2.2,[93] subclause 16.2.2,[94] subclause 18.5,[95] or Subclause 18.6[96] and the other party disagreed with the party's entitlement to give such notice.[97] For all situations under subclause 21.4. (deemed disputes), disputes may be referred directly to the DAAB by either party without the need for a NOD, compliance with subclause 3.7 (on agreement and determination)[98] and sub-paragraph (a) of subclause 21.4.1 of the new forms.[99]

The simplicity of the definition of 'dispute' under subclause 1.1.29 of the new forms beclouds the complexity of the dispute streams above. FIDIC's intentions in introducing these categorisations appear genuine. One obvious reason is to allow parties to circumvent some of the prescribed procedures where these were considered unnecessary in the circumstances.[100] Getting such disputes to the DAAB quickly may save cost and time. It is debatable whether the approach to drafting here is the best way to arrive at such a solution. An unintended consequence of the change may be the potential confusion this can cause parties and professionals who must carefully navigate the different streams of disputes and the procedures for managing them. Disputed 'matters,' 'claims,' and 'deemed disputes' may all be fascinating distinctions but is the benefit of these distinctions worth the likely confusion that they may create in practice? They arguably may perpetuate the perception that the language used in the FIDIC conditions are less user-friendly than others.

88 FIDIC Red and Yellow Books, 2017-2022, Subclause 21.4, paragraph (a).
89 Delayed payment.
90 FIDIC Red and Yellow Books, 2017-2022, Subclauses 21.4, paragraph (b).
91 [Notice].
92 FIDIC Red and Yellow Books, 2017-2022, Subclauses 21.4, paragraph (c) (i).
93 [Termination].
94 [Termination].
95 [Optional Termination].
96 [Release from performance under the Law].
97 FIDIC Red and Yellow Books, 2017-2022, Subclauses 21.4, paragraph (c) (ii).
98 Silver Book, 2017-202, subclause 3.5.[Agreement and Determination].
99 Reference of a Dispute to the DAAB.
100 See also Seppala, C., "Welcome Amendments to FIDIC's 2017 Contracts", [2023] 2 *International Construction Law Review*, 135.

Apart from the deemed disputes under subclause 21.4 of the FIDIC Rainbow suites 2017-2022, every other subject matter of referral to the DAAB must pass through the Engineer. Given the engineer's extensive role under the FIDIC Red and Yellow Books, it is curious that it has been saddled with the role of 'a gatekeeper' for all matters and claims which will go to the DAAB.[101]

The referral process under the new FIDIC forms is prescribed under subclause 21.4.1. Referral of a dispute to the DAAB is subject to various time limits. The default time limit is 42 days of giving or receiving NOD under the subclause on dissatisfaction with Engineer's determination.[102] If a referral is not made within this period, it will be deemed to have lapsed and will no longer be valid. Other requirements of the referral process are set out under subclause 21.4.1(b) to (e) of the FIDIC Red and Yellow Books, 2017-2022. The DAAB has 84 days after receiving the reference to deliver a decision.[103] This may be extended by agreement with the parties. The decision must be reasoned and in writing.[104] A decision may be withheld for failure to pay the members of the DAAB.

The DAAB's decision is binding, enforceable and must be complied with by the parties regardless of whether a NOD is served.[105] If the parties fail to serve a NOD within 28 days, the decision becomes final. The DAAB's decision shall not disrupt the flow of work unless the contract has already been abandoned, terminated, or repudiated. Parties dissatisfied with the DAAB's decision have opportunity[106] to settle their disputes amicably through other dispute resolution mechanisms such as negotiation among senior staff or mediation.[107] After 28 days, parties who are still dissatisfied must serve the necessary notices for arbitration.[108]

The Dispute Avoidance Board under the NEC

101 This raises other questions about the current roles of the engineer under the new form and whether there are signs of a resurgence of the quasi-judicial powers of the Engineer of old See e.g., FIDIC Red Book, 1987, 4th ed, especially Clause 67
102 FIDIC Red and Yellow Books, 2017-2022, Subclause 3.7.5. And in the case of the Silver Book, the Employer's Representative under subclause 3.5.
103 FIDIC Rainbow Suite, 2017-2022, subclauses 21.4.3.
104 Ibid.
105 FIDIC Rainbow Suite, 2017-2022, subclauses 21.4.3, Subclauses 21.4.3.
106 Less time than was available under the FIDIC 1999 forms. Parties attempting amicable settlement had 56 days to do so. Under the FIDIC 2017-2022, such parties only have 28 days to attempt amicable settlement.
107 FIDIC Rainbow Suite, 2017-2022, Subclause 21.5
108 FIDIC Red Book, 1999, Subclause 20.6; FIDIC Red Book, 2017-2022, Subclause 21.6

The Institute of Civil Engineers (ICE) was one of the first organisations in the UK to adopt the dispute board system. It published its dispute board procedures in 2005, which 'drew on the work' of FIDIC'. Consequently, there are many similarities between this document and the FIDIC approach to dispute boards. With the emergence of the NEC contracts in 1993 with its collaborative ethos, it seemed logical that the dispute board procedure would find a fitting place in the new contract. However, this was not the case. The first three editions of the contract focused primarily on cooperation and collaboration among the parties, the Project Manager, and the Supervisor from the inception of projects through to the contract administration stage. It lacked a clearly defined consensual dispute resolution processes.

Though dispute avoidance was one of the core principles underpinning the NEC revolution, the focus remained largely on the project management aspects of the contract utilising concepts such as mutual trust and cooperation,[109] early warning,[110] the programme[111] and compensation event.[112] The expectation was that collaboration will result in less disputes between parties, and it did. The few disputes which will slip through the net were to be resolved by adjudication and escalated to litigation or arbitration depending on the parties' preference. It has been argued elsewhere that this resulted in a situation where the NEC put forward a more adversarial dispute resolution approach which did not align with its core philosophy.[113]

There is evidence of a reversal of this stance in the NEC4 ECC which introduces some collaborative dispute management and resolution processes. Whilst this development aligns with the underpinning NEC ethos, it seems the change was driven by other equally significant developments. During the intervening period between the launch of NEC3 and NEC4, the ICE, the parent entity of the NEC, as a signatory of the Conflict Avoidance Pledge[114] and an active member of the influential Conflict Avoidance

109 NEC 3 Engineering and Construction Contract, Subclause 10.1.
110 Ibid clause 16.
111 Ibid. clause 31.
112 Ibid. clauses 60-65.
113 See Eggleston B, *The New Engineering and Construction Contract- A Commentary* (Blackwell publishing, 2006) p.317; See also Mante, J., "Dispute Resolution under the FIDIC and NEC Conditions: Paradox of Philosophies and Procedures", above fn 50, 182-207.
114 A voluntary non-binding pledge by which organisations commit to proactively avoid disputes in the construction and engineering industry, management them using early intervention processes. See the RICS' Conflict Avoidance Pledge available here: Conflict Avoidance Pledge (rics.org)

Coalition Steering Group(CACSG),[115] had committed itself to collaborative working and the use of early intervention techniques to avoid disputes. It had also acknowledged the value of embedding conflict avoidance techniques into projects. In 2016, the CACSG put together a guide to conflict avoidance and dispute resolution for the construction and Engineering industry.[116] In 2019, ICE worked with the coalition members to publish the Conflict Avoidance toolkit.[117] These developments made it untenable for the NEC to roll out another edition of its forms without some evidence of compliance with the Conflict Avoidance Pledge.

Under the NEC4 ECC, there are three different dispute resolution options, namely Options W1, W2 and W3. Option W1 (Contractual adjudication) and Option W3 (Dispute Avoidance Board) apply where the UK Housing Grants, Construction and Regeneration Act 1996 (HGCRA) (as amended)[118] is not applicable. Option W1 is a refinement of the equivalent option under the NEC2 ECC which was found to be non-compliant with the provisions of the HGCRA.[119] Option W2 offers an adjudication process compliant with HGCRA requirements.

The NEC's description of Options W1, 2 and 3 give the impression that parties have three choices dictated by the nature of the contract. Parties to contracts to which the HGCRA applies must necessarily select Option W2. Where the contract sits outside the scope of the HGCRA, parties could select either Option W1 or W3. This interpretation may be an unduly narrow one.[120] Party autonomy and freedom to contract is not outlawed by the NEC dispute options. Parties could use the Z Clause to modify the dispute options available if they want.[121] Options W1 and 2 begin with attempts by Senior Representatives of the disputants to address budding disputes between parties quickly, amicably, and promptly. The Senior Representatives can adopt any 'soft' dispute

115 A group of six professional institutions and the two largest employers of construction and engineering workers namely: Royal Institution of Chartered Surveyors (RICS), Institution of Civil Engineers (ICE),International Chamber of Commerce (ICC) United Kingdom, Royal Institute of British Architects (RIBA),Chartered Institute of Arbitrators (CIArb),Dispute Resolution Board Foundation (DRBF), Chartered Institution of Civil Engineering Surveyors (ICES), Transport for London (TfL) and Network Rail (NR).
116 A pdf copy of the guide is available on this webpage: Conflict Avoidance Pledge (rics.org)accessed on 12/03/2024
117 Above fn116
118 Se Part 8 of the Local Democracy, Economic Development and Construction Act, 2009.
119 See Mowlem & Co Ltd v Hydra Tight Ltd TCC (2001) 17 Const. L.J. 358
120 See Eggleston, B, (Blackwell publishing, 2006, p.315
121 See the *NEC4 ECC – Practice Note 5, 2019 - Using a Dispute Avoidance Board for contracts covered by the Housing Grants, Construction and Regeneration Act 1996*

resolution approach that they deem appropriate. If parties fail to resolve their disputes at this stage, they can utilise the adjudication process.

The NEC4 ECC Option W3 introduces the Dispute Avoidance Board to the NEC forms. In contrast with the dispute board framework under the FIDIC Contract forms, the NEC Dispute Avoidance Board focuses mainly on dispute avoidance. It has a flexible procedures and issues a non-binding recommendation where parties fail to resolve potential disputes.[122] The Board, like FIDIC's, consist of either one or three members,[123] who are to be identified in the contract data.[124] Where there are three members, each party may nominate one person and the third is to be appointed jointly by the parties under the NEC Dispute Resolution Service Contract at the starting date.[125] There are provisions allowing a nominating body to step in to fill a vacancy if the parties are unable to jointly choose a replacement for a member unable to act.[126]

One of the main tasks of the Dispute Avoidance Board is to visit project site(s) regularly with the intention to '… identify any potential areas of dispute as early as possible and help and guide the Parties towards an early resolution of the issues before positions become entrenched and considerable sums of money are spent'.[127] The Dispute Avoidance Board's visits are to commence from the starting date[128] until the defects date[129] unless the parties agree otherwise. Parties are to indicate the intervals at which the Dispute Avoidance Board visits the Works site in the Contract Data.[130] Parties can also agree for additional site visits, which can take place any time between the starting and defect dates. What happens when one party wants the Dispute Avoidance Board to undertake a site visit but the other party disagrees? It appears that such a visit cannot take place. It is important to note that the rider allowing parties to decide whether to allow visits or not can defeat the purpose of the Dispute Avoidance Board where parties, due to cost concerns, for example, either reject or reduce site visits drastically.

122 See NEC 4 Engineering and Construction Contract, Option W3.
123 Above fn 122, Option W3.1.(1)
124 Above fn 123.
125 NEC 4 Engineering and Construction Contract, Option W3.1.(2)
126 Ibid., Option W3.1.(4)
127 See NEC, *Managing an engineering and construction contract* (User Guide) (Thomas Telford Ltd, 2020), volume 4, 84.
128 NEC 4 Engineering and Construction Contract, Option W3.1.(2)
129 Above fn128.
130 NEC 4 Engineering and Construction Contract, Option W3.1.(2).

Site visits have two main purposes under the NEC arrangement: to inspect progress of works and to identify potential disputes.[131] The second purpose is clearer than the first. What 'inspection' entails is unclear. Under Clause 41 of NEC4 ECC, inspections are within the remit of the Supervisor and the Contractor. Inspection in the context of Option W3 may imply the Dispute Avoidance Board receiving briefing on progress of work and how each party is doing in terms of complying with their contractual obligations. The NEC could clarify this. The agenda for the visit is 'proposed' by the parties and 'decided' by the Dispute Avoidance Board.[132] Members of the Board are required to act impartially.[133] Does this suggest independence and neutrality as well? Often where such requirements are necessary, they are captured expressly.

The Dispute Avoidance Board is to assist the parties to address differences/issues before they become full blown disputes. The NEC4 ECC Guidance notes suggests that the Dispute Avoidance Board's resolution process can be within or outside the contractual framework and may, in certain instances, even lead to an amendment of the contract, in which case parties will be obliged to record the change in accordance with clause 12.3.[134] This mandate is broad and implies that the discussions on any emerging issues could go beyond the confines of the relevant agreement, allowing parties to explore wide range of solutions which may touch on interests of the parties, now and in future. The scope of the types of issues that can be addressed by the Board are equally expansive: any 'potential dispute arising under or in connection with the contract'.[135] The NEC4 ECC does not define a "potential dispute". Will an item which is subject to an early warning process qualify as a potential dispute? What about a compensation event? At what point will the latter become a potential dispute? Can the Board attend early warning meetings[136] with the parties? These remain grey areas which require clarification. Some guardrails may be required to ensure that the DAB's roles do not cut across those of the other players involved in the NEC process. On the face of the

131 NEC 4 Engineering and Construction Contract, Option W3.1.(5)
132 Above fn 131, Option W3.1.(6)
133Above fn131., Option W3.1.(3)
134 See NEC, Managing an engineering and construction contract, volume 4 (User Guide), Thomas Telford Ltd 2017(Reprinted with amendments 2020).p.84
135 NEC 4 Engineering and Construction Contract, Option W3.2.(2).
136 NEC4 ECC, Clause 15

contract, there appears to be two ways of getting the Board involved in dispute avoidance under the NEC4 ECC Option W3: formal and informal involvements.

Formal involvement by the Board

The formal approach will require a referral to the Board four weeks after the other Party and the Project Manager have been notified of the potential dispute.[137] Parties are then required to make available to the Board all relevant materials, including a copy of the contract and progress reports.[138] The Board may visit the relevant site(s), inspect works, and help parties resolve potential disputes.[139] After the visit, the Board is required to prepare notes of their visit and issue a recommendation on how the disputes should be resolved, if there are unsettled potential disputes/disputes by the end of the site visit.[140]

Option W3 is silent on time limit for the Board to deliver its recommendation. In this regard, the Board under the NEC4 ECC is different from the FIDIC's DAAB, which is required to produce a decision within 84 days.[141] Time limits are set for parties referring potential disputes to the Board and for the service of notice of dissatisfaction with the recommendation of the Board. In both instances, parties must act within four weeks. It is unclear why the drafters did not set a time limit for the Dispute Avoidance Board's recommendation. It may be argued that tying the production of a recommendation to completion of the site visit implies that the Board is obliged to produce such report soon after such visits. However, this is problematic for several reasons. Firstly, given that a reference to the Board is a prerequisite to referring a dispute to the Tribunal, it would be appropriate for the NEC Options to set a time limit for the Board to produce its recommendation. What happens if the Board's recommendation is unduly delayed? Are there any circumstances under which the DAB could be circumvented by a party or parties? Secondly, it is debatable whether the Board will have to always issue its recommendation only after site visits.[142] What if the Board has sufficient information from the parties' submissions, copies of progress reports and other relevant materials and therefore do not require a site visit? In that

137 Ibid., Option W3.2(3)
138 Ibid., Option W3.2(4)
139 Ibid., Option W3.2(5)
140 Ibid., Option W3.2(5)
141 FIDIC 2017-2022 Red and Yellow Books, subclauses 21.4.3
142 NEC 4 Engineering and Construction Contract, Option W3.2(5).

case, it is reasonable to assume that the Board will issue its recommendation as soon as it is ready. When must that be?

Informal intervention by the Board

Informal involvement of the Dispute Avoidance Board does not require any referral. The Board can initiate identification and review of potential disputes.[143] The Option W3 subclauses and the guidance notes imply that such potential concerns could be picked up by the Board on its regular site visits. Where necessary, it may request that the parties furnish additional information. All these must be done with the knowledge of the parties. It can help parties settle potential disputes without 'the need for the dispute to be formally referred'.[144]

The Recommendation

It is worth reiterating that the Board under the NEC4 ECC does not issue a decision. The recommendation focuses on suggestions for resolving dispute(s). Beyond this, what goes into a recommendation is less clear. NEC4 ECC Option W3.3 (2) states that a party may be 'dissatisfied' with the Board's recommendation. This implies that the Board's recommendation may contain more than suggestions on how the disputes should be addressed; it may contain some conclusions or even findings in favour of one party or the other, but these will not be 'decisions' nor will they have binding force. The NEC4 ECC Guidance notes on the Dispute Avoidance Board suggest that the recommendations could suggest a solution to the dispute or a means/way by which an agreement could be reached by the Parties. A dissatisfied party must serve a NOD within four weeks of receiving notice of the recommendation of the Board.

Option W3.3(2) raises difficult questions around referral to the Tribunal and enforcement. Firstly, where neither party serves a NOD, a tribunal cannot intervene, even if the dispute remains unresolved. For instance, what happens if a party ignores a recommendation it disagrees with because it is non-binding and does not see the need to serve a NOD? To a party whose position is not favoured by a recommendation, what will be the incentive to file a NOD when failure to do so will prevent its opponent from

143 Ibid.
144 Above fn 143.

resorting to the Tribunal? Option W3.3(1) and (2) will work only in an altruistic relationship. The subclauses essentially tie the hands of a beneficiary of a recommendation from progressing the dispute process under Option W3 when the other party ignores the rest of the process after the recommendation. Even where a party aggrieved by a recommendation is motivated by the NEC ethos to act, it must do so within four weeks of the recommendation, otherwise the dispute will not be considered 'referred' to the Tribunal. Two ways of reversing the unfortunate outcomes above will be to regard unchallenged recommendations as final and binding and, secondly, enforceable by a fast-track process before a Tribunal.

The recommendations could be reviewed by a Tribunal. Members of the Board enjoy immunity for their roles. They cannot be called as witnesses before a tribunal. Each member of the Board, and the parties have an obligation to cooperate with each other.

Discussion

This section critically examines the conceptual rationale for the popularity of dispute boards and provides a discussion of FIDIC and NEC's approaches to the adoption of the dispute board mechanism.

Dispute Boards – Conceptual rationale for popularity

The positioning of dispute boards on the spectrum of construction dispute resolution mechanisms and the consequential impact of this on its popularity has received limited attention. Different dispute avoidance and resolution approaches covering both interest–based[145] and right–based[146] perspectives ranging from dispute prevention strategies to dispute resolution mechanisms are used across many sectors, including construction.[147] These approaches and mechanisms are on a continuum. At the start of the continuum are the prevention processes. The adjudicatory mechanisms could be pictured at the opposite end of the spectrum. The prevention processes tend to be interest-based, collaborative and even informal, with flexible procedures. These processes often have an end goal described with words such as 'avoidance', 'prevention', 'reduction', 'control' and 'management'. The process on this side of the continuum

145 Negotiation and mediation.
146 Adjudication, arbitration, expert determination etc.
147 Blake, S and Brown, J, Stuart, S, *A Practical Approach to Alternative Dispute Resolution*, 6th edn (OUP, 2024).

generally aim to prevent the occurrence of disputes altogether or identify and stop disputes before they become obdurate. Examples of these strategies include effective contract negotiation and drafting and project management techniques such as effective risk identification, allocation and management, early warning meetings, negotiation etc.[148]

Then there are processes such as mediation and conciliation (mid-range processes) which sit next to the above preventive strategies on the dispute resolution spectrum. These mechanisms are also consensual and involve third parties who assist parties to arrive at solutions. Like the preventive strategies, the mid-range processes produce outcomes that are largely party driven. These could prevent escalation and/or promote quick and amicable resolution of disputes. Both the preventive strategies and the mid-range processes lack one important feature: adjudicatory/judicial/quasi-judicial power. Consequently, outcomes are based on agreement between the parties. The outcomes may cost less, and relationships can be strengthened as a result of the use of these mechanisms. However, the lack of a binding and judicially enforceable decision make these options a part-solution only.

To the right of the dispute handling continuum are the adjudicatory processes such as litigation, expert determination, construction adjudication and arbitration. The processes on this side of the spectrum tend to be right-based, unlike the interest-based processes previously discussed. They are handled by third party neutrals with the mandate to apply law and facts within certain procedural boundaries. The decisions are of interim or final nature and are often binding and enforceable. Decisions from these processes are neither consensual nor party generated. They generally ignore interests of the parties and focus mainly on their rights and the relevant law.

There is evidence across the construction industry that the traditional strategies of relying solely on the right-based (adjudicatory) processes such as litigation, adjudication and arbitration are no longer satisfactory.[149] This explains why the Conflict Avoidance

148 These processes are often not traditionally considered dispute processes; dispute avoidance is a collateral benefit.
149 See Conflict Avoidance Coalition Steering Group, Conflict Avoidance Information Guide, 2016. Available at Conflict Avoidance Pledge (rics.org) Accessed on 12/03/2024.See also Conflict Avoidance Coalition Steering Group, Conflict Avoidance Toolkit, 2019.

Pledge[150] in the United Kingdom has already garnered the signatures of about 300 influential construction and engineering companies and professional bodies.[151] Given that different avoidance and resolution mechanisms may be suitable for different kinds of scenarios that can be conveniently used at different stages of the dispute resolution process, many in the industry have resorted to a multi-tiered dispute avoidance and resolution strategy. The multi-tiered approach largely reflects the current practice of most of major standard forms, including the FIDIC and NEC.[152] The use of a multi-tiered dispute resolution framework is an admission by the industry of three key facts. First, all the processes – preventive strategies, mid-range interest-based and right-based adjudicatory processes are essential to the industry. Second, the way to bring all the processes within a single dispute resolution framework is to set them up in a hierarchy reflecting sequence of use.[153] Each mechanism under the multi-tiered system usually involves different personnel and require separate resources (e.g., cost) to set up and administer. Each may sit distinctively either within the consensual or adjudicatory end of the dispute resolution mechanisms continuum. Third, the use of multi-tiered dispute resolution frameworks in many standard form contracts across the construction industry signal a desire for mechanisms that can offer multiple goals of avoidance, management, and resolution as a package. Few dispute mechanisms have anything close to such an offering.[154] In this regard, dispute boards stand out.

The Dispute Board reasonably delivers on all three goals parties to a construction contract will look for in a dispute strategy, namely effective dispute avoidance, management, and quick resolution. The Board can: (i) offer assisted negotiation service to the parties; (ii) informally mediate potential or actual disputes between parties; (iii) operate informally and flexibly in offering advice and discussing issues with parties, thereby fostering collaboration and communication; (iv) address issues quicker than other mechanisms because of their familiarity with the project and issues; (v) deliver a non-binding recommendation if negotiation and mediation efforts fail; and (vi) make a

150 A voluntary non-binding pledge by which organisations commit to proactively avoid disputes in the construction and engineering industry, management them using early intervention processes.
151 Above fn 149.
152 E.g., the FIDIC Red Book, 2017-2022 - the resolution process starts with the DAAB, then amicable settlement and arbitration. The NEC Option W1 process starts with the Senior Representatives, Adjudication and the Tribunal.
153 E.g., DAAB, Amicable settlement and international arbitration as with the FIDIC arrangement.
154 Others include MedArb and ArbMed.

reasoned binding decision when all else fails. Although decisions are interim, they tend to remain uncontested and therefore become final and binding.[155]

The appeal of dispute boards to users is soaring because it (a single entity) can deliver multiple goals, which hitherto were delivered by resort to multiple mechanisms. Apart from providing different dispute handling options, dispute boards also eliminate the need for multiple dispute resolution infrastructures to administer different processes. A dispute board's wide mandate and scope of responsibility across avoidance, management and resolution means there will be limited need to appoint and resource other structures to carry out other dispute processes. Consequently, dispute boards are effective in managing risks related to project time and cost.[156] They are effective at dispute management when integrated into the collaborative project team.[157] Their presence make project teams conscious of dispute avoidance and resolution and provide assurance that differences and disagreements will be taken care of promptly when they arise. The Dispute Board Manual observes that dispute boards serve a similar purpose to project insurance, which in the end saves costs.[158]

The benefits and successes of dispute boards will equally depend on several factors. Gerber and Ong[159] identified procedural fairness, working knowledge of project and fostering positive working relationships as key elements of the process which help achieves the goal of dispute avoidance.[160] This implies that how the process is set up (type), who is involved (qualification and experiences of the Board) and the parties' willingness to support the process are all vital aspects of the process.[161]

Notwithstanding the above conceptual and practical advantages of the dispute board concept, there are challenges and limitations. Conceptually, there is the danger of perceived bias flowing from the Board's performance of informal and quasi-judicial roles. Concerns are often raised about the establishment and maintenance costs of a

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155 Above fn 30.
156 Easton and Russo (ed.), "Dispute Board Manual", above fn 12, chapter 2.
157 Ibid.
158 Ibid.
159 Gerber, P., & Ong, B. "DAPs: when will Australia jump on board?" (2011) 27(1) *Building and Construction Law Journal*, 4-29.
160 The authors identified five factors in total. The others are claim reduction and effective dispute management/resolution.
161 FIDIC, *Practice Note 1: Dispute Avoidance – Focusing on Dispute Boards FIDIC Dispute Avoidance and Adjudication*, (Issue No.1, Version 1, 2023) 9.

dispute board throughout the project cycle and the difficulty in recruiting qualified board members with requisite skills and experience.[162] Whilst the perceived cost of maintaining the standing board has always been an inhibiting factor for dispute board adoption, the other two findings – procedural formalities and negative impact on future relationships - are doubtful reasons for failure to adopt the process. Dispute boards are known for flexibility of process and fostering collaboration. Then there is the limitation of the board being appointed at the start of the contract administration process when the edifice likely to create or cause disputes is already in place. Neither the DAAB under FIDIC nor the Dispute Avoidance Board under the NEC4 ECC has any role at the pre-contract stage before the parties' contractual terms are crystallised.

The point here is not to get the DAAB, or the Dispute Avoidance Board involved in the negotiation of the contractual terms or replace the parties' legal teams. However, it will be worth identifying the relevant dispute board members early and provide them with an opportunity to review the contract documents for the limited purpose of flagging areas which will or likely generate disputes. This is about starting right. The role of the dispute board here will be equivalent to the idea of early contractor involvement (to enhance constructability). In this case, early dispute board involvement will imply that the entity with responsibility for preventing disputes from escalating and resolving them quickly could make an input into the initial contractual process. Both FIDIC and NEC are urged to consider adopting clauses like those on early contractor involvement for their dispute boards. These clauses may be optional, allowing parties to choose to take advantage of this valuable suggestion or sticking with the existing practice of getting the dispute board involved when the contract administration is underway.

There is also the possibility of asking the dispute boards at the end of their term to submit a report evaluating their experiences on the project, parties' contribution, areas of commendation and suggestions for improvement on future projects. Such reports will go to the parties and be subject to the necessary rules on confidentiality and disclosure. Although, it is often said no two construction and engineering projects are

162 Lopez, R and Amara, A, "Comparison of dispute boards and statutory adjudication in construction", (2018) Proceedings of the Institution of Civil Engineers - Management, Procurement and Law 2018 171:2, 70-78 – this study found that some Employers were apprehensive of adopting dispute boards because of the perceived procedural formalities, potential legal cost of setting up and running the boards and fear of harm to future working relationships. The first and last reasons are doubtful.

the same, information generated from such a process will make available an enormous wealth of practical information and insights (even if anonymised) which will inform future projects and help parties improve their processes and interactions with future dispute boards. The two recommendations above can enhance the functionality of the dispute boards under the various standard forms.

FIDIC and NEC : Approach and Extent of Adoption of the Dispute Board Concepts

The FIDIC and NEC forms are very different. They represent the different trends in contracting in construction. FIDIC is often considered a quintessential traditional contract adhering to the formalists' perspective, whilst NEC is often viewed as representing a modern collaborative and contextualists' approach to contracting.[163] FIDIC and NEC take different approaches to dispute resolution.[164] They have different dispute avoidance and resolution pathways.[165] FIDIC has always maintained a common dispute resolution framework across its Rainbow suites – the starting point is the DAAB, followed by amicable settlement and then arbitration. The NEC3 and 4, on the other hand, have three separate dispute resolution options – each Option has a slightly different multi-tiered structure. Option W1 has the Senior Representatives, Contractual Adjudication and the Tribunal. Option W2 has the Senior representatives, Statutory Adjudication and the Tribunal. Option W3 has the Dispute Avoidance Board and the Tribunal. Whilst adjudication (contractual and statutory) has some affiliation with the dispute board concept, it is the Dispute Avoidance Board under Option W3 which brings the NEC dispute resolution framework's alignment with the dispute board concepts into focus. Although there are apparent differences in the FIDIC and NEC dispute resolution frameworks, some similarities could be gleaned from the overall approaches of both contracts to the incorporation of the dispute board concept. The approach to, and the extent of adoption of the dispute board concept by the two contract producers are briefly reviewed below.

FIDIC and the Dispute Board Concept

From 1995, FIDIC incorporated variants of dispute boards into its Conditions of Contract. FIDIC's versions of disputes boards[166] had a common feature; they downplayed the dispute avoidance element of the original dispute board concept.[167] They focused on the adjudicative aspects of the process. This is understandable as it was meant to be a replacement for the Engineer's determination, a quasi-judicial process. Further, the general trend in the construction industry at the time of the introduction of the dispute boards was that the consensual ADR processes were less suitable to the industry, which requires immediate, firm and binding decisions.

163 For a discussion on how the contractual perspective of the different forms influence their approach to dispute resolution, see Mante, J., "Dispute Resolution under the FIDIC and NEC Conditions: Paradox of Philosophies and Procedures", above fn 50, 192-194.
164 Ibid.
165 Ibid.
166 The standing and ad hoc DABs under the FDIC,1999 forms.
167 Except the DAAB introduced in 2017.

Ironically, the examples from America which inspired the adoption of the dispute board idea were review boards which focused largely on avoidance and providing recommendations rather than binding decisions. It could be argued that in choosing to make the review board idea fit the adversarial culture of the construction industry and thereby going along with the dispute adjudication board systems, FIDIC lost the opportunity to offer its users the benefits of having the best of both the avoidance and adjudication worlds, the very principle which has made the concept so popular.

After encouraging the use of a purely adjudicatory dispute board system with relatively minimum emphasis on avoidance and collaborative practice, FIDIC has now moved to emphasise both avoidance and collaboration, leaving adjudication as a last resort. FIDIC's DAAB therefore seeks to bring the benefits of the original dispute board concept, namely dispute avoidance and management to users. The same body also carries out the adjudication duties of the board. This takes away the need for different entities to play the avoidance, management and adjudication roles and therefore saves the parties the extra cost associated with appointment and setting up. All these roles are played by a single body.

That said, there is something unusual about a dispute resolution process which allows members to interact informally with parties, make suggestions to parties on how matters should be resolved, actively assist in negotiating resolutions and even state their positions, to remain in charge of the adjudicatory process over the same matters when the parties fail to agree. The common law system is used to arrangements where arbiters and judges with no prior knowledge or connection with a dispute or the parties involved are selected to resolve such disputes judicially or quasi-judicially. The idea is to avoid any appearance of bias.[168] Should individuals who have made their positions on a matter clear to the parties prior to the adjudicatory process be allowed to formally adjudicate on such issues? In other types of adjudicatory processes such as arbitration, this may raise concerns.[169] However, if both parties agree to such a process, the parties' consent validates such a process. Additionally, the process is generally considered as provisional and therefore parties have the opportunity to air their grievances again before an independent body should the need arise.

The fact that the DAAB runs with the project is one of the unique advantages of the dispute board concept under the FIDIC system. The advantages of this approach have been discussed above. It includes having a dispute avoidance and resolution focused entity in place right from the start of the administration of the contract. FIDIC approves this option but also acknowledges that there are instances where parties may be unwilling to appoint a standing DAAB for reasons including cost and the extra administrative burden that comes with cooperating with the board. FIDIC thus suggest the wording to be used in a contract where the parties choose an Ad hoc DAB. This acknowledgement by FIDIC is as realistic as it is also an admission of some of the

168 *R v Gough* [1993] UKHL 1 [14]; *Porter v Magill* [2001] UKHL 67.
169 See Arbitration Act, 1996,s.24 and *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48,[49,55,151-152].

difficulties associated with the use of DAAB. It is often argued that in the end, having a DAAB is cheaper compared to the cost of resolution where there is no Board.[170] This may be true depending on the size of the project, the funding source and the nature of the parties involved. For a small or medium-size project, the burden of having additional cost from the standing DAAB may weigh heavily on the parties' decision to adopt a DAAB.

The jury is still out on whether the DAAB will reduce disputes on FIDIC projects as the dispute boards have achieved elsewhere.[171] FIDIC's recent trend of encouraging cooperation between parties will provide the cultural shift that DAABs require to thrive. Significantly, the recent changes made by FIDIC to emphasise dispute avoidance and resolution equally implies that, conceptually, at least, FIDIC now has a dispute resolution framework in place to benefit from the full range of services that a dispute board can offer.[172] In this regard, the NEC adopts a slightly different approach, as explained below.

NEC and the Dispute Board Concept

In contrast to FIDIC, the NEC is unlikely to have difficulties with theoretical and cultural alignment with the dispute board's focus on avoidance. The quest for a cultural shift from an adversarial posture to collaborative contracting has been part of the NEC's ethos right from the onset. Indeed, it was surprising that the NEC, with a stated objective of dispute avoidance, had no discernible dispute management or collaborative dispute resolution mechanism in the NEC3 ECC form.[173] The NEC appears to have rectified this apparent anomaly in the NEC4 ECC.

The Dispute Avoidance Board in the NEC4 ECC as a dispute resolution option has one key goal, dispute avoidance. To achieve this, it has a mandate to visit the works site from the starting date[174] until the defect date.[175] On the site, it monitors progress of work and helps parties to resolve potential disputes. The DAB's recommendations are non-binding. With this key features in mind, it appears that the NEC's DAB was designed with the features of the dispute review board in mind.

However, the new DAB under Option W3 is only part of the story. Properly described, the NEC has three dispute resolution processes with connections with the dispute board concept – contractual adjudication under Option W1, statutory adjudication under Option 2 and Dispute Avoidance Board under Option W3. The first - contractual adjudication - had its antecedent in the first and second editions of the NEC forms. The Institute of Engineers (ICE), the sponsors of the NEC forms, incorporated adjudication as the primary dispute resolution mechanism for construction into the first and second

170 Easton and Russo, above fn 12, chapter 2

171 Chern C, *Chern on Dispute Boards*, 4th Edition, Informa Law, Routledge, September 2019); Chern, C, 'Construction Disputes', above fn 6, Ch 14.

172 Subject to following the appropriate guidance offered by the DRBF and FIDIC on the use of the Dispute Boards. See FIDIC Dispute Avoidance and Resolution Forum, Dispute Avoidance- focusing on dispute boards, Issue No.1, Version 1, 2023

173 see Mante, J., 'Dispute Resolution under the FIDIC and NEC Conditions: Paradox of Philosophies and Procedures', above fn 55.

174 NEC 4 Engineering and Construction Contract, Option W3.1.(2)

175 Ibid.

editions of the form published in 1991 and 1993, respectively.[176] Eggleston notes that this early version of adjudication had some of the qualities associated with variations of the dispute board concept. The author writes of the earlier editions of adjudication introduced by the ICE as follows:

> Adjudication as it now exists is not quite what it was intended in the early versions of the NEC. That intention was to have a named adjudicator in each contract who would be on hand to deal with disputes as they arose so that as a matter of good project management all disputes were speedily resolved. To facilitate that aim the early NEC adjudication procedures imposed strict time limits for the referral of disputes to adjudication…[177]

Construction professionals acquainted with the adversarial culture of the industry in the 1980s and 1990s came across the dispute board concept and liked some of its principal features but struggled to accept the idea of using a consensual non-binding dispute mechanism as a primary process of choice in a construction contract. Consequently, the original review board's consensual process with non-binding recommendations needed some tweaking to fit into the industry culture at the time. Hence, there was preference for an adjudicatory process with an interim binding nature.

This reasoning was tacitly endorsed by the Latham Report, which expressly advocated for statutory adjudication with interim binding force in the UK.[178] This led to the enactment of the *Housing Grants, Construction and Regeneration Act 1996*, which established a statutory form of adjudication (adopted by NEC under Option W2), and with it a creation of a statutory right to adjudication. The implication was that parties opting for contractual adjudication under the NEC had to ensure that the option is compliant with the statute. As a result, the NEC offers both contractual and statutory adjudication as Options.[179] With the addition of Option W3 (the Dispute Avoidance Board), it is submitted that the ICE/NEC has gone full circle back to the original dispute board concept, providing separate processes for avoidance and management of disputes on one hand and resolution through adjudication on the other hand. The NEC approach differs from FIDIC's in that, it does not have a single dispute option that offers dispute avoidance and management services as well as a binding decision where necessary or relevant. The NEC's DAB offers avoidance and management services and non-binding recommendations. Essentially, the NEC's DAB is a DRB. Some concerns about how the DAB is designed have been previously highlighted. The flexibility of the rules under Option W3 is in keeping with the cooperative ethos, but the implication is that loose ends are not properly tied.

In sum, the introduction of the DAB by NEC means many of the key elements of the dispute board idea are available across the different dispute resolution options under

176 Eggleston B, *The New Engineering and Construction Contract- A Commentary*, (Blackwell Publishing, 2006) 316.
177 Ibid 317.
178 Latham, M, *Constructing the Team- Final Report of the Government/Industry Review of Procurement and Contractual Arrangements in the UK Construction Industry* (London: HMSO, 1994).
179 Although the processes under these Options are different from the original dispute board concept, it is undeniable that they are conceptually connected to the original dispute board concept.

the NEC4 ECC. The NEC's DAB is a standing body. It has a mandate to avoid/manage potential disputes and produce non-binding recommendations. Adjudication under Option W1 and 2 are not delivered by standing bodies but they produce binding decisions. As recent NEC users' feedback have shown, they may prefer to use dispute options with combinations of processes different to that offered by the extant dispute Options.[180] Whilst no single option under the NEC dispute resolution framework offers a FIDIC-type DAAB service, the flexibility of the NEC contract framework means parties could build their own bespoke dispute avoidance and adjudication edifice similar to that of FIDIC if they are looking for everything in Option W3 and a binding decision by the Board instead of recommendations. Parties who choose Option W1 could decide to replace the Senior representatives with a DAB with a clear mandate to deliver a binding decision. Such a change can be effected through a Z clause.

Conclusion

At the conceptual level, both the NEC and FIDIC contract forms now have dispute resolution mechanisms which straddle avoidance, management and resolution. Both sets of processes have some historical and material connections with the original dispute board idea. Influenced by the prevailing industry culture at the time of adoption, both contract form makers opted for an adjudicatory process. Over three decades on, both NEC and FIDIC have responded to the growing support for more cooperative/collaborative processes and have therefore reached out to the same original source – the dispute board concept - for inspiration. The outcomes of that process by NEC and FIDIC are the Dispute Avoidance Board and the DAAB, respectively.

Both FIDIC and NEC have a single entity playing the dispute avoidance, management and resolution roles. Despite the similarity in the evolution and use of the dispute board concept and its variants, there remains a significant distinction between the approaches. Whilst the NEC's DAB delivers non-binding recommendations, the FIDIC DAAB delivers a decision at the end of the process. The slight advantage of the latter is that the DAAB could deliver everything offered by the DAB and a binding decision as well but the DAB cannot deliver a binding decision. NEC users could have a DAB with a DAAB functionalities but this will require some picking and mixing and the use of a Z Clause. Alternatively, the NEC could decide to introduce another Option W5[181] which will deliver both dispute avoidance and adjudication as a single package. Whilst both contract forms now have demonstrably improved dispute avoidance and resolution strategies which incorporates substantial elements of the dispute board concept, this is just the start of the journey to successful dispute avoidance and quick resolution. A lot will depend on who is involved (qualification and experiences of the Board), parties' willingness to support and cooperate with the board and the nature of the project.

[180] NEC4 ECC – Practice Note 5, 2019 - Using a Dispute Avoidance Board for contracts covered by the Housing Grants, Construction and Regeneration Act 1996.

181 To distinguish it from the East Asian (Hong Kong) Option W4 - used when adjudication, mediation and arbitration are the methods of dispute resolution.

Further, both FIDIC and NEC dispute board[182] arrangements lack two very vital processes which can enhance their viability and efficiency, a pre-contract and post-contract plan. Both are appointed at the start of the contract when the structure likely to create or cause disputes is already in place. Neither the DAAB under FIDIC nor the DAB under the NEC4 ECC has any role at the pre-contract stage before the parties' contractual terms are crystallised. It is recommended that, like the contractual provisions/options on early contractor involvement, there should be early dispute board involvement. This will allow the Board to advice on contractual and legal matters at the inception of the project, with the sole aim of spotting and advising on terms and behaviours which may generate disputes in future. This will help parties start right. Alternatively, a new dispute resolution Option W6 (in the case of the NEC) or an optional clause could be proposed, allowing parties the option of appointing, and involving the DAB/DAAB earlier than usual (preferably before the contract is formally signed).

Finally, drafters of both FIDIC and NEC must consider including a contractual provision which will request that the respective dispute boards will submit a report evaluating their experiences on the project, parties' contribution, areas of commendation and suggestions for improvement on future projects. Obviously, such reports will go to the parties and be subject to the necessary rules on confidentiality and disclosure but could ultimately be anonymised. The evaluative reports could generate a pool of knowledge which will inform future project planning and contractual arrangements.

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182 Or variation thereof.