

FIDIC

FIDIC standards are now considered the best in international practice and for this reason are increasingly appreciated, especially by international investors who wish to have their projects backed by predictable and proven rules of the game.

Among the advantages obtained with the use of standards, it is possible to highlight the security offered by contractual and commercial conditions of proven effectiveness, as well as the standardization and provision of a complete set of documents necessary for the successful completion of the project.

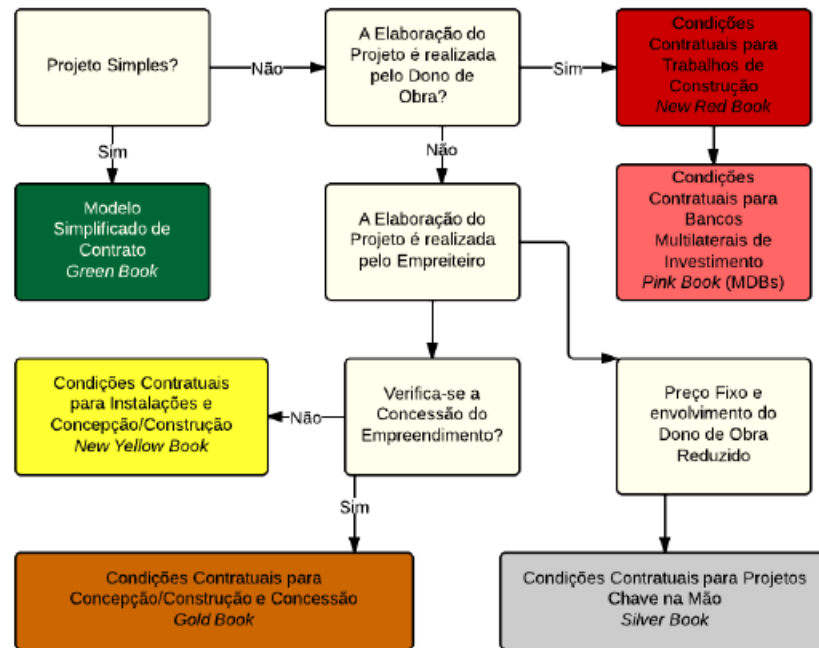
The use of conditions with inadequate risk allocation creates a greater possibility of conflicts during the performance and after the end of the work. Therefore, these more developed parts contain clauses requiring the parties to provide timely notice of events affecting quality, time and cost and to announce claims or complaints regarding additional payments and terms.

In general, it is recommended to take out insurance to protect the contractual parties from the financial consequences of unexpected losses and damages.

The forms of conflict resolution listed in the FIDIC books are derived exclusively from the terms established in the contract. In other words, the parties must agree on the appointment of the DB and, when necessary, submitting a particular issue to the Arbitration Chamber.

FIDIC is divided into a series of books as shown in figure 1 below:

Figure 1 FIDIC Standards



Source: Own

- The "new" Red Book: Conditions of Contract for Construction of Building and Engineering Works Designed by the employer: Construction Contract.
- The 'new' Yellow Book: Conditions of Contract for Installation of Plant and Design for Electrical and Mechanical Plant and for Building and Engineering Works, Designed by the contractor: the Plant and Design/Construction contract.
- The Silver Book: Conditions of Contract for EPC Turnkey Projects: the EPC Contract.
- The Green Book: a summarized form of contract. • The Pink Book: The Multilateral Development Bank (MDB) harmonized edition is the FIDIC Red Book that incorporates amendments from the world's leading banks and is designed for use in projects financed by these banks.
- The Golden Book: the Design-Build Operate (DBO) contract form that includes plant design, construction, operation and maintenance in one contract. It assumes a project-build "green field" project with a 20-year period of operation - the related Guide contains guidance on the changes required to cover a "brown field" agreement.
- The White Paper: a form of consultancy contract in which the consultant must be appointed by the employer or another consultant.

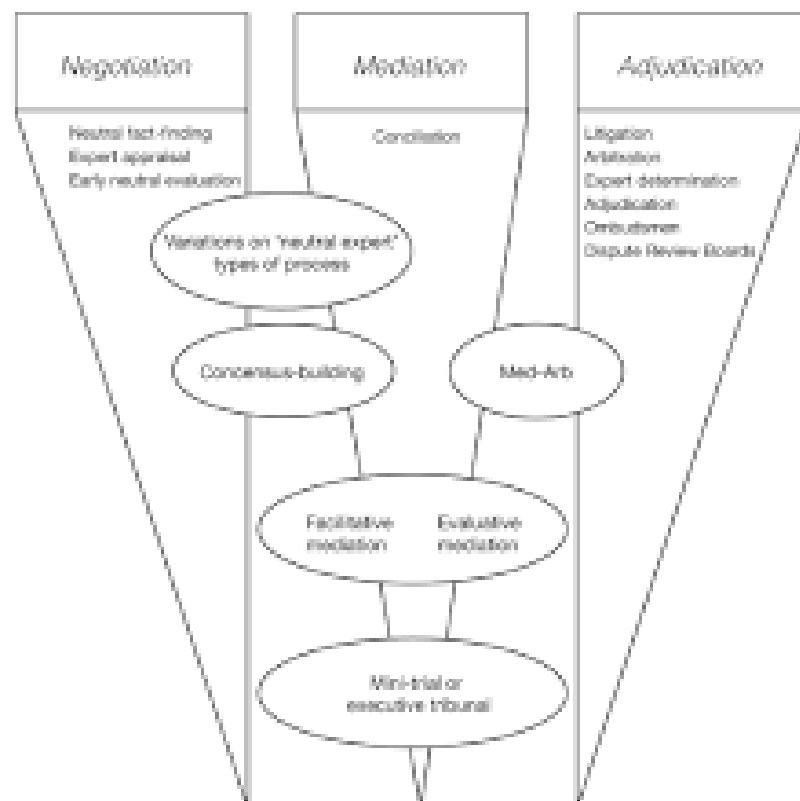
The use of FIDIC standards increases clarity, transparency and predictability, resulting in fewer disputes, lower costs and more successful projects, precisely because there is already an adjusted standard in the various points of the contract.

Dispute Boards

We have Dispute Resolution committees in the following Chambers: Camara Brasil Canada, Arbitration and Mediation Chamber of CREA MG, ICC (international Chamber of Commerce), DRBF and Camarb.

The Disputes council is formed to resolve disputes between parties to construction work (contracts) before the arbitration process begins. Figure 2 illustrates the means for resolving conflicts (overview), highlighting the DB.

Figure 2: Conflict Resolution



Source: : Mackie, K., Miles, D. and Marsh, W. (1995) Commercial Dispute Resolution: A Guide to ADR Practice, Butterworths, London, p. 50. The figure was derived from a graph by Professor Green of Boston University (1993).

The ICC is an international entity made up of national committees established in most countries involved in international trade. It is well known for its Arbitration Court.

It administers more international arbitrations than any other organization, and a large number of these arbitrations involve disputes arising in the international construction sector.

In September 2004, the ICC published its rules on databases, which created documents for three types of databases:

- A Dispute Review Board or Review Committee (DRB equivalent): Experts issue recommendations, which the parties generally undertake to comply with, otherwise the matter is referred to arbitration or the judiciary.
- A Dispute Adjudication Board – (equivalent to DAB): Experts make decisions, which the parties undertake to issue recommendations, which the parties are obliged to comply with through a contractual agreement.
- A Mixed Committee (Equivalent to the CDB): Experts offer recommendations, but can make decisions if one of the parties requests that the choice be linked to pre-established criteria

The ICC rules provide standard contractual clauses for databases and a model tripartite contract.

Whatever the form of the DB, the DB is neither judge nor arbitrator. The DB's role is only to resolve disputes temporarily in order to avoid project paralysis. If either party does not agree with the solution suggested or imposed by DB, that party may refer the dispute to either a judge or an arbitrator in order to obtain a ruling or ruling that definitively resolves the dispute (possibly against DB's decision) , opinion and be legally binding.

While awaiting judgment or award, a party cannot be forced (in the strict sense of the term) to comply with a recommendation or decision of the DB. However, a party who refuses to perform may be considered in default under the contract and be ordered to pay damages.

In practice, this threat acts as an effective deterrent: a vast majority of DB recommendations and decisions are made spontaneously by the parties, even when they are not satisfied with them.

Although neither the recommendations nor the decisions are definitive, the parties almost always accept them and refrain from forwarding them to a judge or an arbitrator, which makes the solutions reached by the DB in fact irrevocable; therefore, in most cases, the determination of the DB, regardless of the form of the DB, definitively resolves the dispute.

As a reference, there are several types of projects using DBs: airports, bridges, construction, dams, energy, highways, ports, infrastructure, mining, energy plans, chemical plants, underground, others.

According to the Dispute Review Board Foundation, research they have carried out suggests that a dispute review board costs 0.05% of final construction costs where there have been few disputes. If there are many disputes, the cost is about 0.25%. In the survey, the lowest percentage reported was 0.04% of the final construction cost. The highest was 0.26%, with the average being 0.15%. The average number of dispute recommendations across all projects in the sample was 4.

We can show examples as in table 1

Empreendimento/ Local	Barragem Ertan China	Aeroporto de Hong Kong	Linha 4 Amarela , Metrô Sao Paulo
Tipo de Comite	Comite Revisor	Comite Adjudicação	Comite Revisor
Custo	USD 5 B	US 15 B	US 1,55 B
Tipo de Conytrato	Contrato FIDIC	Contrato FIDIC	Contrato FIDIC
Quantidade de disputas	40 disputas DRB	6 disputas DRB	10 disputas DRB
Quantidade de Arbitragem	Zero	1 disputa para arbitragem e confirmada a recomendação do Comite	zero

Source: Own

In Brazil, the technical and legal communities are still not very familiar with the format. Few construction contracts provide for a DRB clause in the country. They are still very few in our country. Project owners are still very reluctant about DRB provisions, seeing the method as a potential waste of energy. Furthermore, owners still view a DRB not as an investment but as a cost item.

The most effective way to achieve results is to use DB in contracts before construction begins. This way, DB members will become familiar with the project, resulting in practically few or zero Disputes depending on history.

It is necessary to think about how to add value to the business and how to manage conflicts in projects. It is also noteworthy that Multilateral Development Banks (IDB) adopt these models in order to mitigate risks with high resolution rates, avoiding Litigation.

Committee activities

The best time for the Committee to exist is at the beginning. Where all data and participation are full. This is proven by studies where almost all of the issues brought to the CRD are definitively resolved.

The methodology of dealing with individual issues prevents them from accumulating or becoming complex. The great advantage in the end is its conclusion, as in this case there would be a commitment not to stand still and the financial results to be the fairest possible, with gains for both sides .

The DB process is included in construction contracts to help project participants avoid litigation in the first place and utilize an established dispute resolution methodology. A DB is typically comprised of a panel of three respected and impartial professionals with experience in the specific type of construction proposed and who assist in avoiding and resolving disputes.

To implement a DRB, Board members are selected and approved by the owner and contractor shortly after contract award. Board members are provided with all contract documents and copies of construction progress reports and records of weekly project meetings. This way, the DRB is kept up to date with work progress and is ready to address issues and disputes as they arise.

There is a set of essential provisions that must be included in the contract specifications to ensure the success of the DB process, as well as linking to a standard for example FIDIC. These provisions contain requirements that are not found in other alternative dispute resolution concepts. Revision or deletion of any of these provisions puts the success of the DB process at risk; the effectiveness of the DB and the quality of its contributions to the parties may be seriously compromised.

Contract specifications should provide that the contractor or owner may refer any issue to DB once it is clear, in the opinion of either party, that a dispute or controversy exists and is unlikely to be resolved without DB's participation. Furthermore, the guide specifications allow refer a dispute to a DB hearing if the other party fails to comply with its contracts or reasonable deadlines for dealing with the dispute.

The commitment clauses can be empty, in which the parties choose to resolve any conflicts through the CRD, but do not indicate the requirements for the installation of the Committee, for example whether the CRD will be ad hoc or institutional, how many members it will have or who will be the members, what will be the language used, or the location of the meetings or on the other hand the use of a CRD linked to a specific Chamber, which already has regulations.

In relation to the full clause, it does not provide any doubt regarding the establishment of the Committee, which contains all the necessary requirements for application.

Regarding the tiered clause, there are multiple possibilities for combinations, widely adopted by FIDIC.

IDB (Inter-American Development Bank)

In general, the IDB usually finances projects aimed at economic and social development. One of its requirements is the prevention and rapid resolution of disputes. It is in this direction that the use of CRD has been widely used and with great success. It is important to say that we are talking about many contracts and a lot of money involved, and with that there is also a high risk.

The way to connect the contract with the necessary protection for the IDB of its various projects is normally included in the General Conditions of the Contract, following the FIDIC, which mention the Dispute Resolution Committee.

FINAL CONSIDERATIONS

Although DB is the most renowned form of dispute prevention around the world, with wide application in European countries and the United States, it is an alternative method of great success that has already been proven, although it is still little used in Brazil.

The prevention of any type of conflict in a globalized world, where the essence is relationships, it is necessary to respect contracts, avoiding any type of economic imbalance for any party.

Legal certainty is essential for the continuity and validity of any contract. The rigidity of the various laws at some point requires arbitration or other alternative means of resolving disputes. In the same way that Arbitration in Brazil only advanced after 2001 with its recognition by the Federal Supreme Court, the culture for its use is still in need of total success compared to that already applied throughout the world.

DB originates from common law countries, such as the United States and England, so its application does not depend exclusively on the legal system, where the parties have broad freedom to contractually choose the rules that suit them.

I recognize that any method of resolving disputes must have a supported decision. The decision, however, whether such a decision is binding or non-binding depends on the decision of the parties.

Unlike Brazil, there is very little specific doctrine on Construction Law. It is important to understand that good project and contract practices, which use methodology in their General conditions, in particular, for the practice of Dispute Resolution, notably bring better performance, lower costs and deadlines maintained without downtime.

Anyone who has faced a claims challenge, on the front line of work, where there are high impasses, will notably prefer a conciliation model that brings quick solutions and does not impact work.

Claims by contractors against owners on behalf of subcontractors or suppliers (pass-through claims) may be heard by the DB. Disputes of a subcontractor or supplier with the contractor, or both owner and contractor, cannot be considered by DB.

However, there are major challenges to be achieved, in relation to changing culture, greater training and availability of professionals, in addition to the need for an aligned vision of businesspeople today, given the long time that justice takes to resolve controversies and the impacts resulting.

Alternative means of resolving disputes presuppose that the parties reach an amicable solution to the conflict, otherwise they may take the dispute to arbitration or state jurisdiction.

Given everything that has already been explained, the use of Dispute Boards is a strong trend, both in national and international contracts, and over time it will become more and more used.

Thinking that any contract will have a breeze or a perfect world is a great illusion. There will always be situations to resolve. The use of DB encourages national development, foreign and/or external investments and allows for greater efficiency and speed in concluding contracts, using experts recognized by both parties.