

CICA Seminar : Construction Dispute Resolution

**The Role of Dispute Avoidance and
Adjudication Boards in the new FIDIC models
of contracts**

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What is a 'dispute board'?

- *'A job-site dispute avoidance and adjudication process'* (Peter Chapman)
- Panel of 1 – 3 construction professionals with a mission to:
 - Assist the parties to avoid formal dispute resolution
 - Provide quick and relatively cheap decisions on disputes
- Decisions may be 'appealed' to arbitration/courts but whole purpose is to render such lengthy and costly proceedings unnecessary

Genesis of dispute boards

- A creature of contract not law
 - Involvement of independent neutral, instead of adjudication by employer-appointed engineer
 - A response by construction industry to challenge of dealing effectively with growth in claims/disputes
- Originally 'Made in the USA'
 - Boundary Dam, Washington State – 1960s
 - El Cajon Dam/HPP, Honduras -1980 (WB funding)
 - Hong Kong Airport / Channel Tunnel / Panama Canal
- An Anglo-Saxon / Common Law response to aspects of Anglo-Saxon contract management style

Dispute boards and FIDIC

- Stand-alone FIDIC DB procedure published in 1990s
- Standard feature in main FIDIC forms of 1999
 - Construction contract (Red Book)
 - Design and build contract (Yellow Book)
 - EPC turnkey contract (Silver Book)
- Procedural Rules and Dispute Adjudication Agreement Conditions also proposed
- Dispute board members
 - FIDIC President's List (www.fidic.org)
 - National lists – France, Germany, Japan and others

Dispute boards under the FIDIC 1999 editions

- Adjudication of disputes rather than recommendations
- ‘Standing’ board (Red Book)
 - Appointment at beginning and for duration of contract
 - Regular updates on progress and site visits
- ‘Ad hoc’ board (Yellow and Silver Books)
 - Appointment only once dispute has arisen, and limited to that dispute
- Essentially a formal dispute resolution function
 - Possibility under Red Book for parties to agree to refer a matter to dispute board for a non-binding opinion
 - Overall more reactive than proactive

Dispute boards under the FIDIC 1999 editions

- Max. 84 days from Referral to Decision – unless parties agree to extension
- Decision binding on parties '*who shall promptly give effect to it*'
- Service of Notice of Dissatisfaction within 28 days allows Decision to be 'appealed' to arbitration
- If no NoD, Decision final and binding
- Any failure to comply may be referred to arbitration

Issues with FIDIC 1999 editions

- Key concerns addressed in 2017 editions
 - Constitution and payment of dispute board
 - Constitution procedure reliant on party collaboration
 - Clarification of role of Appointing Entity where lack of party collaboration
 - Use of contractual payment mechanism to ensure contractor recovers 50% share of apyment from employer
 - Enforcement of binding but not final Decisions
 - Issue of whether failure to comply with Decision was to be referred back to dispute board as a new dispute, or could be referred directly to arbitration – the Persero cases
 - 2008 Gold Book solution of direct referral of all dispute board decisions to arbitration retained in 2017 editions

FIDIC 2017 – the advent of the DAAB

- The '*Dispute Adjudication Board*' becomes the '*Dispute Avoidance/Adjudication Board*'
- Proposed for each of Red, Yellow and Silver Books
- Focus on dispute avoidance
 - '*... FIDIC strongly recommends that the DAAB be appointed as a 'standing DAAB' that is a DAAB that is appointed at the start of the Contract who visits the site on a regular basis and remains in place for the duration of the Contract to assist the Parties a) in the avoidance of disputes, and b) in the 'real-time resolution of disputes if and when they arise, to achieve a successful project.'* (FIDIC Guidance Notes)
- Guidance notes also propose alternative wording if parties prefer 'Ad Hoc' alternative

The DAAB and dispute avoidance

- GC 21.3 : Avoidance of Disputes
 - Only following joint request from parties *‘to provide assistance and/or informally discuss and attempt to resolve any issue or disagreement that may have arisen between them during the performance of the contract’*.
 - *‘If the DAAB becomes aware of an issue or disagreement, it may invite the Parties to make such a joint request’*.
 - Request not possible while Engineer dealing with matter in issue
 - *‘Such informal assistance may take place during any meeting, Site Visit, or otherwise. However, unless the Parties agree otherwise, both Parties shall be present at such discussions’*.
 - Parties may jointly seek informal assistance during hearings
 - Parties not bound to act on any advice given, nor is DAAB itself bound by any views expressed

Meetings and site visits

- Greatly expanded provisions in DAAB Procedural Rules to clarify conditions in which DAAB may
 - Provide informal assistance
 - *'...become aware of, and remain informed about, any actual or potential issue or disagreement between the Parties'*
- New provisions regarding
 - DAAB site visits as a party's request 'at times of critical construction events (which may include suspension of the Works or termination of the Contract)'
 - Urgent meetings / site visits

How proactive may a FIDIC DAAB be?

- Common feature of new FIDIC dispute avoidance provisions is requirement for initiative to come from the parties
- Compare ICC Dispute Board Rules (2015)
 - *‘If at any time...the DB considers that there may be a potential Disagreement between the Parties, the DB may raise this with the Parties with a view to encouraging the Parties to avoid the Disagreement on their own...’* (Art. 16)
 - *‘On its own initiative...and with the agreement of all of the Parties, the DB may informally assist the Parties in resolving any Disagreement...’* (Art. 17.1)
 - *‘The informal assistance of the DB may take the form of... one or more separate meetings between the DB and any Party with the prior agreement of all of the Parties...’* (Art. 17.2)
- How compatible are informal assistance and formal dispute resolution by the same dispute board?

Formal dispute resolution by DAAB

- A range of new or expanded provisions in FIDIC 2017
 - Any Referral to DAAB following service of a Notice of dissatisfaction with a Determination of Engineer (RB/YB)/Employer's Representative (SB) must be made within 42 days
 - More detailed Procedural Rules for all stages of the process, including new provisions such as power to *'adjourn any hearing as and when the DAAB considers further investigation by one Party or both Parties would benefit resolution of the Dispute, for such time as the investigation is carried out, and resume the hearing promptly thereafter'*

Extension of DAAB role – under discussion

- World Bank Particular Conditions for use with FIDIC forms include enhanced social and environmental obligations
- Particular focus on issues of
 - Gender-based violence (GBV) and
 - Sexual exploitation and assault (SEA)
- Provisions under consideration to extend DAAB role to decide on alleged breaches of contractor's compliance with arrangements put in place to monitor its own GBV and SEA obligations
 - But not to investigate alleged GBV/SEA incidents

415

Partners

2200

Legal
professionals

3800

Total staff

50+

Offices* worldwide

* Includes associated offices