Dispute Adjudication Boards: Are they the future of dispute resolution?[1]

Contractors who are working in international markets will almost certainly have encountered the Dispute Adjudication Board ("**DAB**") contained in each of the FIDIC Red, Yellow, Silver and Gold Books. However, they may be left with many questions as to why it exists, what it is supposed to achieve, why it is frequently deleted from FIDIC contracts in some markets and how it differs from arbitration. For those outside the construction industry, even the concept of a DAB may be entirely unfamiliar even though it is being gradually extended to contracts in other industries. Notably, the ICC launched its own Dispute Board procedure on 13 October 2014 so the spread of dispute boards is likely to continue—they are particularly suitable for contracts in which many individual disputes may arise.

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The term "dispute board" describes a person or a panel of individuals (usually 3) who, under the terms of the contract either:

- provide non-binding recommendations to the contracting parties on issues arising; and/or
- make binding decisions in relation to such matters.

If the decisions are non-binding and merely advisory, this is generally referred to as a dispute review board. In contrast, if the decisions are agreed to have binding effect between the parties, this is known as a dispute adjudication board or DAB. In the 1999 "rainbow suite" of FIDIC contracts, FIDIC opted to use the DAB form—accordingly, due to the widespread use of FIDIC forms internationally, this has become the dominant form.

1 In addition to sources cited within this article, I have benefitted greatly from discussions on the topic of DABs over the years with my colleagues at White & Case LLP – notably Ellis Baker, Julian Bailey, Phillip Capper, Anthony Lavers and Christopher Seppälä (although none of them bear any responsibility for this article). The views expressed are mine alone.

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The purpose of this article is to de-mystify the DAB by considering its application in practice. The unique nature of the DAB means that many legal issues arise (some of which have been considered by the courts). They are touched on in this article but the focus is on how DABs work in practice rather than the conceptual issues that arise.[2] Although various forms of dispute board exist, both in standard forms and used on a bespoke basis for major projects, this article will focus on the FIDIC DAB form because it is the most likely to be encountered in practice. Similarly, the FIDIC terms "employer" and "contractor" are used to describe the parties under the applicable FIDIC contract.

History[3]

The first recorded use of a dispute board was on Boundary Dam in Washington in the 1960s (known as the "Joint Consulting Board"). It then received a boost due to the publication of a report by the US National Committee on Tunnelling Technology entitled "Better Contracting for Underground Construction" highlighting a familiar litany of undesirable consequences of claims, disputes and litigation. As a result, a dispute board was established for the Eisenhower Tunnel project in Colorado and its success gradually led to the widespread use of dispute boards throughout the US.

Dispute boards went international with the El Cajon Dam and Hydropower Project in Honduras. This project was part funded by the World Bank who, mindful of the inexperience of the Honduras Electricity Company in managing such a major project with international contractors, pushed for a US-style dispute board.[4] The use of the dispute board was perceived as successful, leading to further use on international projects.

The FIDIC DAB

At the same time as this development of dispute boards was taking place, FIDIC was facing criticism over the role of the "Engineer" within its standard form contracts. Although the Engineer was empowered to make determinations under the contracts, contractors were distrustful of the independence of the Engineer given that they were appointed by the employer. These two streams came together in the new FIDIC "rainbow" suite of contracts introduced in 1999.[5] The FIDIC approach to dispute boards was to make the decisions binding (the same approach as the FIDIC contracts had always taken to the decisions of the Engineer) rather than mere recommendations and so the DAB as we know it today was established.

In addition to establishing the DAB form of dispute boards, FIDIC also introduced two distinct kinds of DABs—the "full-term" or "standing" DAB as provided for in the FIDIC Red Book contract and the "ad hoc" DAB provided for in the Yellow Book and Silver Book contracts.[6] There was a certain logic to that distinction in that the nature of the contracts is different with a greater degree of off-site activities undertaken by the Contractor in the Yellow Book and the Silver Book (a point implicitly made in the FIDIC Contracts Guide in its guidance on clause 20.2). Although the FIDIC Contracts Guide is at pains to emphasise that the parties should consider which arrangement is better and draft accordingly, it is the author's experience that the vast majority of contracts either follow the FIDIC standard approach or delete the provisions entirely (see further discussion on deletion below).

Given the historic powers of the Engineer under FIDIC contracts, it was not surprising that the dispute board was given powers to make decisions which were binding on an interim basis. It should also be noted that the rainbow suite was introduced shortly after the UK had pioneered statutory adjudication due to a concern that subcontractors (in particular) were being starved of vital cash-flow. The idea of making decisions binding was therefore in line with the prevailing view about how to improve the operation of construction projects.

2 For those interested in considering these in more detail, a recent paper considering numerous conceptual issues is Bailey, *Current Issues with FIDIC Dispute Adjudication Boards*, Society of Construction Law, January 2015, D176. Many of them are also discussed in Chapter 9 of Baker et al, *FIDIC Contracts: Law and Practice* (Informa, 2009).

3 This section draws on Chapman—*The Use of Dispute Boards on Major Infrastructure Projects*, The Turkish Commercial Law Review, Vol 1, Issue 3, October 2015.

4 The popularity of dispute boards with multilateral development banks continues to this day.

5 FIDIC had introduced the concept slightly earlier in its Design-Build Contract and with an optional amendment to its other standard form contracts.

6 For completeness, it should be noted that the later Gold Book provides for a standing DAB.

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The move away from the previously standard approach of a "standing" dispute board was more surprising and, it is fair to say, has not been welcomed by those actively involved as dispute board members.[7] Again, the FIDIC Contracts Guide gives an indication as to the thinking behind this approach by frequently referencing economic justifications in its discussion of the appropriate choice of DAB.[8] An ad hoc DAB is certainly cheaper than the standing DAB but if cost is the only concern, this could be mitigated by removing the monthly stipend which the standing DAB receives under the standard FIDIC terms. It may also be noted that the ad hoc DAB is more similar to the statutory adjudication which had been introduced in the UK a short time earlier so FIDIC was certainly in line with that approach (which later spread widely throughout Commonwealth jurisdictions).

As discussed below, the FIDIC DAB is not popular with all employers, many of whom remove the provisions. However, multilateral banks have remained enthusiastic supporters—not only is the DAB included in the MDB Harmonised Conditions of Contract for Construction (popularly known as the Pink Book) but also multilateral banks are strongly of the view that it is not to be removed. Accordingly, projects funded by multilateral banks almost invariably contain dispute board provisions and the banks also encourage compliance with the process.

Practical issues with the FIDIC DAB

Establishment of the DAB and availability of arbitration

The first issue that a contractor may encounter is the removal of the DAB completely. This seems particularly prevalent in the Middle East markets which may be linked to concerns about the independence of the DAB as well as a desire to resolve all matters at the end of the project. The usual justification given for the deletion is the cost of funding a standing DAB. However, if cost is the real concern, an ad hoc DAB or modified form of standing DAB could be used and contractors should certainly consider proposing that in negotiations.

Ultimately, whether a DAB is agreed or not is a commercial decision between the employer and the contractor but if a DAB is not going to be included, it should be fully excised in the amendments. An unfortunate situation which sometimes occurs is when the DAB is partially deleted from the contract. This introduces considerable confusion and leaves both sides unclear as to whether they need to proceed with the DAB appointment or go straight to arbitration.

A related practical issue is that neither the standing nor the ad hoc DAB is established on signing of the contract. Rather, the FIDIC Red Book envisages that the DAB is appointed by date specified in the Appendix to Tender and the Yellow and Silver Books only after a dispute has arisen. What happens if one side obstructs the formation of the DAB or, in the case of a standing DAB, the parties simply neglect to move forward with the necessary steps to form that DAB?[9] The FIDIC contracts deal with this scenario in sub-clause 20.8—Expiry of Dispute Adjudication Board's Appointment. Despite the title of the sub-clause, the provisions are not limited to the circumstances in which the DAB's appointment expires. Sub-clause 20.8 provides as follows:

> "If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:
>
> - Sub-Clause 20.4 [*Obtaining Dispute Adjudication Board's Decision*] and Sub-Clause 20.5 [*Amicable Settlement*] shall not apply, and
> - the dispute may be referred directly to arbitration under Sub-Clause 20.6 [*Arbitration*]".

The reference to "or otherwise" seems to make it clear that if one party's intransigence means that a DAB is not appointed, the other party can then proceed straight to arbitration (and

7 Peter Chapman refers to "*enlightened owners*" using a "*standard dispute board despite using the Yellow and Silver Books*" (Chapman—*The Use of Dispute Boards on Major Infrastructure Projects*, The Turkish Commercial Law Review, Vol 1, Issue 3, October 2015 at page 221). In the author's experience, this accurately represents the generally prevailing view amongst dispute board members.

8 This perhaps most clearly referenced in sub-paragraphs (a) and (d) to the discussion in 20.2.

9 Again, this appears a surprisingly common occurrence in practice.

this is supported by the FIDIC Contracts Guide). Furthermore, a recent Swiss Federal Supreme Court decision[10] considered precisely this issue. The gist of the Swiss Federal Supreme Court decision was that whilst the DAB was, in general, a mandatory pre-condition to arbitration, the employer in that case could not insist on the application of the pre-condition due to its own failures to operate the clause in good faith leading to the absence of the DAB.[11] However, the Swiss Federal Supreme Court declined to follow the contractor's suggestion that the words "or otherwise" gave it a wide opt-out from the DAB provisions in all circumstances in which the DAB was not implemented. In this way, the Swiss Federal Supreme Court managed to preserve the intent of the FIDIC approach to DABs but give a practical way out where the process was simply not working.

The reason for the Swiss Federal Supreme Court's caution can be seen from even more recent English case of *Peterborough City Council v. Enterprise Managed Services Ltd*[12], which concerned a Silver Book contract but with the final recourse being to the courts rather than arbitrators. In this case, the employer tried to simply ignore the DAB and proceed with a court action. The contractor immediately applied for a stay of the court action on the grounds that the parties needed to first follow the DAB process in the contract. The employer resisted on three main grounds:

- on the rather audacious suggestion that the DAB provisions were unenforceable (primarily on the basis of the enforcement issues discussed below);
- on the similarly audacious suggestion that because it was an ad hoc DAB, there was (and could be) no DAB in place when the dispute arose;[13] and
- on the grounds that the DAB process was, in the context of the particular contract, pointless and should be dispensed with.

The first argument was dismissed shortly on the basis that it was untenable in the context that subsequent recourse was to the courts rather than arbitration.[14] Whilst the second argument is tenable on the words of sub-clause 20.8, it would effectively render the use of an ad hoc DAB optional and so this was also forcefully rejected by the court.[15] The judge had more sympathy for the third suggestion but ultimately rejected it in favour of making the parties follow the dispute resolution procedure which they had agreed in the contract. Given that arbitrators would not have the judicial discretion available to the judge in this case, it can be expected that an arbitral tribunal would be even less likely to accept jurisdiction over the dispute if one party had ignored the DAB and sought to go straight to arbitration.

Still, there are many further permutations in relation to the non-appointment of DABs and the expiry of their mandate. Experience shows that one side frequently wants to bypass the DAB and go straight to arbitration whereas the other side wants to maintain the DAB procedure. Parties can be inventive about how they try to manoeuvre the situation.

In the case of a standing DAB, the major learning point is that the parties should proceed to have the standing DAB appointed as soon as possible. If the parties are concerned about the cost, they can negotiate to reduce or remove the monthly stipend. In the case of an ad hoc DAB, the parties should try to ensure that the scope for disputes about the appointment is minimised (for example, by following the FIDIC suggestion of a list of pre-approved individuals named in the Contract). A further point to bear in mind with an ad hoc DAB is the referral of future disputes to it—is there only going to be one ad hoc DAB or do the parties accept the possibility of multiple ad hoc DABs? Again, drafting clarity on the point is recommended.

10 4A_124/2014 (unofficial English translation may be found at www.swissarbitrationdecisions.com).

11 Similarly, the FIDIC Contracts Guide states "If one Party prevents a DAB being in place, it would be in breach of contract. Sub-Clause 20.8 then provides a solution for the other Party, which is entitled to submit all disputes (and this breach) directly to arbitration."

12 [2014] EWHC 3193 (TCC).

13 The possibility of this argument was outlined in Baker et al, *FIDIC Contracts: Law and Practice* (Informa, 2009).

14 In the light of the decision in the second *Persero* case discussed below, this argument is unlikely to find favour even in the usual case where the subsequent recourse is to arbitration.

15 At paragraph 33, Edwards-Stuart J suggests that sub-clause 20.8 "probably applies only in cases where the contract provides for a standing DAB, rather than the procedure of appointing an *ad hoc* DAB after a dispute has arisen." This suggestion may go too far.

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Enforcing the decisions of the DAB

Since the introduction of the FIDIC DAB, it is likely that more lawyers' ink has been spilled on the topic of **enforceability** of the DAB's decision than any other matter. This includes 4 Singapore court decisions on one case (two at first instance and two in the Court of Appeal),[16] plus numerous law firm publications and academic articles discussing the case and one FIDIC guidance note responding to it.[17]

This article is not the place for a detailed discussion of the history or potential issues arising from the drafting.[18] The short point is that there is a practical difficulty in ensuring that the binding decisions of the DAB can be enforced because there would rarely be access to the courts to ensure that decisions were enforced (as would be the case with statutory adjudication). Furthermore, arbitrators may be reluctant to make an award requiring compliance with a DAB decision without examining the merits of that decision.

However, the final decision of a majority of the Singapore Court of Appeal in the "Persero" case[19] is likely to enhance the enforceability of the DAB's decisions. Menon CJ and Loh J delivered a decision which was notable both for its robust dismissal of some of the academic arguments based on a close textual analysis of the applicable sub-clause and for its pragmatism in recognising the benefits of enhancing the enforcement of DABs. Indeed, the majority further expressed the view (obiter) that an arbitral tribunal could order a final (rather than interim) award requiring compliance with the DAB's decision if that is all that the tribunal was asked to rule on.

Although the multiplicity of views expressed by the variety of Singapore courts and dissenting judges who have considered the matter may lead some to suggest that the position is unclear, it is submitted that the majority decision of the Singapore Court of Appeal is likely to find favour. It will give arbitrators confidence that they can order compliance with a DAB's decision (whether on an interim or final basis).

Of course, if a party is unhappy with the decision of a DAB, it is unlikely to want to comply with it. Indeed, certain parties may even have great difficulties explaining why it should comply with a decision of DAB which might be overturned in arbitration (this was certainly an issue on a matter that the author was involved in). One course open to such a party is to seize the initiative by commencing arbitration at the end of the amicable settlement period seeking to overturn the DAB's decision as opposed to simply sitting back (as Persero did). This both respects the intended approach of the FIDIC contracts and puts considerable pressure on the other side.

Getting the best results from DABs

This final section considers how DABs operate in practice and how parties can get the best results from using them. There is no doubt that DABs work best when there is a respect on both sides for the process. In such circumstances, parties may well be prepared to let a DAB decision stand in the expectation that a future one may be in their favour. This is similar to statutory adjudication where parties are often content with slightly "rough and ready" decisions if reached fairly and promptly.

On the other hand, there are also projects in which one or both parties simply serves a notice of dissatisfaction to *every* DAB decision as a matter of course. If matters have reached this stage, it probably makes sense for the parties to see if they can agree that matters proceed straight to arbitration since the DAB is not performing its intended function. In order to avoid things getting to this position, it is worth the parties holding an early meeting with the DAB in order to ensure that there is a good understanding of the process on both sides before the project ramps up significantly.

16 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* – [2010] 4 SLR 672; [2011] 4 SLR 305; [2014] SGHC 146 and [2015] SGCA 30.
17 FIDIC Guidance Memorandum to Users of the 1999 Conditions of Contract dated 1 April 2013.
18 For those interested, Seppälä (2015) Const L.J., Issue 7, pages 367 to 374 is a short and incisive discussion of the case and final outcome.
19 *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* – [2010] 4 SLR 672; [2011] 4 SLR 305; [2014] SGHC 146 and [2015] SGCA 30.

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A further consideration is the process undertaken by the DAB. It is evident that the FIDIC contracts give a great deal of latitude to the DAB in how it seeks to resolve disputes. The procedural rules attached as an Annex to the form of Dispute Adjudication Agreement notably specifically allow an inquisitorial approach and for the DAB to "take the initiative in ascertaining the facts and matters required for a decision." Nonetheless, despite FIDIC's attempts to avoid the DAB process to turn into a mini-arbitration, that is often the outcome in practice. Again, an early engagement with the DAB is the best approach if the parties want to use the DAB more creatively than simply for rough and ready dispute resolution.

It is still the norm that external lawyers are not "on the record" for DAB proceedings (although this may well be the case for larger disputes). Nonetheless, the absence of external lawyers in the DAB proceedings does not necessarily mean they are not involved. We are frequently asked to advise "behind the scenes" in terms of the approach which a party wants to put forward in DAB proceedings. Indeed, this is to be recommended in all but simple cases. Suitable external counsel can advise on multiple issues including:

- arguments which are likely to be well (or badly) received by a particular individual;
- how to avoid elements of the DAB process being used against a party in arbitration;
- which arguments should be dropped or re-formulated;
- potential new arguments to use with the DAB; and
- avoiding some of the pitfalls described elsewhere in the article.

In summary, the DAB is an increasingly important part of international construction contracts and needs to be well understood by any party who is entering into such contracts. There are undoubtedly pitfalls in the use of DABs but they are also a powerful tool for resolving disputes before the parties move ahead with an arbitration. Practically speaking, contractors should take the initiative at an early stage in order to get best use of the DABs and obtain the employer's consent to respect the process. This should avoid the position where both sides are antagonistic and treat the DAB only as a short form of arbitration.

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