

The FIDIC Experience with Dispute Boards

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Agenda

- Dispute Resolution Under FIDIC Contracts
- Dispute Boards Under FIDIC Contracts
 - Practical Implementation
 - Case Study
- The Way Forward?
 - Updates under consideration
 - Discussion/Participants experience using FIDIC DAB Procedures
 - Recommendations to Updates Task Group



ADR Techniques

Binding/Enforceable →

Preventative	Unassisted	Third Party Assistance	Third Party Decision Making		
<ul style="list-style-type: none"> • Training • Joint Planning 	Negotiation	Dispute Review Boards	Dispute Adjudication Boards	Arbitration	
		Mediation/ Conciliation			
	Early Neutral Evaluation				
		Expert Determination (non-binding)	Expert Determination (binding)		

← Party Control



Dispute Boards

- Timing of appointment of DB members
 - Ad hoc v. standing
 - Appointed when dispute arises (ad hoc)
 - Appointed at start of project, for the duration (standing)
- Nature of output of DB
 - Decision v. Recommendation
 - Dispute Review Boards (DRB)
 - Dispute Adjudication Boards (DAB)



Dispute Boards

- DRB provides *recommendations*
 - Art 4.2 , ICC Rules for DB:
 - “Upon receipt of a Recommendation, the Parties may comply with it voluntarily but are not required to do so.”
- DAB renders contractually enforceable *decisions*
 - Introduction, ICC DB Rules (2004)
 - “Determinations of Dispute Boards are not enforceable at law as such, although they may become contractually binding on the Parties as described below. Hence, **Dispute Board Members do not act as arbitrators.**” (emphasis added)



Dispute Boards Under FIDIC Conditions of Contract

- DAB method adopted by FIDIC
 - Red, Yellow, Silver and Green
 - Gold and Blue
- Standing v. Ad-hoc
 - Standing DAB
 - Red and Gold
 - Ad-hoc
 - Yellow, Silver, Green and Blue



DAB Under the FIDIC Conditions of Contract

- Sub-Clause 20.2
 - “Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4...”
- Sub-Clause 20.4
 - “...Within 84 days...the DAB shall give its decision, which shall be reasoned....**The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in amicable settlement or an arbitral award...**”
(emphasis added)

FIDIC DAB -- A Case Study

- Background
 - Large infrastructure project in the Middle East
 - World Bank Funded
 - Pink Book
 - European Contractor
 - ≈ 5 year project execution
 - Standing DB
 - Employer -- Engineer (country national)
 - Contractor -- Quantity Surveyor (UK)
 - Chair – Lawyer (Germany)



FIDIC DAB -- A Case Study

- Background
 - Board constituted 8-10 months into project
 - DB able to become familiar with project
 - Procedural process established from the outset
 - Included site visits
 - 3-4 times per year
 - DB decisions rendered within 56 days
 - Reasoned
 - Less formal hearings
 - Parties (not counsel) present at hearings



FIDIC DAB Case Study

Lessons Learned

- Constitute the DB in a timely manner – at the start
 - Must be part of funding considerations (MDBs)
 - Standing DAB allowed for development of internal DB dynamics
 - Getting the members all on the same page
 - Site visits allow for deeper understanding of facts
 - All memories fresh at the hearing
- Choose your members wisely
 - Understand the skill set required
 - Terms of reference between Parties and DB
 - Role and limitations



FIDIC DAB Case Study

Lessons Learned

- Expectations and process must be managed by DB
 - Define and document process early
 - Helped to minimize procedural posturing during hearings
 - No counsel were present at hearings – parties
 - Helped avoid frivolous claims and preserve relationships
 - Contractor was not claims minded
 - Facilitated cooperation & positive working relations
 - DAB internally
 - Employer/Contractor
 - Well reasoned decisions helped promote positive process



Lessons Learned Summary

- Choose correctly
 - DRB v. DAB
 - Standing v. ad-hoc
 - Composition of DB
- Ensure understanding of process
- Ensure compliance with applicable legal system
- Jointly define procedures
 - Rules
 - Establishing a 'common culture'



The Way Forward

- Updates under consideration by the FIDIC Update Task Group include:
 - Standing DAB
 - Red, Yellow and Silver
 - Highlight DAB's role in dispute avoidance
 - Closing the 20.7 gap
- Recommendations to the Updates Task Group?
 - Process
 - Procedure

