The FIDIC Experience with Dispute Boards

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The FIDIC Experience with Dispute Adjudication Boards (DABs)

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
# The FIDIC Experience with Dispute Adjudication Boards (DABs)

## ADR Techniques

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<td>Expert Determination (non-binding)</td>
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<td>Expert Determination (binding)</td>
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- **Binding/Enforceable**
- **Party Control**

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*12th Annual DRBF International Conference • Sydney, Australia • 3-5 May 2012*

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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)
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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
    - “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
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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’
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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