



THE 1999 FIDIC CONDITIONS OF CONTRACT

DISPUTE ADJUDICATION BOARD

This document is intended for the specific use of DRBF 14th Annual International Conference 2014, with the expressed consent of Mr. Michael Mortimer-Hawkins who is a past Chairman of FIDIC Contracts Committee (1999 – 2000).

Singapore,
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Procedures

Normally a dispute will be submitted for adjudication if:

- A determination by the Engineer has been rejected
- Discussions between the Parties to reach agreement have failed
- One Party refuses to attempt agreement
- Discussions are so protracted that it is unlikely agreement will be reached

The members of the DAB must remember at all times that they are, and must be seen to be, **impartial and independent.**

The role of the DAB in the Contract is to settle disputes.

Let us consider a 'full term' DAB with 3 members.

One of the advantages of a 'full term' DAB is that it has the opportunity to follow the progress of the Works and is usually aware of circumstances and events – as they develop – which could lead to a potential dispute. They do this through regular Site Visits as the Works proceed.

Site Visits.

Site Visits should be at about 3 month intervals – say 4 visits a year. If possible, the dates should be agreed as far ahead as possible to ensure that everyone is available.

The advantages of the Site Visit are:

- The DAB becomes an accepted part of the Site team and respected by both parties.
- They can follow the progress of the Works through good times and bad, and can see for themselves the difficulties and on-going events. When a dispute arises, they do not have to 'reconstruct' the events to understand the dispute.
- Regular meetings and discussion with the DAB – even if there is no dispute – can often help in avoiding conflicts.

- The need for reports/records
 - Monthly progress reports from Site
 - Brief log of activities performed during visit – meetings, inspections etc.
 - Notes of on-going events and potential and/or actual claims.

Thus, by being aware of on-going claims (submitted under Clause 20.1) – and the comments by the Parties in respect of those claims, the DAB can often foresee potential disputes developing, and by the time the dispute is submitted to the DAB, the DAB is well prepared to handle it.

Although the Claimant has the ‘burden of proof’ to support and prove his claim, the DAB will be well armed with its own record and on-Site knowledge about the events in question.

Receiving a Dispute

The Party submitting a Dispute to Adjudication is called the Claimant.

The Adjudication process begins when the Claimant gives Notice – or makes a Referral – to the Chairman of the DAB.

Clause 20.4 of the Contract requires the DAB to give its Decision within 84 days from when the Chairman receives the Referral.

This may seem a long time, but let us consider what the DAB has to do before giving its Decision – maybe 84 days is not such a long time after all. (And if one compares the process with the time taken for Arbitration, it is a very short time!)

The Chairman of the DAB must first prepare a programme for the DAB to work to.

A typical time-table for a DAB could be as follows:

Day 1	Referral or Notice (with or without Claimant’s Submission)
Day 14	Claimant’s Submission (if not submitted with Referral)
Day 35	Responding Party (Respondent) Submission
	Reading and analysis of Submissions
	Internal DAB meetings
	Identification of points for clarification or further information
Day 49	Request to Parties for further information
Day 56	Information submitted and studied by DAB
Day 63	Hearing on Site

	Further DAB meeting
	Decision and Reasoning
	Report
Day 84	Delivery of Report and Decision to Parties.

Once given, the Decision of the DAB is binding on the Parties, and the Parties must give effect to the Decision immediately –i.e. monies must be paid, time extensions must be given and completion dates re-set.

However, either Party has the right to appeal against the Decision. If they want to do this, they must do so with 28 days of the Decision being given – and they do this by submitting the Decision to Arbitration.

If they do not appeal within 28 days, then the Decision becomes final.

What Happens at the Hearing?

The Hearing is the opportunity for the DAB to meet both parties (usually, but not necessarily on Site) in order to take up any matter arising from their Submissions in order to have a full understanding of:

- The facts surrounding the dispute
- The Claimant's interpretation of those facts
- The Respondent's interpretation of those facts

The Hearing is more like a Site Meeting than a formal Court proceeding (as Arbitration tends to be). The procedure to be adopted by the DAB is essentially “inquisitorial” – i.e. finding the facts by questioning the Parties.

Although the DAB can, in effect, conduct the Hearings in any way they see fit, they must remember that there are certain things they should not do at the Hearing:

- They should not comment on the merits of either Party's written or oral submissions.
- They should not show favour or take sides.
- They should not express personal opinion.
- They should not allow the two parties to start attacking/questioning each other.

After each Party has spoken (or answered queries or provided clarifications), the other Party should be allowed to respond.

The DAB must remember throughout the Hearing that it is acting impartially.

After the Hearing, the DAB will need time to digest and consider the information it has received. It will usually wish to remain at the Site for a couple of days in case further points arise where they want clarification from the Parties.

The Decision

The written presentation of the Decision is very important. The intention is that both Parties, whether they win or lose, will accept it as being based on a fair and professional determination of the facts. If it is presented in a careless or unclear way, the risk is greater that one or other of the Parties will go to Arbitration in an attempt to get the Decision reversed.

The aim of the DAB is to reach an unanimous Decision – all three members agreeing. If this is not possible, it will be a majority Decision.

The Decision should be well structured and contain the following elements:

- The procedures and formalities adopted by the DAB
- Accurately describe the actual dispute as referred to it
- A brief description of the principal arguments and contentions of each party made both in their written Submissions and at the Hearing
- Must set out the findings of the DAB in respect of each aspect of the case where the Parties have expressed conflicting interpretation and opinion – with reasons. This is important so that the losing Party knows why it has lost.
- Must clearly and precisely give its Decision including details of any amounts to be paid by one Party to the other and any time extensions to be granted. This is important – firstly so both Parties clearly understand what they have to do, and secondly, in the event that either Party chooses to take the matter further (Arbitration), the arbitrators are in no doubt as to what the Decision is and how it was reached.
- Once the Decision – usually presented in the form of an Adjudicator’s Report – is prepared, it is signed by all members before being sent to both Parties. In the event that one member of the DAB is not in agreement with the majority opinion, he should be allowed to record his disagreement in the Adjudicator’s Report.

Once the reasoned Decision is given, it becomes immediately binding on the Parties and each Party must immediately put into effect the Decision of the DAB.

If either Party is dissatisfied with the Decision, they have 28 days to refer the matter to Arbitration (if they so wish). However, even if they do refer it to Arbitration, they still have to give effect to the Decision until the Decision is changed or reversed by Arbitration. If they fail to refer the matter to Arbitration within 28 days, then the Decision becomes finally binding.