

WELCOME

DRBF

Administration & Practice Workshop

Bogor, Indonesia, 5 August 2022

Dispute Resolution Board Foundation. *Moving projects forward* since 1996.



Today's Program

Session 1	9:00	Introduction to Dispute Boards (DBs)
Session 2	9:45	Selection & Appointment of DB Members and the DB Agreement
Tea/Coffee break	10:30	
Session 3	10:45	Site Visits & Meetings, Opinions
Lunch	11:30	
Session 4	13:30	Claims, Disputes, Referrals & Decisions
Session 5	14:15	Enforcement of DB Decisions
Session 6	15:45	Local Experiences, Q&A
End of Workshop	16:30	

OVERVIEW OF WORKSHOP

- **Brief history of Dispute Boards (DBs)**
- **Types of DBs and what they do**
- **Role of DBs in dispute resolution**
- **Formation of DBs and the selection and appointment of DB Members**
- **Procedures for making a referral to the DB**
- **Amicable settlement and enforcement of Decisions**

ANNEXURES

→ FIDIC Pink Book 2010

- Clause 20
- General Conditions of Dispute Adjudication Agreement
- Procedural Rules

→ FIDIC Red Book 2017

- Clauses 20 & 21
- General Conditions of Dispute Avoidance/Adjudication Agreement
- Procedural Rules



SESSION I: INTRODUCTION TO DISPUTE BOARDS

SESSION I

- ➔ Dispute Boards: Introduction & History
- ➔ Formation and Functions of Dispute Boards
- ➔ Ethics
- ➔ Selection and Appointment of Dispute Board Members
- ➔ Dispute Board Agreement



INTRODUCTION & HISTORY

What is a Dispute Board (DB)?

A Dispute Board (DAB/DRB/DB) is a board of **impartial professionals** formed at the **beginning of the project** to follow construction progress, **encourage dispute avoidance**, and **assist in the resolution of disputes** for the duration of the project.

Types of Dispute Board

→ **Dispute Review Board (DRB)**

→ Non binding recommendations (reject immediately)

→ **Dispute Adjudication Board (DAB)(DB)**

→ Binding decisions (accept or reject immediately, but binding until amicably settled / arbitral award)

→ **Combined Dispute Board (CDB)**

→ Parties may agree binding decision or recommendations

Other words to know:

→ **Dispute Resolution Expert (DRE)**

→ **Dispute Avoidance Boards (DAB)**

→ **Conflict Avoidance Panel (CAP)**

History of Dispute Boards

| 1970s: Tunneling industry studied

new approaches to dispute resolution

| **1975: First DRB used: I-70 Eisenhower Tunnel (2nd bore)**

| **1981: First international DB, El Cajon Dam, Honduras**

| **1992: FIDIC issues DAB Supplement to the 4th Ed. Red Book**

| **1995: The World Bank makes DBs mandatory for all World Bank-financed projects in excess of US \$50M**

| **1996: Dispute Resolution Board Foundation established; Dispute Board Manual published**

History of Dispute Boards

- 1997: Asian Development Bank & European Bank** adopt DB approach for reconstruction & development
- 1999: FIDIC rainbow suite introduces Standing and Ad Hoc Dispute Adjudication Boards**
- 2004: ICC** introduces DB rules (DRB/DAB/CDB)
- 2005: World Bank** (on behalf of all development banks/multilateral lending agencies) with FIDIC develop “harmonised” set of conditions with a DB
- 2006: 9 Multilateral Development Banks** adopt DBs, and ICC and ICE publish DB Rules

History of Dispute Boards

2007: The DRBF updates Dispute Board Manual

2008: DRBF expands to promotion and education worldwide

2010: Dispute prevention and avoidance becomes a major shift in focus for DBs

2013: DRBF Region 3 (Australasia) established

2016: The DRBF celebrates its 20th anniversary

2017: Indonesia includes DBs into Law

Concept of the Dispute Board

→ Dispute avoidance

- During periodic meetings, the **DB reviews the status** of outstanding issues and inquires about any potential disputes or claims.
- **Parties are invited to jointly seek “opinions”** at the outset of a dispute to put the matter to rest promptly .
- The **informal opinion is issued** at the request of **both parties**.

→ Dispute resolution

- **Resolution of claims in “real time” is critical** to the success of the dispute resolution process.
- The **DB will deliver a decision on a formal dispute** at the request of **one party**.

DRBF Statistical Database 1975 - 2017

Number of completed projects:

Over 2,800

Total construction value:

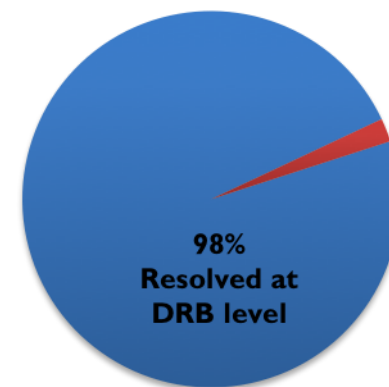
Over USD \$275 Billion

Dispute Board Track Record

The DRBF project database shows the process has resulted in a very high rate of success in resolving disputes.

*Resolution rate to date:
over 98% of matters going
to the DB **do not go** on to later
arbitration or litigation.*

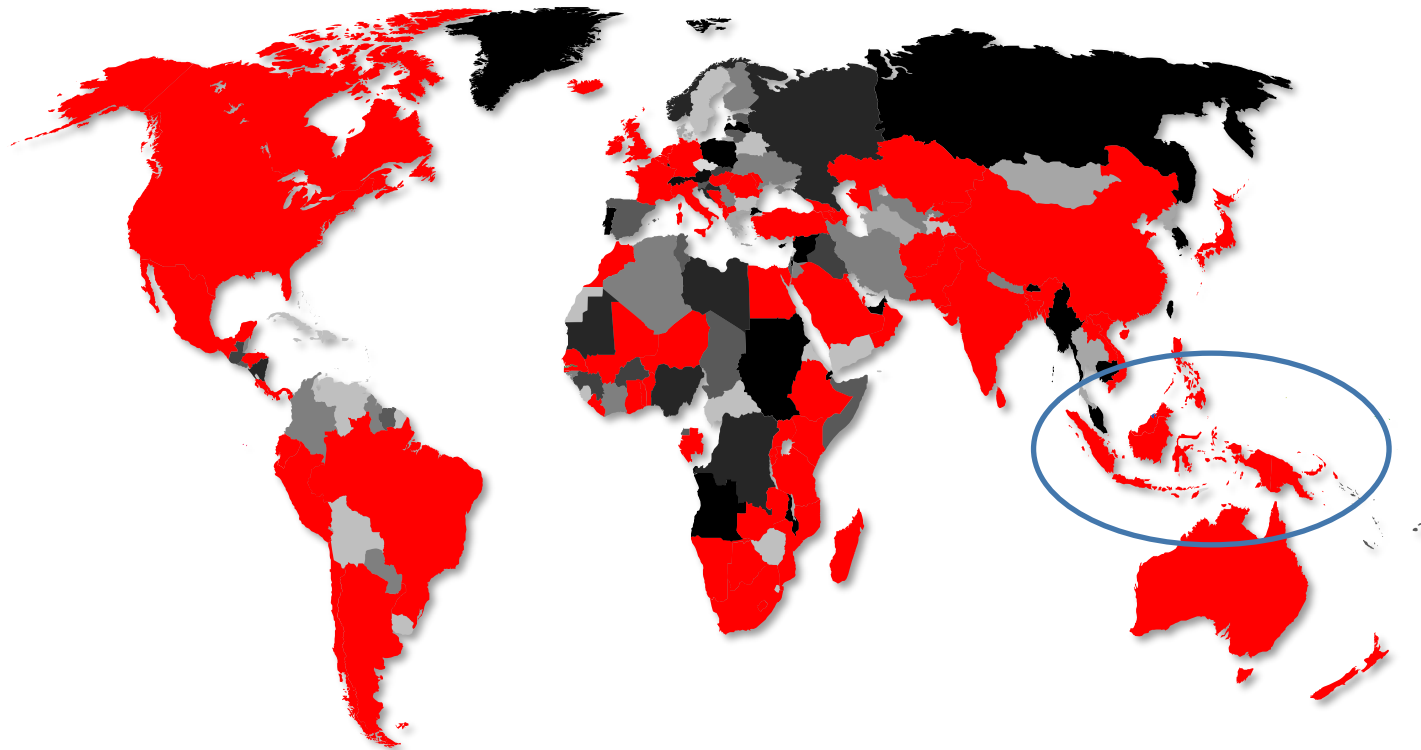
Resolved at DRB level



Worldwide Use of Dispute Boards

→ Countries include: Albania, Argentina, Armenia, Azerbaijan, Australia, Bangladesh, Benin, Bosnia, Botswana, Brazil, Bulgaria, Burundi, Canada, Chile, China, Czech Republic, Denmark, Dominican Republic, Ecuador, Egypt, Ethiopia, France, Gambia, Germany, Georgia, Gabon, Ghana, Honduras, Hong Kong, Hungary, Iceland, India, **Indonesia**, Ireland, Italy, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Liberia, Madagascar, Mali, Malawi, Malaysia, Moldova, Morocco, Mozambique, Namibia, New Zealand, Niger, North Macedonia, Oman, Pakistan, Panama, Papua New Guinea, Peru, Philippines, Poland, Qatar, Romania, Rwanda, Saudi Arabia, Senegal, Serbia, Slovakia, South Africa, Sri Lanka, Sudan, Tanzania, Timor Leste, Togo, Turkey, Uganda, U.K, U.S.A, Vanuatu, Vietnam, Zambia.

Dispute Boards Worldwide



Types of Projects Using DBs

- Airports
- Bridges
- Hydro
- Highways
- Nuclear
- Mining
- Ports
- Power plants
- Metro
- Medical
- Universities
- Shipping

What do they have in common?

- Lengthy duration
- Complex site/construction methods
- High risk

Sub Classification of DBs

→ Ad hoc

- Formed only **after a dispute has crystallised**
- **No provisions for dispute avoidance**
- **Binding** decisions
- For example: most bespoke forms of contract and priority choice in FIDIC Design and Build and EPC contracts (1999 editions - standing boards in 2017 editions)

Sub Classification of DBs

→ Standing

- Formed at commencement of contract
- Routine site visits, meetings
- Dispute avoidance role
- Informal opinions
- Binding decisions

Principle characteristics of Dispute Boards

- ➔ **Parties select DB**
 - Choice of Board Member(s)
 - Members familiar with the project
- ➔ **DB is Proactive**
- ➔ **DB is independent, impartial & experienced**
- ➔ **Process is in-house**
- ➔ **DB issues binding decisions**
- ➔ **DISPUTE AVOIDANCE**

**Dispute
Avoidance**

Dispute Avoidance: Role of the DB

→ Dispute avoidance

- *“If at any time the Parties so agree, they may jointly refer a matter to the DB for it to give its opinion” (FIDIC GCC 20.2)*
- *“The purpose of site visits is to enable the DAB to become and remain acquainted with the progress of the Works and any actual or potential problems or claims”
(FIDIC Procedural Rule 2)*

Dispute Avoidance: Role of the DB

→ Dispute avoidance

→ *“A Dispute Board is a standing body typically set up upon signature or commencement of performance of a mid- or long-term contract, to help the parties avoid or overcome any disagreements or disputes that arise during the implementation of the contract.” (ICC Dispute Board Rules 2015)*

→ *“They [DBs] may assist the Parties ...” (ICC DB Rules Art I)*

Some Notable Dispute Boards in the region

→ Jakarta MRT

- Phase 1: 6 packages each had an ad-hoc DB, appointed at the start of the project
- Phase 2: standing DBs

→ Australian Embassy in Jakarta

- completed in 2015
- single person DAB
- dispute free: when issues arose the parties and the DAB worked through to a solution.

Some Notable Dispute Boards in the region

- ➔ Patimban Port Development Project (I),
Package I – Terminal Construction
 - ➔ JICA Loan
 - ➔ October 2018 – November 2020 (760 days)
 - ➔ 3-Member DB (set up in April 2019)
 - ➔ 3rd Site visit: 22 – 24 January 2020

Some Notable Dispute Boards in the region

- Secondary National Road Development Projects
 - Millennium Challenge Account-Philippines (2014-2017)
 - 222-Km Road + 62 Bridges
 - 4 Contract Packages
 - Standing Sole DAB (Dispute Avoidance Board)
 - Completed; No dispute referred to DAB



FORMATION AND FUNCTIONS OF DISPUTE BOARDS

Formation of the DB

→ DB is a creature of **contract**

- *“Contract – means the agreement of the Parties that contains or is subject to provisions for establishing a Dispute Board under the Rules” (ICC Rules Art 2)*
- *“The Parties shall appoint a DB by the date stated in the Appendix to Tender.” (FIDIC GCC 20.2)*
- *“The agreement between the Parties and either the sole or each of the three members shall incorporate by reference the General Conditions of Dispute Board Agreement contained in the Appendix to these General Conditions ...” (FIDIC GCC 20.2)*

Main Functions of a Standing DB

- Become & remain **conversant with the contract & periodically visit site**;
- **Keeps up-to-date** with progress, developments and (potential) problems at the site;
- **Encourage parties to resolve issues** before they become disputes, to give opinions;
- **Adjudicate a dispute** that is referred to it.

Function of an **ad hoc DB**
is solely to decide referred disputes.

Summary of Recommended Elements for a Successful DB

1. DB members are **neutral** and subject to the approval of **both parties**.
2. DB members sign a **Three-Party Agreement** obligating them to serve both parties equally.
3. DB fees and **expenses are shared equally** by the parties.
4. DB is **organized when work begins**, before there are any disputes.

Summary of Recommended Elements for a Successful DB

5. DB keeps abreast of job developments by maintaining **review of relevant documentation and regularly visiting the site.**
6. DB adopts an **inquisitorial approach.**
7. The Parties have available to them an **Advisory Opinion process.**
8. **Either party can refer a dispute** to the DB.
9. If required, an **informal but comprehensive hearing** is convened promptly.

Recommended Elements for a Successful DB

10. The decision of the DB is binding and final, unless a party serves appropriate notice of dissatisfaction which leads to arbitration/litigation;

(Note: the giving of a notice of dissatisfaction does not automatically render the decision non-binding. It remains binding until arbitration/litigation delivers a result. If no arb/lit occurs, the decision becomes binding for all time.)

11. The DB members cannot be called as witnesses in subsequent proceedings.



DRBF ETHICS

Canon I

Conflict of Interest and Disclosure

Board members must avoid the appearance of, or any actual, conflict of interest during the term of the Dispute Board. Board members must disclose, before their appointment, any interest, past or present relationship, or association that could reasonably be considered by a contracting party as likely to affect that member's independence or impartiality. If, during the term of a Dispute Board, a Board member becomes aware of any fact or circumstance that might reasonably be considered by a contracting party as likely to affect that Board member's independence or impartiality, the Board member must inform the other Board members and disclose the matter to the contracting parties.

Canon 2

Confidentiality

Board members must ensure that information acquired during the term of the Dispute Board remains confidential and must not be disclosed, unless such information is already in the public domain. Any such confidential information may only be disclosed if approved by the contracting parties or if compelled by law. Board members must not use such confidential information for any purpose beyond the activities of the Dispute Board.

Canon 3

Board Conduct and Communications

Board members must conduct all Board activities in an expeditious, diligent, orderly, and impartial manner. Board members must act honestly, with integrity and without bias. There must be no unilateral communications as between a Board member and a contracting party, except as permitted under the Dispute Board operating procedures.

Canon 4

Board Procedures

All Board meetings and hearings must be conducted in accordance with the applicable contract provisions and operating procedures, in a manner that provides procedural fairness to the contracting parties. Dispute Board recommendations and Decisions must be made expeditiously on the basis of the provisions of the contract, the applicable law and the information, facts and circumstances submitted by the contracting parties.



SELECTION AND APPOINTMENT OF DB MEMBERS

What Does It Take?

→ Industry Experience

- At least 10 years, but generally more...

→ Qualifications

→ Dispute Resolution Experience

- As a member of a tribunal

→ Training

- Dispute Boards
- Dispute Resolution
- Contract knowledge

→ Independence

→ Social skills

→ Availability

Qualities

→ Knowledge of the project type and experience in the industry

“The DB shall comprise ... suitably qualified persons ... shall be a professional experienced in the type of construction involved ...”

→ Knowledge of the contract

“...and with the interpretation of the contractual documents.”

→ Language

“... suitably qualified persons each of whom shall be fluent in the language for communication defined in the Contract ...”

(FIDIC Pink Book GCC 20.2)

Qualities

→ Impartiality/Fairness

“Every DB Member must be and remain independent of the Parties”
(ICC Rules Art 8)

→ Legal knowledge/training

→ Willingness to travel

→ Present commitments

→ The ability to make a decision

How Do You Find DB Members?

- ➔ Recommendation
- ➔ Reputation
- ➔ National lists
- ➔ International lists
 - ➔ ICC makes appointments, but has no official list
 - ➔ DRBF website, member resumes
 - ➔ FIDIC President's List
 - ➔ RICS List
 - ➔ Associations of Arbitrators

DB Appointment

- Pre-agreed in the contract provisions
- List included in the contract
- Parties agree on a shortlist
- Parties agree & appoint all 3
- Most common is that parties select one member each, members agree on the chair for approval
- Failure to Agree

Most Common Method


- ➔ Each party selects one DB member
 - ➔ That member is not a representative for the party selecting them
 - ➔ FIDIC GCC 20.2 – ICC Art 7
- ➔ DB members select Chair for parties' agreement
 - ➔ Reputation
 - ➔ Recommendation
 - ➔ What discipline?
 - ➔ Qualities?
- ➔ Advantage - parties are involved as far as possible

Contract Provisions for Appointment

- ➔ Contract specific, but will include such terms as:
 - ➔ Appointment of the Dispute Board (FIDIC GCC 20.2)
 - ➔ Appointment of Dispute Board Members (ICC Rules Art 7)

Failure to Agree on the DB

- ➔ If not agreed **by date stated or as specified in contract, or**
- ➔ If either party **fails to nominate a Member, or**
- ➔ If the parties **fail to agree the Chair, or**
- ➔ If the parties **fail to agree on a replacement Member**
- ➔ **Default provision** should be the appointment by the appointing official or entity in the Appendix to Tender or equivalent
 - ➔ ICC Rules Art 7
 - ➔ FIDIC GCC 20.3



DISPUTE BOARD AGREEMENT

What is a Dispute Board Agreement?

- ➔ Agreement between employer/owner and contractor and all members (DRBF Three-Party Agreement)
- ➔ A Three-Party agreement between employer, contractor and each DB Member (FIDIC Pink Book GCC 20.2 & ICC Rules Art 10)
- ➔ General Conditions of Dispute Adjudication Agreement and the Annex Procedural Rules ***usually*** contained in the contract

What does a Dispute Board Agreement Include?

- Details of parties and member(s)
- Purpose of the DB
- Term of office
- Warranties
- Scope of work
- Obligations of the parties and members
- Default
- Disputes and governing law
- Signatures

Warranties and General Obligations

Main warranties by the DB Member:

- to be **independent** of the parties and engineer;
- to be **impartial** to the parties;
- **promptly disclosure** of anything which could cause a perceptions of a lack of independence or impartiality.

In compliance, the DB Member shall:

- **have no financial interest** in the project, parties or engineer;
- **have no undisclosed previous employment** with parties or engineer;
- **give full disclosure** of past & present professional /personal relationship.

Start of DB Agreement

Standing DB: Agreement takes effect on latest date of either:

- a) the commencement date of the contract;
- b) when parties and member have each signed the agreement; or
- c) when all Three-Party Agreements between the parties and other DB members have been signed (as appropriate)

Expiry of the Dispute Board Agreement

Standing DB – Subject to early termination.
Expiry date is at the end of the project.

Termination of Dispute Board Agreement

Member may terminate (for example):

- if payment not received within 70 days of submitting valid invoice;
- at any time, for whatever reason, by giving not less than 10 weeks notice;
- If employer or contractor fails to comply with Dispute Board Agreement.

Parties may **jointly** terminate (for example):

- at any time, for whatever reason, by 6 weeks notice;
- If member fails to comply with Dispute Board Agreement.

Payment of Fees

In a Standing DB, each member is paid:

- a retainer fee per calendar month;
- a daily fee whilst working or travelling for work;
- all reasonable expenses;
- any taxes properly levied in the country on payments made to the member (unless member is a national or permanent resident of the country).

What does a DB cost?

The cost illustration below is based on a standing DB appointed for a two year project in a country more than one day travel away from each member's home location, and visiting the site every four months during the construction works. An example of a monthly retainer of USD 3,000 and a daily fee of US\$ 3,000 have been used for this exercise. The figures are only an approximate guide to costs and should be adjusted for the actual situation and details of each project.

		1 person DB	3 person DB
Monthly Retainer	$\$3,000 \times 24 \text{ mths} =$	\$72,000	\$216,000
Site Visits	$\$3,000 \times 6\text{nr} \times 5 \text{ days} =$	\$90,000	\$270,000
Visit Expenses	est. $\$4,000 \times 6\text{nr} =$	\$24,000	\$ 72,000
Monthly Retainer during DNP	$\$2,000 \times 12 \text{ mths} =$	\$24,000	\$ 72,000
Total		\$210,000	\$630,000

What does a DB cost?

If a dispute is referred to the DB, depending on the complexity and scope, the member may well spend 15-20 days (including the time for a hearing) and other two members may spend 10 days each in case of 3-member DB. The hearing may be conducted at the time of periodical Site visit, thus, the expenses may be calculated as a half of the Site visit expenses. The additional DB costs (based on 15 days) are thus:

	1 person DB	3 person DB
Daily Fees \$3,000 x 15 days	\$45,000	\$ 45,000
Daily Fees \$3,000 x 10 days x 2	-	\$ 60,000
Expenses \$4,000 x 1/2	\$ 2,000	\$ 6,000
Total	\$47,000	\$111,000

Is a Dispute Board of Value?

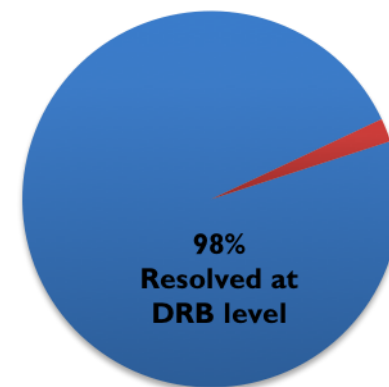
Standing DBs	Estimated Cost	Project Value	% of Project
1 person DB	\$210,000	\$50m	0.42%
3 person DB	\$630,000	\$350m	0.18%

Dispute Board Track Record

The DRBF project database shows the process has resulted in a very high rate of success in resolving disputes.

*Resolution rate to date:
over 98% of matters going
to the DB **do not go** on to later
arbitration or litigation.*

Resolved at DRB level



Who Pays for the DB?

- **Costs are shared equally between the parties.** Method of payment is contract specific;
- **Each member submits their invoices** to the contractor for payment. Contractor obligated to pay within 56 days of receipt of invoice.
- **Contractor includes 50% of invoiced amounts** in his applications for payment for reimbursement by employer.
- **JICA's Standard Bidding Document: Employer pays 100% of retainer fee and costs for regular site visits.** The costs of Referral shall be shared equally.
- **If contractor fails to pay, employer has a duty to pay the amount due.** Employer is then reimbursed by contractor for 50% of the invoiced amount, plus any financing charges and costs of recovering the fees.

Can Dispute Avoidance Work for Other Industries?

Dispute Boards have been used for:

- IT projects
- Manufacturing
- Process Plants
- PPP projects: roads, hospitals, rail projects
- Aerospace Procurement
- Insurance Contracts
- Shipbuilding
- Telecommunications
- Film and TV Production



What can go wrong?

- ➔ It is midway through the term of the contract, and the DB meets the newly appointed contractor representative – an old school friend....
- ➔ One party wishes to terminate the appointment of one of the Members
- ➔ One party fails to communicate with the other in respect of forming the DB

In Summary:

What can go wrong?

- ➔ Will my nominated member look after my interests?
- ➔ One DB member wants a higher fee than the other or the chair?

Coffee / Tea Break



SESSION 2: DISPUTE AVOIDANCE

SESSION 2

→ Site Visits and Meetings

→ Opinions

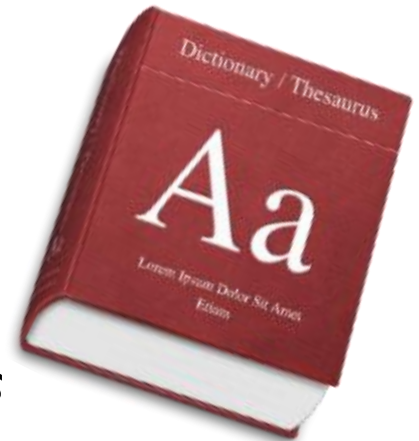
What is a Dispute?

Dictionary Definition:

“a disagreement between management and employees that leads to industrial action” (Oxford)

“a discussion, often heated, in which a difference of opinion is expressed” (Oxford)

“a regulated discussion of a proposition between two matched sides” (Webster)



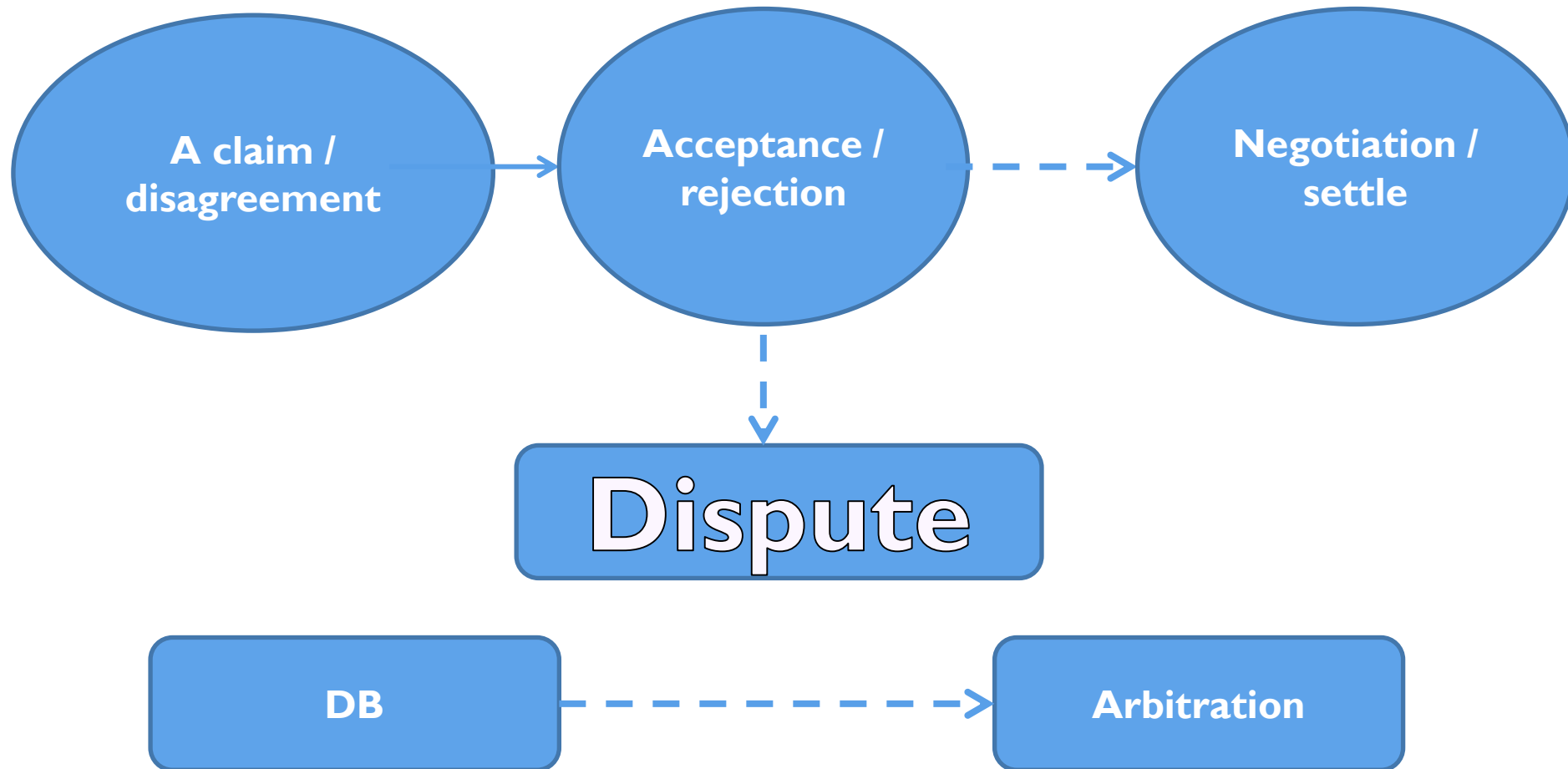
What is a Dispute?

Contract Definition:

“...means any situation where (a) one Party makes a claim against another Party; (b) the other Party rejects the claim in whole or in part; and (c) the first Party does not acquiesce, provided however that a failure by the other Party to oppose or respond to the claim, in whole or in part, may constitute a rejection if, in the circumstances, the DAB or the arbitrator(s), as the case may be, deem it reasonable to do so.”

*(FIDIC **Gold Book**, 2008)*

When is a dispute a “*dispute*”



When is a dispute a “dispute”

- Procedure contract specific
- Claim by one party
- Consultation – further information
- Rejection – or silence
- Acceptance or negotiation to conclusion
- Dispute

Disputes about....

- ➔ Disputes in construction typically about:
 - ➔ Contract Interpretation
 - ➔ Quality
 - ➔ Progress
 - ➔ Information (quality of or lack of)
 - ➔ Payment

Time & Money

Disputes about....

- Disputes in construction commonly occur between:
 - employer and consultants
 - employer and main contractor
 - main contractor and subcontractor/suppliers



Why do we have disputes?

- ➔ Poor communication
- ➔ Poor documentation
- ➔ Poor interpretation
- ➔ Poor relationships
- ➔ Human factor
 - ➔ Ego
 - ➔ Attitude
 - ➔ Face
 - ➔ Head in the sand!



What is the advantage of practicing dispute avoidance?

→ Cost

- Money
- Emotions
- Time
- Loss of focus

“How to stop a simple problem spiraling from a breeze to a whirlwind”

- Nael Bunni

Cost advantage to Dispute Avoidance

→ ICC Arbitration: a \$10m dispute may cost about \$300,000 in administrative and arbitrator's fees **plus** the parties' legal costs, and management time.

How do Dispute Boards practice dispute avoidance?

- Has the experience to be heard and respected
- Monitors the project
- Reviews documents and visits the site
- Watches, reads, inspects and asks
- Encourages communications between the parties
- Encourages disagreements to be settled
- Gives opinions
- Resolves disputes

Why use a Dispute Board?

- DB remains familiar with the project
- **Dispute avoidance attitude**
- Parties choose Members
- Parties maintain control over the outcome
- Encourages maintaining good relationships
- Confidential
- The DB is **PROACTIVE**



SITE VISITS & MEETINGS

Site Visits

- **The “Site Visit” = Site tour + Site meeting**
- **Between site visits**
- **Opinions**

Site Visit

→ Purpose

- To see the site
- To meet the key people
- Become acquainted with **construction methodology & conditions**
- Become acquainted with **any difficulties first hand**
- At the request of a party, to **see a specific problem**



When is the Site Visit?

- ➔ Contract specific or by agreement
- ➔ May coincide with a key stage of the works
- ➔ May be arranged as part of a hearing or dispute procedure
- ➔ Timing will be affected by:
 - Religious holidays
 - Availability of key staff
 - Coordination with site activities
 - Periods of site closure
 - Extreme weather conditions
- ➔ By specific request of a party



Frequency of Site Visits

→ ICC (ICC DB Rules Art 12):

“At the beginning of its activities the DB shall, in consultation with the Parties, shall establish a schedule of meetings and, if relevant to the Contract, site visits. The frequency of scheduled meetings and site visits shall be sufficient to keep the DB informed of the performance of the Contract and of any disagreements. Unless otherwise agreed by the Parties and the DB ... there shall be a minimum of three such visits per year.”

Frequency of Site Visits

➔ FIDIC 1999 (Procedural Rule 1):

“Unless otherwise agreed by the Employer and the Contractor, the DAB shall visit the site at intervals of not more than 140 days, including times of critical construction events, at the request of either the Employer or Contractor. Unless agreed by the Employer, the Contractor and the DAB, the period between consecutive visits shall not be less than 70 days, except as required to convene a hearing...”

Frequency of Site Visits

➔ FIDIC 2017 (Procedural Rule 3, 3.3):

“at interval of not more than 140 days unless otherwise jointly agreed by the Parties and the DAAB; and at interval of not less than 70 days ...”

Who should attend?

- Employer **Yes**
- Contractor **Yes**
- Engineer **Yes**
- All board members **Yes**

- Lawyers for the parties? **Why?**
- Sub-Contractors? **By agreement?**
- Suppliers? **By agreement?**
- Other interested parties? **Why?**

Ist Site Visit

➔ For the first visit:

- ➔ DB introduces itself
- ➔ Party introductions and presentation of roles in the project
- ➔ Obtain contact names and details (if unsure)
- ➔ DB chair to describe the role of the DB and the main procedures
- ➔ Acquaintance with contract terms & documents

DB Preparation for Site Visit

- ➔ Sufficient information from the parties to brief the DB members and that which they request
- ➔ Essential that the DB reads the reports before the visit!

Parties' Preparation for Site Visit

→ DB members to be provided

in a timely manner with:

- Contract and contract documents, drawings, etc
- Contract programme
- Minutes of site meetings and progress reports
- Schedule of any variations or instructions issued/received
- Schedule of any claims or disputes

→ **Timetable & Agenda:** Employer & Contractor encouraged to propose and agree (Default - DB sets the agenda); DB takes the lead to consult and propose.

Parties' Preparation for Site Visit

- ➔ To ensure fitting representation capable of making decisions
- ➔ To ensure that everyone has reserved the time available for the DB site visit
- ➔ To ensure logistics attended to
- ➔ Contribute to an agenda

Sample Timetable



07:00	Arrive at Km 120
07:30	Stop at Culvert Km 142
08:00	Stop at Quarry Km 166
10:00	Office Km 195
10:00	Tea break
10:30	Meeting
13:00	Lunch
14:00	Meeting
19:30	Supper



07:00	Breakfast
08:30	Meeting
10:00	Visit to Borrow Area Km 210
13:00	Lunch
14:00	Meeting
16:30	DB draft report
17:30	Presentation of draft report
18:30	DB Departs

Sample Agenda

- Introduction by DB Chair
- Statement of progress by employer / engineer & contractor
- Matters of concern by each party

SITE VISIT

- Reconvene to discuss any matters arising from the site visit
- DB to prepare a site visit report
 - Ideally before it leaves
 - Or very shortly after if not (may be more cost effective)
 - Site visit report to be provided to both employer / engineer & contractor



Site Tour

- ➔ Briefing on tour and route
- ➔ Safety gear, contractor briefing
- ➔ Guided tour with employer, contractor and engineer together
- ➔ DB members to identify any areas of special interest to it beforehand
- ➔ Discussions about issues to be with all parties present or reconvene together at the end



To do or not to do

- ➔ *“Arguments as to the merits of the respective cases are not to be presented to the DB during the site tour”*
- ➔ The tour *could* be led by the engineer
- ➔ Tour is an all inclusive affair – everybody together
- ➔ DB to ask about matters at issue and request to be taken to areas involved
- ➔ DB should ask only very open questions
- ➔ DB is not there to criticise the works or a party
- ➔ Safety issues – every professional has a duty to speak up

Site Visit Benefits

- ➔ Visits generate discussion involving senior members of the parties
- ➔ Encourages that some issues may be agreed before the DB visit (DB casts a long shadow)
- ➔ Makes parties focus on and discuss progress, quality, cash flow
- ➔ Promotes discussion of matters of concern

Communication

Site Visit Benefits

- ➔ Provides a high level forum for discussion - decisions
- ➔ Stops issues from festering into unsolvable disputes
 - Remember the parties may be reluctant to talk about matters of concern
 - The DB must provide a “safe” environment for the parties to do this

What are matters of concern?

- ➔ Parties should notify matters of concern to the DB prior to the visit...but often don't
- ➔ Matters of concern may include:
 - Progress of the works
 - Quality of the works
 - Administration and contract issues/protocols
 - Payment
- ➔ DB from its observations will have its own matters of concern



Matters of concern

- **Parties reluctant to discuss concerns**
- **DB may have to take the lead**
- **Getting the parties to hold meetings to resolve issues for themselves**
- **One party may feel more comfortable with a private discussion**
- **Is there an opportunity to discuss an issue with a DB member alone?**
- **Listen to the parties and ask questions**

In Between Site Visits & Meetings

- **DB may request any information** from site that they deem necessary
- **Follow the progress** and **be alert** to matters of concern
- **Prepare for following Site Visit**
- **Prepare any specific line of inquiry**
- **Monthly retainer**

OPINIONS



Opinions

FIDIC Pink Book SC 20.2

- ➔ *“If at any time the Parties so agree, they may jointly refer a matter to the DB for it to give its opinion.”*
- ➔ DB may offer a verbal or oral opinion
- ➔ Opinion is not binding on parties or the DB

Opinions

→ ICC Art 16 Avoidance of Disagreements

- *“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 them to avoid the Disagreement on their own without any further involvement of the DB...*
- *...the DB may assist the Parties in defining the potential Disagreement .*
- *The DB may suggest a specific process that the Parties could follow to avoid the Disagreement, while making it clear to the Parties that it stands ready to provide informal assistance ...”*

Opinions

→ ICC Art 17 Informal Assistance with Disagreements

- *“On its own initiative or upon the request of any Party and in either case with the agreement of all of the Parties ...*
- *The informal assistance of the DB may take the form of a conversation among the DB and the Parties; one or more separate meetings between the DB and any Party with prior agreement of all the Parties; a written note from the DB to the Parties; or any other form of assistance that may help the Parties resolve the Disagreement”*

Opinions

- ➔ ICC Art 17 Informal Assistance with Disagreements
 - ➔ If called upon to issue a Conclusion, DB not bound by any views expressed whether written or oral, and
 - ➔ DB shall not take into account any information that has not been available to all Parties
 - ➔ Includes possibility of *ex parte* meetings with agreement of the Parties

Opinions

The opinion:

- ➔ What is its benefit?
- ➔ Should it be verbal or written?
- ➔ What are its restrictions?

In summary:

What can go wrong?

- ➔ Is the DB limited to the meeting regime in the contract?
- ➔ What happens if only party turns up for a visit?
- ➔ On a walkabout the site the DB finds that it is only with one of the parties, who starts to discuss a matter of concern?
- ➔ What if the DB considers whole or part of the works is not safe to visit?
- ➔ Should meetings on the site be recorded?

Ishoma

Lunch and Friday Prayer



SESSION 3: DISPUTE RESOLUTION

SESSION 3

- ➔ The process of referring a dispute to the DB, the rules that govern such and the procedures that are to be adopted
- ➔ Look at who is involved and what part they play
- ➔ Review the path that the referral will follow in a hearing or a documents-only referral

Procedure

- ➔ How is a dispute referred to a Dispute Board?
- ➔ Contract Specific:
 - ➔ FIDIC
 - ➔ ICC

Procedure

FIDIC PINK BOOK 2010 – GCC 20.4

- ➔ Any Party may refer a dispute of any kind whatsoever
- ➔ Referral to be in writing
- ➔ Copies to the other party and engineer
- ➔ Must state that it is given under SC 20.4
- ➔ Parties to promptly make available all such additional information & access to the site as DB may require

Procedure

FIDIC RED BOOK 2017 – SC 21.4

- ➔ Either Party may refer a dispute as defined in SC 1.1.29, if done in accordance with Clause 21
- ➔ If no referral within 42 days of an engineer determination, any related NOD expires
- ➔ Referral interrupts the limitation/prescription period unless prohibited by law
- ➔ Procedure in SC 21.4.2 & Procedural Rules (7 pages)

Procedure

ICC – Art 18

- ➔ Any Party may refer a Disagreement, thereafter called a dispute
- ➔ Referral to be in writing
- ➔ No informal conversations or separate meetings with DB
- ➔ A clear and concise description of the nature and circumstances of the dispute
- ➔ List of issues for determination and referring party's position

Procedure

ICC – Art 19

- Concise written statement of its case
- Supporting documents
- Statement of what referring party wants DB to determine
- Copies to the other Party

Procedure

Response & Additional Documentation

→ ICC DB Rules: ICC – Art 20 and 21 detail the procedure for the other Party's Response & Additional Documentation, and the procedure for Hearings.

Procedure

How long does the DB have to make a Decision, and from when?

➔ *“Within 84 days after receiving such reference ...”*
(FIDIC Pink Book GCC 20.4)

Procedure

- ➔ *“the Date on which the Statement of Case is received by the sole DB Member or the president of the DB ... shall for all purposes, be deemed to be the date of the commencement of the referral (“the Commencement Date”)” (ICC DB Rules Art 19)*
- ➔ *“The DB shall issue its Conclusion promptly and in any event, within 90 days of the Commencement Date” (ICC DB Rules Art 22)*

Procedure

“Within 84 days after receiving such reference, or within such other period as may be proposed by the DB and approved by both Parties, the DB shall give its decision ...” (FIDIC 1999 GCC 20.4)

“ ... the DB may extend the time limit with agreement of the Parties. In the absence of such agreement, the DB may, after consulting the Parties, extend the time limit ... provided ... the total duration of any such extension shall not exceed 20 days.” (ICC DB Rules Art 22)

Procedure

The clock is running

FIDIC – Overall period 84 days

No set timetable

Decision

FIDIC

84

ICC

+30

+15

90

ICC – Overall period 90 days

Prescribed timetable

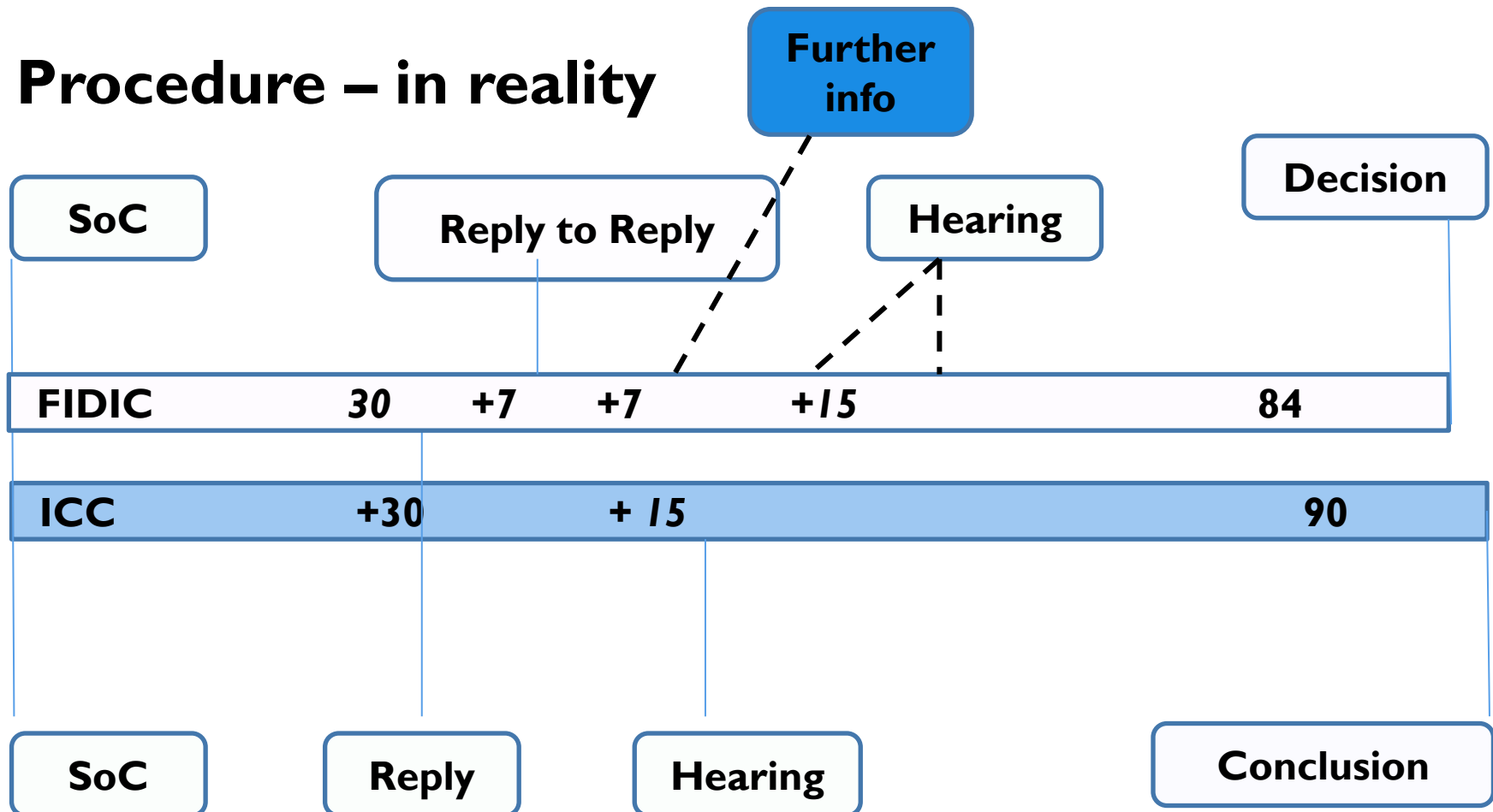
SoC

Reply

Hearing

Conclusion

Procedure – in reality



Procedure: Under What Powers & Rules

→ FIDIC Pink Book PR 8(a)

- *“establish the procedure to be applied in deciding a dispute”*
- *“decide upon the DB’s own jurisdiction ...”*
- *“conduct any hearing as it thinks fit, not being bound by any rules or procedures other than those contained in the Contract and these rules”*
- *“open up, review and revise any certificate, decision, determination, instruction, opinion or valuation of the Engineer ...”*

Procedure: Under What Powers & Rules

→ ICC 15 Powers of the DB

“The proceedings before the DB shall be governed by the Rules and, where the Rules are silent, by any rules which the Parties or, failing them, the DB may settle on. In particular, in the absence of an agreement of the Parties with respect thereto, the DB shall have the power, inter alia, to:

determine language

require the Parties to produce documents

call meetings site visits and hearings

decide on procedural matters

question the Parties

take any measures necessary for it to fulfil its function as a DB”



PRESENTATION

Presentation

FIDIC has no prescribed structure

ICC DB Rules:

Art 19 Statement of Case

Art 20 Response and additional Documentation

Presentation

- ❑ Statement of Case
 - ❑ Reply to Statement of Case
 - ❑ Response to Reply to Statement of Case
 - ❑ Reply to Response to Reply to Statement of Case
-
- ➔ Narrowing of the issues – No new items
 - ➔ Further particulars

Presentation

Statement of Case

Jurisdictional Issues

Details

Request for Decision

Appendices

Contract documents

Photographs

Video

Experts statements

Records

Correspondence

Minutes



HEARING

To be heard or not to be heard?

FIDIC Pink Book PR 6

“The DAB may conduct a hearing ...”

FIDIC Pink Book PR 8(c)

“conduct any hearing as it thinks fit ...”

ICC Art 15

“In the absence of an agreement of the Parties... the DB shall have the power ... call meetings, site visits and hearings”

ICC Art 19

“A hearing regarding a Dispute shall be held unless the Parties and the DB agree otherwise”

Hearing v Documents Only

Hearing

- DB Members together
- Inquisitorial face to face
- Opportunity to be seen & heard
- Witnesses
- Site or elsewhere
- “Scene of the crime”
- Other info at Site
- Combine with Site Visit
- Focus

Documents Only

- Cost
- Immediacy
- Expert Witness

Hearing – informal & orderly

Procedural

- Rules of the proceedings
- Rules of evidence
- Representation
- Oaths / Affirmations
- Opening statements
- Rebuttals
- Replies
- Witnesses of fact
- Expert witnesses
- DB *inquisition*
- Closing

Administrative

- Venue
- Timetable
- Facilities
- Attendance list
- Seating
- Power points
- Translators
- Transcripts
- Comfort breaks & lunch!

Who is to attend or not to attend?

→ FIDIC Pink Book PR 7

→ “... the DAB shall have power to ... refuse admission to hearings or audience at hearings to any person other than representatives of the Employer, the Contractor and the Engineer”

→ ICC Art 21

→ “the Parties shall appear in person or through duly authorized representatives who are in charge of the performance of the Contract ...

→ In addition they may be assisted by advisors.”

What if Party fails to attend?

→ FIDIC Pink Book PR 7

→ “... the DAB shall have power to ... proceed in the absence of any party who the DAB is satisfied received notice of the hearing; but shall have discretion to decide whether and to what extent this power may be exercised.”

→ ICC Art 21

→ “If any of the Parties refuses or fails to take part in the DB procedure or any stage thereof, the DB may proceed notwithstanding such refusal or failure”

What if a DB member fails to attend?

→ FIDIC Pink Book PR 9

→ “if a Member fails to attend a meeting or hearing ... the other two Members may nevertheless proceed to make a decision, unless .”

→ ICC Art 21

→ “Hearings shall be held in the presence of all DB Members unless the DB decides ... after consultation with the Parties, that it is appropriate to hold the hearing in the absence of a DB Member...”

In Summary:

What can go wrong?

- ➔ A DB Member is sick and cannot attend the fourth day of the hearing. When it comes to making the decision one party does not agree that the 2 remaining Members can make the decision. What happens?
- ➔ A DB Member dies during the making of the decision. What happens?
- ➔ One party wants to postpone the hearing as legal rep. is unable to attend. What happens?

In Summary:

What can go wrong?

- ➔ One party wants to have the hearing on site, which is difficult to travel to, and the other wants a decision based on a documents only basis. What happens?
- ➔ One party requests that the DB review the “interim” award given in a previous referral as it considers the award has been subsumed by a subsequent referral and now is worth less. What happens?



SESSION 4: ENFORCEMENT OF DISPUTE BOARD DECISIONS

Enforcement of Dispute Board Decisions

- ➔ Amicable Settlement
- ➔ Enforcement under the FIDIC Pink Book
- ➔ Enforcement under the FIDIC 2017 Suite
- ➔ Enforcement under the ICC Dispute Board Rules



AMICABLE SETTLEMENT

Amicable Settlement

➔ In this situation:

- ➔ the DB has been unable to help the parties to avoid the dispute
- ➔ Dispute has been referred to the DB and Decision issued
- ➔ Notice of Dissatisfaction has been given under Pink Book Sub-Clause 20.4/Red Book 2017 Sub-Clause 21.4

Amicable Settlement

- ➔ FIDIC Pink Book Sub-Clause 20.5 (Red Book 2017 SC 21.5) requires both parties to attempt to settle the dispute amicably before arbitration
- ➔ Arbitration can be commenced 56 days after NOD, even if no attempt at settlement made
- ➔ FIDIC 2017 reduces the amicable settlement period from 56 days to 28 days



ENFORCEMENT UNDER THE FIDIC PINK BOOK

Enforcement of Dispute Board Decisions Under FIDIC Pink Book

- Where no Notice of Dissatisfaction (within 28 days from Decision receipt) is given:
- The Decision becomes binding and final
 - The failure to comply can be referred to arbitration under Clause 20.7 without waiting for the expiry of the 56 day period for amicable settlement under Clause 20.5

Enforcement of Dispute Board Decisions Under FIDIC Pink Book

- ➔ Where a valid Notice of Dissatisfaction is given:
 - ➔ The Decision is binding, but not final
 - ➔ Enforcement becomes problematic, and there are conflicting views as to what the successful party should do in order to obtain enforcement
 - ➔ The problem arises from the lack in the 1999 FIDIC Suite of wording explicitly allowing the successful party to refer to arbitration the failure of the unsuccessful party to comply with the Decision

Enforcement of Dispute Board Decisions Under FIDIC Pink Book

PT Perusahaan Gas Negara v CRW Joint Operation [2015] SGCA 30 (Persero II Case) - Singapore

DB Decision given - Notice of Dissatisfaction served

Held, at the end, that **a Party must comply promptly with a binding Decision even though it is not final and may be subject to revision in arbitration.**

Similar Decision in South Africa: Tubular Holdings (Pty) Ltd v DBT Technologies (Pty) Ltd

Enforcement of Dispute Board Decisions Under FIDIC Pink Book

➔ In the event that the losing party fails to honour the Decision, the successful party should:

“Seek a Partial Award from the Arbitral Tribunal (assuming the relevant Arbitration rules allow for the Tribunal to make such an order) or Court.”

Enforcement of Dispute Board Decisions Under FIDIC Pink Book

- ➔ DB members should consider very carefully a situation where a successful party applies to them to make a Decision in its favour seeking damages for breach of the obligation to comply with an existing Decision
- ➔ Having already awarded relief (typically money) can that same sum be the subject of a further Decision or can an award of damages be limited only to interest on the original sum?

Enforcement of Dispute Board Decisions Under FIDIC Pink Book

The most popular route at present is to seek a Partial Award from the Arbitral Tribunal but even this route may not be certain.


FIDIC Guidance Memorandum 1st April 2013



ENFORCEMENT UNDER THE FIDIC 2017 SUITE

Enforcement of Dispute Board Decisions Under FIDIC 2017

- **Any** failure to comply with the Decision can be referred to arbitration without waiting for the expiry of the 28 days' period for amicable settlement under Clause 21.5
- In the case of a binding but not final award, the rights of the parties as to the merits are reserved until the final award



ENFORCEMENT UNDER ICC DISPUTE BOARD RULES

Enforcement under the ICC Dispute Board Rules

→ Recommendations (DRB)

- If no Party has given written notice expressing its dissatisfaction with a Recommendation within 30 days of receiving it, it becomes final and binding - Article 4.3
- If a Party fails to comply with a Recommendation the other Party may refer the “failure itself” to arbitration (or court) - Article 4.4

Enforcement under the ICC Dispute Board Rules

- ➔ A Party may give written notice expressing its dissatisfaction with a Recommendation within 30 days of receiving it - Article 4.5
- ➔ A Recommendation would thus be unenforceable and the dispute must be finally settled by arbitration
- ➔ Upon receipt of a Recommendation, the Parties may comply with it voluntarily but are not required to do so.

Enforcement under the ICC Dispute Board Rules

Decisions

- ➔ Article 5.2 states that a Decision is binding upon its receipt
- ➔ If no Party gives a written notice expressing its dissatisfaction with a **Decision** within 30 days of receiving it, the Decision remains binding and shall become final - Article 5.3
- ➔ Article 5.4 makes it clear that in such event of a Party's failure to comply with the **Decision** the other party may refer the "failure itself" to arbitration

Enforcement under the ICC Dispute Board Rules

- ➔ Where a Party has given written notice expressing its Dissatisfaction, enforcement of a binding, rather than a final and binding, decision is possible – Articles 5.5 & 5.6
- ➔ Article 5.2 reinforces this by stating that the Parties shall comply with the Decision, without delay
- ➔ Dispute to be finally settled by arbitration / court

Discussion

Examples

What can go wrong?

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Are you a DRBF member?

If not, ask us or your Country Representative for more information about:

- **DRBF Website**, with **member directory** and **DB database**
- **Newsletters and Journals**
- **Conferences and Training**
- **Leadership Opportunities**
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