

## FIDIC Dispute Board Decisions: Late for a Very Important Date?

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A FIDIC dispute board has just 84 days to give a decision, which is not very long. What happens when a FIDIC dispute board (DAB or DAAB) fails to deliver its decision on time and neither party serves a notice of dissatisfaction?

### The FIDIC dispute board and its decisions

FIDIC's Red, Yellow and Silver books each contain a tiered dispute resolution procedure which includes adjudication by a dispute board (a Dispute Adjudication Board or 'DAB' in the 1999 books and a Dispute Avoidance/Adjudication Board or 'DAAB' in the 2017 books and 2022 reprints).

The contractual agreement between the parties and the member(s) of the dispute board should incorporate the general conditions of the dispute board agreement in the applicable book, which can be amended as the parties and the member(s) may agree between them.

The dispute board is required to give its decision on the dispute referred to it within 84 days of receipt of that referral, or within such other period as may be proposed by the dispute board and approved by both parties.<sup>1</sup>

If either party is dissatisfied with the decision either party may, give notice to the other party of its dissatisfaction, within 28 days after receiving the decision. If such notice is given, the decision is binding but it does not become final. In that case, following a period mandated for amicable settlement, and if no settlement is reached, the dispute may proceed to arbitration for final determination.

The 84-day period (absent agreement to extend) is tight, especially if the referral is complex, involves a great many documents and is very technical. It is perhaps not surprising that a dispute board may find it difficult to give a decision within that period.

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<sup>1</sup> See Sub-Clause 20.4 (1999 books) and Sub-Clause 21.4 (2017 books and 2022 reprints).



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A dispute board may inadvertently give its decision late for example by missing the deadline in the applicable time zone, which may be in the country of the project or that of the parties or their lawyers.<sup>2</sup>

### Status of a late dispute board decision

The FIDIC books mentioned above are silent as to the status of a dispute board decision that is given late and where notices of dissatisfaction are not served.

There are various possibilities where a decision is served late:

- The lateness is irrelevant. The decision is final and binding unless and until either party raises a valid notice of dissatisfaction which will propel the matter to amicable settlement and a potential arbitration.
- The lateness is relevant. The decision is null and void unless it is accepted as determinative by the parties.
- The lateness is relevant. The decision is rendered valid where either party raises a valid notice of

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<sup>2</sup> Note that a DAAB decision is not late where the due date for payment of a member, or members', invoice has passed, and it has not been paid. In this instance the decision is to be delivered as soon as practicable following receipt of payment. Determining when a decision in this instance will not be clear cut and is case dependant.



dissatisfaction as to the lateness so that the dispute and the issue of lateness will proceed through amicable settlement to arbitration.

- The lateness is relevant. The decision is null and void. The Engineer's determination becomes final and the route to arbitration is lost where both parties fail to issue a valid notice of dissatisfaction as to the lateness.
- The lateness is relevant. The decision is null and void. The Engineer's determination is not final, and the matter may be referred once again to a dispute board via Sub-Clause 20.4 (1999 books) / 21.4 (2017 books and 2022 reprints).

Some guidance on the status of a late decision can be found in ICC Case No. 10619. The contract in this case was the FIDIC Red Book 4th edition and so there was no provision for a dispute board. The arbitral tribunal decided that two determinations made by an Engineer pursuant to Sub-Clause 67, which were not made within the 84-days required by the contract, were invalid and not binding. This may apply by analogy to decisions of a dispute board.

There is also case law on statutory adjudications from common law jurisdictions that may provide guidance, although caution should be exercised in applying these decisions to FIDIC dispute board adjudication, since they depend on the wording of the statute in question. The cases concerning statutory adjudications also contradict each other, with some courts deciding that a late adjudication decision is valid, while others consider it invalid, including because the adjudicator lacked jurisdiction after the expiry of the time limit<sup>3</sup>. A decision late but nonetheless delivered "forthwith" has been held valid, but a decision issued 74 hours late has been held invalid.<sup>4</sup>

## What are the possible implications?

As set out above, there are various scenarios for what might happen where a decision is late. The first is that the lateness of a decision may be considered

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<sup>3</sup> Further discussion on these decisions can be found in Howard Kennedy's commentary on Clause 20 of the 1999 contracts see *Paice & Anor v Harding (t/a MJ Harding Contractors)* [2016] EWHC 2945 (TCC), *Simons Construction Ltd v Aardvark Developments Ltd* [2003] EWHC 2474 (TCC), *Civil Contractors (Aust) Pty Ltd v Galaxy Developments Pty Ltd & Ors* [2021] QCA 10, *Ian Street Developer Pty Ltd v Arrow International Pty Ltd & Anor* (Ian Street) [2018] VSCA 294

<sup>4</sup> *Cubitt Buildings & Interiors Ltd v Fleetglade Ltd* [2006] EWHC 3413, *Lorraine Lee v Chartered Properties (Building) Ltd* [2010] EWHC 1540 (TCC).

irrelevant, whilst the second is that the late decision is nonetheless accepted by the parties.

In scenario three, the decision is delivered late but one or both parties raise a notice of dissatisfaction. Here the party or parties use the so-called 'escape clause' which provides that, if a dispute board fails to give its decision within the period of 84 days (or as otherwise approved), either party may, within 28 days after this period has expired, issue a notice of dissatisfaction<sup>5</sup>. The dispute may then be resolved by arbitration if it is not resolved by amicable settlement and, in that arbitration, the parties may make submissions about the validity (or not) of the late decision.

In scenario four neither party gives a notice of dissatisfaction, and the 'escape clause' route to an arbitration will be lost. The losing party may then argue that there is no valid dispute board decision (because it was late), no right to arbitrate (because no notice of dissatisfaction) and that any Engineer's determination that was the subject of the referral to the dispute board should stand. It is unlikely that those drafting the FIDIC books foresaw this outcome, but it is the logical conclusion.

Scenario five envisages a further referral of the matter to a dispute board; where the decision is late and no notice of dissatisfaction has been issued; pursuant to Sub-Clause 20.4 (1999 books)/21.4 (2017 books and 2022 reprints).

## What can the parties do?

In a FIDIC contract there is a presumption that the contracting parties intend for their dispute(s) to be resolved through the multi-tiered dispute resolution process provided (where unamended by the parties), or by agreement.

Where an adjudicator delivers a decision late and the original Engineer's determination was advantageous to one party, the benefitting party may consider not serving a notice of dissatisfaction, as in scenario 4 above.

As the decision is a nullity, if the opposing party fails to serve a notice of dissatisfaction, then the unintended consequence is that the matter cannot progress to arbitration. Arguably the Engineer's determination is final.

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<sup>5</sup> Sub-Clause 20.4 (1999 books) and Sub-Clause 21.4.4 (2017 books and 2022 reprints).



The disadvantaged party may have recourse to the courts of the governing law country, but that will depend on the individual jurisdiction. The seat selected by the parties for the arbitration (if agreed) will not be relevant as the arbitration provisions will not have been triggered.

This course of action might be perceived as contrary to the ethics of the dispute resolution process, and it may not assist the parties to move past their dispute(s) and finish the project. However, it appears from the express wording of the contract to be a legitimate course of action and it will, in any event, be a useful negotiation tool to the benefitting party.

Consequently, it is vital that, where this situation arises, the disadvantaged party serves a notice of dissatisfaction. In that way the matter can proceed to the amicable resolution stage and, if necessary, thereafter to arbitration.

## Implications for the dispute board

If the dispute board gives a late decision, it could be argued that the member(s) are not entitled to fees or expenses incurred in respect of the reference and/or that there has been a breach of the Dispute Adjudication Agreement, or Dispute Adjudication/Avoidance Agreement, perhaps giving rise to a claim in damages against the dispute board member(s). However, it would be necessary to demonstrate the member(s) had, in respect of the Red, Yellow and Silver Books 1999, acted in bad faith, per Section 5(c) of the General Conditions of Dispute Adjudication Agreement, or, in respect of the Red, Yellow and Silver Books 2017 (and 2022 reprints), demonstrated fraud, gross

negligence, deliberate fault or reckless misconduct, per Section 8.1(c) of the General Conditions of Dispute Avoidance / Adjudication Agreement. In all other respects the parties will have agreed not to pursue the member.

There are steps that a dispute board may take to avoid a late decision. It may ask the parties to agree to an extension of time for the decision (and should ensure that the parties have time to respond before expiry of the original time period). The Dispute Adjudication Agreement, or Dispute Adjudication / Avoidance Agreement, may be amended to include provisions regarding the time by which the decision should be given and the relevant time zone as well as methods of delivery of the decision. If email is used to deliver the decision, delivery and read receipts should be obtained as proof of timing and care should be taken to ensure that the decision is not delayed by the message failing to leave an outbox or because of attachments which are too large.

## Conclusion

A late dispute board decision causes uncertainty, increased costs, arguments and claims. These can be avoided with some simple planning. It is important that parties who find themselves in this situation take stock and consider their options. Howard Kennedy is experienced in dealing with decisions delivered late by a dispute board and would be happy to assist should you find yourself in this position.

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