

The use of Dispute Boards – recent experience

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Introduction

The suite of FIDIC Contracts, First Edition, published in 1999 includes three different Dispute Adjudication Board (DAB) procedures for the resolution of disputes:-

1. A “full-term” DAB, which comprises one or three members who are appointed before the Contractor commences executing the Works, and who typically visit the Site on a regular basis thereafter (typically the interval periods for site visits are between 70 and 140 days). During these visits, the DAB would also be available to assist the Parties in avoiding a dispute, if they and the DAB all agree. The FIDIC Conditions of Contract for Construction (“Red Book”) includes the wording required for this full-term procedure, including: *“If at any time the Parties so agree, they may jointly refer the matter to the DAB for it to give its opinion.”* [Paragraph 7. of Sub-Clause 20.2 refers].
2. An “ad-hoc” DAB, which comprises one or three members who are only appointed if and when a particular dispute arises, and whose appointment typically expires when the DAB has issued its decision on that dispute. The FIDIC Conditions of Contract for Plant and Design-Build (“Yellow Book”) and the FIDIC Conditions of Contract for EPC/Turnkey Projects (“Silver Book”) include the wording required for this ad-hoc DAB procedure, the difference between them being that the “Yellow Book” refers to the Engineer, whereas the “Silver Book has an Employer’s Representative but no Engineer.
3. Under the “Red” and “Yellow Books” only, pre-arbitral decisions may be made by the Engineer, if he is an independent professional consulting engineer with the necessary experience and resources. Guidance on suggested substituted wording is given: *“The Engineer shall act as the DAB in accordance with this Sub-Clause 20.4, acting fairly, impartially and at the cost of the Employer”*. This procedure may involve less expense (which is directly borne by the Employer), because of the Engineer’s involvement in the

Payment Certificate is unlikely to exceed \$1.25M (US), a one-person DAB may be preferred for reasons of economy, unless the Engineer is considered sufficiently independent, professional for him to make decisions under Sub-Clause 20.4.

- (e) The Country and/or the nationality of the Parties. The Books are recommended for use on an international basis, so the parties are usually not of the same nationality. The DAB may therefore perform better if the nationality of each member is not the same as that of either Party or of the other members (if any). However, each of the regular visits of a full-term DAB may then require significant travelling expenses. If both parties are of the same nationality, the member(s) of the DAB could be residents of the Country, in which case it might be appropriate to reduce the Dollar thresholds in (d) above.

The role of the Engineer

As mentioned earlier in the Introduction, pre-arbitral decisions may be made by the Engineer, if he is an independent professional consulting engineer with the necessary experience and resources (Procedure 3. for use with the “Red” and “Yellow Books”). Notwithstanding whether or not this option is adopted, the Engineer is still required to make fair determinations under Sub-Clause 3.5 of the Contract wherein it is stated that:

“Whenever these Conditions provide that the Engineer shall proceed in accordance with this Sub-Clause 3.5 to agree or determine any matter, the Engineer shall consult with each Party in an endeavour to reach agreement. If agreement is not achieved, the Engineer shall make a fair determination in accordance with the Contract, taking due account of all relevant circumstances”.

In my experience, Engineers appointed under FIDIC Contracts do not always appear to have sufficient resources to carry out their role of supervision and contract administration and the delegated assistants often lack the necessary experience. Additionally, some Engineers are put under pressure from Employers, because the Employers in turn are in part controlled by their Funding Agencies, to control costs within artificially set and unrealistically low budgets. These outside factors may well sometimes contribute to unfair and late determinations being made by

- Issuing variations under Sub-Clause 13.1 with a value in excess of €50,000.

As regards any claim from the Contractor for an Extension of Time for Completion, the Engineer was required to *“make comments to the request for extension and shall forward it to the Employer for approval. Extension of time is approved by signing Addendum to the Contract.”* Clearly such requirements were in direct conflict to the obligation for the Engineer to act impartially. In the event, the Engineer made several formal evaluations (or “comments”) of claims for Extension of Time for Completion for the Employer’s approval but these in turn were not approved. The Contracting Authority were reluctant to authorise any further payments despite the Engineer’s views that such Extensions of Time were due because of clear design errors, omissions and other circumstances beyond the Contractor’s control and for which he was not contractually liable. Hence disputes arose and were referred to the ‘ad hoc’ DAB but not before the Contractor had terminated the Contract citing the grounds that *“the Employer substantially fails to perform his obligations under the Contract”* (Sub-Clause 16.2 (d)).

Appointment of the DAB

In my experience many contracts which incorporate DABs only make provision for their appointment as an ad-hoc DAB, who are only appointed if and when a particular dispute arises and whose appointment typically expires when the DAB has issued its decision on that dispute. In addition it is increasingly apparent that the full-term DAB provisions of the FIDIC Conditions of Contract for Construction, First edition, 1999 (“Red Book”) are often amended to an ad-hoc DAB, as in the case of the earlier example for the rehabilitation and partial reconstruction of roadworks. The ad-hoc DAB consisting of a sole member, is clearly analogous to an appointment as an adjudicator under the UK Housing Grants, Construction & Regeneration Act 1996 (Act) but all the advantages of the full-term DAB are then lost.

With an ad-hoc DAB, the DAB will rapidly need to become conversant with the project developments that led to the dispute, in order to deliver a fair and robust decision. Whilst the timescale is more generous (84 days) than that allowed under the equivalent UK Construction Act compliant procedure (28 days), there is more potential for the decision not to satisfy one or other of the Parties and for the dispute to proceed to arbitration or litigation, particularly if the dispute is of a complex nature.

they would also have to agree to pay all the DAB's fees & expenses, reasonably incurred, by regular stage payments suitably invoiced periodically and (iii) the referring Party would then be responsible for Court or Arbitration enforcement of the DAB's Decision(s) should this become necessary. Subject to the foregoing provisos the DAB could then proceed with the referral.

A particular "Yellow Book" contract provided that the DAB would consist of one Member.

Clause 20.3 provides that, in the event of the Parties not agreeing upon the appointment of a sole member of a DAB, the appointment shall be made by the appointing entity or official named in the Appendix, after due consultation. The appointment is final and conclusive and each Party is responsible for paying one half of the remuneration of the appointing official. In this instance the appointing official was the President of FIDIC.

Clause 2 of the General Conditions of the Dispute Adjudication Agreement stipulates that;

"The Dispute Adjudication Agreement shall take effect when the Employer, the Contractor and each of the Members (or Member) have respectively each signed a dispute adjudication agreement.

When the Dispute Adjudication Agreement has taken effect, (i.e. after signing), the Employer and Contractor shall each give notice to the Member accordingly. If the Member does not receive either notice within six months after entering into the Dispute Adjudication Agreement, it shall be void and ineffective".

Sub-Clause 20.4 states that:

"If a dispute (of any kind whatsoever) arises between the Parties..... then, after a DAB has been appointed in terms of Sub-Clause 20.3, (i.e. by the appointing authority), either Party may refer the dispute in writing to the DAB for its decision.

The DAB is required to give its decision within 84 days after receiving the reference, or the advance payment, whichever date is later, or other period agreed. However, the DAB shall not be obliged to give its decision until full payment of all of its submitted invoices has been received.

allegation or claim which has been rejected and the rejection is not acceptable to the person who made the original statement or complaint. For example, under a FIDIC Form of Contract it is clearly not necessary for a claim to have been considered by the Engineer under the Sub-Clause 2.5 or 3.5 procedure in order to create a dispute. Furthermore, Sub-Clause 20.4 of the FIDIC Conditions of Contract "Red Book" states that a dispute can be "*of any kind whatsoever*", all as reproduced below:-

"If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion, valuation of the Engineer, then after a DAB has been appointed pursuant to Sub-Clauses 20.2 [Appointment of the Dispute Adjudication Board] and 20.3 [Failure to Agree Dispute Adjudication Board] either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause"

Sub-Clause 20.1

Under FIDIC Contracts, disputes often result from a difference of opinion between the Parties as to the correct interpretation of Sub-Clause 20.1 wherein it is stated that:-

"If the Contractor considers himself to be entitled to any extension of the Time for Completion and/or any additional payment, under any Clause of these Conditions or otherwise in connection with the Contract, the Contractor shall give notice to the Engineer, describing the event or circumstance giving rise to the claim. The notice shall be given as soon as practicable, and not later than 28 days after the Contractor became aware, or should have become aware, of the event or circumstance."

"If the Contractor fails to give notice of claim within such period of 28 days, the Time for Completion shall not be extended, the Contractor shall not be entitled to additional payment, and the Employer shall be discharged from all liability in connection with the claim. Otherwise, the following provisions of this Sub-Clause shall apply."

Failure to comply with this notice provision results in the Contractor forfeiting his right to an extension of Time for Completion and to additional payment and the Employer is then discharged

Accordingly, the DAB should take account of the views of the Employer and the Contractor on the procedures they would prefer, or may have agreed. The full procedure for a complex dispute could entail:-

1. the referral
2. the other Party's response
3. the referring Party's reply to 2.
4. the other Party's reply to 3.

Unless the dispute is sufficiently straightforward for the DAB to prepare its decision based upon documents only, a formal hearing may be convened after these submissions. Additionally, particularly where the DAB is constituted as an ad-hoc DAB, it may be appropriate to set aside some time in the programme for Site visits.

The referral must include full details of the referring Party's case, the various assertions and arguments on which it relies, and the detailed decision which it wishes the DAB to make. Overall this position paper defines the matters which are referred to the DAB for its decision, and thus defines the scope of the dispute and the DAB's jurisdiction. The other Party will then typically prepare its own position paper, with full details of its case, etc. agreeing, wherever possible, with the facts as presented by the referring Party and providing counter arguments and other particulars, perhaps overlooked by the referring Party, which are considered relevant.

In other cases, for example, the Parties may wish that the DAB first decide upon the admissibility, or otherwise, of an extension of time claim before moving on to matters of quantum. In such cases it may be appropriate to establish the 84-day timetable allowing for two hearings, moving on to the second submissions and hearing to deal with quantum after the matters relating to the extension of time have been concluded.

In addition, it may be appropriate for the DAB to propose issuing decisions on a complex dispute in stages, rather than issuing one decision dealing with all aspects of the dispute.

However, it should be noted that with the ad-hoc DAB arrangement, such as that outlined under FIDIC "Yellow" & "Silver" Books in Sub-Clause 20.2, the appointment of the DAB expires when the DAB has given its decision on the dispute referred to it under Sub-Clause 20.4, unless other disputes have been referred to the DAB by that time under Sub-Clause 20.4, in which case the relevant date is when the DAB has also given decisions on those disputes. In some cases it

provide a written summary of the oral presentation immediately before giving it, including print-outs of any visual display.

The hearing will be convened at a suitable location for both Parties and could be on the Site. The hearing rooms will need to be provided with any necessary equipment for presentations, etc. and in addition side rooms should be provided for each Party for use during the adjournments in the proceedings and for private discussions. The DAB can “*refuse admission to hearings or audience at hearings to any persons other than representatives of the Employer, the Contractor and the Engineer*” [Procedural Rule 7]. The DAB will endeavour to keep representation by the Parties to an absolute minimum with only those persons present who are vital to the proceedings. However, in practice it is more difficult to restrict numbers as the DAB has an overriding obligation to act fairly and impartially. It is normal practice for the DAB to request a list of proposed representatives from each Party beforehand, also identifying each representative’s role and involvement, and then to seek confirmation from each Party that they have no objection to inclusion of any of the proposed representatives.

The DAB is empowered to adopt an inquisitorial role [Procedural Rule 7] and to that extent it lessens the adversarial atmosphere at the hearing. This is a very useful feature, providing the DAB with the power to ask questions and enquire into the causes of the dispute. To facilitate this role at the hearing, the DAB might adopt a seating arrangement that places the Parties side by side opposite the DAB rather than the usual confrontational seating arrangement with the Parties facing each other across the table.

The DAB is also empowered to proceed in the absence of any Party who the DAB is satisfied received notice of the hearing [Procedural Rule 7]. It is prudent for the DAB to ensure that prior to proceeding in any hearing *ex-parte* it is satisfied that the absent Party has no valid reason for non-attendance and that all possible attempts to ensure attendance have been made. Notwithstanding the non-attendance of a Party it is imperative to ensure that the hearing is conducted fairly and impartially and that any documents put in evidence before, during or after the hearing are also made available to the absent Party.

Unless special reasons exist or the Parties request, there should be no video recordings, no tape recordings and no minutes. Parties may wish to make their own notes, but generally no transcript is made. Examples of special reasons when a transcript might be appropriate are:-

for either financing the project or for its ultimate commercial success. This is the basis upon which this document has been prepared.

Clause 20 still deals with claims, disputes and arbitration but there have been some significant changes. In particular the very strict time bar contained in the second paragraph of Sub-Clause 20.1 in the other long forms of contracts may be overruled by the DAB if the DAB considers the circumstances justify late submission. Significant changes to the details required to be furnished within the 42 day period following the Contractor becoming aware of his entitlement have also taken place and a time bar has been introduced which once again may be overruled by the DAB under certain circumstances. However, no guidance is given as to the 'rules' or situations that might permit an overruling by the DAB and it is also unclear as to why the Employer's Representative is not given the same express authority to overrule the strict 28-day time bars?

The appointment of the one or 3-person DAB expires upon the issue of the Commissioning Certificate and accordingly the construction phase DAB does not function during the Operation Service Period. The DAB is then replaced during the Operation Service Period with a one-person DAB jointly agreed between the parties at the time of issuing of the Commissioning Certificate. The period of appointment is for 5 years but may be extended by agreement between the parties. The fall-back position remains arbitration under the rules of arbitration of the International Chamber of Commerce.

Conclusion

As can be seen from the above examples, a number of practical problems have been encountered with the DAB procedures. Within the UK jurisdiction, most of the jurisdictional and other problems sometimes encountered by adjudicators have been considered, decided and documented by the courts. When operating outside of UK jurisdiction, the same amount of feedback is not readily available to Parties and DABs. It is hoped that these reported examples will go some way towards promoting further feedback from others and encourage a wider debate on these and other issues.